

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

ECO ORO MINERALS CORP.

Claimant

and

THE REPUBLIC OF COLOMBIA

Respondent

ICSID Case No. ARB/16/41

**DECISION ON JURISDICTION, LIABILITY AND
DIRECTIONS ON QUANTUM**

Members of the Tribunal

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Professor Horacio A. Grigera Naón, Arbitrator
Professor Philippe Sands QC, Arbitrator

Assistant to the President of the Tribunal

Mr. João Vilhena Valério

Secretary of the Tribunal

Ms. Ana Constanza Conover Blancas

Date of dispatch to the Parties: 9 September 2021

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ANNEX A: CHRONOLOGY OF RELEVANT FACTS	

TABLE OF SELECTED DEFINED TERMS

Amber	Amber Capital LP
Angostura Project	Mining project located in the Eastern Cordillera of the Andean system, within the Vetas-California gold district, approximately 70 kilometres northeast of the city of Bucaramanga, Municipality of California, Department of Santander, and 400 kilometres North of Bogotá, comprising the Angostura gold-silver deposit
ANLA	National Environmental Licensing Authority (<i>Autoridad Nacional de Licencias Ambientales</i>)
ANM	National Mining Agency (<i>Agencia Nacional de Minería</i>)
Annex 811	Annex 811 of the Treaty
Article 46	Article 46 of the ICSID Convention
Article 801(2)	Article 801(2) of the Treaty
Article 805	Article 805 of the Treaty
Article 811	Article 811 of the Treaty
Article 811(2)(b) Rule	The latter part of the sub-clause
Article 811(2)(b) Exceptions	The first part of the sub-clause
Article 814(2)	Article 814(2) of the Treaty
Article 821	Article 821 of the Treaty
Article 838	Article 838 of the Treaty
Article 2201(3)	Article 2201(3) of the Treaty
Au	Gold
Biodiversity Convention	Covenant on Biological Diversity made in Rio on 5 June 1992
Bodega Project	La Bodega and La Mascota deposits
Calvista	Calvista Gold Corporation
Canada	The Government of Canada

Canada’s Non-Disputing Party Submission	Non-Disputing Party Submission of Canada dated 27 February 2020
CDMB	Regional Autonomous Corporation for the Defense of the Bucaramanga Plateau (<i>Corporación Autónoma Regional para la Defensa de la Meseta de Bucaramanga</i>)
CIPE	Intersectoral Commission for Infrastructure and Strategic Projects (<i>Comisión Intersectorial de Infraestructura y Proyectos Estratégicos</i>)
CIM	Canadian Institute of Mining, Metallurgy and Petroleum
CIMVAL	Canadian Institute of Mining, Metallurgy and Petroleum on Valuation of Mineral Properties
CJEU	Court of Justice of the European Union
Claimant or Eco Oro	Eco Oro Minerals Corp.
Claimant’s Memorial	Claimant’s Memorial on the Merits dated 19 March 2018
Claimant’s Post-Hearing Brief	Claimant’s Post-Hearing Brief dated 1 March 2020
Claimant’s Rejoinder	Claimant’s Rejoinder on Jurisdiction dated 5 December 2019
Claimant’s Reply	Claimant’s Reply on Merits and Counter-Memorial on Jurisdiction dated 31 May 2019
Claimant’s Response on Bifurcation	Claimant’s Observations on the Respondent’s Request for Bifurcation dated 18 May 2018
Claimant’s Response to Canada’s Non-Disputing Party Submission	Eco Oro’s Response to Canada’s Non-Disputing Party Submission of 27 February 2020 dated 3 March 2020
Colombia or the Respondent	The Republic of Colombia, a sovereign State
Commission	Joint Commission of the Free Trade Agreement Between the Republic of Colombia and Canada
Commission’s Decision	Joint Commission of the Free Trade Agreement Between the Republic of Colombia and Canada, Decision No. 6 (24 October 2017)
Comparable Companies	Ventana, Galway and Calvista
Comparable Transactions	Three neighbouring properties to the Angostura Project (AUX Canada’s purchases between February 2011 and December 2012)

of all of the outstanding shares of Ventana Gold Corporation, Galway Resources Ltd, and Calvista Gold Corporation) used by Compass Lexecon to calculate the fair market value of the Project

Concession 3452 or the Concession	Concession Contract for the Exploration and Exploitation of a Deposit of Gold, Silver, Chromium, Zinc, Copper, Tin, Lead, Manganese, Precious Metals and Associated Minerals No. 3452 entered into on 8 February 2007 between Eco Oro and INGEOMINAS, comprising the Angostura gold and silver deposit located in the Soto Norte region of the department of Santander, within the Vetas-California gold district
Contributions Document	A document prepared by IAvH in 2014 titled “ <i>Contributions to the delimitation of the páramo through identification of lower limits of the ecosystem at a 1:25,000 scale and analysis of the social system of the territory</i> ”
CORPONOR	Regional Autonomous Corporation of the North-East Border (<i>Corporación Autónoma Regional de la Frontera Nororiental</i>)
CRA	Charles River Associates
CRIRSCO	Committee for Mineral Reserves International Reporting Standards
cut-off date	Mandatory cut-off date under the FTA: 8 September 2013
CVR	Contingent Value Rights
C-[#]	Claimant’s exhibit
CL-[#]	Claimant’s legal authority
DCF	Discounted Cash Flow
Decree 2820	Decree No. 2820 of 5 August 2010
ECODES	ECODES Ingeniería Ltda.
ECODES Report	ECODES Ingeniería Ltda. Report “ <i>State of Preservation of Biodiversity in the Ecosystems of the Angosturas Sector, Municipality of California, Department of Santander</i> ” dated May 2013
ECT	Energy Charter Treaty
EIA	Environmental Impact Study (<i>Estudio de Impacto Ambiental</i>)

Environment Agreement	Canada-Colombia Environment Agreement, signed on 21 November 2008 and in force on 15 August 2011
Extractable Minerals	Extractable minerals Eco Oro had the right to exploit
FET	Fair and equitable treatment
First Baptiste Statement	Witness Statement of Ms. Brigitte Baptiste dated 24 December 2018
First Behre Dolbear Report	Expert report of Behre Dolbear titled “ <i>Report on Eco Oro Minerals Corporation’s Angostura Gold Project – Santander Department, Colombia</i> ” dated 19 March 2018, prepared by Mr. Bernard J. Guarnera and Dr. Robert E. Cameron
First Compass Lexecon Report	Expert report of Compass Lexecon titled “ <i>Valuation Assessment of the Angostura Project</i> ” dated 19 March 2018, prepared by Messrs. Pablo T. Spiller and Santiago Dellepiane A.
First CRA Report	Expert report of Charles River Associates (CRA) dated 24 December 2018, prepared by Dr. James C. Burrows and Dr. Tiago Duarte-Silva
First García Granados Statement	Witness Statement of Mr. Javier García Granados dated 24 December 2018
First González Aldana Statement	Witness Statement of Mr. Wilmer González Aldana dated 19 March 2018
First Moseley-Williams Statement	Witness Statement of Mr. Mark Moseley-Williams dated 19 March 2018
First Rossi Report	Expert report of Mr. Mario E. Rossi dated 24 December 2018
Forest-Páramo Transition	Forest-Páramo Transition Conceptual Framework study undertaken by the IAvH
FPS	Full protection and security
FTA or Treaty	Free Trade Agreement between Canada and the Republic of Colombia signed on 21 November 2008 and which entered into force on 15 August 2011
Galway	Galway Resources Ltd.
General Environmental Law	Law No. 99 of 1993
Golder	Golder Associates

Greystar	Greystar Resources Limited
Harrington	Harrington Global Opportunities Fund Ltd.
Hearing	Hearing on jurisdiction, merits and damages held in Washington, D.C. from 20-24 January 2020
IAvH	Alexander von Humboldt Institute for Biological Resource Research (<i>Instituto de Investigación de Recursos Biológicos Alexander von Humboldt</i>)
ICSID Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings, in force as of 10 April 2006
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States dated 18 March 1965, which entered into force on 14 October 1966
ICSID or the Centre	International Centre for Settlement of Investment Disputes
IFC	International Finance Corporation
ILC	International Law Commission
ILC Draft Articles	International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts (2001)
INGEOMINAS	Colombian Institute of Geology and Mining (<i>Instituto Colombiano de Geología y Minería</i>)
Investment Agreement	Investment Agreement entered into on 21 July 2016 between Eco Oro and Trexs
Johnson Report	Expert Report of Mr. Christopher Johnson dated 9 October 2019
Judgment C-35	Colombian Constitutional Court Judgment C-35 of 8 February 2016
LIBOR	London Inter-bank Offered Rate
masl	Metres above sea level
Memoria Técnica	IAvH ‘ <i>Technical Specifications for the Territory’s Comprehensive Management for the Conservation of the Páramo Jurisdicciones – Santurbán – Berlin. Incorporation of Social and Economic Aspects.</i> ’ (2014)
MinAmbiente	Ministry of Environment

MINERCOL	Colombian National Mining Company (<i>Empresa Nacional Minera Limitada, MINERCOL Ltda.</i>)
Minesa	Sociedad Minera de Santander S.A.S.
Minister Sarmiento	Minister of Environment Luz Helena Sarmiento Villamizar
Minister Sarmiento Statement	Witness Statement of Ms. Luz Helena Sarmiento Villamizar dated 24 December 2018
MinMinas	Ministry of Mines and Energy
Mr. Giraldo	Mr. Luis Alberto Giraldo
Ms. Stylianides	Ms. Anna Stylianides
MST	Minimum standard of treatment
Ms. Wolfe	Ms. Courtney Wolfe
NI 43-101	National Instrument 43-101, Standards of Disclosure for Mineral Projects
Notice of Intent	Notice of Intent to submit a claim to arbitration pursuant to Article 821(2)(c) of the FTA dated 7 March 2016
Participating Shareholders	Trexs and certain existing shareholders of Eco Oro holding approximately 37% of Eco Oro's issued and outstanding common shares prior to the closing of the Second Tranche
Parties	The Claimant and the Respondent
Paulson	Paulson & Co. Inc.
PDAC	Prospectors and Developers Association of Canada
PEA	Preliminary Economic Assessment
Petitioners	<i>Comité para la Defensa del Agua y el Páramo de Santurbán</i> ; Center for International Environmental Law (CIEL); Inter-American Association for the Defense of the Environment (AIDA); MiningWatch Canada; Institute for Policy Studies (IPS); and Centre for Research on Multinational Corporations (SOMO)
Petitioners' Application	Petitioners' application for leave to file a non-disputing party submission pursuant to Annex 831 of the FTA and Rule 37(2) of the ICSID Arbitration Rules dated 19 December 2018
PIN	Project of National Interest (<i>Proyecto de Interés Nacional</i>)

PINEs	Projects of National and Strategic Interest (<i>Proyectos de Interés Nacional y Estratégico</i>)
PMA	Environmental Management Plan (<i>Plan de Manejo Ambiental</i>)
Political Constitution	Colombia’s Political Constitution of 1991
PTO	Construction and Works Plan (<i>Plan de Trabajo y Obras</i>)
Ramsar Convention	Ramsar Convention on Wetlands of International Importance of 1971
Request for Arbitration	Request for Arbitration dated 8 December 2016
Requisitioning Shareholders	Ms. Wolfe and Harrington
Respondent’s Counter-Memorial	Respondent’s Counter-Memorial on the Merits dated 24 December 2018
Respondent’s Memorial	Respondent’s Memorial on Jurisdiction dated 24 December 2018
Respondent’s Post-Hearing Brief	Respondent’s Post-Hearing Brief dated 1 March 2020
Respondent’s Rejoinder	Respondent’s Rejoinder on the Merits dated 9 October 2019
Respondent’s Reply	Respondent’s Reply on Jurisdiction dated 9 October 2019
Respondent’s Request for Bifurcation	Respondent’s Request for Bifurcation dated 18 April 2018
Respondent’s Response to Canada’s Non-Disputing Party Submission	Colombia’s Response to Canada’s Non-Disputing Party Submission dated 3 March 2020
Ricaurte Opinion	Legal Opinion of Professor Margarita Ricaurte dated 31 May 2019
R-[#]	Respondent’s exhibit
RL-[#]	Respondent’s legal authority
Sarmiento Pinzón Statement	Witness Statement of Mr. Carlos Enrique Sarmiento Pinzón dated 9 October 2019
Second Baptiste Statement	Second Witness Statement of Ms. Brigitte Baptiste dated 9 October 2019

Second Behre Dolbear Report	Expert report of Behre Dolbear dated 31 May 2019, prepared by Mr. Bernard J. Guarnera, Mr. Mark K. Jorgensen and Dr. Robert E. Cameron
Second Compass Lexecon Report	Expert report of Compass Lexecon titled “ <i>Valuation Assessment of the Angostura Project</i> ” dated 31 May 2019, prepared by Dr. Manuel A. Abdala and Mr. Pablo T. Spiller
Second CRA Report	Expert report of Charles River Associates (CRA) dated 9 October 2019, prepared by Dr. James C. Burrows and Dr. Tiago Duarte-Silva
Second García Granados Statement	Witness Statement of Mr. Javier García Granados dated 9 October 2019
Second González Aldana Statement	Witness Statement of Mr. Wilmer González Aldana dated 31 May 2019
Second Moseley-Williams Statement	Witness Statement of Mr. Mark Moseley-Williams dated 30 May 2019
Second Rossi Report	Expert report of Mr. Mario E. Rossi dated 9 October 2019
Third Behre Dolbear Report	Expert Report of Behre Dolbear dated 18 December 2019, prepared by Mr. Bernard J. Guarnera, Mr. Mark K. Jorgensen and Dr. Robert E. Cameron
Trexs	Trexs Investments LLC
Tr. Day [#] ([Speaker(s)]), [page:line]	Transcript of the Hearing (considering the Claimant’s Transcript corrections in the Annex to its Post-Hearing Brief, which were not disputed by the Respondent)
Tribunal	Arbitral tribunal constituted on 11 September 2017 in ICSID Case No. ARB/16/41
Ulloa Statement	Witness Statement of Ms. María Isabel Ulloa dated 24 December 2018
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
VCLT	Vienna Convention on the Law of Treaties of 23 May 1969

Ventana

Ventana Gold Corporation

Vivero Arciniegas Report

Expert Opinion of Prof. Felipe de Vivero Arciniegas dated
9 October 2019

2007 Atlas

2007 IAvH Páramo Atlas

2090 Atlas

Map attached to Resolution 2090, which was on a scale of
1:25,000 and was stated to be an integral part thereof

I. INTRODUCTION¹

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) on the basis of Section B of Chapter Eight of the Free Trade Agreement between Canada and the Republic of Colombia, signed on 21 November 2008 and which entered into force on 15 August 2011 (the “**FTA**” or the “**Treaty**”),² and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States dated 18 March 1965, which entered into force on 14 October 1966 (the “**ICSID Convention**”).

A. THE PARTIES

2. The claimant is Eco Oro Minerals Corp. (formerly known as Greystar Resources Limited (“**Greystar**”)), a corporation constituted under the laws of British Columbia, Canada, and trading publicly on the Canadian Securities Exchange (formerly, on the Toronto Stock Exchange), with its registered address at Suite 300-1055 West Hastings Street, Vancouver, BC V6E 2E9, Canada (“**Eco Oro**” or the “**Claimant**”).³
3. The respondent is the Republic of Colombia, a sovereign State (“**Colombia**” or the “**Respondent**”).
4. The Claimant and the Respondent are collectively referred to as the “**Parties**”. The Parties’ representatives and their addresses are listed above on page (i).

¹ Within the table of contents, a click on any heading will take you to the respective heading in this Decision. A click on the symbol in the upper-right corner of every page will take you back to the table of contents. This facilitates navigation within the document.

² Free Trade Agreement between Canada and the Republic of Colombia (signed on 21 November 2008 and entered into force on 15 August 2011) (**Exhibit C-22**; see also **Exhibit R-137**); and Circular No. 024 of the Directorate of Foreign Commerce of the Ministry of Commerce concerning the entry into force of the Treaty (3 August 2011) (**Exhibit C-21**). See also Canada-Colombia Environment Agreement (also signed on 21 November 2008 and in force on 15 August 2011) (**Exhibit R-138**).

³ For ease of reference, the Tribunal refers to the Claimant as Eco Oro even when referring to actions undertaken before it had changed its name from Greystar to Eco Oro.

B. BACKGROUND TO THE DISPUTE

5. This dispute relates to measures adopted by the Respondent in connection with the *paramo* ecosystem in Santurbán, which allegedly have deprived Eco Oro of its mining rights under a concession contract for the exploration and exploitation of a deposit of gold, silver, chromium, zinc, copper, tin, lead, manganese, precious metals and associated minerals entered into on 8 February 2007 between Eco Oro and INGEOMINAS. The contract relates to the Angostura gold and silver deposit located in the Soto Norte region of the department of Santander, within the Vetas-California gold district: Concession Contract 3452 (“**Concession 3452**” or the “**Concession**”).
6. The Claimant alleges that Colombia has breached its obligations under (i) Article 805 of the FTA by means of the unlawful, creeping and indirect expropriation of its investment; and (ii) Article 811 of the FTA by failing to accord Eco Oro’s investment the minimum standard of treatment (“MST”). The Claimant seeks full reparation for what it deems to be the destruction of its investment in Colombia, claiming compensation for damage caused as a result of the Respondent’s breaches and violations of the FTA and international law in an amount of USD 696 million, plus pre-award and post-award interest. The Respondent submits that Eco Oro’s claims ought to be dismissed in their entirety as the Tribunal lacks jurisdiction over this dispute and there is no basis of liability accruing to Colombia under the FTA.
7. Save as specified otherwise, the versions of the exhibits and relevant translations into English thereof referred to by the Tribunal in this decision are the ones provided by the Parties via the online case document repository (Box). In cases where the Parties have provided different translations of the same document or portion thereof, a table containing both translations is used.
8. The Tribunal has given careful consideration to the extensive factual and legal arguments presented by the Parties in their written and oral submissions, and taken full account of the submissions from the Government of Canada. The Tribunal does not consider it necessary to reiterate all such arguments, but rather addresses those arguments which it considers most relevant for its decisions. The Tribunal’s reasons, without repeating all the arguments

advanced by the Parties, address what it considers to be the determinative factors required to decide on the requests of the Parties. Where the Tribunal considers, however, that a brief repetition of certain aspects of its conclusions in the context of particular issues is appropriate, it has done so. The Tribunal's analysis shall not be limited to authorities referred to by the Parties.⁴

II. PROCEDURAL HISTORY

A. INITIATION OF THE ARBITRATION

9. On 7 March 2016, the Claimant wrote to the Respondent, notifying it pursuant to Article 821(2)(c) of the FTA of the claims Eco Oro intended to submit to international arbitration (“**Notice of Intent**”).⁵ In its Notice of Intent, the Claimant, *inter alia*, proposed to hold amicable consultations with Government representatives, with a view to establishing a constructive dialogue permitting to reach a negotiated solution to the dispute.
10. On 8 December 2016, ICSID received a request for arbitration from the Claimant against Colombia, accompanied by exhibits C-001 to C-061 (the “**Request for Arbitration**”).
11. On 15 December 2016, the Respondent submitted to the Centre a copy of a Notice of Denial of Benefits sent on that same date to the Claimant by which Colombia stated that it denied the benefits of Chapter 8 of the FTA to Eco Oro and its alleged investments on the basis of Article 814(2) of the FTA.⁶
12. By letter of 20 December 2016, the ICSID Secretariat requested additional information from Eco Oro concerning its Request for Arbitration, which was provided on 22 December 2016.
13. On 29 December 2016, the Acting Secretary-General of ICSID registered the Request for Arbitration, as supplemented on 22 December 2016, in accordance with Article 36(3) of the

⁴ See, e.g., *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (22 September 2014) (**Exhibit RL-96**), para. 568, fn. 460.

⁵ Notice of intent to submit the claim to arbitration (7 March 2016) (**Exhibit C-48**).

⁶ Letter from the Republic of Colombia (Mr. Palau van Hissenhoven) to Eco Oro (Mr. Moseley-Williams) (15 December 2016) (**Exhibit R-20**).

ICSID Convention, and notified the Parties of the registration. In the Notice of Registration, the Acting Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

B. CONSTITUTION OF THE TRIBUNAL

14. The Parties agreed to constitute the Tribunal in accordance with Article 37(2)(a) of the ICSID Convention as follows: the Tribunal would consist of three arbitrators, one to be appointed by each Party, and the third, presiding arbitrator to be appointed by agreement of the Parties. Pursuant to the Parties' agreed method of constitution, failing an agreement of the Parties on the presiding arbitrator, she or he would be appointed by the Secretary-General of ICSID, without limitation to the ICSID Panel of Arbitrators.
15. The Tribunal is composed of:

- a. Ms. Juliet Blanch, a national of the United Kingdom, President, appointed by the Secretary-General pursuant to the Parties' agreement. Ms. Blanch's contact details are as follows:

Ms. Juliet Blanch
Lamb Building
3rd Floor South
Temple
London
EC4Y 7AS
United Kingdom

- b. Professor Horacio A. Grigera Naón, a national of Argentina, appointed by the Claimant. Professor Grigera Naón's contact details are as follows:

Professor Horacio A. Grigera Naón
5224 Elliott Road
Bethesda
Maryland 20816
United States of America

and

- c. Professor Philippe Sands QC, a national of France, the United Kingdom and Mauritius,⁷ appointed by the Respondent. Professor Sands' contact details are as follows:

Professor Philippe Sands QC
 Matrix Chambers
 Gray's Inn
 London WC1R 5LN
 United Kingdom

16. On 11 September 2017 and in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the “**ICSID Arbitration Rules**”), the Secretary-General notified the Parties that all three arbitrators had accepted their appointments and that the Arbitral Tribunal (the “**Tribunal**”) was therefore deemed to have been constituted on that date. Ms. Ana Constanza Conover Blancas, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

C. INITIAL PROCEDURAL STEPS

17. On 13 September 2017, ICSID received a letter from the *Comité para la Defensa del Agua y el Páramo de Santurbán*, the Center for International Environmental Law (CIEL), the Inter-American Association for the Defense of the Environment (AIDA), MiningWatch Canada, the Institute for Policy Studies (IPS) and the Centre for Research on Multinational Corporations (SOMO) (together, the “**Petitioners**”) addressed to the Tribunal. In their letter, the Petitioners advised the Tribunal that one or more of them anticipated to submit a request for leave to participate in the arbitration as *amici curiae*. The Petitioners further requested the Tribunal to (i) make available to them the documents submitted to or issued by the Tribunal in the proceeding by establishing procedures for the publication of case materials, and (ii) establish a timetable for requesting leave for *amici* intervention, in order to avoid disrupting the proceedings. On 14 September 2017, the Secretary of the Tribunal transmitted a copy of the Petitioner's letter to the Tribunal and the Parties.

⁷ The Parties were notified on 8 March 2021 of the fact that Professor Sands had been granted the nationality of Mauritius.

18. On 22 September 2017, in response to an invitation to provide comments from the Tribunal, each Party filed observations on the Petitioners' letter of 13 September 2017.
19. On 10 October 2017, the Secretary of the Tribunal wrote to the Parties, on behalf of the President of the Tribunal, to inquire whether the Parties would agree to the appointment of Mr. João Vilhena Valério as an assistant to the President of the Tribunal in this case. By communications of 13 and 16 October 2017, the Parties confirmed their agreement on the appointment of Mr. Vilhena Valério. On 30 October 2017, the Secretary of the Tribunal transmitted a copy of Mr. Vilhena Valério's signed declaration of independence and impartiality to the Parties.

D. FIRST SESSION AND WRITTEN PHASE OF THE PROCEEDINGS

20. On 21 November 2017, in accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties by telephone conference.
21. On 30 November 2017, following the first session, the Tribunal issued **Procedural Order No. 1**, recording the Parties' agreements on procedural matters and the decision of the Tribunal on the disputed issues. Procedural Order No. 1 established, *inter alia*, that: the applicable Arbitration Rules would be those in effect from 10 April 2006, except to the extent modified by Section B of Chapter Eight (Investment) of the FTA and supplemented by any rules adopted by the Joint Commission of the Free Trade Agreement Between the Republic of Colombia and Canada (the "**Commission**") under Articles 822(2), 832, and 2001(3)(a) of the FTA; the procedural languages would be English and Spanish; the Tribunal's award and procedural orders, the notice of intent and the Request for Arbitration would be publicly available subject to the deletion of confidential information; and that the place of the proceeding would be Washington, D.C. Procedural Order No. 1 also set out three scenarios for procedural timetables for the written phase, including time limits for the filing of applications from non-disputing parties.
22. On 20 March 2018, the Claimant filed a Memorial on the Merits dated 19 March 2018 (the "**Claimant's Memorial**"), with exhibits C-62 to C-279 and legal authorities CL-1 to CL-91. The pleading was also accompanied by two witness statements and two

expert reports, as follows: (i) Witness Statement of Mr. Mark Moseley-Williams dated 19 March 2018 (“**First Moseley-Williams Statement**”); (ii) Witness Statement of Mr. Wilmer González Aldana dated 19 March 2018 (“**First González Aldana Statement**”); (iii) Expert report of Behre Dolbear titled “*Report on Eco Oro Minerals Corporation’s Angostura Gold Project – Santander Department, Colombia*” dated 19 March 2018, prepared by Mr. Bernard J. Guarnera and Dr. Robert E. Cameron (“**First Behre Dolbear Report**”), with supporting documents BD-1 to BD-36; and (iv) Expert report of Compass Lexecon titled “*Valuation Assessment of the Angostura Project*” dated 19 March 2018, prepared by Messrs. Pablo T. Spiller and Santiago Dellepiane A. (“**First Compass Lexecon Report**”), with supporting documents CLEX-1 to CLEX-66.

23. On 18 April 2018, the Respondent filed a request to address the objections to jurisdiction as a preliminary question (the “**Respondent’s Request for Bifurcation**”) accompanied by exhibits R-1 to R-20 and legal authorities RL-1 to RL-30.
24. On 18 May 2018, the Claimant filed a response to the Respondent’s Request for Bifurcation (the “**Claimant’s Response on Bifurcation**”), accompanied by exhibits C-280 to C-300 and legal authorities CL-92 to CL-128.
25. On 4 June 2018, the Tribunal advised the Parties that it was inclined to join the jurisdictional objections to the merits and that the majority of the Tribunal had been discussing whether the most efficient conduct of the proceeding could lead it to bifurcate the damages phase. The Parties were invited to submit observations on this proposal, which were received on 15 June 2018.
26. On 28 June 2018, following additional exchanges between the Parties, the Tribunal issued **Procedural Order No. 2**, dismissing the Respondent’s Request for Bifurcation and joining Respondent’s jurisdictional objections and issues related to quantum to the merits phase of the proceeding.
27. By emails of 17 and 20 August 2018, the Parties informed the Tribunal that they had agreed to propose to the Tribunal amendments to Annex A to Procedural Order No. 1 concerning

the timetable for the remaining procedural steps in the arbitration. In addition, the Parties proposed to reserve the last two weeks of January 2020 to hold an oral hearing.

28. By emails of 24 August 2018, in response to a consultation from the Tribunal, the Parties confirmed their availability to hold the pre-hearing organizational meeting set out in Section 20 of Procedural Order No. 1 on 20 December 2019, as well as their agreement to hold the hearing in Washington, D.C.
29. On 29 August 2018, the Tribunal issued **Procedural Order No. 3**, by which it approved the amendments to the procedural calendar proposed by the Parties on 17 and 20 August 2018, including the hearing dates and the date for the pre-hearing organizational meeting.
30. By letter of 26 September 2018, the Respondent filed a request for a 60-day extension of the deadline set out in Procedural Order No. 3 to submit its Counter-Memorial on the Merits and Memorial on Jurisdiction. On 1 October 2018, in response to an invitation to provide comments from the Tribunal, the Claimant submitted its observations regarding the Respondent's extension request.
31. On 10 October 2018, following additional exchanges between the Parties, the Tribunal issued **Procedural Order No. 4** concerning adjustments to the procedural calendar. In its order, the Tribunal granted a 60-day extension to the Respondent to file its Counter-Memorial on the Merits and Memorial on Jurisdiction and allowed a 60-day extension to the Claimant for the filing of its Reply on the Merits and Counter-Memorial on Jurisdiction, if so required.
32. By communications of 26 and 29 October 2018, and 27 and 29 November 2018, the Parties consulted with the Tribunal concerning potential alternative hearing dates, in case the Claimant were to apply for a 60-day extension under Procedural Order No. 4 and the end-January 2020 hearing needed to be moved. Having consulted with the Parties, the Tribunal concluded that it was necessary to keep the January 2020 hearing dates to avoid several additional months of delay in the proceeding.

33. By communications of 18 and 20 December 2018, the Parties informed the Tribunal of their agreement to propose amendments to the procedural calendar with respect to the timetable for the remaining procedural steps prior to the hearing.
34. On 19 December 2018, the Petitioners filed an application for leave to intervene as non-disputing parties pursuant to Annex 831 of the FTA and Rule 37(2) of the ICSID Arbitration Rules, which included a request to file a written submission, to access case documents and to attend the hearing (the “**Petitioners’ Application**”).
35. On 21 December 2018, the Tribunal issued **Procedural Order No. 5**, approving the Parties’ proposed amendments to the procedural calendar of 18 and 20 December 2018.
36. On 24 December 2018, the Respondent filed a Counter-Memorial on the Merits (“**Respondent’s Counter-Memorial**”) and Memorial on Jurisdiction (“**Respondent’s Memorial**”), with exhibits R-21 to R-154 and legal authorities RL-31 to RL-132. The pleading was also accompanied by four witness statements and two expert reports, as follows: (i) Witness Statement of Ms. Brigitte Baptiste dated 24 December 2018 (“**First Baptiste Statement**”); (ii) Witness Statement of Mr. Javier García Granados dated 24 December 2018 (“**First García Granados Statement**”); (iii) Witness Statement of Ms. Luz Helena Sarmiento Villamizar dated 24 December 2018 (“**Minister Sarmiento Statement**”); (iv) Witness Statement of Ms. María Isabel Ulloa dated 24 December 2018 (“**Ulloa Statement**”); (v) Expert report of Charles River Associates (CRA) dated 24 December 2018, prepared by Dr. James C. Burrows and Dr. Tiago Duarte-Silva (“**First CRA Report**”), with supporting documents CRA-1 to CRA-93; and (vi) Expert report of Mr. Mario E. Rossi dated 24 December 2018 (“**First Rossi Report**”), with supporting documents MR-1 to MR-45.
37. On 28 January 2019, each Party filed observations on the Petitioners’ Application. The Claimant’s observations were accompanied by legal authorities CL-129 to CL-138 and the Respondent’s observations were accompanied by legal authorities RL-133 to RL-138.
38. On 18 February 2019, the Tribunal issued **Procedural Order No. 6** concerning the Tribunal’s decision on the Petitioners’ Application. In its order, the Tribunal denied the

Petitioners' request to file a non-disputing party submission, it denied the Petitioners' request to obtain access to case documents which were not publicly available, and it confirmed that the Petitioners had the right to attend the oral hearing as it was open to the public pursuant to Article 830(2) of the FTA and paragraph 21.8 of Procedural Order No. 1. The Tribunal concluded the following at paragraph 35 of Procedural Order No. 6:

“[O]n the basis of the strikingly limited Application, the Tribunal does not find that the Petitioners have met the requirements of Arbitration Rule 37(2) and Annex 831 of the FTA, or even sought to meet those requirements. Those provisions impose on a petitioner a duty to set out reasoned arguments, and none are sufficiently present.”

39. On 22 March 2019, following exchanges between the Parties, each Party filed a request for the Tribunal to decide on production of documents.
40. On 5 April 2019, the Tribunal issued **Procedural Order No. 7**, ruling on the Parties' respective requests for document production.
41. On 1 June 2019, the Claimant filed a Reply on Merits and Counter-Memorial on Jurisdiction dated 31 May 2019 (“**Claimant's Reply**”), with exhibits C-301 to C-446 and legal authorities CL-139 to CL-198. The pleading was also accompanied by two witness statements and three expert reports, as follows: (i) Witness Statement of Mr. Mark Moseley-Williams dated 30 May 2019 (“**Second Moseley-Williams Statement**”); (ii) Witness Statement of Mr. Wilmer González Aldana dated 31 May 2019 (“**Second González Aldana Statement**”); (iii) Expert report of Behre Dolbear dated 31 May 2019, prepared by Mr. Bernard J. Guarnera, Mr. Mark K. Jorgensen and Dr. Robert E. Cameron (“**Second Behre Dolbear Report**”), with supporting documents BD-37 to BD-50; (iv) Expert report of Compass Lexecon titled “*Valuation Assessment of the Angostura Project*” dated 31 May 2019, prepared by Dr. Manuel A. Abdala and Mr. Pablo T. Spiller (“**Second Compass Lexecon Report**”), with supporting documents CLEX-67 to CLEX-97; and (v) Legal Opinion of Professor Margarita Ricaurte dated 31 May 2019 (“**Ricaurte Opinion**”), with supporting documents PMR-1 to PMR-46.
42. On 26 September 2019, the Respondent filed a request for the Tribunal to decide on production of documents. On 29 September 2019, the Claimant filed observations on the

Respondent's request. On 2 October 2019, the Respondent filed further observations on its request of 26 September 2019.

43. On 4 October 2019, the Tribunal issued **Procedural Order No. 8**, ruling on the Respondent's request of 26 September 2019.
44. On 10 October 2019, the Respondent filed a Rejoinder on the Merits ("**Respondent's Rejoinder**") and Reply on Jurisdiction ("**Respondent's Reply**"), both dated 9 October 2019, with exhibits R-155 to R-197 and legal authorities RL-139 to RL-175. The pleading was also accompanied by three witness statements and four expert reports, as follows: (i) Second Witness Statement of Ms. Brigitte Baptiste dated 9 October 2019 ("**Second Baptiste Statement**"); (ii) Second Witness Statement of Mr. Javier García Granados dated 9 October 2019 ("**Second García Granados Statement**"); (iii) Witness Statement of Mr. Carlos Sarmiento dated 9 October 2019 ("**Sarmiento Pinzón Statement**"); (iv) Expert report of Charles River Associates (CRA) dated 9 October 2019, prepared by Dr. James C. Burrows and Dr. Tiago Duarte-Silva ("**Second CRA Report**"), with supporting documents CRA-94 to CRA-159; (v) Expert report of Mr. Mario E. Rossi dated 9 October 2019 ("**Second Rossi Report**"), with supporting documents MR-49 to MR-78; (vi) Expert Report of Mr. Christopher Johnson dated 9 October 2019 ("**Johnson Report**"), with supporting documents CJ-1 to CJ-30; and (vii) Expert Report of Prof. Felipe de Vivero Arciniegas dated 9 October 2019 ("**Vivero Arciniegas Report**"), with supporting documents PFDV-1 to PFDV-12.
45. On 8 November 2019, the Claimant filed an application requesting that the Tribunal (i) strike from the record of the arbitration certain sections of the Johnson Report on the basis of Rule 31(3) of the ICSID Arbitration Rules or, alternatively, (ii) grant the Claimant the right to make a written submission, with additional expert evidence, by 18 December 2019 in response only to the offending sections in the Johnson Report. On 18 November 2019, the Respondent filed observations requesting that the Tribunal reject the Claimant's application in full.
46. On 25 November 2019, the Tribunal issued **Procedural Order No. 9** by which it granted (i) the Claimant, the right to file a written response to the sections in the Johnson Report that

it deemed to be offending by 18 December 2019, and (ii) the Respondent, the opportunity to address the response filed by the Claimant at the oral hearing.

47. On 6 December 2019, the Claimant filed a Rejoinder on Jurisdiction dated 5 December 2019 (“**Claimant’s Rejoinder on Jurisdiction**”), with exhibits C-447 to C-457 and legal authorities CL-199 to CL-216.
48. On 19 December 2019, pursuant to Procedural Order No. 9, the Claimant submitted the Third Expert Report of Behre Dolbear dated 18 December 2019, with supporting documents BD-51 to BD-64 (“**Third Behre Dolbear Report**”).

E. HEARING-RELATED PROCEDURAL MILESTONES

49. On 16 December 2019, the Parties informed the Tribunal of the expert and factual witnesses that they wished to call for cross-examination at the hearing.
50. On 18 December 2019, each Party confirmed to the opposing Party, with a copy to the Tribunal, the order in which it wished to cross-examine the other Party’s expert and factual witnesses.
51. On 20 December 2019, the President of the Tribunal held a pre-hearing organizational meeting with the Parties by telephone conference pursuant to Section 20.1 of Procedural Order No. 1.
52. On 27 December 2019, the Tribunal issued **Procedural Order No. 10** concerning the organization of the hearing.
53. On 6 January 2020, the Respondent informed the Tribunal and the Claimant of the inability of one of its fact witnesses, Ms. María Isabel Ulloa, to attend the hearing. The Respondent requested that Ms. Ulloa be allowed to testify at a later date in late February or March 2020. On the same date, the Claimant reserved its right to cross-examine Ms. Ulloa at a later date and proposed to revisit the issue at the end of the hearing in order to determine whether her cross-examination would in fact be necessary.

54. On 7 January 2020, the Tribunal confirmed the Claimant’s right to decide within 21 days of the end of the hearing whether it wanted to arrange a subsequent date to cross-examine Ms. Ulloa.
55. On 7 January 2020, the Claimant confirmed that it had couriered to the Tribunal members and the Secretary of the Tribunal a USB drive containing the Electronic Hearing Record (i.e., copies of all pleadings, witness statements, expert reports, exhibits, legal authorities, translations, decisions and orders in the arbitration file, with a unified hyperlinked index, as jointly agreed by the Parties).⁸

F. THE HEARING

56. A hearing on jurisdiction, merits and quantum was held in Washington, D.C. from 20 to 24 January 2020 (the “**Hearing**”). The following persons were present at the Hearing:

Tribunal:

Ms. Juliet Blanch	President
Prof. Horacio A. Grigera Naón	Arbitrator
Prof. Philippe Sands QC	Arbitrator

Assistant to the President of the Tribunal:

Mr. João Vilhena Valério	Assistant to the President of the Tribunal
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ICSID Secretariat:

Ms. Ana Constanza Conover Blancas	Secretary of the Tribunal
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For the Claimant:

Counsel

Mr. Nigel Blackaby	Freshfields Bruckhaus Deringer US LLP
Ms. Caroline Richard	Freshfields Bruckhaus Deringer US LLP
Mr. Alexander Wilbraham	Freshfields Bruckhaus Deringer US LLP
Mr. Lee Rovinescu	Freshfields Bruckhaus Deringer US LLP
Mr. Juan Pedro Pomés	Freshfields Bruckhaus Deringer US LLP
Mr. Elliot Luke	Freshfields Bruckhaus Deringer US LLP
Ms. Amy Tan	Freshfields Bruckhaus Deringer US LLP
Mr. Nicolás Córdoba	Freshfields Bruckhaus Deringer US LLP
Ms. Brianna Gorence	Freshfields Bruckhaus Deringer US LLP
Mr. Jowkuell Arias-Tapia	Freshfields Bruckhaus Deringer US LLP

⁸ The Parties provided a substitute USB drive during the Hearing.

Mr. Reynaldo Pastor
 Ms. Sandra Diaz
 Mr. José Vicente Zapata
 Mr. Juan Israel Casallas

Freshfields Bruckhaus Deringer US LLP
 Freshfields Bruckhaus Deringer US LLP
 Holland & Knight LLP
 Holland & Knight LLP

Parties

Ms. Anna Stylianides
 Mr. Paul Robertson
 Mr. Diego Orduz
 Ms. Martha Arenas
 Mr. Rafael Ardila
 Mr. Pierre Amariglio

Eco Oro Minerals Corp.
 Eco Oro Minerals Corp.
 Eco Oro Minerals Corp.
 Eco Oro Minerals Corp.
 Eco Oro Minerals Corp.
 Eco Oro Minerals Corp.

Witnesses

Mr. Mark Moseley-Williams
 Mr. Wilmer González Aldana

Experts

Prof. Pablo Spiller
 Dr. Manuel Abdala
 Ms. Carla Chavich
 Mr. Stephen Hurley
 Mr. Bernard J. Guarnera
 Mr. Mark Jorgensen
 Dr. Robert Cameron
 Prof. Margarita Ricaurte

Compass Lexecon
 Compass Lexecon
 Compass Lexecon
 Compass Lexecon
 Behre Dolbear
 Behre Dolbear
 Behre Dolbear
 Ricaurte Rueda Abogados

Hearing Consultant

Ms. T-zady Guzman

FTI Consulting

For the Respondent:

Counsel

Mr. Fernando Mantilla-Serrano
 Mr. John Adam
 Mr. Samuel Pape
 Mr. Diego Romero
 Ms. Paloma García Guerra
 Mr. Ignacio Stratta
 Mr. Hugo Varenne

Latham & Watkins LLP
 Latham & Watkins LLP
 Latham & Watkins LLP
 Latham & Watkins LLP
 Latham & Watkins LLP
 Latham & Watkins LLP
 Latham & Watkins LLP

Parties

Ms. Ana María Ordóñez Puentes

*Agencia Nacional de Defensa Jurídica del
 Estado, Republic of Colombia*

Mr. Camilo Andrés Ayala Patiño

Oficina Comercial del Ministerio de Comercio, Industria y Turismo de Colombia, Washington D.C.

Witnesses

Ms. Brigitte Baptiste

Mr. Javier García Granados

Mr. Carlos Sarmiento

Ms. Luz Helena Sarmiento

Experts

Mr. Felipe de Vivero Arciniegas

Mr. Christopher Johnson

Mr. Mario E. Rossi

Mr. James C. Burrows

Mr. Tiago Duarte-Silva

Charles River Associates

Charles River Associates

Court Reporters:

Ms. Dawn Larson

Ms. Marta Rinaldi

Ms. María Eliana Da Silva

Worldwide Reporting, LLP

D-R Esteno

D-R Esteno

Interpreters:

Ms. Silvia Colla

Mr. Daniel Giglio

Mr. Charles Roberts

57. The following persons were examined during the Hearing:⁹

On behalf of the Claimant:

Mr. Mark Moseley-Williams

Mr. Wilmer González Aldana

Prof. Margarita Ricaurte

Mr. Mark Jorgensen

Mr. Bernard J. Guarnera

Dr. Robert Cameron

Dr. Manuel Abdala

Prof. Pablo Spiller

Ricaurte Rueda Abogados

Behre Dolbear

Behre Dolbear

Behre Dolbear

Compass Lexecon

Compass Lexecon

On behalf of the Respondent:

Ms. Brigitte Baptiste

Mr. Javier García Granados

⁹ The Claimant confirmed it did not wish to exercise its right to examine Ms. María Isabel Ulloa: Tr. Day 5 (Mr. Blackaby), 1587:7-13.

Mr. Carlos Sarmiento
 Ms. Luz Helena Sarmiento
 Mr. Felipe de Vivero Arciniegas
 Mr. Christopher Johnson
 Mr. Mario E. Rossi
 Mr. James C. Burrows
 Mr. Tiago Duarte-Silva

Charles River Associates
 Charles River Associates

58. During the Hearing, in addition to the substitute USB drive containing the Electronic Hearing Record, the Parties provided the following materials:

The Claimant:

- CH-1:** (A) Presentation for Claimant’s Opening Statement (20 January 2020); (B) Chronology of relevant facts (20 January 2020);
- CH-2:** Demonstrative summarizing Felipe de Vivero’s engagements by Colombian State entities in 2017-2019;
- CH-3 (ENG):** Presentation of Professor Margarita Ricaurte Rueda (23 January 2020) (ENG);
- CH-3 (SPA):** Presentación de la Profesora Margarita Ricaurte Rueda (23 de enero de 2020) (SPA);
- CH-4:** Eco Oro press releases relied upon in Compass Lexecon’s presentation of 24 January 2020 (various dates);
- CH-5:** Presentation of Behre Dolbear (23 January 2020);
- CH-6:** Demonstrative showing (i) differences in Christopher Johnson’s calculations between his report of 9 October 2019 and presentation of 23 January 2020, and (ii) a table of the capital expenditure contingency allowances from various preliminary economic assessments (various dates);
- and
- CH-7:** Presentation of Compass Lexecon (24 January 2020).

The Respondent:

- > Respondent’s Opening Statement;
- > Mario E. Rossi Opening Slides;
- > Felipe de Vivero Presentation;
- > CRA Presentation;
- > Christopher Johnson Presentation;
- Johnson Errata** Corrections to Johnson Report;

CRA Errata 1	Updated Table 7-1: Valuation of the Angostura Project as of 8/8/2016, Based on the Value of Comparable Assets with Unweighted Resources; and
CRA Errata 2	CRA-97 Summary of Valuation of the Angostura Project Based on the Value of Comparable Assets (Updated).

59. In accordance with Procedural Order No. 1, which provided that hearings would be open to the public, except when necessary to protect confidential information, the Hearing was broadcast to a public viewing room at the World Bank headquarters.

G. POST-HEARING PROCEEDINGS

60. On 28 January 2020, the Tribunal issued **Procedural Order No. 11**, providing guidance regarding the Parties' post-hearing briefs – to be filed by 28 February 2020 – and posing the following six questions to the Parties:

*“**QUESTION 1** - The arbitral record incorporates references to decisions of the Colombian courts or to Colombian law in connection with matters apparently connected with disputed issues in this arbitration. What legal relevance should the Tribunal attribute to such references given the fact that the claims in this case have been made under international treaties/international law?*

***QUESTION 2** - Article 2201 of the Canada-Colombia Free Trade Agreement provides, inter alia, as follows:*

‘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 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.*

4. Nothing in this Agreement shall be construed to prevent a Party from adopting or maintaining measures relating to nationals of the other Party aimed at preserving public order, subject to the requirement that such measures are not applied in a manner that constitutes arbitrary or unjustifiable discrimination. Without prejudice to the foregoing, the Parties understand that the rights and obligations under this Agreement, in particular the rights of investors under Chapter Eight (Investment), remain applicable to such measures.'

What is the effect of the second sentence of the exception in Article 2201(4) (as emphasised in italics), and its absence from the exception in Article 2201(3), on the application of Chapter Eight (Investment) to the rights of investors in relation to measures to which the Article 2201(3) exception is applicable? It would be helpful if the assessment could take into account other treaty practise of Canada and Colombia.

QUESTION 3 - *What, if any, is the application and effect of the 'margin of appreciation enjoyed by national regulatory agencies when dealing with public policy determinations' (ICSID Case No. ARB/10/7, Phillip Morris v. Uruguay, Award, 8 July 2016 (Authority RL-102), ¶ 388) to the delimitation of the páramo?*

QUESTION 4 - *Both Colombian legal experts addressed Constitutional Court Decision C-339/02 of 7 May 2002 (Exhibit C-82) in their testimony on Day 4. In Decision C- 339/02, the Constitutional Court addresses a constitutional challenge against articles 3 (partially), 4, 18 (partially), 34, 35 (a) and (c) (partially), and 36 (partially) of the Mining Code 2001. This Decision, inter alia, provides as follows:*

[...]

Article 34(1) prohibits mining exploitation and exploration works in such areas that are delimited and declared, in accordance with the regulations in force, as areas for the protection of renewable natural resources or the environment, or that expressly exclude mining activities. Up to this point, there are no objections to the provision, since it is in agreement with the principles set out in the Constitution for environmental and natural resource protection, which were discussed at the beginning of these recitals.

Article 34(2) indicates that excluded areas comprise the following: a) The system of national natural parks; b) regional natural parks, and c) reserve forest areas. The aim is to protect biodiversity, given the great importance that Colombia has worldwide, as acknowledged by the Court in analyzing the issue. The Court also explains that, besides the areas excluded in this Law, there may be others, whether already declared or to be declared as such in the future by the environmental authority.

Of course, excluded areas must be clearly geographically delimited by the environmental authority, in compliance with Article 5 of Law 99 of 1993. Provision is also made for cooperation by the mining authority in areas of mining interest, which is in keeping with the principle of priority protection of the country's biodiversity, along with sustainable exploitation, in accordance with universal and sustainable development principles included in the Rio Declaration on Environment and Development dated June 1992, which was ratified by Colombia.

The Court considers it worth mentioning that the mining authority must cooperate with the environmental authority, but this duty of cooperation does not limit or condition the exercise of the powers of the environmental authority, which is the one authorized to establish excluded areas. Thus, the operative part will make the enforceability of Article 34(2) of Law No. 685 of 2001 subject to certain conditions.

[...]

When applying paragraph 3, one must follow the precautionary principle, a principle which can be understood with the expression 'in dubio pro ambiente'. The same principle must be applied with respect to the fourth paragraph of article 34, in accordance with the principle number 25 of the Rio Declaration that states: 'Peace, development and environmental protection are interdependent and indivisible'.

Assuming that Colombia is observing the precautionary principle referred to above — i.e., in dubio pro ambiente — so far as the delimitation of the páramos is concerned, does that have any impact on the consideration of its rights and obligations under international law?

Specifically, assuming that the fact that it has yet to delimit the páramo (see, e.g., Exhibit C-455) is legitimate and grounded on Colombia's duty not to allow activities that pose a risk irreversibly to affect the environment and its natural resources, does that prevent Colombia from incurring any possible responsibility under international law in case it is established that the investors' rights have been violated?

QUESTION 5 - *In discussing Constitutional Court Decision C-35 both Colombian legal experts referred to the right of many parties affected by the decision to seek compensation from the lower courts. What domestic legal options were available to a diligent investor to obtain compensation after the Constitutional Court's Decision C-35?*

QUESTION 6 - *The parties are further invited to make any further submissions they believe relevant, if and only to the extent they believe it would be helpful to the Tribunal, arising out of the evidentiary hearing which took place between 20 - 24 January 2020."*

61. On 11 February 2020, the Government of Canada (“**Canada**”) wrote a letter to the Tribunal providing written notice to the disputing parties and to the Tribunal that Canada intended to exercise its right to file a non-disputing submission on questions of interpretation of the Treaty pursuant to Article 827(2) of the FTA.
62. On 12 February 2020, the Tribunal invited Canada to file its written submission by 4 March 2020 and noted that the disputing parties would then have 21 days upon receipt of said submission to file observations on Canada’s submission.
63. On 13 February 2020, the Claimant sent a letter to the Tribunal requesting the Tribunal to place certain conditions and parameters on Canada’s submission and the responsive submissions of the Parties.
64. On 17 February 2020, the Parties were invited to provide a joint booklet containing all the relevant legislation in Spanish and English and in chronological order so as to assist the Tribunal in preparation for the Tribunal’s deliberations scheduled for 5 March 2020.¹⁰
65. On 18 February 2020, the Respondent sent a letter to the Tribunal conveying its endorsement to Canada’s filing of a non-disputing party submission and deferring to the Tribunal as to when and in which conditions the Tribunal wished to receive such submission and the Parties’ comments thereto.
66. On 19 February 2020, the Tribunal wrote to the Parties and to Canada, *inter alia*, as follows:

“Having carefully reviewed and considered the parties’ observations, the Tribunal concludes that it would be assisted by receiving a written submission from Canada that does not exceed 8 pages and is limited to the questions raised in the Tribunal’s Procedural Order No. 11 of 28 January 2020.”

¹⁰ As per the Tribunal’s request during the Hearing: Tr. Day 2 (Ms. Blanch) 403:9 *et seq* and Tr. Day 5 (Ms. Blanch), 1584:14 *et seq*.

*In view of considerable time constraints related to the Tribunal's deliberations scheduled for 5 March 2020 in the present proceeding, the Tribunal is obliged to request that the written submission from Canada be received not later than **Thursday, 27 February 2020**. The parties will be allowed to submit a brief reply submission by **Tuesday, 3 March 2020** which shall not exceed 4 pages. The Tribunal apologises for the short time afforded to you in this regard, which is necessary to allow it to meet the demands of the schedule in this arbitration.*

The Tribunal notes that the deliberations it will hold on 5 March will be preliminary in nature. The Tribunal may raise further questions for the parties arising out of such initial deliberations.”

67. On 27 February 2020, the Claimant requested a 48-hour extension to the deadline for filing the post-hearing briefs. On the same date, the Respondent opposed the extension request.
68. On 27 February 2020, the Tribunal granted the Claimant's extension request and noted that the Parties could file their respective post-hearing briefs by 1 March 2020.
69. On 27 February 2020, Canada filed its non-disputing party submission (“**Canada's Non-Disputing Party Submission**”).
70. On or about 28 February 2020, the Parties provided a Joint Booklet of Relevant Legal Instruments to the Tribunal in hard copy.
71. On 1 March 2020, the Parties filed their respective post-hearing briefs. The Claimant's submission was accompanied by an Annex containing corrections to the Hearing transcript (“**Claimant's Post-Hearing Brief**”). In footnote 212 of the Claimant's Post-Hearing Brief, reference was made to a new, unnumbered, legal authority (i.e., Constitutional Court, Judgment T-299, 3 April 2008). The Respondent's submission was accompanied by a Consolidated List of Exhibits (on account of the reference made in the said submission to twelve new legal authorities – RL-176 to RL-187) (“**Respondent's Post-Hearing Brief**”).
72. On 3 March 2020, the Parties filed their respective comments on Canada's Non-Disputing Party Submission.
73. On 5 March 2020, the Tribunal held a deliberations session in London, United Kingdom. Further sessions were held via Zoom on 8 February 2021 and 25 March 2021.

74. No notification was received from the Respondent pursuant to paragraph 41 of Procedural Order No. 10 with regard to the corrections to the Hearing transcript attached to the Claimant's Post-Hearing Brief.
75. On 6 November 2020, 12 March 2021 and 6 August 2021, the Tribunal updated the Parties with regard to the status of its ruling pursuant to paragraph 5.3 of Procedural Order No. 1.

III. THE PARTIES' REQUESTS FOR RELIEF

A. ECO ORO'S REQUEST FOR RELIEF

76. In its Rejoinder on Jurisdiction,¹¹ the Claimant requests the following relief:
- (a) a declaration that:
 - (i) Colombia has breached Article 805 of the Treaty by unlawfully expropriating Eco Oro's investment in Colombia; and
 - (ii) Colombia has breached Article 811 of the Treaty by failing to accord Eco Oro's investment in Colombia the minimum standard of treatment;
 - (b) an order that Colombia compensate Eco Oro for its breaches of the Treaty and international law in an amount of USD 696 million;
 - (c) pre-award interest on (b) at a commercially reasonable rate of 6.6 percent per annum calculated from the Valuation Date of 8 August 2016 until the date of the Tribunal's Award, compounded semi-annually, or at such other rate and compounding period as the Tribunal determines will ensure full reparation;
 - (d) post-award compound interest on (b) and (c) from the date of the Tribunal's Award at such rate as the Tribunal determines will ensure full reparation;
 - (e) a declaration that:
 - (i) the award of damages and interest in (b), (c) and (d) is made net of applicable Colombian taxes; and
 - (ii) Colombia may not deduct taxes in respect of the payment of the award of damages and interest in (b), (c) and (d);

¹¹ Repeated at para. 85 of the Claimant's Post-Hearing Brief.

- (f) an order that Colombia indemnify the Claimant in respect of any double taxation liability that would arise in Canada or elsewhere that would not have arisen but for Colombia's adverse measures;
- (g) an order that Colombia indemnify the Claimant in respect of any costs that it incurs in the course of remediating the area of Concession 3452;
- (h) such other relief as the Tribunal considers appropriate; and
- (i) an order that Colombia pay all of the costs and expenses of this arbitration, including Eco Oro's legal and expert fees, the fees and expenses of any experts appointed by the Tribunal, the fees and expenses of the Tribunal and ICSID's other costs and fees.¹²

B. COLOMBIA'S REQUEST FOR RELIEF

77. In its Reply on Jurisdiction,¹³ the Respondent requests the Tribunal to dismiss Eco Oro's claims for lack of jurisdiction.
78. In its Counter-Memorial,¹⁴ the Respondent requests the following relief:

Based on the above, the Republic of Colombia respectfully requests the Tribunal to:

- (a) Dismiss Eco Oro's Claims in their entirety and declare that there is no basis of liability accruing to the Republic of Colombia under the FTA, including but not limited as a result of:
 - (i) Any claim or violation by the Republic of Colombia of Article 805 of the FTA;
 - (ii) Any claim or violation by the Republic of Colombia of Article 811 of the FTA;
 - (iii) Any claim that Eco Oro suffered losses for which the Republic of Colombia could be liable;
- (b) Order that Eco Oro pay the Republic of Colombia all costs associated with these proceedings, including arbitration costs and all professional fees and disbursements, as well as the fees of the arbitral tribunal, plus interest thereon; and
- (c) Grant such relief that the Tribunal may deem just and appropriate.¹⁵

¹² Claimant's Rejoinder, para. 218. The Claimant's latest Request for Relief is in some respects different from the one set out in para. 463 of the Claimant's Memorial and in para. 834 of the Claimant's Reply.

¹³ Respondent's Reply, para. 127. See also Respondent's Memorial, para. 164 and Respondent's Post-Hearing Brief, para. 78.

¹⁴ Repeated at para. 78 of the Respondent's Post-Hearing Brief.

¹⁵ Respondent's Counter-Memorial, para. 526. See also Respondent's Rejoinder, para. 540.

IV. FACTUAL BACKGROUND

79. The following summary of facts is based on the Parties' submissions and is without prejudice to the relevance of these facts for the decisions of the Tribunal. The Tribunal does not purport to set out all facts it has considered for the purposes of this Decision. The absence of reference to particular facts or assertions, or to the evidence supporting any particular fact or assertion, should not be taken as an indication that the Tribunal did not consider those matters. The Tribunal has carefully considered all evidence and arguments submitted to it in the course of these proceedings. **Annex A** hereto is a detailed chronology prepared by the Tribunal on the basis of the documentary and witness evidence which contains those facts which seem to the Arbitral Tribunal to be of relevance in order to set the matters in issue in this arbitration into context.

A. *DRAMATIS PERSONAE*

(1) **Eco Oro**

80. Eco Oro (named Greystar until August 2011¹⁶) is a small mining company¹⁷ incorporated under the laws of British Columbia, Canada.¹⁸ Eco Oro was listed on the Toronto Stock Exchange ("TSE") and, as from 23 October 2017, started trading on the Canadian Stock Exchange ("CSE").¹⁹ Eco Oro has received investments from different entities, notably the

¹⁶ Certificate of Change of Name of Eco Oro issued by the Registrar of Companies of British Columbia, Canada (16 August 2011) (**Exhibit C-23**).

¹⁷ Junior companies are "*small companies that are currently developing or seeking to develop a natural resource or field. These companies will first conduct a resource study and either provide the results to shareholders or to the public at large to prove there is assets. If the study yields positive results, the junior company will either raise capital or attempt to be bought out by a larger company.*" Office of the Compliance Advisor Ombudsman (CAO), "Compliance Investigation, IFC Investment in Eco Oro (Project # 27961), Colombia" (30 June 2016) (**Exhibit MR-10**).

¹⁸ Greystar Resources Ltd., Certificate of Incorporation (29 April 1987) (**Exhibit C-63**), pp. 25-27; Greystar Annual Information Form (12 April 1999) (**Exhibit R-156 / CLEX-16**), p. 4; Amalgamation Agreement between Greystar Resources Ltd And Churchill Resources Ltd (13 June 1997) (**Exhibit C-69**); Certificate of Amalgamation (15 August 1997) (**Exhibit C-70**). See also Office of the Compliance Advisor Ombudsman (CAO), "Compliance Investigation, IFC Investment in Eco Oro (Project # 27961), Colombia" (30 June 2016) (**Exhibit MR-10**), Annex 2.

¹⁹ Eco Oro Minerals Corp., Eco Oro Receives Final Approval to List on CSE (23 October 2017) (**Exhibit CLEX-18**); Eco Oro News Release "Eco Oro Receives Conditional Listing Approval from CSE" (17 October 2017) (**Exhibit C-256**); Eco Oro News Release "Eco Oro Receives Final Approval to List on CSE" (23 October 2017) (**Exhibit C-297**); Eco Oro, Form 2A Listing Statement (23 October 2017) (**Exhibit R-43**).

International Finance Corporation (“**IFC**”),²⁰ a member organization of the World Bank Group focused on private sector investments, Trexs Investments LLC (“**Trexs**”),²¹ a Delaware company, subsidiary of Tenor Capital Management Company (Tenor), that invests in companies with international treaty and arbitration claims²² and others.²³ Eco Oro was amongst the first foreign mining companies to invest in Colombia’s emerging mining sector.²⁴ Although Eco Oro considered Colombian country risk to be significant –Colombia having been home to South America’s largest and longest-running insurgency, along with the risk of regulatory changes– it did not consider such risks to be an impediment to continuing operations.²⁵ Eco Oro’s investment in Colombia has been recognized and cited as an example to prospective investors in the Colombian mining sector.²⁶

²⁰ Greystar News Release “Greystar Announces Completion of International Finance Corporation Investment” (20 March 2009) (**Exhibit C-118**); IFC Environmental & Social Review Summary of the Investment in Greystar (9 February 2009) (**Exhibit C-270**). See also RBC Capital Markets First Glance, “Greystar Resources, Ltd., IFC Gets Back into Speculative Mining Investment” (5 February 2009) (**Exhibit CRA-141**).

²¹ Investment Agreement between Eco Oro and Trexs (21 July 2016) (**Exhibit R-12**). See also Investment Agreement between Eco Oro and Trexs, Schedule A: Contingent Value Rights Certificate (21 July 2016) (**Exhibit C-452**); Eco Oro News Release “Eco Oro Minerals Announces Investment by Tenor Capital” (22 July 2016) (**Exhibit R-1 / R-30**); Eco Oro Management Information Circular (13 September 2016) (**Exhibit R-5**); and Eco Oro Form 51-102F3 - Material Change Report re closing of second tranche of its private placement (17 November 2016) (**Exhibit R-6 / R-38**).

²² See Decision of the Supreme Court of British Columbia, *Harrington Global Opportunities Fund Ltd. and Courtenay Wolfe v. Eco Oro Minerals Corp.*, 2017 BCSC 664 (2017) (**Exhibit R-136**), para. [10].

²³ Eco Oro News Release “Eco Oro Announces Private Placement Of Up To \$3 Million” (26 January 2015) (**Exhibit R-23**); Eco Oro News Release “Eco Oro Minerals Closes First Tranche of Private Placement” (6 February 2015) (**Exhibit R-24**); Eco Oro News Release “Eco Oro Closes Second Tranche of Private Placement” (12 February 2015) (**Exhibit R-25**); Eco Oro News Release “Eco Oro Closes Private Placement” (23 February 2015) (**Exhibit C-221 / C-364**); Eco Oro News Release “Eco Oro Announces Private Placement of up to \$3.5 Million” (17 August 2015) (**Exhibit R-27**); Eco Oro News Release “Eco Oro Minerals Closes Non-Brokered Private Placement” (27 August 2015) (**Exhibit R-28**); Eco Oro News Release “Eco Oro Minerals Closes Non-Brokered Private Placement” (31 August 2015) (**Exhibit C-221**).

²⁴ Request for Arbitration, para. 5. See also Eco Oro, Management’s Discussion and Analysis (30 September 2017) (**Exhibit R-42**); Letter from Eco Oro (Ms. Stylianides) to Minister of Environment (Mr. Vallejo López) (28 November 2014) (**Exhibit C-33**).

²⁵ Greystar 1998 Annual Report (19 April 1999) (**Exhibit R-35**), p. 25.

²⁶ Banco de la República and Coinvertir, Colombia Talking Points (Third Quarter 2003) (**Exhibit C-283**); Ministry of Mines and Energy, Mining and Energy Planning Unit, Monthly Mining and Energy Bulletin, Issue No. 56 (February 2005) (**Exhibit C-284**); Ministry of Mines and Energy, Mining and Energy Planning Unit, Monthly Mining and Energy Bulletin, Issue No. 59 (May 2005) (**Exhibit C-285**); Ministry of Foreign Affairs, Memorias al Congreso 2007 (excerpt) (20 July 2007) (**Exhibit C-287**), p. 6; Ministry of Mines and Energy, National Mining Agency, Colombian Geological Service, UPME and Antioquia Government, Colombian Mining Statistics Yearbook (excerpt) (2007/2012) (**Exhibit C-286**). See also Galway Resources Ltd Press Release, “Galway Secures Land Position in California, Colombia Gold Trend” (28 July 2009) (**Exhibit C-120**).

81. Eco Oro owns 100% of the mining project located in the Eastern Cordillera of the Andean system, within the Vetas-California gold district, approximately 70 kilometres northeast of the city of Bucaramanga, Municipality of California, Department of Santander, and 400 kilometres North of Bogotá, comprising the Angostura gold-silver deposit (the “**Angostura Project**” or “**Project**”).²⁷
82. In addition to being the recipient of prizes and recognitions in Canada,²⁸ Eco Oro has received the following awards in Colombia:
- a. October 2006: “award from those responsible for the organization of the [2006 Mining] Fair, and in the presence of the President of the Republic, in recognition of [Greystar’s] outstanding performance during its exploration stage”;²⁹
 - b. 1 October 2015: CDMB Award for Environmental Excellence,³⁰ and
 - c. 13 October 2016: CDBM Award for Environmental Performance of Cleanest Production (P+L).³¹

²⁷ The Angostura Project also includes five satellite projects: Móngora, La Plata, Armenia, Agualimpia and Violetal. See Notice of Intent to submit the claim to arbitration (7 March 2016) (**Exhibit C-48**), fn. 1. See also Ministry of Mines, Mining and Energy Planning Unit, Mining, an excellent choice for investing in Colombia: The Investor’s Guide (2005) (**Exhibit C-94**), Figures 1 and 2.

²⁸ Prospectors and Developers Association of Canada (PDAC), “PDAC in Brief”, Number 44 (April 2006) (**Exhibit C-12**).

²⁹ Greystar’s institutional magazine “Visión Minera”, Issue No. 7 – Year 3 (October 2006) (**Exhibit C-13**).

³⁰ CDMB Resolution No. 995 granting the Award for Environmental Excellence to Eco Oro (1 October 2015) (**Exhibit C-38**). In this Resolution, the said Regional Environmental Authority acknowledges Eco Oro’s contribution “to the improvement and sustainability of the environment within the area of their jurisdiction” and, *inter alia*, highlights that Eco Oro (i) “has created guidelines for good environmental practices through different activities aimed at improving quality of life [; (ii)] has contributed to promoting proper management of natural resources through various internal and external procedures, contributing to raising awareness in connection with the sustainable use of renewable natural resources [; (iii)] has incorporated the use of good environmental practices in conducting its administrative processes, reducing the use of office supplies resulting in a proper and responsible use of natural resources [; (iv)] has contributed to the protection of the environment and the preservation of natural resources, framing its activities around a cornerstone of sustainability [; (v)] has implemented preventive and corrective actions aimed at the proper use of natural resources, generating actions that contribute to mitigating the effects of climate change [; and (vi)] has liaised with the Regional Environmental Authority for the Defense of the Bucaramanga Plateau (CDMB), joining forces to conduct various campaigns aimed at improving vegetation, decontaminating water sources and protecting natural reserves.”

³¹ CDMB Resolution No. 824 (13 October 2016) (**Exhibit C-55**). In this Resolution, CDMB mentions, *inter alia*, that Eco Oro “stood out due to its environmental performance and management during the 2013-2015 period, creating green production strategies in the efficient use and saving of water AYUEDA, management program

(2) Republic of Colombia

83. With more than 54,000 species registered in the Global Biodiversity Information Facility (GBIF), Colombia shares first place with Brazil in terms of biodiversity in the world and is identified by the United Nations Environment Programme as one of the 17 megadiverse countries that are home to 70% of the biodiversity in the world on only 10% of its territory. Colombia ranks number one in terms of biodiversity in birds and orchids, second in plants, amphibians, freshwater fish and butterflies, third in reptiles and palm trees and fourth in mammal diversity.³²
84. Colombia's Political Constitution of 1991 ("**Political Constitution**")³³ is designated as the Green Constitution³⁴ as a consequence of the fact that environmental protection is at the heart of Colombian society and law. As far back as 1992, in its Judgment T-411/92, the Constitutional Court of Colombia,³⁵ stated that:

“Ecology contains an essential core, it being understood by this that part that is absolutely necessary so that legally protected interests and what gives rise to it turn out to be real and effectively act as a guardian. The essential content is overtaken or not recognized when the right is submitted to the limitations that make it unfeasible, making it more difficult beyond what is reasonable or divesting it of the necessary protection. The rights to work, private property, and freedom of business enjoy special protection, provided that there exists a strict respect of the ecological function, this is the duty to safeguard the environment due to a fundamental constitutional right.”

85. According to Colombia, it has “*a particularly significant moral responsibility to conserve and preserve its environment for the benefit of the planet and mankind.*”³⁶ Articles 8, 58, 79

for liquid, industrial and domestic waste, program for industrial and domestic solid waste, program for the protection of flora and recovery of forest ecosystems, environmental education programs, and the Management Program for particulate matter and gases.”

³² IAvH “Biodiversity and ecosystem services” (2014) (**Exhibit R-120**); IAvH “BIODIVERSITY 2015: State and Trends of Colombian Continental Biodiversity” (2016) (**Exhibit R-127**). See also Colciencias, “Colombia, el segundo país más biodiverso del mundo” (2016) (**Exhibit R-126**); Colciencias, “La Biodiversidad de nuestro país en números” (2017) (**Exhibit R-129**); and IAvH “Colombian Biodiversity: Numbers to Keep in Mind” (11 September 2017) (**Exhibit R-128**).

³³ Political Constitution of Colombia (1991) (**Exhibit C-65**).

³⁴ See, e.g., Constitutional Court, Judgment C-35 (8 February 2016) (**Exhibit C-42**), pp. 93 and 98.

³⁵ Constitutional Court of Colombia, Judgment T-411/92 (17 June 1992) (**Exhibit R-134**). In this judgment, the Constitutional Court makes reference to “*an Ecological Constitution.*”

³⁶ Tr. Day 1 (Mr. Mantilla-Serrano), 245:10-13.

and 80 of the Political Constitution establish the State’s duty and the particulars of protecting the nation’s natural wealth; the prevalence of general interest on the matter and the social and ecological function of ownership; the collective right to enjoy a healthy environment; the protection of diversity and integrity of the environment and preservation of the areas of special ecological importance as well as the State’s duty to plan the management of natural resources to guarantee sustainable development, their preservation and restoration and prevent and oversee environmental impairment factors. Colombia is also a party to several environment-related international conventions, inter alia, the 1971 Ramsar Convention on Wetlands of International Importance (the “**Ramsar Convention**”)³⁷ and the 1992 Convention on Biological Diversity (the “**Biodiversity Convention**”).³⁸ Colombia has a diversified economy, which is guided by the principle of sustainable development. Mining has been one of its key sectors.³⁹

³⁷ Ramsar Convention on Wetlands of International Importance (2 February 1971) (**Exhibit RL-31**). See also Ramsar Sites Information Service, “Annotated List of Wetlands of International Importance” (Undated) (**Exhibit R-153**); IAvH “Biodiversity 2015, Historic legal instruments for the protection of the páramos” (2015) (**Exhibit R-188**). According to the Respondent, the Ramsar Convention entered into force in Colombia on 18 October 1998: Tr. Day 1 (Mr. Mantilla-Serrano), 254:14-16 and Respondent’s Timeline 3.

³⁸ Decree No. 205 of 1996 (29 January 1996) (**Exhibit R-54**). See also United Nations, UN Agenda 21, Chapter 18, Protection of the Quality and Supply of Freshwater Resources: Application of Integrated Approaches to the Development, Management and Use of Water Resources (1992) (**Exhibit R-142**).

³⁹ Tr. Day 1 (Mr. Mantilla-Serrano), 248:1-7. See also Article Canal 1 “Juan Manuel Santos se posesiona como Presidente de la República” (7 August 2010) (**Exhibit C-130**) (“*it will be necessary to set in motion the infrastructure, housing, mining, farming, and innovation ‘locomotives’ to boost industries and trade and generate employment*”); Letter from Attorney General (Mr. Ordóñez Maldonado) to Ministry of Environment, Ministry of Mines and National Mining Agency (9 September 2013) (**Exhibit C-28**) (“*the mining sector was [...] one of the cornerstones for the financing of the Development Plan. The many reforms required by the State to make the mining industry the ‘locomotive’ contributing to Colombian prosperity were based on this assumption.*”). See also IAvH “Guía divulgativa de criterios para la delimitación de páramos de Colombia” (2011) (**Exhibit R-117**); G. Andrade Pérez, “La delimitación del páramo y la incierta gestión de los servicios ecosistémicos de la alta montaña en escenarios de cambio ambiental”, in: IAvH, *Visión socioecosistémica de los páramos y la alta montaña colombiana: memorias del proceso de definición de criterios para la delimitación de los páramos* (2013) (**Exhibit R-118**); R. Hofstede, “Lo mucho que sabemos del páramo. Apuntes sobre el conocimiento actual de la integridad, la transformación y la conservación del páramo”, in: IAvH, *Visión socioecosistémica de los páramos y la alta montaña colombiana: memorias del proceso de definición de criterios para la delimitación de los páramos* (2013) (**Exhibit R-119**); R. Hofstede, “Los Páramos Andinos ¿Qué sabemos? Estado de conocimiento sobre el impacto del cambio climático en el ecosistema páramo” (2014) (**Exhibit R-122**); IAvH, *Historia ambiental*, in: “Guías para el estudio socioecológico de la alta montaña en Colombia” (2015) (**Exhibit R-124**); IAvH, “Biodiversidad 2015, Historic legal instruments for the protection of páramo ecosystems” (2015) (**Exhibit R-188**) (containing a very useful chronology of legal instruments connected with the protection of páramos); and CDMB, “Páramo Santurbán” (25 November 2015) (**Exhibit R- 193**).

B. PÁRAMO ECOSYSTEMS

86. Páramos are high-mountain ecosystems that play a central role in maintaining biodiversity, premised on a unique capacity to absorb and restore water. In South America, páramo ecosystems form the so-called ‘pearl necklace’ along the Andean Mountains. In Colombia, 37 páramo complexes have been identified, representing about 50 percent of the world’s páramo ecosystems. Páramos have highly endemic flora and fauna. The Santurbán Páramo provides water to around 2.5 million people in 68 surrounding municipalities.⁴⁰ Indeed, Colombia views the páramo ecosystems as “*environmental jewels*”.⁴¹

C. RELEVANT GOVERNMENTAL AUTHORITIES

(1) Environmental Authorities⁴²

87. On 22 December 1993, the Congress of Colombia enacted Law No. 99 of 1993 (“**General Environmental Law**”), *inter alia*, formulating the principles that govern Colombian environmental policy, creating the Ministry of Environment (“**MinAmbiente**”) and reorganizing the Public Sector in charge of the management and conservation of the environment and the renewable natural resources.⁴³
88. Articles 1(2) and (4) of the General Environmental Law formulate the general environmental principles that: (i) the country’s biodiversity, as it is a national heritage site and of interest to humanity, must be protected first and foremost and maximized sustainably; and (ii) páramos, low páramos, water springs, and aquifer recharging zones must be especially protected.

⁴⁰ Tr. Day 1 (Mr. Mantilla-Serrano), 253:8-10.

⁴¹ Tr. Day 1 (Mantilla-Serrano), 249:5 *et seq.* (in particular, 267:14-21 – “*Colombia were becoming more and more aware of the importance of protecting these kind of jewels, environmental jewels that we have been entrusted with in taking care of in Colombia. And that took place in the early '90s, and I have been walking you through the different measures, international measures and domestic measures that were taken by Colombia in order to fulfill this mission*”; 268:10-12 – “*the protection and the actual ban on mining is—if we’re talking about centuries, it’s quite recent*”) For a timeline of the legal instruments for the protection of the páramos, see IAvH, Biodiversidad 2015, Historic legal instruments for the protection of páramo ecosystems (2015) (**Exhibit R-188**).

⁴² For a full chronology, refer to IAvH, “Biodiversity 2015, Historic legal instruments for the protection of the páramos” (2015) (**Exhibit R-188**).

⁴³ Law No. 99 of 1993 (General Environmental Law) (22 December 1993) (**Exhibit C-66**).

89. Pursuant to Article 2 of the General Environmental Law, MinAmbiente is *“the lead agency for the management of environment and renewable natural resources, and shall be in charge of promoting a relationship of respect and harmony between man and nature and of defining, pursuant to this Law, the policies and regulations to which the recovery, conservation, protection, regulation, handling, use and exploitation of the Nation’s renewable natural resources and environment shall be subject, in order to guarantee sustainable development.”* Article 2 further determines that MinAmbiente, *“jointly with the President of the Republic and ensuring the participation of the community, shall develop the national policy on environment and renewable natural resources, so that the right of all the persons to enjoy a healthy environment is guaranteed and the Nation’s natural heritage and sovereignty is protected.”*
90. Article 23 of the General Environmental Law created the Regional Autonomous Corporations, public corporate entities charged with *“administering, within the area under their jurisdiction, the environment and renewable natural resources, and promoting sustainable development in compliance with the legal provisions and the policies of the Ministry of Environment.”* In the area of the Project, the two competent Regional Autonomous Corporations are the Regional Autonomous Corporation of the North-East Border (**“CORPONOR”**) and the Regional Autonomous Corporation for the Defence of the Bucaramanga Plateau (**“CDMB”**).
91. Article 19 of the General Environmental Law further created the Alexander Von Humboldt Institute (**“IAvH”**), a civil non-profit corporation, of a public nature but subject to the rules of private law, *“charged with conducting basic and applied research on the genetic resources of the national flora and fauna and with drawing up and preparing the scientific biodiversity inventory in all the national territory”* and *“in charge of the applied scientific investigation in relation to the biological and hydrobiological resources in the continental territory of the Country.”*

92. MinAmbiente was restructured in 2011, its designation – Ministry of Environment, Housing and Territorial Development (MADVT) – being substituted by Ministry of Environment and Sustainable Development (MADS).⁴⁴
93. On 27 September 2011, the National Environmental Licensing Agency (“ANLA”) was created so as “*to take care of the study, approval and issuance of environmental licences, permits and processes that will contribute to improve the efficiency, efficacy and effectiveness of environmental management and sustainable development.*”⁴⁵ This Special Administrative Unit substituted the Directorate of Environmental Licenses and Permits, which acted on behalf of the MinAmbiente between 1993 and 2011.

(2) Mining Authorities

94. According to Article 317 of the Mining Code 2001, the Ministry of Mines and Energy (“MinMinas”) is the default mining authority.⁴⁶ The objective of MinMinas is to formulate, adopt, direct and coordinate the policies, plans and programs of the Sector of Mines and Energy.⁴⁷
95. MinMinas delegated certain administrative functions to the following entities:
- a. National Mining Company – MINERCOL Ltda. (“MINERCOL”): between 2001 and 2004;⁴⁸
 - b. Colombian Geology and Mining Institute – INGEOMINAS (“INGEOMINAS”): between 2004 and 2011;⁴⁹ and
 - c. National Mining Agency (“ANM”): between 2011 and the present.⁵⁰

⁴⁴ See IAvH, “Biodiversity 2015, Historic legal instruments for the protection of the páramos” (2015) (**Exhibit R-188**). The Tribunal uses the term MinAmbiente at all times for ease of reference.

⁴⁵ Decree No. 3573 (27 September 2011) (**Exhibit R-56**).

⁴⁶ See Law No. 685 (as amended) (8 September 2001) (**Exhibit C-8**).

⁴⁷ Decree No. 381 (16 February 2012) (**Exhibit R-58**).

⁴⁸ Ministry of Mines, Resolution No. 181053 (22 August 2001) (**Exhibit R-65**); Ministry of Mines, Resolution No. 181130 (7 September 2001) (**Exhibit R-66**).

⁴⁹ Ministry of Mines, Resolution No. 180074 (27 January 2004) (**Exhibit R-67**).

⁵⁰ Decree No. 4134 (3 November 2011) (**Exhibit R-57**).

D. ECO ORO'S INVESTMENT IN THE ANGOSTURA PROJECT AND THE MEASURES ADOPTED BY COLOMBIA

(1) Open-Pit Mining Project

96. At the recommendation of a former director of Eco Oro,⁵¹ in the early 1990s, Eco Oro decided to invest in a gold-silver deposit located in Angostura, within the California-Vetas Mining District, a region of longstanding mining tradition.⁵² This deposit, together with the La Bodega and La Mascota gold-silver deposits, is distributed over a ~4 km interval of an 11 km long, NE trending high to intermediate sulphidation epithermal system that forms the core of the California-Vetas gold district. The deposits occur in that order, from NE to SW, and are located in the western branch of the Eastern Andean Cordillera of northeastern Colombia near the border with Venezuela, some 400 km NNE of the Country's capital, Bogotá, and ~67 km NE of the city of Bucaramanga, the capital of the Department of Santander. The deposit is situated at elevations of from 2,400 to 3,500 metres above sea level (“masl”).⁵³

⁵¹ Greystar News Release “Greystar Resources Ltd.: Resignation of Attilio G. Spat as a Director” (1 March 2006) (**Exhibit C-105**).

⁵² See Ministry of Environment, Resolution No. 2090 of 2014 (19 December 2014) (**Exhibit C-34 / MR-35**); Ministry of Mines and Energy, Mining Districts: Exports and Transportation Infrastructure (2005) (**Exhibit C-95 / R-184**) (“gold has been mined since colonial times”); Instituto Geográfico Agustín Codazzi, “Nombres Geográficos de Colombia, Región Santandereana” (2014) (**Exhibit C-198**). See also Constitutional Court Judgment No. T-361 (30 May 2017) (**Exhibit C-244**), e.g., pp. 214-215, where the Constitutional Court acknowledges that “there are 30 municipalities of Santander and Norte de Santander within the area of the Santurbán Páramo” and that gold mining “has always been connected to [the great Department of Santander] and its populations”.

⁵³ Porter GeoConsultancy, California-Angostura district – Angostura, La Bodega, La Mascota (2015) (**Exhibit C-225**). See also Documents relating to royalty payments for Permit 3452 (1989-2007) (2007) (**Exhibit C-302**).

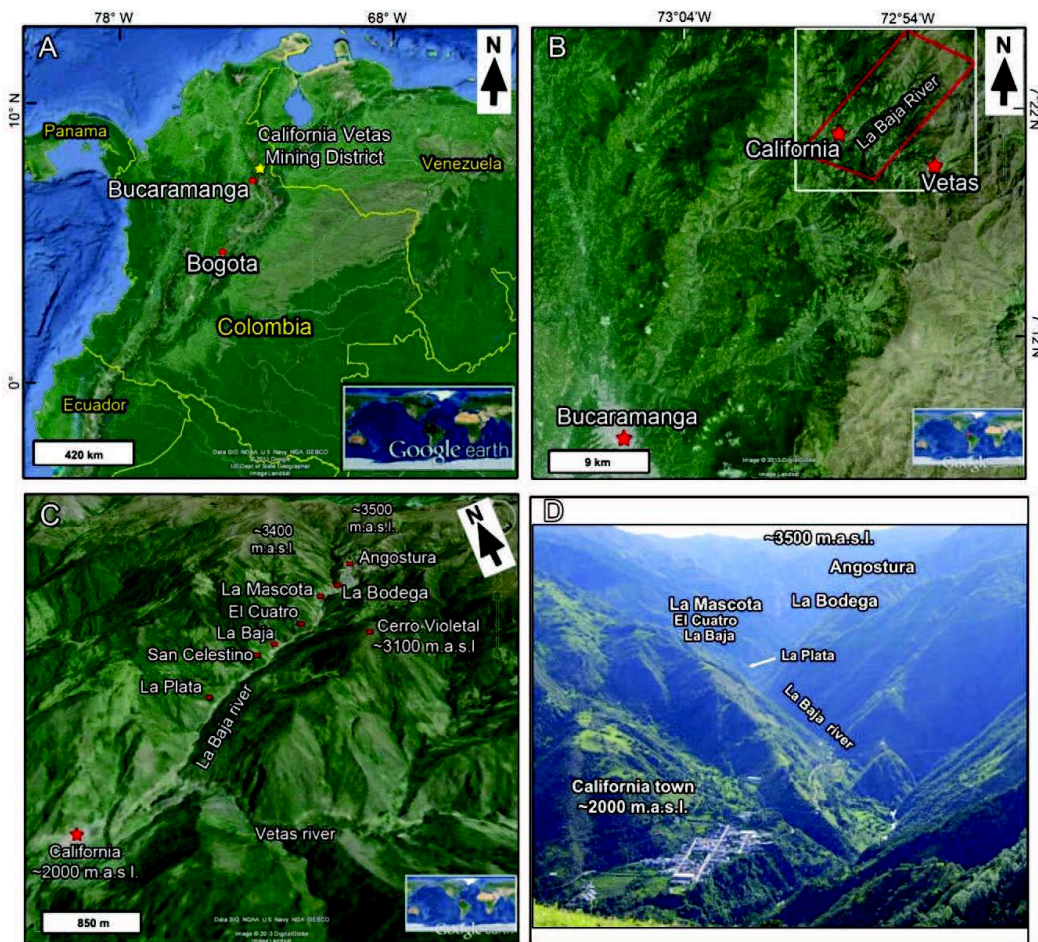


Exhibit MR-11

97. Gold is reported to have been discovered in the California-Vetas district as early as 1549 during a Spanish military action, although it had already been the site of much earlier artisanal activity by the indigenous Sura people. Spanish colonials exploited two open-pit operations in the district at San Antonio in the La Baja portion and at La Perezosa, immediately SW of La Mascota and NE of Angostura respectively. Production continued on a small scale through the next two and a half centuries. In the early 19th and 20th centuries the British company Colombian Mining Association and French company Francia Gold and Silver undertook operations that included a mill and smelter just outside the town of California. In 1947, the Anaconda Copper Mining Company took an option on a property at La Baja that encompassed the present La Bodega deposit and conducted exploration via tunneling and 746 m of drilling. Core recoveries were reportedly so poor that insufficient information was available to justify a large option payment and Anaconda withdrew. Nippon

Mining Company undertook drilling in the La Baja area in 1967, whilst exploration was undertaken by Placer Development and INGEOMINAS in the 1970s and 1980s respectively.⁵⁴

98. On 28 October 1994, Eco Oro entered into an assignment agreement with Mr. Crisanto Peña and with Minas Los Diamantes of **Permit 3452**.⁵⁵ Permit 3452 had originally been granted in 1988 to Mr. Crisanto Peña and to Mr. José Alfredo Rangel and entitled its holders to explore and exploit precious metals in a 250-hectare area within the Angostura gold deposit.⁵⁶ Permit 3452 was governed by Decree 2477 of 1986⁵⁷ and expressly provided that the area encompassed by Permit 3452 did not fall within the scope of Article 20 of said Decree, which provides as follows:

“Exploration and exploitation activities shall not be performed in the manner provided in the above articles: [...]

e) In other areas where the performance of mining activities is prohibited by the Code on Renewable Natural Resources and Environmental Protection and other applicable provisions.”

99. In 1995, Eco Oro started carrying out a program of surface mapping, sampling and diamond drilling.⁵⁸ Between 1995 and 2001, Eco Oro acquired additional rights over the Angostura

⁵⁴ Porter GeoConsultancy, California-Angostura district – Angostura, La Bodega, La Mascota (2015) (**Exhibit C-225**); and A.L. Rodríguez Madrid, “Geology, Alteration, Mineralization and Hydrothermal Evolution of the La Bodega-La Mascota deposits, California-Vetas Mining District, Eastern Cordillera of Colombia, Northern Andes”, MSc. Thesis, University of British Columbia, (February 2014) (**Exhibit MR-11**). See also Constitutional Court Judgment T-361 (30 May 2017) (**Exhibit C-244**), pp. 215 *et seq.*

⁵⁵ This area was later reduced to 230,032 hectares: Ministry of Mines Resolution No. 992194 (1 September 1997) (**Exhibit R-163**).

⁵⁶ Contract of Assignment between Minas Los Diamantes Ltda. and Greystar Resources Ltd. (28 October 1994) (**Exhibit C-2 / C-67**); Ministry of Mining and Energy Resolution No. 707 (29 March 1988) (**Exhibit C-1bis**); Ministry of Mining and Energy Resolution No. 106214 (20 December 1994) (**Exhibit C-281**); and Ministry of Mines, Regional Division of Bucaramanga Resolution No. 993017 (7 February 1996) (**Exhibit C-3**).

⁵⁷ Decree No. 2477 of 1986 (31 July 1986) (**Exhibit C-62**); see also Tr. Day 1 (Mr. Blackaby), 20:14-15. For more detail on Colombia’s mining legal framework, refer to III.A below.

⁵⁸ Strathcona Mineral Services Limited, Angostura Gold-Silver Project, Colombia: Review of Resource Estimate Prepared by Kinross Technical Services for Greystar (June 2000) (**Exhibit C-75 / BD-3 / MR-4**), p. 6.

deposit.⁵⁹ Eco Oro has also acquired other titles, which are not directly relevant to the matter at hand in these proceedings.⁶⁰

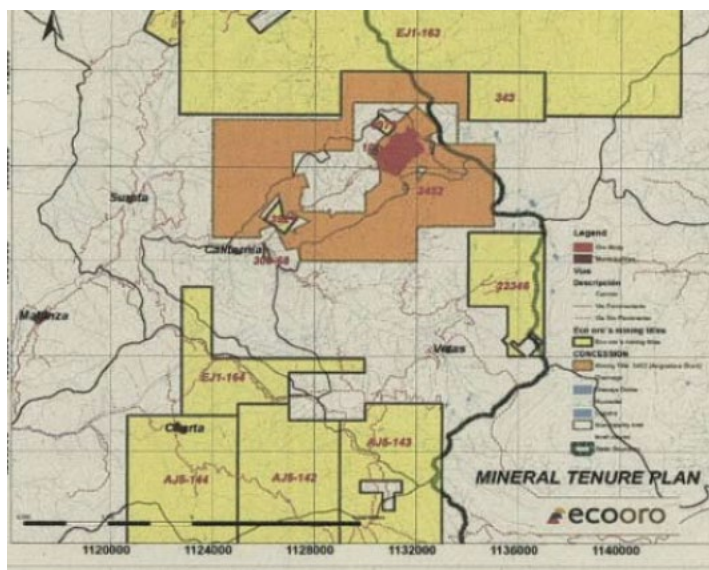


Exhibit C-375

100. On 6 June 1997, the Congress of Colombia enacted Law 373 of 1997,⁶¹ Section 16 of which establishes the following:

⁵⁹ See Annex B to Claimant’s Reply; Email from Wilmer González (Eco Oro) to Luis Alberto Giraldo (Santurbán manager), together with a document named “Eco Oro – Angostura Project: Responsible mining for Soto Norte and the country” (16 October 2014) (**Exhibit C-350**); Email from Martha Arenas (Eco Oro) to ANLA together with letter “Request for visit to the Angostura Project” (26 November 2015) (**Exhibit C-375 / C-376**); Micon International Limited “Technical Report on the Updated Mineral Resource Estimate for the Angostura Gold-Silver Deposit, Santander Department, Colombia, prepared for Eco Oro Minerals Corp” (Effective date: 1 June 2015; Report date: 17 July 2015) (**Exhibit MR-8 / CRA-41 / CLEX-2 / BD-30 / C-37**), p. 7, Table 4.1; and Documents relating to Eco Oro’s titles prior to their integration into Concession 3452 (Undated) (**Exhibit C-443bis**). See also Map of Eco Oro’s mining titles prior to integration into Concession 3452 (Undated) (**Exhibit C-434**) and Tr. Day 1 (Mr. Blackaby), 21:1-12.

⁶⁰ Exploitation licenses 300-68 and 13921 (in 2003), concession contracts 6979 and AJ5-142 (in 2006) and titles AJ5-143, AJ5-144, EJ1-159, EJ1-163, EJ1-164 and 343-54 (in 2007) – see Claimant’s Memorial, fn. 96; and Email from Martha Arenas (Eco Oro) to ANLA together with letter “Request for visit to the Angostura Project” (26 November 2015) (**Exhibits C-375 / C-376**). See also Eco Oro Press Release “Eco Oro Announces Asset Purchase Agreement with Sociedad Minera de Santander S.A.S.” (18 July 2018) (**Exhibit C-407**); and Eco Oro Press Release “Eco Oro announces closing of previously announced asset purchase transaction with Sociedad Minera de Santander S.A.S.” (13 September 2018) (**Exhibit C-412**).

⁶¹ Law No. 373 of 1997 (6 June 1997) (**Exhibit C-68**).

“Section 16. Protection of special management zones. In preparing and presenting the program it shall be specified that the páramo areas, cloud forests and areas of influence of water springs and mountain headwater clusters shall be acquired as a priority by environmental entities of the relevant jurisdiction, which will carry out the studies necessary to determine their actual capacity to supply environmental goods and services to initiate a recovery, protection and conservation process.” [Tribunal’s emphasis]

101. After obtaining CDMB’s approval of the relevant Environmental Management Plan (“PMA”) for the exploratory stage of the mining project for Permit 3452 (in June 1997⁶²), Eco Oro announced its first resource estimates, in the region of several million ounces, in September 1997.⁶³ One year later, Eco Oro published a news release stating that the previous resource estimate had been doubled in volume and which contemplated an open pit mine or an underground mine.⁶⁴ This estimate was again updated in November 2005 declaring indicated and inferred resources of 10.3 million ounces of indicated and inferred resources of gold⁶⁵ and by mid-2006 the declared resources were increased by a further million ounces of gold. By January 2009 gold resources of over 15 million ounces were declared⁶⁶ and by August 2010 Eco Oro estimated over 11 million ounces of measured, indicated and inferred gold.
102. The **2001 Mining Code**⁶⁷ came into force in September 2001. The Deputy Minister of Mines stated that the aim of the reforms achieved by the 2001 Mining Code was to ensure

⁶² CDMB Resolution No. 568 (4 June 1997) (**Exhibits C-5 / R-64**). See also CDMB Order (with Terms of Reference for Environmental Management Plan) (18 December 1996) (**Exhibits R-61 / R-191**); and Environmental Management Plan for Gold Exploration in the Municipality of California, Santander, prepared by Geocol, Ltda. For Greystar (March 1997) (**Exhibit C-4**).

⁶³ Greystar News Release “Multi-Million Oz. Gold Resource Projections Announced” (30 September 1997) (**Exhibit CLEX- 22**).

⁶⁴ Greystar News Release “Greystar Doubles Angostura Resource Estimate” (3 November 1998) (**Exhibit CLEX-23**).

⁶⁵ Snowden Mining Consultants, “Amended Resource Update, Angostura Project, Santander, Colombia” (10 November 2005) (**Exhibit C-100**), pp. 7-8.

⁶⁶ Metálica Consultores S.A., “Mineral Resource Estimate, Angostura Gold Project, Santander, Colombia” (21 January 2009) (**Exhibit C-116**), p. 17.

⁶⁷ See Law No. 685 (as amended) (8 September 2001) (**Exhibit C-8**). See also Speech of President Andrés Pastrana on signing into force the Mining Code 2001 (15 August 2001) (**Exhibit C-274**) (“*We have to bring new private investment to the country and pave the way for exploration and mining activities by businessmen. Evidently, a true causal link between national and foreign capital and the mining industry depends on the existence and upholding of clear, modern and competitive rules, and a clear definition of the roles for the State and of the private sector. Bearing this in mind and taking into account the need to adapt the 1988 mining*”).

“a more modern legislation, which gives legal stability to investors, in accordance with international standards.”⁶⁸ The 2001 Mining Code provided for three phases: exploration, construction and exploitation in one unified concession contract.⁶⁹ It further provided, *inter alia*, as follows:

“ARTICLE 1. PURPOSES. The public interest purpose of this Code is to promote the technical exploration and exploitation of privately-held and state-owned mining resources; to foster such activities in order to meet the needs of domestic and foreign demand for such resources, and to ensure that these resources are exploited in accordance with the principles and regulations governing the rational exploitation of non-renewable natural resources and the environment, focusing on sustainable development and the country’s social and economic progress as a comprehensive notion.

[...]

ARTICLE 15. NATURE OF THE BENEFICIARY’S RIGHT. The concession contract and other titles issued by the Government referred to in the preceding Article shall not grant the beneficiary any property right on the minerals ‘on site,’ but the right to exclusively and temporarily determine the existence of minerals in exploitable quantities and qualities within the covered area, and to take such minerals through extraction or abstraction, and the right to subject third party plots of lands to the easements required for the efficient performance of such activities.

[...]

legislation to the new global economic realities, and of course the tenets of the 1991 political constitution, the National Government has taken it upon itself to prepare, agree upon, and promote the adoption of a new mining code that ensures a stable and attractive regulatory framework for investment that is also fair and beneficial to all Colombians. These new regulations will be crucial to improve the competitiveness of the sector.”).

⁶⁸ Article El Tiempo “Minería, con 30 años de rezago” (12 June 2000) (**Exhibit C-76**).

⁶⁹ Article 58 (*Rights Under the Concession*) of the 2001 Mining Code. See Law No. 685 (as amended) (8 September 2001) (**Exhibit C-8**).

ARTICLE 34. AREAS THAT MAY BE EXCLUDED FROM MINING. Mining exploration and exploitation works and projects may not be carried out in areas declared and delimited in accordance with the legal framework currently in force for the protection and development of renewable natural resources or the environment and which, in accordance with the relevant legal provisions, expressly exclude said works and projects. The aforementioned exclusion zones will be those constituted in accordance with the legal provisions in force, such as areas that comprise the system of national natural parks, regional natural parks and forest reserve areas. To that end, these areas should be geographically delimited by the environmental authority on the basis of technical, social and environmental studies with the collaboration of the mining authority, in those areas of mining interest.

In order for mining exploration and exploitation works and projects to be excluded or restricted in areas for the protection and development of renewable natural resources or the environment, the act by which these are declared must be expressly based on studies that establish the incompatibility of or need to restrict mining activities. However, by means of a well-founded administrative act of the environmental authority that orders the subtraction of the required area, the mining authority may authorize that in the areas referred to in this article, with the exception of parks, mining activities may be carried out in a restricted manner or only by means of specified extraction methods and systems that do not affect the objectives of the exclusion zone. To that end, the interested party in the Concession Contract must present studies that demonstrate the compatibility of mining activities with such objectives.

[...]

ARTICLE 36. EFFECTS OF THE EXCLUSION OR RESTRICTION.

In concession contracts, the areas, plots of land and courses where, pursuant to the above articles, mining activities are prohibited shall be deemed excluded or restricted by operation of law or conditioned by the granting of special permits or authorizations.

This exclusion or restriction need not be declared by any authority whatsoever, or be expressly stated in acts and agreements, nor may be subject to any waiver by the bidder or concessionaire of such areas or plots of land. If such areas or plots of lands were actually the site of a concessionaire's works, the mining authority shall order they be immediately removed and cleared, without awarding any payment, compensation or damages whatsoever for this reason, notwithstanding the proceedings the competent authorities may commence in each case where applicable.

[...]

ARTICLE 45. DEFINITION.

The mining concession contract is the agreement entered into between the State and an individual to carry out, at the individual's expense and risk, exploration works for state-owned minerals that may be found within a delimited area, and to exploit them under the terms and conditions established in this Code. This agreement differs from public works contracts and public services concession contracts. The phases comprised by the concession contract within its purposes are technical exploration, economic exploitation, mineral beneficiation at the concessionaire's expense and risk and closure or ceasing of the relevant works and construction.

ARTICLE 46. APPLICABLE LAW.

The mining laws in force at the time that the concession contract is perfected will be applicable throughout the term of its execution and extensions. If said laws are modified or added to at a later date, these laws will apply to the concessionaire only insofar as they broaden, confirm or improve its rights with the exception of those regulations that contemplate the modification of the anticipated economic revenues to the State or Territorial Entities.

[...]

ARTICLE 197. CONSTITUTION AND EXERCISE OF THE RIGHT.
The conclusion of a concession contract and its registration in the National Mining Registry are regulated by the provisions of this Code.

For the execution of this contract, before the commencement and performance of the exploitation work, all environmental requirements and conditions set forth in this Chapter, and for those not foreseen therein, those set forth in the general environmental regulations, should be met.
[Tribunal's emphasis]

103. The 2001 Mining Code also contained a provision allowing for the integration of areas founded in different mining titles, pursuant to which Eco Oro applied for the integration of the areas encompassed by its different titles.⁷⁰ As Eco Oro's titles were governed by different statutes, Eco Oro requested that the provisions of the 2001 Mining Code be applied to all its titles (*acogimiento*) and agreed that the resulting concession contract would be considered to be in the exploration phase.⁷¹ In February 2007, INGEOMINAS authorized

⁷⁰ Letter from Greystar (Mr. Rafael Guillermo Silva Silva) to Minercol (10 December 2002) (**Exhibits C-314 / R- 83**).

⁷¹ See Letter from Greystar (Mr. Hernan Jose Pedraza Habeych) to Minercol (16 August 2002) (**Exhibit R-179**) and Documents relating to Eco Oro's titles prior to their integration into Concession 3452 (Various dates)

the integration of the areas of ten of the mining titles held by Eco Oro within the Angostura deposit.⁷² In its Resolution, INGEOMINAS further established the following:

“As to the duration of the contract to be signed and the plate it will have, it is observed that the oldest title is permit No. 3452, registered in the National Mining Register on August 14, 1990; consequently, it will be this title that will determine the plate and the duration of the contract to be signed, which has an execution period of 16 years, therefore said term must be discounted from the title to be granted, which will have a remaining total duration of 14 years counted from the registration of the contract to be signed, and will have an exploration stage of 3 years, 2 years of construction and assembly, and the remainder will be the exploitation period, the above in response to the approved single exploration and exploitation program.

The term of the contract for the consolidated areas was calculated in accordance with Article 103 of [the 2001 Mining Code].” [Tribunal’s emphasis]

104. On 8 February 2007, Eco Oro and INGEOMINAS entered into a Concession Contract for the Exploration and Exploitation of a Deposit of Gold, Silver, Chromium, Zinc, Copper, Tin, Lead, Manganese, Precious Metals and Associated Minerals No. 3452 with INGEOMINAS (“**Concession 3452**”).⁷³ Concession 3452 was registered with the Mining Registry on 9 August 2007.⁷⁴

(**Exhibit C-443**), whereby Greystar requested, *inter alia*, that the provisions of the 2001 Mining Code be applied to all its titles. See also INGEOMINAS Resolution DSM No. 75 (2 February 2007) (**Exhibits C- 109 / R-68**).

⁷² INGEOMINAS Resolution DSM No. 75 (2 February 2007) (**Exhibit C-109 / R-68**). See also INGEOMINAS, Technical Opinion (1 February 2007) (**Exhibit C-318**). See also Minercol Report on Coordination of Monitoring and Control of Mining Titles (13 October 2003) (**Exhibit C- 89**); and Documents relating to Eco Oro’s titles prior to their integration into Concession 3452 (Various dates) (**Exhibit C-443**).

⁷³ Concession Contract No. 3452 (8 February 2007) (**Exhibit C-16 / MR-34**). It should be noted that, pursuant to Clause 25 of the Concession Contract, there are four Annexes to the contract, which form part of it: “*Annex No. 1. Topographic Map[;] Annex No. 2. Terms of Reference for exploration works and Works and Activities Program and Environmental Mining Guidelines [sic] [;] Annex No. 3. Approved Works and Activities Program PTO[;] Annex No. 4. Administrative Annexes[;] Photocopy of the Legal Representative’s identity card for THE CONCESSIONAIRE[;] Photocopy of the TIN of THE CONCESSIONAIRE[;] Environmental authorizations[;] The environmental-mining policy, and[;] Proof of payment of stamp duty.*” These Annexes are not on the record. See also Greystar News Release, “Greystar Granted Integrated Mining Concession at Angostura” (14 February 2007) (**Exhibit C-110**).

⁷⁴ See, for instance, ANM, Resolution VSC No. 2 (8 August 2012) (**Exhibit R-72**); and INGEOMINAS, Resolution No. DSM-28 (22 February 2011) (**Exhibit C-19**).

105. In May 2007, the IAvH published the 2007 IAvH Páramo Atlas (the “**2007 Atlas**”),⁷⁵ which was prepared on a scale of 1:250,000. The IAvH established a lower limit for the bioclimatic zone of the sub-páramo being 3200 masl which resulted in a 54% overlap of the Santurbán Páramo and the area of Concession 3452.
106. On 16 April 2008, Eco Oro filed an amended PMA with CDMB further to the integration of the areas of its mining titles.⁷⁶ Whilst there is no reference in the file as to whether this PMA was approved, there are subsequent acts by CDMB determining that Eco Oro’s activities were generally compliant with environmental requirements and approving the Environmental Audit Reports submitted by Eco Oro on the basis of an approved PMA⁷⁷ on the basis of which, Eco Oro contends, it understood its amended PMA had been approved.⁷⁸
107. On 20 March 2009, Eco Oro announced that the IFC had completed an investment in the company.⁷⁹ The investment was preceded by an Environmental & Social Review by the IFC, which, on the basis of baseline studies undertaken by Ingetec, highlighted the fact that the area of influence of the Project enshrined a “*habitat of key importance*”, “*the páramo, an area of significant biological relevance defined by Colombian legislation.*”⁸⁰

⁷⁵ IAvH, Atlas of Colombia páramos (2007) (**Exhibit C-14bis / MR-29**).

⁷⁶ Letter from Greystar (Mr. Laserna) to CDMB (Mr. Schmitz) (16 April 2008) (**Exhibit C-111**). See also Environmental Management Plan for the Integration of Mining Exploration Areas in the Angostura Project (16 April 2008) (**Exhibit C-17**).

⁷⁷ Letter from the CDMB (Mr. Schmitz) to Greystar (Mr. Laserna) (10 December 2008) (**Exhibit C-320**). See also Letter from the CDMB (Mr. Villamil Vasquez) to Eco Oro (Mr. Galeano Bejarano) (15 August 2014) (**Exhibit C-214 / C-215**); Eco Oro Environmental Compliance Report Q3 and Q4 2014 for the Angostura underground project (12 February 2015) (**Exhibit C-359**); Letter from Eco Oro (Mr. Moseley-Williams) to ANLA (Mr. Iregui) (5 January 2016) (**Exhibit C-39**).

⁷⁸ Email from Omar Ossma (Eco Oro) to David Heugh (Eco Oro) and others (14 February 2012) (**Exhibit C-332**).

⁷⁹ Greystar News Release “Greystar Announces Completion of International Finance Corporation Investment” (20 March 2009) (**Exhibit C-118**). In connection with IFC’s investment in Eco Oro, see also: Greystar News Release “Greystar Announces Completion of International Finance Corporation Investment” (20 March 2009) (**Exhibit C-118**); IFC Performance Standards on Environmental and Social Sustainability (2012) (**Exhibit C-155**); Email exchange between Mr. Mark Moseley-Williams, Mr. Juan Jose Rossel (International Finance Corporation) and others (11 February 2016) (**Exhibit C-389 / C-392**); and Email from Mr. Mark Moseley-Williams to Mr. Juan Orduz (11 February 2016) (**Exhibit C-390**).

⁸⁰ IFC Environmental & Social Review Summary of the Investment in Greystar (9 February 2009) (**Exhibit C- 270**). See also RBC Capital Markets First Glance, “Greystar Resources, Ltd., IFC Gets Back into Speculative Mining Investment” (5 February 2009) (**Exhibit CRA-141**).

108. On 23 September 2009, Eco Oro submitted its Construction and Works Plan (*Plan de Trabajo y Obras*) (“PTO”) to INGEOMINAS.⁸¹ The filing of a PTO is required by Article 84 of the 2001 Mining Code prior to the expiry of the exploration phase and is presented for the approval of the competent environmental authority. Exploitation cannot be commenced without, *inter alia*, such approval. Section 1.9.2 of the 2009 PTO was titled “*Main environmental and social problems*” and states “[t]he proximity of project Angostura to the Santurbán Páramo is something to be taken into account, because the lakes are situated in the area [...]” The plans which were to be submitted with the PTO were delivered on 10 February 2010.
109. On 22 December 2009, Eco Oro applied for a Global Environmental License to MinAmbiente. Among other materials provided, Eco Oro submitted an Environmental Impact Study (“EIA”) prepared by Unión Temporal Vector and Ingetec pursuant to the Terms of Reference provided by MinAmbiente.⁸² This EIA identified a significant presence of páramo and subpáramo ecosystems in the Concession area. On 13 January 2010, MinAmbiente ordered the commencement of an administrative procedure for the grant of a Global Environmental License.⁸³
110. On 9 February 2010, **Law 1382** of 2010 was enacted.⁸⁴ Pursuant to Article 3 of this Law, Article 34 of the 2001 Mining Code was amended to include an express reference to “páramo ecosystems” amongst the areas in which mining operations could be prohibited, reading, in relevant part, as follows:

“Mining exploration and exploitation works and projects may not be carried out in areas declared and delimited in accordance with the legal framework currently in force for the protection and development of renewable natural resources or the environment.”

⁸¹ Greystar (Mr. Arguelles Macedo) presents the Works Program (*Programa de Trabajo y Obras -PTO*) to INGEOMINAS (Mr. Jiménez Bautista) (23 September 2009) (**Exhibit R-44 / R-84**).

⁸² Letter from the Ministry of Environment (Ms. Morales) to Greystar (Mr. Felder) (26 January 2009) (**Exhibit C-117**); Angostura Project Environmental Impact Study (December 2009) (**Exhibit C-321** (Chapter 3) / **Exhibit R-158** (Chapter 1)); Letter from Greystar (Mr. Felder) to the Ministry of Environment (Ms. Zapata) (22 December 2009) (**Exhibit C-121**).

⁸³ Ministry of Environment, Order No. 28 (13 January 2010) (**Exhibit C-322**).

⁸⁴ Law No. 1382 (9 February 2010) (**Exhibit C-18**).

The aforementioned exclusion zones will be those that have been constituted or will be established in accordance with the legal provisions in force, such as areas that comprise the system of national natural parks, regional natural parks, protected forest reserve areas and other forest reserve areas, páramo ecosystems, and the wetlands indicated in the list of international importance of the Ramsar Convention. To that end, these areas should be geographically delimited by the environmental authority on the basis of technical, social and environmental studies. The páramo ecosystems shall be identified in accordance with the cartographic information provided by the Alexander Von Humboldt Investigation Institute.”

111. Article 3, paragraph 1, further contained a grandfathering provision providing that:

“If on the effective date of this law, any construction and assembly or exploitation activities are being undertaken subject to a mining title and an environmental license or their equivalent in areas which were not previously excluded, such activities shall be allowed until their expiration, but no extensions shall be granted with regard to such titles.”

112. Article 3, paragraph 3, in turn specified that:

“The declaration of the exclusion areas referred to in this section requires the Ministry of Mining and Energy’s prior non-binding opinion.”

113. On 20 April 2010, MinAmbiente ordered that the EIA be returned to Eco Oro, on the grounds that the project was located in a páramo zone as delineated according to the 2007 Atlas.⁸⁵ The Order issued by MinAmbiente further made reference to the amendment of Article 34 of the 2001 Mining Code introduced by Article 3 of Law 1382 of 9 February 2010, noting that *“in order to define the [mining] exclusion area [...] reference must be made to the definition of the [IAvH], as established by said law.”* The Order issued by the MinAmbiente requested Eco Oro to present a new study taking into account the so-called *“Páramo of Santurbán”* ecosystem as an area excluded from mining activities.

⁸⁵ Ministry of Environment, Order No. 1241 (20 April 2010) (**Exhibit R-14**). See also Ministry of Environment, *Concepto Técnico* No. 594 (15 April 2010) (**Exhibit R-78**).

114. This decision generated significant concern both within Eco Oro and in the market at large. Eco Oro was concerned that almost all its activities were above 3200 masl thus coming within the boundaries of the 2007 Atlas, including half of the open pit area, and this decision effectively stopped the project, causing it to be potentially unfeasible or uneconomic.⁸⁶ Eco Oro published a news release on 26 April 2010,⁸⁷ which was echoed in several specialised news outlets.⁸⁸ Eco Oro's market value collapsed that day.⁸⁹
115. On 29 April 2010, Eco Oro filed a request for reconsideration of the 20 April 2010 order issued by MinAmbiente, on the basis that Eco Oro's application had been submitted under the prior iteration of Article 34 of the 2001 Mining Code and, therefore, should be considered under such provisions and not the amended provisions introduced by Law 1382.⁹⁰ Eco Oro also referred to the consolidation of its mining titles and to the fact that it had adhered to the provisions of the 2001 Mining Code, which contained Article 46 which Eco Oro invoked to argue that Law 1382 should not apply retroactively to the Concession. Eco Oro further argued that, even if Law 1382 were applicable, the requirements set out in Article 34 of the 2001 Mining Code as amended by said law had not been complied with. Eco Oro noted that the IAvH was not an environmental authority and therefore had no jurisdiction to declare a

⁸⁶ Email from S. Kesler (Greystar) to D. Rovig (Greystar) and others (24 April 2010) (**Exhibit R-180**). See also Greystar, Internal Memorandum (3 May 2010) (**Exhibit R-159**), mentioning a meeting with the Minister of Environment.

⁸⁷ Greystar News Release "Greystar Resources Announces Request by The Colombian Government for a New Angostura Environmental Impact Assessment" (26 April 2010) (**Exhibit CRA-138**).

⁸⁸ RBC Capital Markets, First Glance Comment "Greystar Resources Ltd. – New EIA," (26 April 2010) (**Exhibit CRA-144**); Scotia Capital Intraday Flash "Greystar Resources Ltd. "New EIA and Mine Redesign Requested – Angostura Viability Could be in Jeopardy" (26 April 2010) (**Exhibit CRA-145**); Canaccord Adams Daily Letter "Greystar Resources Ltd. – New EIA Request Threatens Development of Angostura" (27 April 2010) (**Exhibit CRA-146**); Jennings Capital Inc. Revised Recommendation "Greystar Resources Ltd. "New Development Slams Brakes on Angostura's Advancement" (27 April 2010) (**Exhibit CRA-147**); RBC Capital Markets Price Target Revision "Greystar Resources Ltd. – Agonizing Over Angostura" (27 April 2010) (**Exhibit CRA-148**).

⁸⁹ CRA: Eco Oro Enterprise Value and Junior Gold Miner Index (Undated) (**Exhibit CRA-98**); Second CRA Report, Figure 4. Eco Oro has acknowledged this: Greystar, CEO report to the Board of Directors (3 May 2010) (**Exhibit R-160**) ("*The impact of the 'auto' on share price was dramatic*"). See also Office of the Compliance Advisor Ombudsman (CAO), "Compliance Investigation, IFC Investment in Eco Oro (Project # 27961), Colombia" (30 June 2016) (**Exhibit MR-10**), p. 18 ("*Following the Ministry of Environment's EIA decision in April 2010, the company's share price dropped considerably, and remained volatile. IFC noted the project's future was uncertain, due to concerns raised by various environmental and regional political groups over the project's potential impact on water resources derived from the páramo area, but committed to remain engaged with the company on E&S issues.*").

⁹⁰ Letter from Greystar (Mr. Felder) to Ministry of Environment (Mr. Peñaranda Correa) (29 April 2010) (**Exhibit R-85**).

mining exclusion zone. Eco Oro was concerned about the impact of MinAmbiente’s decision and, in a report to the Board of Directors, the CEO noted that a “*comprehensive communication plan [had] to be developed to inform and shape Government and public opinion that mining can be conducted responsibly alongside preservation of páramo and water resources.*”⁹¹ It was also noted that CDMB was “*getting more vocal on preservation of páramo*” and that the publicity given to Eco Oro’s permit issue was attracting the attention of NGOs who supported protection of the páramo and water resources from the activities of miners.

116. On 19 May 2010, Eco Oro reported internally that it had had a “*very good meeting with Martinez the Mines Minister*” who had said the “*Governments [sic] definitely wants the project to go ahead.*”⁹²
117. On 27 May 2010, MinAmbiente overturned its previous order and directed that the assessment of Eco Oro’s EIA be resumed on its merits.⁹³
118. As a part of the procedure required to be followed with respect to mining applications, MinAmbiente held public hearings in California and in Bucaramanga. The meeting in California, in November 2010, registered support for Eco Oro’s mining project,⁹⁴ while the one held in Bucaramanga in March 2011 was suspended due to violent confrontations.⁹⁵

⁹¹ Greystar, CEO report to the Board of Directors (3 May 2010) (**Exhibit R-160**).

⁹² Email from Frederick Felder (Greystar) to Steve Kesler (Greystar) and others (19 May 2010) (**Exhibit C-323**).

⁹³ Ministry of Environment, Order No. 1859 (27 May 2010) (**Exhibit R-15**).

⁹⁴ Article Vanguardia “Californianos manifiestan apoyo a Greystar” (21 November 2010) (**Exhibit C-137**); Article Vanguardia “Así fue la audiencia pública de Angosturas” (22 November 2010) (**Exhibit C-138**); Greystar News Release “Greystar Announces Completion of Angostura Project Public Hearing” (29 November 2010) (**Exhibit C-276**). See also Office of the Compliance Advisor Ombudsman (CAO), “Compliance Investigation, IFC Investment in Eco Oro (Project # 27961), Colombia” (30 June 2016) (**Exhibit MR-10**), Annex 2.

⁹⁵ Greystar News Release “Greystar Resources Disappointment at Early Termination of Public Hearing in Bucaramanga” (7 March 2011) (**Exhibit C-146**). See also Office of the Compliance Advisor Ombudsman (CAO), “Compliance Investigation, IFC Investment in Eco Oro (Project # 27961), Colombia” (30 June 2016) (**Exhibit MR-10**), Annex 2.

Several demonstrations took place in different parts of the country, some of them in support of the mining project and some others in support of páramo protection and water quality.⁹⁶

119. On 4 October 2010, pursuant to Order GTRB-0485,⁹⁷ the Bucaramanga Regional Working Group of INGEOMINAS asked Eco Oro to complete its PTO with respect to “*the definition of dumps, drilling and blasting, reservoirs, exploitation fronts, leaching piles and geology as well as plans, schedules, etc.*” Eco Oro was notified of this request two months after the date of the order and given two months to obtain the requested documentation. Documentation was provided on 24 January 2011, 18 February 2011 and 22 February 2011 and, on 14 March 2011, Eco Oro provided hydrogeological and stability studies.
120. On 15 December 2010, INGEOMINAS approved Eco Oro’s application for the first two-year extension of the exploration stage under Concession 3452.⁹⁸ Unlike subsequent extension decisions, INGEOMINAS did not refer in this extension approval to there being any limitation on Eco Oro’s activities within the area of the Concession.
121. On 20 January 2011, INGEOMINAS notified Eco Oro of its Technical Opinion on the hydrogeological chapter of Eco Oro’s PTO,⁹⁹ which contained serious reservations about the hydrogeological model presented by Eco Oro and recommended that Eco Oro carry out a “*more exhaustive work [...] in the hydrogeological research that would lead to minimizing the uncertainties shown in the model.*”

⁹⁶ In February 2011, March 2012, November 2013, April 2015, March 2018. See Office of the Compliance Advisor Ombudsman (CAO), “Compliance Investigation, IFC Investment in Eco Oro (Project # 27961), Colombia” (30 June 2016) (**Exhibit MR-10**), Annex 2; Images and video of demonstrations in California, Santander (18 March 2018) (**Exhibit C-273**).

⁹⁷ INGEOMINAS, Order No. SFOM-027 (24 May 2011) (**Exhibit R-63**).

⁹⁸ INGEOMINAS, Resolution No. GTRB No. 267 (15 December 2010) (**Exhibit R-69 / PMR-23**).

⁹⁹ INGEOMINAS, Technical Opinion on the hydrogeological chapter of Greystar’s Program of Tasks and Works (PTO) (20 January 2011) (**Exhibit R-79**). See also INGEOMINAS, Order No. GTRB-0458 (4 October 2010) (**Exhibit R-62**).

122. On 22 February 2011, INGEOMINAS designated Concession 3425 and the Project a Project of National Interest (“PIN”).¹⁰⁰ Among the reasons for that decision, INGEOMINAS set out the following:

“This project has a social and economic impact in the regions where the operations are located and in the country, which translates into benefits such as the creation of new jobs, royalties and investment in works that will benefit the region.

As the project involves polymetallic sulphides, the techniques required for the exploration, exploitation and extractive metallurgy involve the use of chemical methods to treat the mineral ore that have an environmental impact, which is a very sensitive subject for the communities that are directly affected and, therefore, stricter verification and compliance with the technical, legal and economic obligations is required in order to maximize the use of the reserves with the least possible environmental impact.

In accordance with the bioclimatic characterization, the project’s geographical location requires special attention from the Colombian Government, as public opinion has shown great interest in the effects it might have on the ecosystems and the communities that would be affected by the exploration works.

Pursuant to the criteria established in Resolution No. 955 dated November 21, 2007, INGEOMINAS considers this to be a project of national interest as it meets the following requirements:

- 1. Large size with a high level of production.*
- 2. High operating, technological and financial capacity.*
- 3. Production is primarily intended for international markets.*
- 4. It generates important economic resources for the country and the regions where the operations are located.”*

¹⁰⁰ INGEOMINAS, Resolution No. DSM-28 (22 February 2011) (**Exhibit C-19**). See also National Mining Agency, Resolution No. 206 (22 March 2013) (**Exhibit R-73**); and National Mining Agency, Resolution No. 341 of 2013 (20 May 2013) (**Exhibit C-26**).

(2) Underground-mining Project

123. On 23 March 2011, after certain groups from outside the California and Vetás area voiced their opposition to the open pit project based on its perceived environmental impact and after internal discussions and the consideration of alternative solutions,¹⁰¹ Eco Oro requested that it be permitted to withdraw its Environmental License application.¹⁰² Eco Oro made clear that it was not fully withdrawing from the Project and clarified that the intent was “*simply to desist from on-going environmental licensing to allow for a future re-filing in the terms that reflect concerns.*”¹⁰³ As an alternative to the open pit project, on 18 March 2011 reference was first made to an underground-mine, in a news release addressing the purported celebration by IAvH of Eco Oro’s withdrawal from the Project.¹⁰⁴ However, on 31 May 2011, MinAmbiente decided not to accept Eco Oro’s withdrawal request but to continue *sua sponte* with the administrative procedure.¹⁰⁵ It proceeded to refuse to grant the global environmental licence requested by Eco Oro. (This decision was confirmed by ANLA on 31 October 2011.¹⁰⁶)
124. On 11 May 2011, the Colombian Constitutional Court rendered **Judgment No. C-366**, whereby Law 1382 of 2010 was declared unconstitutional on the basis of lack of prior consultation.¹⁰⁷ However, the effects of this declaration of unconstitutionality were deferred for a term of two years.

¹⁰¹ Cutfield Freeman & Co presentation to Greystar Board of Directors on “Open pit v Underground” (March 2011) (**Exhibit C-326**); Email from Frederick Felder (Greystar) to Steve Kesler (Greystar) and others (19 May 2010) (**Exhibit C-323**); Greystar, CEO report to the Board of Directors (3 May 2010) (**Exhibit R-160**); Letter from Steve Kesler (Greystar) to the Greystar Board of Directors (14 March 2011) (**Exhibit C-327**).

¹⁰² Letter from Greystar Resources Ltd. (Mr. Ossma Gómez) to the Ministry of Environment (Ms. Sarmiento) (23 March 2011) (**Exhibit R-18 / R-86**).

¹⁰³ Greystar News Release “Greystar Resources to study viability of alternate project at Angostura” (18 March 2011) (**Exhibit CLEX-24 / R-21**).

¹⁰⁴ E-mail from Arturo Quiros Boada (ANDI – Asociación Nacional de Empresarios de Colombia) regarding IAvH press release (18 March 2011) (**Exhibit C-328**).

¹⁰⁵ Ministry of Environment, Resolution No. 1015 (31 May 2011) (**Exhibit R-16 / R-71**).

¹⁰⁶ Ministry of Environment, Resolution No. 35 (31 October 2011) (**Exhibit C-290**).

¹⁰⁷ Constitutional Court, Judgment No. C-366 (11 May 2011) (**Exhibit C-150**).

125. On 24 May 2011, INGEOMINAS decided not to continue the assessment of the PTO following Eco Oro's request to withdraw it.¹⁰⁸
126. On 25 May 2011, MinAmbiente issued **Resolution No. 937**.¹⁰⁹ Article 1 provided that its purpose was “[t]o adopt the cartography mapped at 1:250,000 scale provided by the [IAvH] set forth in the so-called Atlas of Colombian Páramos [i.e., the 2007 Atlas¹¹⁰] for the identification and delimitation of Páramo Ecosystems.” Article 1 further provided in relevant part as follows:

“Paragraph 1. In the event that the environmental authorities have conducted, within their areas of jurisdiction on the current status of the páramos and approved the respective environmental management plans, the identification and cartographic delimitation of the páramo ecosystem will be the one set forth in said studies and plans prepared; and therefore, it will be the one applicable for all legal purposes, provided the cartographic scale utilized for delimitation is equal to or more detailed than the 1:25,000 scale, and the elevation that was defined as the lower altitudinal limit for the ecosystem is not increased, nor is the extent of the total established area decreased, according to the identification made at the cartography 1:250,000 scale provided by the Alexander von Humboldt Research Institute of Biological Resources.

Paragraph 2. The páramo ecosystems that have been declared in a category of protected area will maintain that condition. However, under no circumstance may mining activities or any other that are incompatible with these ecosystems may be authorized.

Paragraph 3. The cartography adopted through this resolution will be available for consultation by the interested parties on the website of the Ministry of Environment, Housing and Territorial Development.”

127. On 16 June 2011, **Law 1450** of 2011 (the 2010-2014 National Development Plan) was enacted.¹¹¹ Article 202 of this Law provided in relevant part as follows:

¹⁰⁸ INGEOMINAS, Order No. SFOM-27 of 2011 (24 May 2011) (**Exhibit R-63**).

¹⁰⁹ Ministry of Environment, Resolution No. 937 (25 May 2011) (**Exhibit R-70**).

¹¹⁰ IAvH, Atlas of Colombia Páramos (2007) (**Exhibit C-14bis / MR-29**).

¹¹¹ Law No. 1450 (16 June 2011) (**Exhibit C-20**).

“The páramo and wetland ecosystems should be delineated to a scale 1:25,000 based on technical, economic, social and environmental studies adopted by the Ministry of Environment, Housing and Territorial Development or by whoever acts in that capacity. The delineation will be adopted by said entity through an administrative act.

The Regional Autonomous Corporations, the Sustainable Development Corporations, large urban centers and the Public Environmental Institutions shall undertake the process of zoning, regulation and determination of the regime of uses of these ecosystems, based on said delineation, in accordance with the superior regulations and conforming to the criteria and guidelines outlined by the Ministry of Environment, Housing and Territorial Development or by whoever acts in that capacity. For this, they shall have a period of up to three (3) years from the date of completion of the demarcation.

Paragraph 1. No agricultural activities, exploration or exploitation of hydrocarbons and minerals, nor construction of hydrocarbon refineries shall be undertaken in the páramos ecosystems. For these purposes, the cartography contained in the Atlas of Colombian Páramos by the Alexander von Humboldt Investigations Institute will be considered as a minimum reference, until a more detailed scale cartography has been obtained.

Paragraph 2. In wetland ecosystems, agricultural activities, high-impact hydrocarbon and mineral exploration and exploitation activities may be restricted partially or completely on the basis of technical, economic, social and environmental studies adopted by the Ministry of the Environment, Housing and Territorial Development or any other entity acting in its place. Within ninety (90) calendar days of the enactment of this Law, the National Government shall set the regulations regarding the applicable criteria and procedures. Under no circumstances may these activities be conducted in wetlands specified in the list of wetlands of international importance of the RAMSAR Convention.”¹¹²

¹¹² For a judicial interpretation of this provision, refer to *Consejo de Estado*, Advisory Opinion No. 2233 (11 December 2014) (**Exhibit R-135**). For an interpretation of this provision by the Ministry of Mines, refer to Letter from Ministry of Mines (Ms. Díaz Lopez) to INGEOMINAS (Mr. Montes) (27 September 2011) (**Exhibit C-330**) (“Currently, the requirements for declaring páramo ecosystems throughout the country, as reflected in the law in force have not been satisfied. Although the transitional regime in [Law 1450] requires that the cartography set out in the von Humboldt Institute’s Atlas to be used as a minimum reference, at no point does it determine that such cartography established the areas excluded from mining. Finally, the position of the control organs in relation to the protection of natural resources is clear to this Office. Thus, the precautionary principle constitutes one of the fundamental tenets of Colombian environmental policy. However, such principle cannot disregard acquired rights, in accordance with Article 58 of the Political Constitution.”).

128. On 27 September 2011, MinMinas shared its opinion on this provision with INGEOMINAS as follows:¹¹³

“Currently, the requirements for declaring páramo ecosystems throughout the country, as reflected in the law in force have not been satisfied. Although the transitional regi[m]e in [Law 1450] requires that the cartography set out in the von Humboldt Institute’s Atlas to be used as a minimum reference, at no point does it determine that such cartography established the areas excluded from mining. Finally, the position of the control organs in relation to the protection of natural resources is clear to this Office. Thus, the precautionary principle constitutes one of the fundamental tenets of Colombian environmental policy. However, such principle cannot disregard acquired rights, in accordance with Article 58 of the Political Constitution.”

129. Brigitte Baptiste, Head of the IAvH, commented on this provision and on the provisions of the late Law 1382 of 2010¹¹⁴ nearly two years later (on 27 June 2013), as follows:

“First, I would like to insist and clarify that the delimitation to which we are permanently referring is an administrative act by the Ministry of Environment, the environmental authority, through which a specific legal regime for the high mountain territories is adopted. It is not the delimitation of an ecosystem for academic reasons or for the exclusive purpose of conservation; it is a very unexpected policy decision in the history of this country which excludes economic activities in about 3 million hectares of high mountain.

Such delimitation, as an administrative act, was ordered by law – a law that was first established by the former mining code, which has been repealed. The law was more recently established in the development plan law, so it constitutes a fully effective mandate from Congress giving powers and instructions to the Ministry of Environment, the autonomous regional corporations and the Humboldt Institute.”

130. On 20 June 2011, Eco Oro requested Terms of Reference for the preparation of an EIA for an underground mine, as an alternative to an open pit mine.¹¹⁵ On 27 February 2012, ANLA provided the Terms of Reference and, due to the Project’s location, invited Eco Oro to take into consideration in its EIA that the delimitation of the Santurbán Páramo at a scale of

¹¹³ Letter from Ministry of Mines (Ms. Díaz Lopez) to INGEOMINAS (Mr. Montes) (27 September 2011) (**Exhibit C-330**) (USB drive provided at the Hearing).

¹¹⁴ Speech by Brigitte Baptiste “Por qué y para qué delimitar los páramos?” (27 June 2013) (**Exhibit C-184**) (USB drive provided at the Hearing).

¹¹⁵ Letter Greystar (Mr. Heugh) to Ministry of Environment (Ms. Sarmiento) (20 June 2011) (**Exhibit C-153**).

1:25,000 was underway pursuant to the provisions of Law No. 1450 and that the provisional boundaries of the páramo had been set forth in the cartography of the 2007 Atlas.¹¹⁶

131. At around this time, Eco Oro carried out a corporate rebranding,¹¹⁷ which signalled a significant change in corporate identity. According to Eco Oro’s President and CEO at the time, “[t]he Greystar name has negative associations with Government in Colombia and in Bucaramanga. Rebranding is necessary. This can be achieved through renaming the Colombian company or through a corporate transaction. Clearly Government and public do not trust a junior with no CV to develop a large and sensitive project.”¹¹⁸ In a letter to MinMinas in 2013,¹¹⁹ Eco Oro summed up those changes as follows:

¹¹⁶ Letter from ANLA (Ms. Sarmiento) to Eco Oro (Mr. Heugh) attaching terms of reference for the Angostura underground mine project (27 February 2012) (**Exhibit C-24**).

¹¹⁷ Certificate of Change of Name of Eco Oro issued by the Registrar of Companies of British Columbia, Canada (16 August 2011) (**Exhibit C-23**).

¹¹⁸ Letter from Steve Kesler (Greystar) to the Greystar Board of Directors (14 March 2011) (**Exhibit C-327**). In this letter, Mr. Kesler makes the following assertions with regard to the open-pit and underground options: “7. A preliminary evaluation of an underground project indicates a smaller project but with robust economics and at a capex that Greystar can manage. 8. EBX is developing a similar underground project at La Bodega. [...] 10. Greystar does not want a NO decision to the current project as this is always difficult to reverse. An agreement with Government to delay a decision and allow a joint study of options for leach pads would be a better outcome. This was verbally agreed in Toronto. However, a change of location outside of the present project area (eg to Surata) will mean significant delay in undertaking, new baseline studies, geotechnical studies, project redesign and new EIA as well as engaging in land purchase. There would still be no guarantee of an environmental license. Bucaramanga objections to a cyanide heap leach in a water course feeding the city would remain. However, an option to develop the open pit in the future should 'be maintained. 11. The underground option requires a program of drilling to increase resources and to classify as reserves, more detailed mine design studies, plant location and tailings dam studies. Discussions in Toronto with concentrate traders indicated that a market does exist for pyrite concentrate and this needs to be developed as an alternative. With the development of Cerro Matoso's heap leach project there will be a market for acid in Colombia. This makes the option of off-site processing through roasting worth exploring. Minimization of project footprint in challenging topography has value in public perception as well as reduced site preparation costs.” See also Office of the Compliance Advisor Ombudsman (CAO), “Compliance Investigation, IFC Investment in Eco Oro (Project # 27961), Colombia” (30 June 2016) (**Exhibit MR-10**).

¹¹⁹ Letter from Eco Oro (Mr. Linares Pedraza) to the Minister of Mines (Mr. Acosta Medina) (25 November 2013) (**Exhibit R-94**). See also Office of the Compliance Advisor Ombudsman (CAO), “Compliance Investigation, IFC Investment in Eco Oro (Project # 27961), Colombia” (30 June 2016) (**Exhibit MR-10**) (“April [2011:] The company announces a change of officers and directors, in accordance with an agreement with a shareholder, stating that the company will focus on reformulating the Angostura project in a manner that is environmentally sustainable and socially responsible.”).

“The changes that have taken place around the Angostura Project are translated, among others, in that it is being led under a new philosophy and a new strategic direction, nurtures itself from learning and knowledge of the experiences and mistakes of the past. Equally behind this project are new investors with a more human and environmental outlook; there is a new Board of Directors with the participation of Colombians interested in marking the development of this country and a new team mostly made up of Santandereans.

You, Minister, must be aware of the abysmal differences between the old Greystar open-cast project from a technical and environmental point of view, and today’s Eco [Oro] underground project. But perhaps, we have not made a big enough effort you [sic] pick up the feeling, the mood, the soul of those who day by day fight. Our company takes it from there and shapes, with realities, the dreams of thousands of families of the needy province of Soto Norte.

Our identity is authentic and genuinely Colombian, and like you Dr. Amilkar, we are proud of it: for no reason - not even for gold - would we be at the forefront of a project that could undermine or jeopardise our land and our people.”

132. On 15 August 2011, after the corporate rebranding and change of direction had taken place, the FTA came into force.¹²⁰
133. The following year, on 23 March 2012, Eco Oro announced its first resource estimates for the underground-mine project.¹²¹
134. On 27 August 2012,¹²² ANM approved Eco Oro’s application¹²³ for the second two-year extension of the exploration stage under Concession 3452 (“**Resolution VSC 2**”).¹²⁴ In this

¹²⁰ Free Trade Agreement between Canada and the Republic of Colombia (signed on 21 November 2008 and entered into force on 15 August 2011) (**Exhibit C-22**; see also **Exhibit R-137**); and Circular No. 024 of the Directorate of Foreign Commerce of the Ministry of Commerce concerning the entry into force of the Treaty (3 August 2011) (**Exhibit C-21**). See also Canada-Colombia Environment Agreement (also signed on 21 November 2008 and in force on 15 August 2011) (**Exhibit R-138**).

¹²¹ Golder Associates, “Updated Preliminary Economic Assessment on the Angostura Gold-Silver Underground Project, Santander Department, Colombia” (23 March 2012) (**Exhibit BD-21 / CLEX-26 / CRA-40 / MR-2**). See also Eco Oro News Release “Eco Oro Minerals Announces Filing of Updated Preliminary Economic Assessment Technical Report” (27 March 2012) (**Exhibit C-158**); and Spreadsheet received from Eco Oro containing resource figures (2017) (**Exhibit BD-35**).

¹²² Letter from Eco Oro (Ms. Stylianides) to Minister of Environment (Mr. Vallejo López) (28 November 2014) (**Exhibit C-33**), Annex 1.

¹²³ Letter from Eco Oro (Mr. Ossma Gómez) to the ANM (Mr. Medina González) (4 May 2012) (**Exhibit R-90**).

¹²⁴ ANM, Resolution VSC No. 2 (8 August 2012) (**Exhibit R-72**).

decision, ANM highlighted that the extension was granted exclusively for the area that did not overlap with the PZ Jurisdicción-Santurbán Páramo zone. ANM further ordered that, once the decision became final, the areas overlapping with the páramo be handed over pursuant to Article 82 of the 2001 Mining Code. On 29 August 2012, Eco Oro requested that Resolution VSC 2 be revoked in its entirety.¹²⁵ On 12 September 2012, ANM issued **Resolution VSC 4**,¹²⁶ whereby it amended its previous Resolution, stating that:

*“Based on the evidence of the validity of the applicability of Laws No. 1382 of 2010 and No. 1450 of 2011 to concession agreement No. 3452, how the legal exclusion indicated therein is to be put into practice should be considered, with the elements available to the mining authority and **based on the criteria of reasonableness, proportionality and responsibility.***

[...]

*Hence, and in response to the arguments put forward by the mining title holder in its petition for reversal, it is **necessary to examine the rationality and proportionality of the decision contained in Resolution No. VSC-002, dated August 8, 2012, based on the undeniable fact that, at present, Article 202 of Law No. 1450 of 2011 has not been developed, so there is no map at a more detailed scale to provide the mining authority with solid arguments to delimit with absolute certainty the páramo that the resolution is intended to protect.***

As a result, the decision in Resolution No. VSC-002, dated August 8, 2012, must be intended to protect both the collective right to the environment represented by the preservation of the páramo and the right of the holder of the mining title to preserve an area whose legal status is uncertain, because it cannot be said with complete certainty, due to the absence of technical parameters, that it is located within the páramo.

However, the precautionary and prudent action that must be taken by the government agency concerning collective rights cannot go so far as to threaten subjective rights. Hence, the instruments provided for by the legal system have to be used to create conditions to suspend rights so that, when an uncertain condition is satisfied, the right is either granted or forfeited.

¹²⁵ Letter from Eco Oro (Mr. Ossma Gómez) to the ANM (Mr. Caicedo Navas) (29 August 2012) (**Exhibit R-91**).

¹²⁶ National Mining Agency, Resolution No. VSC-4 (12 September 2012) (**Exhibit C-25**).

Accordingly, and in response to the arguments put forward by the holder of the mining title in its petition for reversal filed under No. 2012-261-026565-2, it is clear that the delimitation of the páramo ecosystem based on the map of the Alexander von Humboldt Research Institute is temporary until the competent environmental authority creates the final delimitation at a scale of 1:25,000 after carrying out the technical, economic, social and environmental studies referred to in Article 202 of Law No. 1450 of 2011. For this reason, the mining authority determination must be in line with said condition. Therefore, the mining authority considers it appropriate to adjust Article 1 of Resolution No. VSC-002 of 2012 and, therefore, will modify it to extend the exploration stage of mining concession agreement No. 3452 of 2007, suspending exploration activities in the area overlapping with the páramo, in accordance with the delimitation based on the map in the Páramo Atlas of Colombia by the Alexander von Humboldt Institute, until the Ministry of the Environment and Sustainable Development or the entity acting in its capacity issues the final delimitation of the páramo area in accordance with Article 202 of Law No. 1450 of 2011. This will serve to ensure the effective enforcement of the prohibition on mining activities in páramo areas contained in Article 202 of Law No. 1450 of 2011.

[...]

[Eco Oro] may not carry out exploratory activities in the páramo area pursuant to Article 202 of Law No. 1450 of 2011, until the Ministry of the Environment and Sustainable Development or the entity acting in its capacity issues the final delimitation to a scale of 1:25,000.” [Tribunal’s emphasis]

135. On 16 January 2013, CDMB created the second park in the Santurbán area, the Santurbán Regional Park, the first park in that area, the Sisavita Regional Natural Park, having been created by CORPONOR in June 2008.¹²⁷ Eco Oro’s initial assessment was that the officially declared boundaries should not impede development of the Project, although significant portions of its property (both mineral holdings and surface rights) fell within the boundaries of the Santurbán Páramo Park, in relation to which Eco Oro reserved its rights.¹²⁸

¹²⁷ CDMB Agreement No. 1103 and CORPONOR Agreement No. 17 (23 November 2007) (**Exhibit R-115**). *Apud* Letter from Greystar (Mr. Ossma Gómez) to INGEOMINAS (Mr. Neiza Hornero) (7 July 2011) (**Exhibit R-88**); Tr. Day 1 (Mr. Mantilla-Serrano) 257:5-6.

¹²⁸ Eco Oro News Release “Development of Eco Oro’s Angostura Project Not Restricted by Official Park Boundaries” (17 January 2013) (**Exhibit C-176**). See Letter from Eco Oro (Ms. Stylianides) to Minister of Environment (Mr. Vallejo López) (28 November 2014) (**Exhibit C-33**).

136. In May 2013, Eco Oro received a Report that it had commissioned ECODES Ingeniería Ltda. (“**ECODES**”) to prepare titled “State of Preservation of Biodiversity in the Ecosystems of the Angosturas Sector, Municipality of California, Department of Santander.”¹²⁹ According to this Report, “*within the Páez-Angosturas polygon, no coverages typical of the páramo ecosystems were found*” (the “**ECODES Report**”).¹³⁰ Eco Oro circulated the ECODES Report to several government recipients¹³¹ and its contents were referred to by MinMinas in a presentation concerning the delimitation of the Santurbán Páramo.¹³²
137. On 19 June 2013, the ANM again declared the Project a PIN.¹³³
138. On 26 July 2013, Brigitte Baptiste, Head of the IAvH, gave a presentation to the Fifth Constitutional Commission of the Colombian Congress during which she said:¹³⁴

¹²⁹ ECODES Ingeniería Ltda. Report “State of Preservation of Biodiversity in the Ecosystems of the Angosturas Sector, Municipality of California, Department of Santander” (May 2013) (**Exhibit C-180**). See also ECODES Report Chapter 2, *Componente Vegetación* (**Exhibit C-441**).

¹³⁰ This position is reiterated in a presentation imparted by ECODES, in which it states that “[i]n the area of the Páez-Angosturas Polygon, belts of Andean forests and high Andean forests were located. Sub-páramo and páramo areas can be found beyond this area, outside of the polygon – that is, in the area of PNRPS [Santurbán Páramo Regional Park] and up to 3600 ma.s.l., (Van der Hammen et al. 2001).” – ECODES Presentation, Biodiversity Conservation of the ecosystems within the Angosturas Sector, California, Santander (Undated) (**Exhibit C-272**).

¹³¹ Letters from Eco Oro to multiple Government recipients enclosing the ECODES Report (May 2013) (**Exhibit C-336**). See also Eco Oro News Release “Eco Oro Receives Study Indicating Angostura Deposit Not in Páramo” (7 May 2013) (**Exhibit C-182**).

¹³² Ministry of Environment Presentation “Delimitation of the Páramo of Santurbán” (December 2014) (**Exhibit C-217**).

¹³³ National Mining Agency Resolution No. 592 (19 June 2013) (**Exhibit C-27**).

¹³⁴ Minutes No. 20 of 2013 (8 May) of the Fifth Constitutional Commission, Congressional Gazette No. 565 (26 July 2013) (**Exhibit C-340**). See also Brigitte Baptiste interview, Youtube (14 September 2012) (**Exhibit C-164**); Speech by Brigitte Baptiste “Por qué y para qué delimitar los páramos?” (27 June 2013) (**Exhibit C-184**); Letter from IAvH (Ms. Baptiste) to Mayor of Vetás and others (30 October 2013) (**Exhibit C-189**); Blu Radio, transcript of Brigitte Baptiste’s radio interview (15 November 2017) (**Exhibit C-406**).

“The scope of science’s role in determining and fulfilling society’s requirements will always be partial, first because that is the nature of knowledge, and second because the scientific research sector in Colombia and in the Environmental Sector is very weak. The law directs us to produce the information necessary to delimit the páramo, but fails to provide us with the minimum tools or instruments to do so. During the first twelve months of that process, we really have to aggressively draw on the funding on which we depend in order to commence that process, which includes building a series of criteria and academic conferences that enable us to do our best.

[...]

The páramo demarcation process required by law is of national scale – this is very important – and the Institute must provide the requisite knowledge so that all the páramos of the country – thirty-four páramo complexes – may be delimited over the years, in a way that their biodiversity and ecological function is protected. For us, it is impossible, from a scientific point of view, to attain the detailed zoning or micro-zoning referred to by Alfredo Molina at the beginning of the session, since Colombia’s poor information systems and handling and processing of environmental information are terribly, terribly underdeveloped. We strive to abide by the law starting from a national vision and from a process of estimation at successive, more detailed, scales, reach then more precise estimations, which will in any case always contain a significant level of uncertainty for decision-making processes, and which pave the way for the required processes of agreement.

Up to now, the Institute has made no delimitation proposal, no. I am sure that any member of society may decipher, with the existing data, the boundaries and characteristics of the páramo. But from our point of view, we have an ecological and ecosystemic model with a 1:100,000 scale which is still extremely inaccurate. Based on the information available which will be gathered in the upcoming days, we will surely have to debate which delimitation is required by law, even with a 1:25,000 scale, which is probably not enough for the need or urgency of decision-making in specific points such as the Vetás and California municipalities.

Now then, we have a great willingness and the time necessary to produce, let’s say, the best state-of-the-art knowledge on the region’s biology and ecosystem, and to discuss the rest of the information on social and economic studies. We also want to understand, very well, the dependence of the communities on the páramo’s ecosystems and their lifestyles. A few days ago, we were in the countryside – specifically, in Vetás and Berlín – and we were told to leave. I perfectly understand the tension that we are working with, and it is absolutely not our intention to cause any conflict with the community at all, much less for the sake of a healthy environment built by local communities and minorities that depend on their daily activities to survive, but we also have to comply with the law.”

139. On 30 July 2013, on the basis of the restriction contained in Resolution VSC 4, which Eco Oro understood to be “*presently indicative and temporary*”,¹³⁵ Eco Oro requested from the ANM a suspension of activities “*until the final delimitation of the Santurbán ecosystem on a 1:25,000 scale is disclosed.*”¹³⁶ This request was based on the provisions of Article 54 of the 2001 Mining Code stating “*technical, logistic and legal reasons*” and attaching a document named “*Technical Considerations on the Suspension of Activities under Mining Concession Agreement 3452.*” This suspension request was granted by **Resolution VSC 1024** on 5 December 2013 for the term of six months commencing on 1 July 2013.¹³⁷ That suspension was extended for a further six months on 17 January 2014¹³⁸ and again on 21 July 2014.¹³⁹
140. During the suspension, Eco Oro reported situations of *galafardeo* (unauthorized mining activities) occurring in the areas encompassed by the Concession Contract 3452.¹⁴⁰ This situation resurfaced later in June 2016.¹⁴¹ Illegal mining has been an issue that the Colombian mining sector has been facing for decades. It was mentioned, for instance, in the Assignment Contract entered into between Greystar and Minas Los Diamantes in 1994.¹⁴² This type of activity is particularly harmful, as illegal miners use mercury, arsenic, cyanide

¹³⁵ Letter from Eco Oro (Mr. Gómez Flórez) to the ANM (21 December 2012) (**Exhibit R-92**).

¹³⁶ Eco Oro, Press Release titled “Eco Oro Provides Corporate Update” (20 September 2012) (**Exhibit R-22**); Letter from Eco Oro (Mr. Gómez Flórez) to the ANM (Mr. Granados) (30 July 2013) (**Exhibit R-93**).

¹³⁷ National Mining Agency, Resolution No. VSC 1024 (5 December 2013) (**Exhibit C-192**). See also Letter from the CDMB (Mr. Villamil Vasquez) to Eco Oro (Mr. Galeano Bejarano) (15 August 2014) (**Exhibit C-214 / C-215**).

¹³⁸ National Mining Agency, Resolution No. VSC 16 (17 January 2014) (**Exhibit C-199**).

¹³⁹ ANM, Resolution VSC No. 714 (21 July 2014) (**Exhibit R-74**).

¹⁴⁰ Eco Oro News Release regarding “Galafardeo” (unauthorized mining activities) in California (25 February 2014) (**Exhibit C-202**). According to Constitutional Court Judgment No. T-361 (30 May 2017) (**Exhibit C-244**), p. 217, citing Buitrago Emerson, *Una historia y una vida alrededor del oro: territorialidad y minería en el municipio de Vetás, Santander, Colombia*, in Barbara Göbel and Ulloa Astrid, *Extractismo minero en Colombia y America Latina*, Ed, Universidad Ciencias Humanas, Grupo Cultura y Ambiente, Berlín, 2014, pp. 334-335 (not on the record): “*Galafardeo: illegal extraction from mine tunnels; the miners carry out ore containing gold chips to be crushed at home. There are two ways in which this is done: (i) by illegally entering the mine tunnels; and (2) by creating openings from outside the tunnels*”.

¹⁴¹ IFC Environmental & Social Review Summary of the Investment in Greystar (9 February 2009) (**Exhibit C- 270**); Letter from Eco Oro (Ms. Arenas Uribe) to the National Mining Agency (Mr. García Granados) (2 June 2016) (**Exhibit C-236**).

¹⁴² Contract of Assignment between Minas Los Diamantes Ltda. and Greystar Resources Ltd. (28 October 1994) (**Exhibit C-2 / C-67**).

and explosives.¹⁴³ The existence of illegal mining activity in the areas granted to Eco Oro was also reported by the press¹⁴⁴ and acknowledged by some Colombian authorities.¹⁴⁵

141. On 9 September 2013, the Attorney General sent a letter to MinAmbiente, MinMinas and ANM.¹⁴⁶ In this letter, the Attorney General stressed that the Colombian economic model defined in the Political Constitution contemplated two key concepts so far as mining is concerned: (i) mining, as with any other activity that has an impact on the environment, must be developed responsibly and subject to strict environmental standards that ensure compliance with the Colombian Constitution, especially, Article 80; and (ii) mining is a lawful activity defined by law as being of social interest and public utility; it is broadly regulated by the Colombian legal system and contributes to Colombian growth and development. In that context, the Attorney General requested the addressees of its letter, *inter alia*, to:

“Avoid ideologization of the debate and make decisions based on comprehensive supporting studies; [...] Regularly share any progress made in the zoning and delimitation process for the sake of transparency; [...] Recognize any consolidated situations and vested rights to prevent the filing of legal claims against the Colombian state; [...] The National Mining Agency is required to proceed with caution to refrain from rejecting proposals or terminating agreements if there are conditions – such as the decisions made by the Ministry of the Environment and Sustainable Development – that may threaten citizens and companies that, relying on the principle of confianza legítima, have approached the State to propose or develop mining concessions.”

¹⁴³ Article Portafolio “Minería ilegal se toma una zona de Santurbán” (6 February 2016) (**Exhibit C-40**).

¹⁴⁴ Article La Razón “Vetas está preocupado por la llegada de la ilegalidad” (14 March 2013) (**Exhibit C-179**); Article Portafolio “Al menos mil mineros operan ilegalmente en Santurbán” (1 August 2014) (**Exhibit C- 211**); Article Portafolio “Minería ilegal se toma una zona de Santurbán” (6 February 2016) (**Exhibit C- 40**); Article El Espectador “En Colombia, el 88% de la producción de oro es ilegal” (2 August 2016) (**Exhibit C- 52**).

¹⁴⁵ Letter from the Municipality of Vetas to Attorney General (Mr. Ordóñez) (20 February 2015) (**Exhibit C-363**); Intersectoral Commission for Infrastructure and Strategic Projects (CIIPE) Minutes of Meeting No. 5 [CONFIDENTIAL DOCUMENT] (16 August 2016) (**Exhibit C-397**); Intersectoral Commission for Infrastructure and Strategic Projects (CIIPE) Minutes of Meeting No. 9 [CONFIDENTIAL DOCUMENT] (21 November 2016) (**Exhibit C-399**); National Mining Agency Resolution No. 683 (9 August 2017) (**Exhibit C- 248**).

¹⁴⁶ Letter from Attorney General (Mr. Ordóñez Maldonado) to Ministry of Environment, Ministry of Mines and National Mining Agency (9 September 2013) (**Exhibit C-28**).

142. On 11 October 2013, the Santander Mine Workers' Union (SINTRAMISAN) sent a letter to MinAmbiente¹⁴⁷ stating, *inter alia*, the following: “*We only request that you DO NOT LIMIT OUR LIVES, JUST DELIMIT THE SANTURBÁN PÁRAMO.*”
143. On 7 November 2013, the Intersectoral Commission for Infrastructure and Strategic Projects (“**CIPE**”) was created. CIPE was responsible for supporting the management and overview of Projects of National and Strategic Interest (“**PINES**”).¹⁴⁸
144. On 24 February 2014, the Mayors of Soto Norte and other Municipalities wrote a letter to MinAmbiente, countersigned by hundreds of citizens,¹⁴⁹ stating, *inter alia*, the following:

“Since the declaration of the Santurbán Páramo Regional Natural Park (PNR), more than 1,300 direct jobs and approximately 2,500 indirect jobs have been lost in the areas of Vetas, California, Surata Matanza, Charta and Tona. This reduction in employment in the area has resulted in a complicated situation for civil unrest and illegality that will likely be aggravated if the delimitation of the Páramo ecosystem covers an area larger than the Park. This is because the communities of the Soto Norte region are not prepared to allow their rights to be further affected; It is our duty to show that the Ministry of Environment’s decision on the delimitation of the Santurbán páramo ecosystem should not ignore the acquired rights of mining titleholders of the Soto-Norte Region. This results in a sensitive situation from a juridical and political perspective because in the municipalities that make up the region, there are innumerable deposits of gold and silver, over which there are many mining titles that were acquired from the Constitution and the Law (some of which were granted under the terms of Law 2655 of 1988 and others under Law 685 of 2001), and registered in the National Mining Registry; [...] If the real objective is to preserve the area adequately, to prevent the proliferation of illegal mining and to avoid environmental disasters, displacement and misery, as well as a rise in unemployment and legal uncertainty, the area of the páramo should not be larger than the area of the park.”

¹⁴⁷ Letter from Santander Mine Workers' Union (SINTRAMISAN) to Ministry of Environment (Minister Sarmiento) (11 October 2013) (**Exhibit C-278**).

¹⁴⁸ Decree No. 2445 of 2013 (7 November 2013) (**Exhibit R-162**). See also National Council of Economic and Social Policy (CONPES) Document No. 3762, Policy Guidelines for the Development of Projects of National and Strategic Interest – PINES (20 August 2013) (**Exhibit R-149**).

¹⁴⁹ Letter from Mayors of Soto Norte *et al.* to Ministry of Environment (Minister Sarmiento) and CDMB (Mr. Anaya Méndez) (24 February 2014) (**Exhibit C-201**) (USB drive provided at the Hearing).

145. On 29 March 2014, Minister of Environment Luz Helena Sarmiento (“**Minister Sarmiento**”) gave an interview to a newspaper¹⁵⁰ during which she said:

“Tomorrow, in Santurbán, we will show the final boundaries of the páramo. This is the solution to the typical conflict between the environment and development, which is a matter of debate in the country and throughout the world. Tomorrow we will put an end to the uncertainty,” she said.

[...]

What happens in Greystar’s case?

Greystar, which is now Eco Oro, has no environmental license for exploitation.

So it cannot carry out activities within the páramo?

They need to work outside the established boundaries. But the fact that they are outside does not mean that they have secured the license. It means that they have the right to file the request to obtain the environmental license for exploitation. Outside the boundary, they can carry on with their exploration, which does not require a license.

[...]

In short, will the foreign companies have to leave the Santurbán Páramo?

Yes. There are two Canadian giants: the previously called Greystar, which now goes by Eco Oro, and Leyhat. And a Brazilian one, AUX, which was exploring way below the páramo and seems to be having administrative problems unrelated to the delimitation. They are trying to sell and they fired a majority of their employees. The two Canadians must, I believe, analyze whether operating outside the established boundary is profitable.

Why?

Because they cannot carry out mining activities in the titles that they have in the páramo.

They did not have a license?

No. And as I tell my children, ‘Sorry, life is hard’...”.

¹⁵⁰ Article El Tiempo “Gobierno trazó límites para salvar al páramo de Santurbán” (30 March 2014) (**Exhibit C-203**) (USB drive provided at the Hearing).

146. The coordinates of the páramo ecosystem were not, however, published the following day (or indeed for eight months thereafter). On 1 April 2014, Eco Oro stated in a press release that MinAmbiente had announced that the boundaries of the Santurbán Páramo had been delineated but no coordinates or cartography had been received by Eco Oro. Eco Oro further noted that once it had received the cartography, it would assess the impact of the delineation of the páramo on its assets.¹⁵¹
147. On 6 August 2014, ANM approved Eco Oro’s application¹⁵² for the third two-year extension of the exploration stage under Concession Contract 3452.¹⁵³ In its decision, ANM reiterated that Eco Oro “*may not perform exploration activities within the páramo area, pursuant to Article 202 of Law No. 1450 of 2011, until the Ministry of the Environment and Sustainable Development, or any other entity that may replace it, issues the final delimitation at a 1:25,000 scale.*”
148. In August 2014, the newly appointed Minister of Environment¹⁵⁴ visited Santander.¹⁵⁵ During this visit, the Minister said that “*The solution to this problem lies in where the boundary will be located, but the most important, complementary aspect is how to clearly guarantee that these people can continue to live in decent manner and, likewise, how to guarantee adequate supply and quality of water to the entire Bucaramanga metropolitan area [...].*” To that effect, a manager, Luis Alberto Giraldo (“**Mr. Giraldo**”), was appointed to lead the process aimed at coordinating the various stakeholders and become acquainted first-hand with the reality of the municipalities. In performance of his duties, he visited

¹⁵¹ Eco Oro News Release “Boundaries of Páramo Of Santurbán Announced” (1 April 2014) (**Exhibit C-29**). See also Eco Oro News Release “Colombian Authorities Respond to Eco Oro’s Enquiries Regarding the Páramo of Santurbán” (3 April 2014) (**Exhibit C-30**) and several news articles on Santurbán: Article El Tiempo “Gobierno trazó límites para salvar al páramo de Santurbán” (30 March 2014) (**Exhibit C-203**); Article Vanguardia “Minambiente ‘se la juega’ por la preservación de Santurbán” (1 April 2014) (**Exhibit C-204**); Article El Tiempo “Anuncian demanda a la delimitación del páramo de Santurbán” (2 April 2014) (**Exhibit C-205**); Article Vanguardia “Delimitación del páramo de Santurbán, de claro a oscuro” (3 April 2014) (**Exhibit C-206**); Article El Colombiano “Santurbán polarizó el país: Brigitte Baptiste” (20 April 2014) (**Exhibit C-344**).

¹⁵² Letter from Eco Oro (Mr. Gómez Flórez) to the ANM (Ms. García Botero) (7 May 2014) (**Exhibit R-95**).

¹⁵³ National Mining Agency, Resolution VSC No. 727 (6 August 2014) (**Exhibit C-212**).

¹⁵⁴ Article Contexto ganadero “Estos son los 3 retos principales del nuevo MinAmbiente” (12 August 2014) (**Exhibit C-213**).

¹⁵⁵ Email from Wilmer González Aldana (Eco Oro) to Hernán Linares (Eco Oro) with Minutes of Visit of the Minister of Environment to Santander (27 August 2014) (**Exhibit C-345**).

California, Vetas and Berlín on 26 September 2014.¹⁵⁶ On 16 October 2014, Eco Oro provided Mr. Giraldo with a document containing information on the Project.¹⁵⁷

149. On 8 September 2014, a newspaper article recounted the history of the Santurbán Páramo, stating that there were records of Santurbán as a páramo for more than four centuries.¹⁵⁸
150. On 7 October 2014, MinAmbiente sent a letter to the *Consejo de Estado*¹⁵⁹ asking the following seven questions:

“1. Does the prohibition under Article 202(1) of Law No. 1450 apply prospectively, i.e. would it affect only legal or factual situations that had not already materialized prior to the entry into force of the prohibitions contained in Law No. 1382 of 2010 and Law No. 1450 of 2011?”

2. If the answer to the previous question is no, is the enforcing authority of such law required to immediately order the closure of all prohibited activities? Would such order result in potential liability for the State in relation to persons with an interest in legal situations which have already materialized in the area delimited as a páramo ecosystem?”

3. If the answer to the first question is no, is the government allowed to request compliance with such law in a gradual or progressive manner, in furtherance of the principle of legitimate expectations?”

4. Can the environmental authority, through zoning and the regime governing the uses of the delimited páramo ecosystem, adopt environmental actions to progressively and gradually allow the reconversion of prohibited activities in páramo ecosystems, even when such activities had materialized before the entry into force of Law No. 1450 of 2011?”

¹⁵⁶ Email from Hernán Linares (Eco Oro) to the Management Committee of Eco Oro (23 September 2014) (**Exhibit C-346**). See also Transcript of Luis Alberto Giraldo’s video (26 September 2014) (**Exhibit C-347**).

¹⁵⁷ Email from Wilmer González (Eco Oro) to Luis Alberto Giraldo (Santurbán manager), together with a document named “Eco Oro – Angostura Project: Responsible mining for Soto Norte and the country” (16 October 2014) (**Exhibit C-350**).

¹⁵⁸ Article La Silla Vacía “El tal páramo de Santurbán sí existe” (8 September 2014) (**Exhibit R-110**).

¹⁵⁹ Letter from the Ministry of Environment (Mr. Vallejo) to the *Consejo de Estado* (Mr. Hernandez) (7 October 2014) (**Exhibit C-348**).

5. Is it possible to file an application for an environmental license with the environmental authority in relation to mining titles that had been granted before the entry into force of such prohibition and that did not apply for or obtain the relevant environmental license authorizing the commencement of mining exploitation activities? Is the environmental authority, while Law No. 1450 of 2011 is in force, allowed to authorize mining exploitation activities by granting an environmental license for mining titles that were effective prior to the entry into force of the legal prohibition under Law No. 1382 of 2010?

6. Pursuant to Article 202 of Law No. 1450, is the Ministry required to delimit the ecosystem in line with the technical elements provided by natural sciences, taking into account the social and economic information required to characterize the area?

7. Or is it required to define the ecosystem by combining the elements resulting from natural sciences and the social and economic aspects of the area, which would involve excluding ecosystems already transformed by human activities from the delimitation of the páramo?"

151. On 11 December 2014, the *Consejo de Estado* issued an Advisory Opinion,¹⁶⁰ whereby it answered those questions in relevant part as follows:

Claimant's Translation	Respondent's Translation
<p><i>c. In such case (inability to continue contracts that pose a risk to páramo ecosystems), the government must review on a case-by-case basis the need to reach agreements for economic compensation in order to avoid legal claims. Regarding the concern that the consulting entity expresses on this point that certain contracts may also be covered by Bilateral Investment Treaties (BITs), the Court notes that in fact, these types of agreements include, with some minor variations, the following standard clause:</i></p>	<p><i>c. In such case (inability to continue contracts that pose a risk to páramo ecosystems), the government must review on a case-by-case basis the need to reach agreements for economic compensation in order to avoid legal claims. Regarding the concern that the Consulting entity expresses on this point such that some contracts may also be covered by Bilateral Investment Treaties (BITs), the Court notes that in fact, these types of agreements include, with some minor variations, the following standard clause:</i></p>

¹⁶⁰ *Consejo de Estado* Advisory Opinion No. 2233 (11 December 2014) (Exhibit R-135).

*“Neither of the Parties may take, either directly or indirectly, measures to expropriate, nationalize, or any other measure of the same nature or effect, against the investments of the investors from the other Party, **unless such measures are taken in the public interest**, in a non-discriminatory manner, and following the due process of law, and provided that provisions are made to make prompt, effective, and adequate compensation.*
(Emphasis added)

This clause thus protects investors from direct or indirect expropriations, but in no way prohibits enactment of subsequent laws by the treaty states, instead establishing a guarantee of nondiscrimination, due process, good faith, and economic compensation.

*“Neither of the Parties may take, either directly or indirectly, measures to expropriate, nationalize, or any other measure of the same nature or effect, against the investments of the investors from the other Party, **unless such measures are taken in the public interest**, in a non-discriminatory manner, and following the due process of law, and provided that provisions are made to make prompt, effective, and appropriate compensation.*
(Emphasis added)

This clause thus protects investors from direct or indirect expropriations, but in no way prohibits enactment of subsequent laws by the treaty states, instead establishing a guarantee of non-discrimination, due process, good faith, and economic compensation.

In this way, the BITs allow, without infringement of the agreements, application of statutes enacted for reasons of public interest, as in this case would be the protection of páramo ecosystems as providers of water and biological diversity, and there are few reasons not to accept such protection in the overall context of protection and defense of the environment. As such, there would be no infringement of investment agreements in application of laws enacted for reasons of general interest (which the BIT allows as a power of the signatory governments), unless the Colombian government were to use discriminatory criteria or refuse to provide the necessary compensation for the specific situations affected by the new law.

[...]

In this way, the BITs allow, without infringement of the agreements, application of statutes enacted for reasons of public interest, as in this case would be the protection of páramo ecosystems as providers of water and biological diversity, and there are few reasons not to accept such protection in the overall context of protection and defense of the environment. As such, there would be no infringement of investment agreements in application of laws enacted for reasons of general interest (which the BIT allows as a power of the signatory governments), unless the Colombian government were to use discriminatory criteria or refuse to provide the necessary compensation for the specific situations affected by the new law.

[...]

c. Those contracts executed prior to Act 1382 of 2010 that pose a risk to the páramo ecosystems which cannot be neutralized through existing environmental instruments cannot continue, and the general interest of environmental protection must take precedence over the private interests of the mining concession-holder. In these events, the need to reach agreements for economic compensation so as to avoid legal claims must be reviewed on a case-by-case basis.”

152. On 17 October 2014, a Colombian newspaper noted that in the “*last few weeks [...] [m]ultinational mining company AUX, formerly owned by Brazilian businessman Eike Batista, was transferred to a Qatari investment group, which recently bought the company for more than USD 400 million.*”¹⁶¹
153. On 17 December 2014, the ANM sent a letter to MinAmbiente pursuant to the cooperation principle enshrined in Article 34 of the 2001 Mining Code, together with “*Technical Studies conducted in the Santurbán páramo area, at scales of 1:250.000 and 1:100.000, and the proposed line based on the mines surveyed in the mining censuses of 1966, 1997, 2000, and 2010, with the respective memorandum summarizing the reasons for the proposal.*”¹⁶²
154. The boundaries of the Santurbán Páramo were eventually published on 19 December 2014 by means of **Resolution 2090**.¹⁶³ The Resolution divided the páramo into three zones: (i) the preservation zone; (ii) the restoration zone; and (iii) the sustainable use zone. The same resolution made some exceptions to the general prohibition to carry out mining operations in the area. Among other exceptions, the Resolution stipulated that mining operations could be authorised and executed in the restoration zones of the páramo located in the municipalities of Vetás, California and Suratá (where Concession 3452 is located). Additionally, and generally, the Resolution contained a grandfathering provision, similar (but not identical) to that contained in Law 1382, which provided that those projects with a mining concession contract and with an environmental control and management instrument could continue with the operations despite being located in a páramo, not being nonetheless entitled to any extension. According to ANM, there were 54 current mining titles

¹⁶¹ Email from Hernán Linares (Eco Oro) to Management Committee of Eco Oro, forwarding Article Vanguardia “Se mueven piezas en el ‘ajedrez’ de Santurbán” (17 October 2014) (**Exhibit C-351**). See also “Abu Dhabi’s Mubadala Takes Ownership in Gold Firm AUX”, The Wall Street Journal (12 February 2015) (**Exhibit C-220**).

¹⁶² Letter from National Mining Agency (Mr. Martínez) to Ministry of Environment (Mr. Vallejo) (17 December 2014) (**Exhibit C-354**). The enclosures have not been provided in the instant proceedings. The Claimant requests that the Tribunal take adverse inferences (Tr. Day 1 (Ms. Richard), 94:19-21).

¹⁶³ Ministry of Environment Resolution No. 2090 of 2014 (19 December 2014) (**Exhibit C-34 / MR-35**). See also Yulieth Natalí Avila Pinto, Thesis “Characterization of the Main Vegetation Cover in the Santurbán Páramo” (29 January 2015) (**Exhibit C-358**) (“[...] in accordance with contract No. 13-10-308-043PS entered into with the Alexander von Humboldt Biological Resources Research Institute, I prepared a characterization of the species in the main vegetation coverages found in this area, taking into account the population-páramo interaction, the main land uses and the anthropogenic interventions that put at risk the biodiversity and the resources obtained from this complex.”).

overlapping with the Santurbán Páramo, in a superimposed area of 21,200.72 hectares, corresponding to 16.3% of the páramo complex.¹⁶⁴ According to the Mining Registry, the delimitation approved by this Resolution 2090 entailed a 54.7% of overlap with the area granted to Eco Oro under Concession 3452.¹⁶⁵

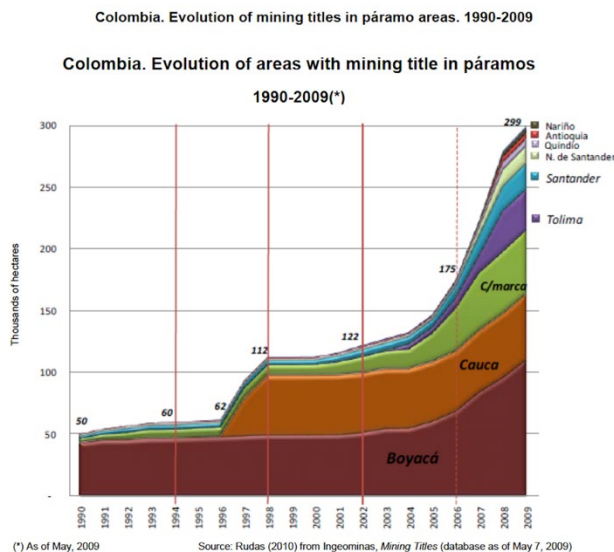


Exhibit C-132

155. Resolution 2090 was received with intense reactions from miners and mayors of bordering Municipalities, who requested that the delimitation be reconsidered.¹⁶⁶ This is against a background where between 1990 and 2009 the granting of mining titles in páramo ecosystems had increased significantly¹⁶⁷ and investments in the mining sector had increased

¹⁶⁴ National Mining Agency, Presentation “Santurbán Berlín Páramo Complex – Mining Title Ownership” (January 2015) (**Exhibit C-449**).

¹⁶⁵ Mining Registry Report RT-0821-14 “Analysis of Mining Title Overlap in the Defined Criteria – Santurbán Páramo Area According to Resol 2090 of 2014” (18 December 2014) (**Exhibit C-448**); and Letter from the ANM (Aura Isabel González) to the Constitutional Court (Alberto Rojas) (25 April 2015) (**Exhibit C-450**).

¹⁶⁶ Letter from the Mayor of Vetás (Mr. González) to the Minister of Environment (Mr. Vallejo) (6 January 2015) (**Exhibit C-357**); Letter from the Municipality of Vetás to Attorney General (Mr. Ordóñez) (20 February 2015) (**Exhibit C-363**); Article Vanguardia “Mineros piden al Polo no politizar problemática de Santurbán” (21 April 2015) (**Exhibit C-223**).

¹⁶⁷ Guillermo Rudas, “Dinámica de la minería en Colombia y retos de la política ambiental. Algunas tendencias recientes” (27 August 2010) (**Exhibit C-132**), slide 8. See also Letter from the Ministry of Environment to the Constitutional Court (11 February 2016) (**Exhibit C-43**), where MinAmbiente states, *inter alia*, the following: “It is estimated that 36% of the municipalities (400 in total) are partly on páramo ecosystems; of these, 10 municipalities have approximately 70% of their area inside the ecosystem and 31 municipalities have 50%. Approximately 70% of the country’s population is located in the Andes. According to the information from the 2005 census of the Colombian Department of National Statistics (DANE), approximately 184,000 people live

from USD 466 million in 2002 to approximately USD 3.054 billion in 2009, an increase of 555%.¹⁶⁸ Indeed, on 19 April 2016, a newspaper article featured an interview with the Mayor of California,¹⁶⁹ in which he stated the following:

“In the opinion of the Mayor of California, it was clear that not even those who delimited the Santurbán páramo knew how to explain it.

‘At the meeting with prosecutor Ordóñez, it was clear that neither the Ministry of Environment, nor the Alexander von Humboldt Institute, could explain why the line was made as it was [...]. The Minister of the Environment only went to Tona, and none of the Vice ministers that they sent walked on the páramo, none went to the area, they did not look into the social and economic aspects, and that is something the Court is not aware of.’”

156. On 6 January 2015, following the delimitation of the Santurbán Páramo by Resolution 2090, ANM decided not to further extend the suspension of Eco Oro’s activities, on the basis that the technical circumstances giving rise to the stay of the activities were deemed overcome.¹⁷⁰
157. On 25 April 2015, a newspaper article reported that President Santos attended a mining conference and stated the following: *“What Colombia needs, I reiterate and would like to say it again to you, is a strong, organized and competitive mining sector, especially now that we are decisively moving in the direction towards peace and reconciliation.”* According to the same article, MinMinas promised at that conference *“to support projects classified as projects of national interest (the well-known PINEs) such as Eco Oro’s Angostura in Santurbán (Santander).”*¹⁷¹

in rural areas of municipalities which are more than 50% covered by páramo landscape. Furthermore, 32 populated centers are located within páramo complexes. The images below illustrate municipalities and townships located within a reference area provided by the Alexander von Humboldt Institute, specifically, the demarcated Santurbán páramo.”

¹⁶⁸ Indicators of Mining in Colombia, Monitoring the National Mining Development Plan 2007-2010 (December 2010) (**Exhibit C-277**).

¹⁶⁹ Article Vanguardia “El problema de Santurbán es que lo delimitaron desde un escritorio” (19 April 2016) (**Exhibit C-228**).

¹⁷⁰ National Mining Agency, Resolution VSC No. 3 (6 January 2015) (**Exhibit C-35**).

¹⁷¹ Article La Silla Vacía “Los coqueteos de Santos II a los mineros” (25 April 2015) (**Exhibit C-366**).

158. On 9 June 2015, **Law 1753** (National Development Plan 2014-2018) was enacted, which included exceptions similar to the ones in Resolution No. 2090.¹⁷² The relevant provisions of Law 1753 are as follows:

“Article 173. Protection and delimitation of páramos. No person may engage in agricultural activities, exploration or exploitation of non-renewable natural resources or construction of hydrocarbon refineries in the areas delimited as páramos.

The Ministry of the Environment and Sustainable Development shall delimit páramo areas within the area of reference defined in the map provided by the Alexander Van Humboldt Institute at a scale of 1:100,000, or 1:25,000, if available. In this area, the regional environmental authority shall conduct the technical studies required to characterize the environmental, social, and economic context pursuant to the terms of reference issued by the Ministry of the Environment and Sustainable Development. Within such area, the Ministry of the Environment and Sustainable Development shall delimit the páramo area on the basis of technical, environmental, social, and economic criteria.

Paragraph 1. Within the area delimited as páramo, those activities for the exploration and exploitation of non-renewable natural resources that have a contract and an environmental license with the equivalent environmental control and management instrument, granted prior to February 9, 2010 for mining activities, or prior to June 16, 2011 for activities involving hydrocarbons respectively, may continue to be performed until termination without extension. From the entry into force of this law, the Environmental Authorities shall review the environmental licenses granted prior to the effective date of the prohibition for the delimited páramo areas, and they shall be subject to the control, follow-up, and review by the mining, hydrocarbons and environmental authorities, within the scope of their powers and following the guidelines issued for that purpose by the Ministry of the Environment and Sustainable Development.

In any case, failure to comply with the terms and conditions under which the mining or environmental licenses were granted will result in the expiration of the mining title pursuant to the Colombian Mining Code, or in direct revocation of the environmental license without the holder’s consent and without right to compensation.

¹⁷² Law No. 1753 of 2015 (9 June 2015) (**Exhibit C-36**).

If, despite the existence of the environmental license, it is not possible to prevent, mitigate, rectify, or compensate for any possible environmental damage to the páramo ecosystem, the mining activity may not be continued. The Ministry of Agriculture and Rural Development, any entities falling within its purview and the political-administrative subdivisions, in coordination with the Regional Environmental Authorities and subject to the guidelines of the Ministry of the Environment and Sustainable Development, shall agree on the design of, training on, and implementation of replacement and conversion programs for any agricultural activities being conducted prior to June 16, 2011 within the delimited páramo area, in order to ensure the gradual application of the prohibition.

Paragraph 2. In the area of reference not included within the delimited páramo area, it is forbidden to grant new mining titles, to enter into new agreements for the exploration and exploitation of hydrocarbons, or to conduct new agricultural activities. This area shall be subject to organization and comprehensive management by the authorities of the political-administrative subdivisions pursuant to the guidelines issued by the Regional Environmental Authorities, so as to mitigate and prevent any disturbances affecting the area delimited as páramo and to contribute to the protection and preservation thereof.

Paragraph 3. Within a period of three (3) years following the delimitation, the environmental authorities shall zone and define the uses to be assigned to the delimited páramo area pursuant to the guidelines issued for that purpose by the Ministry of the Environment and Sustainable Development.”

159. Law 1753 further established that ANLA would be fully and exclusively in charge of the procedures regarding the environmental permits and licenses required for the performance of the Strategic Projects of National Interest (PINEs) and that the persons in charge of the projects validated as PINEs were to abandon any ongoing environmental procedures and resubmit them to ANLA.
160. Eco Oro held meetings with the Minister of Mines and was informed that Ms. Claudia Pava had been appointed as an official to remain in Bucaramanga and that her main goal was to look after Eco Oro’s Project, considered by the MinMinas as the “VIP” Project in the region.¹⁷³ The Vice-Minister of Mines also reassured Eco Oro: “*You are Pines and there are many ways in which we can help.*”¹⁷⁴ Eco Oro understood that the relevant authorities

¹⁷³ Email from Wilmer González (Eco Oro) to Hernán Linares (Eco Oro) (13 August 2015) (**Exhibit C-370**).

¹⁷⁴ WhatsApp Communication between Mark Moseley-Williams and Vice-Minister of Mines María Isabel Ulloa (21 October 2015) (**Exhibit C-226**).

were “willing to work hand in hand with Eco Oro to get the project ahead” and further that “ANLA was willing to evaluate the underground project under the páramo ecosystem, but that such a decision would be dependent upon studies showing that the hydrology of the protected area would not be affected.”¹⁷⁵ The PINES Group from MinMinas visited the Angostura Project site on 7 May 2015.¹⁷⁶ On 26 November 2015, Eco Oro invited ANLA to take a 2 to 3-day visit to the Angostura Project, so as to have a first-hand understanding of the current status, advances and vision of the Project.¹⁷⁷

161. On 17 July 2015, Micon International Limited prepared a National Instrument 43-101, Standards of Disclosure for Mineral Projects NI 43-101 (“**NI 43-101**”)-compliant resource estimate for the Angostura Project.¹⁷⁸

162. On 1 October 2015, CDMB granted an Award for Environmental Excellence to Eco Oro.¹⁷⁹

¹⁷⁵ Email exchange between Mark Moseley-Williams, Juan Jose Rossel (International Finance Corporation) and others (11 February 2016) (**Exhibit C-389 / C-392**).

¹⁷⁶ Email from Wilmer González (Eco Oro) to Yakelim Durán (Eco Oro) and others (5 May 2015) (**Exhibit C-367**). See also Eco Oro’s visitors log (7 May 2015) (**Exhibit C-368**).

¹⁷⁷ Email from Martha Arenas (Eco Oro) to ANLA together with letter “Request for visit to the Angostura Project” (26 November 2015) (**Exhibit C-375 / C-376**).

¹⁷⁸ Micon International Limited “Technical Report on the Updated Mineral Resource Estimate for the Angostura Gold-Silver Deposit, Santander Department, Colombia, prepared for Eco Oro Minerals Corp” (Effective date: 1 June 2015; Report date: 17 July 2015) (**Exhibit MR-8 / CRA-41 / CLEX-2 / BD-30 / C-37**).

¹⁷⁹ CDMB Resolution No. 995 granting the Award for Environmental Excellence to Eco Oro (1 October 2015) (**Exhibit C-38**). In this Resolution, the said Regional Environmental Authority acknowledges Eco Oro’s contribution “to the improvement and sustainability of the environment within the area of their jurisdiction” and, *inter alia*, highlights that Eco Oro (i) “has created guidelines for good environmental practices through different activities aimed at improving quality of life [; (ii)] has contributed to promoting proper management of natural resources through various internal and external procedures, contributing to raising awareness in connection with the sustainable use of renewable natural resources [; (iii)] has incorporated the use of good environmental practices in conducting its administrative processes, reducing the use of office supplies resulting in a proper and responsible use of natural resources [; (iv)] has contributed to the protection of the environment and the preservation of natural resources, framing its activities around a cornerstone of sustainability [; (v)] has implemented preventive and corrective actions aimed at the proper use of natural resources, generating actions that contribute to mitigating the effects of climate change [; and (vi)] has liaised with the Regional Environmental Authority for the Defense of the Bucaramanga Plateau (CDMB), joining forces to conduct various campaigns aimed at improving vegetation, decontaminating water sources and protecting natural reserves.” In October 2006, Eco Oro had received an “award from those responsible for the organization of the [2006 Mining] Fair, and in the presence of the President of the Republic, in recognition of [Greystar’s] outstanding performance during its exploration stage.” – Greystar’s institutional magazine “Visión Minera”, Issue No. 7 – Year 3 (October 2006) (**Exhibit C-13**).

163. In December 2015, ANM published a brochure named “Exploring Opportunities.”¹⁸⁰ In this investment promotion material, ANM included a legal disclaimer to the effect that the information outlined in that publication had been prepared based on the existing rules and that those rules could be amended at any time. ANM added that “*Colombia occupies the 9th place worldwide in proper climate for mining investments, improving two places since 2014 according to the report ‘Where to Invest in Mining 2015’ presented by the American consulting firm Behre Dolbear.*”¹⁸¹ ANM further provided information detailing those companies with projects in Colombia, mentioning “*Eco Oro, Canada*” (p. 24); Colombia’s main institutions (pp. 26-27); the duration of the Concession Contract (p. 28); the type of duties to be paid: surface canons / royalties (p. 33); and IIAs and FTAs entered into by Colombia (p. 37). ANM warned prospective investors that they should verify whether the proposed title was or was not within the prohibited areas for mining, whether it was in an area with communities of ethnic minorities and/or in an environmental exclusion zone (p. 30). No express reference was made to páramos.
164. On the basis of Law 1753, on 5 January 2016, Eco Oro requested ANLA to provide Terms of Reference for the preparation of an EIA for an underground-mine project.¹⁸² On 25 January 2016, ANLA replied to Eco Oro’s request, asking Eco Oro to provide an executive summary of the project.¹⁸³ (Eco Oro did not pursue this, however, as the Colombian Constitutional Court Judgment C-35 of 2016 referred to below, determined that the provision of such Terms of Reference was in the competence of local/regional authorities).

¹⁸⁰ National Mining Agency, Brochure “Exploring Opportunities” (December 2015) (**Exhibit C-294**). See also Ministry of Mines, Mining and Energy Planning Unit, Mining, an excellent choice for investing in Colombia: The Investor’s Guide (2005) (**Exhibit C-94**): despite being very thorough and containing a table identifying areas where mining is prohibited, páramos are not included in the list. Speech by President Uribe at the International Mining Show held in Medellín (18 November 2005) (**Exhibit C-11 / C-101**). It is noteworthy that Colombia also envisaged to attract junior mining companies to invest in its mining sector: Beatriz Duque Montoya, Policy for Promoting Colombia as a Mining Country (2007) (**Exhibit C-15**); Ministry of Mines and Energy Presentation (1 December 2008) (**Exhibit C-115**).

¹⁸¹ National Mining Agency Brochure “Exploring Opportunities” (December 2015) (**Exhibit C-294**), p. 4.

¹⁸² Letter from Eco Oro (Mr. Moseley-Williams) to ANLA (Mr. Iregui) (5 January 2016) (**Exhibit C-39**).

¹⁸³ Letter from ANLA (Ms. González) to Eco Oro (Mr. Moseley-Williams) (25 January 2016) (**Exhibit C-387 / C-388**).

165. On 8 February 2016, the Colombian Constitutional Court issued Judgment C-35 of 2016, (“**Judgment C-35**”)¹⁸⁴ which, *inter alia*, struck down the provisions of Law 1753 of 2015 that established exceptions to the general prohibition to perform mining operations in the páramo, including the exceptions that echoed the ones included in Resolution No. 2090 (mentioned above). Additionally, Judgment C-35 declared section 51 of Law 1753 unenforceable, thereby eliminating ANLA’s exclusive competence regarding the environmental permits and licenses required for the performance of the PINEs.
166. This decision was the subject of two clarification requests, one from MinAmbiente¹⁸⁵ and the other from the ANM.¹⁸⁶ The two requests were denied by the Constitutional Court, the first on procedural grounds¹⁸⁷ and the second on the basis that the “*jurisdiction of the Constitutional Court is expressly set forth in Article 241, and does not include a role as an advisory or consulting body to deal with the effects of its own decisions or the effectiveness of legal or regulatory provisions.*”¹⁸⁸ The decision was criticised by the mining sector, which expressed concern for the “*legal instability in the country which was directly affecting investments in, and the future of, mining operations.*”¹⁸⁹ After analysing the impact of the unconstitutionality declaration rendered with regard to Article 173(1)(1) of Law 1753 on the performance of mining concession contracts awarded prior to 9 February 2010, CIIPE

¹⁸⁴ Constitutional Court, Judgment No. C-35 (8 February 2016) (**Exhibit C-42**).

¹⁸⁵ Letter from the Ministry of Environment to the Constitutional Court (11 February 2016) (**Exhibit C-43**).

¹⁸⁶ Letter from National Mining Agency to the Constitutional Court seeking clarification on the consequences of Constitutional Judgment C-35 (24 February 2016) (**Exhibit C-44**). ANM, *inter alia*, states that “*By declaring the unenforceability of the subsections of the provision challenged, which were intended to provide for the implementation of an adjustment period, the Constitutional Court makes a radical choice which does nothing but shift the attribution of damage. Consequently, any potential wrong caused will not be attributed to a Legislative act but to a court decision. [...] when performing a ‘balancing exercise’, contractual rights cannot be disregarded as under the balancing theory, the prevailing right must be able to absorb the damage caused by the non-prevailing right and create additional profit. From the above it follows that the prevailing right must be capable of compensating the holder of the non-prevailing right in such a way so as to secure the protection of lawfully acquired rights.*”

¹⁸⁷ Decision 097/16 of the Colombian Constitutional Court (2 March 2016) (**Exhibit C-47**).

¹⁸⁸ Constitutional Court, Ruling 138/16 (6 April 2016) (**Exhibit C-49**).

¹⁸⁹ Article RCN Radio “Sector minero critica fallo de Corte Constitucional sobre explotación de minerales en el país” (25 May 2016) (**Exhibit C-233**).

concluded that the Angostura Project could not be carried out with respect to over 60% of the mineralized area.¹⁹⁰

167. On 12 February 2016, Eco Oro first considered the commencement of dispute resolution proceedings under the FTA.¹⁹¹ On 7 March 2016, Eco Oro filed a Notice of Intent to submit the claim to arbitration.¹⁹² On 8 December 2016, Eco Oro filed its Request for Arbitration. A newspaper article dated 26 March 2016 referred to the fact that three companies were relying on the Free Trade Agreements executed by Colombia with the United States and Canada to demand that the mining agreements involving strategic ecosystems be honoured¹⁹³ writing:

“The delimitation of páramos in Colombia is paying off a historical debt to the environment, but it is also creating a legal limbo for companies that already held concessions with environmental licenses in those strategic areas.

In addition to the delimitation of the Santurbán páramo, eight other ecosystems were delimited this week and the Government expects that, by the end of this year, the other 27 high-mountain systems will have their boundaries delimited to protect them from mining and hydrocarbons extraction, following the decision of the Constitutional Court that, even before its prohibition in 2010, there should not have been any projects in such strategic areas. But the Government had allowed the continuation of such projects until the expiration of the contracts, precisely to prevent legal disputes.

¹⁹⁰ Intersectoral Commission for Infrastructure and Strategic Projects (CIIPE) Minutes of Meeting No. 5 [CONFIDENTIAL DOCUMENT] (16 August 2016) (**Exhibit C-397**).

¹⁹¹ Minutes of a meeting of the Board of Directors of Eco Oro Minerals Corp. (12 February 2016) (**Exhibit C-393**). In these minutes, reference is made, *inter alia*, to a conversation between Mr. Orduz and representatives of Mubadala. Mubadala, the Abu Dhabi sovereign wealth fund, owns Minesa, which operates the Soto Norte Project. See Claimant’s Memorial, para. 436; “Abu Dhabi’s Mubadala Takes Ownership in Gold Firm AUX”, The Wall Street Journal (12 February 2015) (**Exhibit C-220**); First Behre Dolbear Report, para. 31. See also Article El Espectador “Sin una nueva delimitación de Santurbán, no se podrá explotar” (26 November 2017) (**Exhibit C-265**), where the then Minister of Environment, Mr. Luis Gilberto Murillo, mentions an official visit of President Juan Manuel Santos to the United Arab Emirates and Mubadala’s investment in a project within the Santurbán páramo area.

¹⁹² Notice of intent to submit the claim to arbitration (7 March 2016) (**Exhibit C-48**).

¹⁹³ Article El Espectador “Minería: seguridad jurídica o soberanía?” (26 March 2016) (**Exhibit C-227**).

According to the National Mining Authority (ANM), there are more than 475 mining titles – 286 in exploitation – that overlap with 28 páramos, covering an area of 127,000 hectares. Such concessions are held by nearly 100 companies and 300 individuals who will have to cease their activities as páramos continue to be delimited.

Eco Oro, formerly Greystar, a Canadian company that has been developing the Angostura mining project for twenty years in the Santurbán páramo, has sparked the first flame. A couple of weeks ago, ignoring the authority of the Ministry of Mines and the National Mining Authority, the company sent a letter to President Juan Manuel Santos, communicating its intention to formally initiate amicable settlement proceedings, invoking the provisions of the free trade agreement with Canada that provide legal protection to foreign companies.

[...]

'We have invested USD 250 million, have progressed this project for twenty years and the idea is to continue to make progress towards that goal, obviously respecting the environment, the páramo. I have also seen the film 'Wild Magic' and we are all aware that this is an ecosystem we need to take care of, but that does not entail that mining cannot be done. There are compatibilities, and that is what we are looking for,' stated Mark Moseley-Williams, President of Eco Oro.

For such reason, the Government is debating whether to halt the mining locomotive that it so enthusiastically announced in 2010 or to seek solutions so that these businesses can carry out their mining projects without affecting the ecosystems. How will it act with respect to the mining titles that overlap with the páramos? Why did it grant concessions within those ecosystems? How feasible is it that an international tribunal could undermine the country's autonomy?

The Minister of the Environment, Gabriel Vallejo, has already agreed that there will be strict compliance with the judgment rendered by the Constitutional Court, ordering the eradication of any mining activities currently carried out in the páramos and that new mining titles in them not be granted.

'Following the resolutions that I have signed regarding the delimitation of the páramos, with respect to mining and hydrocarbons, environmental licenses shall, in accordance with the relevant limitations, cease to be in force. And we are working with the Ministry of Mines to make a decision regarding titles currently in force in order to have them terminated on the basis of the Constitutional Court decision.'

In any case, the Minister said that companies are entitled to file any claims they may consider appropriate if they believe their rights have been violated. However, ‘we are abiding by a decision of the Court.’

Another question that comes into play is: Why did the Government grant concessions in the ecosystems?

First, because doing so had only been impliedly prohibited under a section of the 2010-2014 Development Plan, but with the exception that the companies holding concessions with an environmental license granted prior to 2010 could perform exploitation activities in the páramos until their contracts were terminated. However, that is what the high court objected to.

According to the former comptroller for environmental matters, Mauricio Cabrera, he warned on several occasions, in his capacity as advisor to the Ministry of the Environment, that granting titles in such areas would cause legal problems in the future.

‘Later, in 2013, the Office of the Comptroller General issued a warning because that year, the Government reopened the mining registry. We said it was inappropriate and that under the circumstances it was not appropriate to grant mining titles in the country again. Nevertheless, this is what occurred.’

That is to say, the problem that the Executive attempted to avoid six years ago has just reappeared with Eco Oro’s warning. However, this is not the only one that the Colombian Government will have to face. Cosigo Resources and Tobie Mining and Energy are already demanding compensation in the amount of USD 16.5 billion. The companies argue that after the declaration of the national natural park of the Yaigojé-Apaporis reserve, in 2007, their mining rights were unlawfully revoked, in violation of the Free Trade Agreement with the United States. [...].”

168. On 30 June 2016, the IFC’s Office of the Compliance Advisor Ombudsman (CAO), issued a report entitled “Compliance Investigation, IFC Investment in Eco Oro (Project # 27961), Colombia.”¹⁹⁴ Shortly thereafter, on 27 September 2016, the IFC informed Eco Oro that it was “considering divesting its interests in Eco Oro and the Angostura project”¹⁹⁵ noting that

¹⁹⁴ Office of the Compliance Advisor Ombudsman (CAO), “Compliance Investigation, IFC Investment in Eco Oro (Project # 27961), Colombia” (30 June 2016) (**Exhibit MR-10**).

¹⁹⁵ Email from Jan Wehebrink (IFC) to Anna Stylianides (Eco Oro) (27 September 2016) (**Exhibit C-238**). See also Article Mongabay “World Bank exits controversial Angostura goldmine project in Colombian moorland” (23 March 2017) (**Exhibit MR-9**), where the author asserts that “[a] new Colombian law that prohibits mining in moorlands, followed by an independent audit, led to the IFC’s divestment.”; see also AIDA, “World Bank divests from Eco Oro Minerals and mining project in Colombian Páramo” (19 December 2016),

“[g]iven recent developments in Colombia, and in particular, the ANM’s recent withdrawal of a significant portion of the mining title upon which the Project depends, we take the view that the Project is unlikely to be developed further.” The Center for International Environmental Law (CIEL), an NGO, noted that “[t]he IFC’s divestment not only extricates the Bank from a clear conflict of interest, but also highlights the presence of ill-advised mining projects in the Colombian páramo and the illegitimacy of the suit.”¹⁹⁶

169. On 21 July 2016, Eco Oro entered into an Investment Agreement with Trexs (“**Investment Agreement**”).¹⁹⁷ According to Eco Oro’s announcement of 22 July 2016¹⁹⁸:

*“The Investment, which is subject to customary terms and conditions, is going to occur in two tranches. The first tranche (**Tranche 1**), which is closed concurrently with the execution of the Agreement, is for US\$3 million and the second tranche (**Tranche 2**) is for US\$11 million. The Company has issued 10,608,225 common shares, which represents 9.99% of the Company’s issued and outstanding shares, to the Investor pursuant to Tranche 1.*

*The Company will call a meeting of its shareholders to obtain shareholder approval for the issuance of common shares pursuant to Tranche 2. Pursuant to Tranche 2, the Company will issue 84,590,427 common shares, which will result in the Investor owning an aggregate of 49.99% of the Company’s issued and outstanding shares and an unsecured convertible note in the principal amount of US\$7 million (the **Note**). In the event that shareholder approval is not obtained, Tranche 2 will consist of the Note and secured contingent value rights (the **CVR**), entitling the Investor to 51% of the gross proceeds of the Arbitration.”*

available at: <https://aida-america.org/en/press/world-bank-divests-eco-oro-minerals-and-mining-project-colombian-p-ramo> (not available on the record).

¹⁹⁶ See AIDA, “World Bank divests from Eco Oro Minerals and mining project in Colombian Páramo” (19 December 2016), available at: <https://aida-america.org/en/press/world-bank-divests-eco-oro-minerals-and-mining-project-colombian-p-ramo>; CIEL, *Protecting the Colombian Páramo from Eco Oro Mining (February 2017)*, available at: <https://www.ciel.org/project-update/eco-oro/> (CIEL insisted that IFC divested in Eco Oro) (not available on the record).

¹⁹⁷ Investment Agreement between Eco Oro and Trexs (21 July 2016) (**Exhibit R-12**). See also Investment Agreement between Eco Oro and Trexs, Schedule A: Contingent Value Rights Certificate (21 July 2016) (**Exhibit C-452**).

¹⁹⁸ Eco Oro News Release “Eco Oro Minerals Announces Investment by Tenor Capital” (22 July 2016) (**Exhibit R-1 / R-30**). See also the recitals of the Decision of the Supreme Court of British Columbia, *Harrington Global Opportunities Fund Ltd. and Courtenay Wolfe v. Eco Oro Minerals Corp.*, 2017 BCSC 664 (2017) (**Exhibit R-136**).

170. On 26 July 2016, ANM informed Eco Oro that, on the basis of overlap between the area granted under Concession 3452 and the Santurbán Páramo Preservation Zone, “*the surface canon to be paid by the concession holder [would] need to be assessed and paid solely on the non-overlapping area, provided that no mining activity [was] permitted to be carried out on the remaining piece of land.*”¹⁹⁹ Eco Oro replied to ANM on 5 August 2016, insisting that the full surface canon would be paid on the basis that, to that date, Concession 3452 was valid, had not been modified and its extension was pending.²⁰⁰ On 3 November 2016, ANM approved the payment of “*surface canon fees in the amount of COP 118,769,899 for the tenth year of the exploration period under Concession Contract No. 3452, which shall extend from 9 August 2016 through 8 August 2017.*”²⁰¹
171. On 8 August 2016, Eco Oro was notified that ANM had approved Eco Oro’s application for the fourth two-year extension of the exploration stage under Concession 3452.²⁰² In its decision, ANM highlighted that the extension applied “*exclusively with respect to the area that does not overlap with the ZP – JURISDICTIONS – SANTURBÁN – BERLIN páramo preservation zone.*”²⁰³
172. On 13 September 2016, Eco Oro called a special shareholder meeting to be held on 13 October 2016.²⁰⁴
173. On 19 September 2016, Eco Oro submitted a document named “*Update of Exploration Activities Schedule Period 2016-2018 Mining Concession Contract 3452*” to ANM.²⁰⁵ Eco Oro noted the following:

¹⁹⁹ Letter from the National Mining Agency (Mr. García Granados) to Eco Oro (Ms. Arenas Uribe) (26 July 2016) (**Exhibit C-50**).

²⁰⁰ Letter from Eco Oro (Mr. Moseley-Williams) to the National Mining Agency (Mr. García Granados) (5 August 2016) (**Exhibit C-54**).

²⁰¹ National Mining Agency, Resolution No. VSC 144 (3 November 2016) (**Exhibit C-398**).

²⁰² Letter from Eco Oro to the National Mining Agency containing Request for Extension of Exploration Period (6 May 2016) (**Exhibit C-230**).

²⁰³ National Mining Agency, Resolution No. VSC 829 (notified to Eco Oro on 8 August 2016) (2 August 2016) (**Exhibit C-53**). See also National Mining Agency, Technical Report No. VSC 169 (1 August 2016) (**Exhibit C-51**).

²⁰⁴ Eco Oro Management Information Circular (13 September 2016) (**Exhibit R-5**).

²⁰⁵ Letter from Eco Oro (Ms. Arenas Uribe) to the ANM (Mr. García Granados) (19 September 2016) (**Exhibit R-97**) (USB drive provided at the Hearing).

“This measure strongly affects the Angostura Project, since [it] deprives Eco Oro’s mining rights, specifically 50.73% of the area of Mining Concession 3452, and makes it seriously question its viability.

In this sense, this document is intended to describe the activities to be carried out during the extension, which are aimed at establishing whether or not it is viable to continue developing the Angostura Project, considering the new measure adopted.

We clarify that submission of this present proposal of works does not suppose nor can be interpreted, in any way, as project viability.

Finally, we note that Eco Oro reserves all its rights under the Free Trade Agreement signed between the Republic of Colombia and Canada on 21 November 2008 and international law in relation to this matter.”

174. On 13 October 2016, CDMB granted the Award for Environmental Performance of Cleanest Production (P+L) to Eco Oro.²⁰⁶
175. On 9 November 2016, on the basis that shareholder approval was not obtained for the issuance of common shares pursuant to the Second Tranche, Eco Oro issued a Material Change Report,²⁰⁷ noting that it had issued CVRs and convertible notes entitling Trexs and certain existing shareholders of Eco Oro holding approximately 37% of the Eco Oro’s issued and outstanding common shares prior to the closing of the Second Tranche (the “**Participating Shareholders**”) to an aggregate of 70.93% of the gross proceeds of the present arbitration.
176. On 5 December 2016, Eco Oro wrote to CDMB, *inter alia*, acknowledging the position conveyed by CDMB during a meeting to the effect that CDMB would be unable to process and grant an environmental license for the development of the Project without a

²⁰⁶ CDMB, Resolution No. 824 (13 October 2016) (**Exhibit C-55**). In this Resolution, CDMB mentions, *inter alia*, that Eco Oro “stood out due to its environmental performance and management during the 2013-2015 period, creating green production strategies in the efficient use and saving of water AYUEDA, management program for liquid, industrial and domestic waste, program for industrial and domestic solid waste, program for the protection of flora and recovery of forest ecosystems, environmental education programs, and the Management Program for particulate matter and gases.”

²⁰⁷ Eco Oro Form 51-102F3 - Material Change Report re closing of second tranche of its private placement (17 November 2016) (**Exhibit R-6 / R-38**).

Constitutional Court decision with respect to the action for the protection of constitutional rights requested from that Court against Resolution 2090 of 2014.²⁰⁸

177. On 17 January 2017, Technical Opinion VSC 3 was issued by the ANM titled “Assessment of Complementary Document on the Extension of Exploration Stage” one of the conclusions of which (2.1.4.1) stated: “*However, following Resolution 2090 of December 19, 2014, whereby the Santurbán Páramo is delimited, it is necessary to clarify whether mining operations in the ‘Zones for the restoration of the páramo ecosystem’ can be executed or not. Furthermore, it needs to be defined if this area is part of the ‘Santurbán-Berlín Páramo Area.’ [...] Therefore this aspect needs clarification, from a legal standpoint, as to whether mining is permitted in this area, or not, pursuant to the provisions of Resolution 2090 of December 19, 2014 and Court Judgement C-035 of February 8, 2016 on the páramos. [...].*” Paragraph 2.1.4.4 noted: “*Please send this technical opinion to the legal office of the Projects of National Interest Group, to make the necessary clarification.*”²⁰⁹

178. On 8 February 2017, the ANM issued **Resolution VSC 10** which, *inter alia*, stated:

“Consequently, and in accordance with the provisions of Resolution No. 0206 of 22 March 2013, the Vice Presidency for Mining Monitoring, Control and Safety of the National Mining Agency rules:

*1. Notify [Eco Oro] of Technical Concept VSC-003 of 17 January 2017, so that within thirty (30) days from the notification of this order, they present the clarifications listed therein, as well as the observations they consider relevant.”*²¹⁰

179. On 10 February 2017, Ms. Courtney Wolfe (“**Ms. Wolfe**”) and Harrington Global Opportunities Fund Ltd. (“**Harrington**”), shareholders of Eco Oro (Ms. Wolfe owning approximately 0.942% and Harrington approximately 9.05% of Eco Oro’s issued and outstanding common shares) (the “**Requisitioning Shareholders**”), requisitioned the Board of Directors of Eco Oro to call a meeting of shareholders for the purpose of reconstituting the Board by removing each of the incumbent directors and electing six independent

²⁰⁸ Letter from Eco Oro (Mr. Moseley-Williams) to CDMB (Mr. Carvajal) (5 December 2016) (**Exhibit C-57**).

²⁰⁹ National Mining Agency, Technical Report No. VSC 3 (17 January 2017) (**Exhibit C-240**).

²¹⁰ National Mining Agency, Resolution VSC No. 10 (8 February 2017) (**Exhibit R-75**).

directors.²¹¹ On 27 March 2017, the Requisitioning Shareholders issued a Circular entitled “Let’s Fix Eco Oro.”²¹²

180. On 7 March 2017, Eco Oro requested ANM to authorise the suspension of Eco Oro’s obligations under Concession 3452 pursuant to Article 51 of the 2001 Mining Code, on the basis of *force majeure* or unforeseeable circumstances (*caso fortuito*).²¹³ According to Eco Oro, the delineation of the Santurbán Páramo had become uncertain following both Judgment C- 35 and given that a decision of the same Constitutional Court was expected in a *tutela* action concerning Resolution 2090. Eco Oro further alluded to an additional source of uncertainty, arising from the fact that some decisions by ANM identified that mining was prohibited in the preservation zone, whereas other decisions noted that such prohibition extended to the restoration zone as well. Finally, Eco Oro stressed that the CDMB (the environmental authority responsible for licensing the Project) had recently informed Eco Oro that, given the lack of clarity regarding the regulatory framework applicable to the Project, it was not in a position to process or grant an environmental license requested by Eco Oro so that the Angostura Project could progress to the construction and mounting and, subsequently, exploitation phases, until the litigation currently on foot was resolved.
181. On 23 March 2017, Eco Oro replied to ANM with regard to Resolution VSC 10, noting that it was not the competent authority for making this type of determinations: the Colombian State and particularly the mining and environmental authorities were the bodies that should develop the guidelines that the mining title holder was to follow, in accordance with their own interpretation of the Law and case law.²¹⁴

²¹¹ Press Release by Requisitioning Shareholders regarding Meeting to Reconstitute Eco Oro Board (10 February 2017) (**Exhibit R-32**).

²¹² Eco Oro Shareholder Circular “Let’s fix Eco Oro” (27 March 2017) (**Exhibit R-39**). See also Eco Oro Management Information Circular (29 March 2017) (**Exhibit R-40**).

²¹³ Letter from Eco Oro (Ms. Arenas Uribe) to the National Mining Agency (Mr. García Granados) (7 March 2017) (**Exhibit C-241**).

²¹⁴ Letter from Eco Oro (Ms. Arenas Uribe) to the National Mining Agency (Mr. García Granados) (23 March 2017) (**Exhibit C-242**).

182. On 24 April 2017, the Supreme Court of British Columbia rendered a Judgment²¹⁵ with regard to a petition by the Requisitioning Shareholders to set aside the issuance of shares by Eco Oro’s Board of Directors to Trexs, Amber Capital LP (“**Amber**”),²¹⁶ Paulson & Co. Inc. (“**Paulson**”)²¹⁷ and Ms. Anna Stylianides (“**Ms. Stylianides**”) on the basis of oppression. The petition was dismissed, *inter alia*, because the Supreme Court considered that “[t]he petitioners [were] sophisticated investors and invested in Eco Oro with their eyes open and with full knowledge of the Investment Agreements and Notes.”²¹⁸
183. On 11 May 2017, during his speech in the National Mining Congress, the Minister of Mines addressed the Constitutional Court decisions that declared several articles of the 2001 Mining Code unenforceable. According to the Minister of Mines, “*we have been left in a very serious situation: there are many norms and we do not know what the rule is. We fill legal loopholes with decrees.*” The head of the Mining department added that many of the current problems in the sector, in terms of regulation, come from “*not having regulated the Constitution of 1991; for 25 years, some principles have remained open to interpretation. Winds of change started to blow and so did interpretations.*” The Minister of Mines further stated that “*The Court is breaking a golden rule by legislating. The Court is legislating and laws are made by Congress.*”²¹⁹

²¹⁵ Decision of the Supreme Court of British Columbia, *Harrington Global Opportunities Fund Ltd. and Courtenay Wolfe v. Eco Oro Minerals Corp.*, 2017 BCSC 664 (2017) (**Exhibit R-136**).

²¹⁶ A Delaware limited partnership, which is an established international investment fund manager and has invested heavily in Eco Oro: Decision of the Supreme Court of British Columbia, *Harrington Global Opportunities Fund Ltd. and Courtenay Wolfe v. Eco Oro Minerals Corp.*, 2017 BCSC 664 (2017) (**Exhibit R-136**), para. [10].

²¹⁷ An investment advisement fund based in the United Kingdom, which is an established international investment fund manager and has invested heavily in Eco Oro: Decision of the Supreme Court of British Columbia, *Harrington Global Opportunities Fund Ltd. and Courtenay Wolfe v. Eco Oro Minerals Corp.*, 2017 BCSC 664 (2017) (**Exhibit R-136**), para. [10]. See also Electronic Data Gathering, Analysis, and Retrieval (EDGAR) system of the US Securities and Exchange Commission, Company search results for Paulson & Co. Inc. (3 April 2018) (**Exhibit R-13**).

²¹⁸ Decision of the Supreme Court of British Columbia, *Harrington Global Opportunities Fund Ltd. and Courtenay Wolfe v. Eco Oro Minerals Corp.*, 2017 BCSC 664 (2017) (**Exhibit R-136**), paras. [83] and [86].

²¹⁹ Article El Mundo “Sector minero crece pese a la amenaza de la inseguridad jurídica” (11 May 2017) (**Exhibit C-243**).

184. On 22 August 2017, ANM refused to grant a further suspension of obligations under Concession 3452, on the basis that the events invoked by Eco Oro were not unforeseeable.²²⁰ The same Agency decided a suspension request submitted by Eco Oro with respect to a different mining title concluding that the obligations should be suspended on the basis of *force majeure*.²²¹
185. On 11 September 2017, Eco Oro announced, *inter alia*, that Trexs had agreed to loan USD 4 million to Eco Oro.²²²
186. On 12 September 2017, Eco Oro issued a notice of annual general and special meeting of shareholders and management information circular for a meeting to be held on 10 October 2017.²²³
187. Nearly one year after it had been filed, on 13 October 2017, ANM approved the PTO filed by Sociedad Minera de Santander S.A.S. (“**Minesa**”) – the holder of a mining concession that was completely surrounded by Concession 3452 – for the furtherance of its Soto Norte mining project “*provided that its execution does not interfere with the rights of the holders of concession contract No. 3452 and Exploitation License 0105-68 and other holders that could be affected.*”²²⁴ On 8 November 2017, Eco Oro appealed that decision.²²⁵ On 21 November 2017, the Minister of Environment stated that the decision over the environmental license to be granted to Minesa would be put on hold until the delimitation of

²²⁰ National Mining Agency, Resolution No. 906 (received by Eco Oro on 15 September 2017) (22 August 2017) (**Exhibit C-249**).

²²¹ National Mining Agency, Resolution No. 683 (9 August 2017) (**Exhibit C-248**).

²²² Eco Oro Press Release titled “Eco Oro Reschedules Annual General and Special Shareholders Meeting, Amends Settlement Agreement and Obtains Loan” (11 September 2017) (**Exhibit R-33**).

²²³ Eco Oro, Notice of Annual General and Special Meeting of Shareholders and Management Information Circular (12 September 2017) (**Exhibit R-9 / R-41**).

²²⁴ National Mining Agency, Resolution VSC No. 195 (13 October 2017) (**Exhibit C-255**). See also Letter from Eco Oro (Mr. Moseley-Williams) to Minesa (Mr. Bowden) (17 July 2017) (**Exhibit C-246**); Letter from National Mining Agency (Mr. García Granados) to Eco Oro (Ms. Arenas Uribe) (28 August 2017) (**Exhibit C-250**); Letter from Eco Oro (Ms. Arenas Uribe) to National Mining Agency (Mr. García Granados) (30 August 2017) (**Exhibit C-251**); Letter from Minesa (Mr. Cuesta Esguerra) to National Mining Agency (Ms. Peláez Agudelo) (15 September 2017) (**Exhibit R-101**); National Mining Agency Technical Report VSC 326 (6 October 2017) (**Exhibit C-254**).

²²⁵ Eco Oro Appeal of the National Mining Agency Resolution VSC 195 (8 November 2017) (**Exhibit C-258**).

the Santurbán Páramo is revised.²²⁶ The Minister of Environment further stated that “[e]ach potential effect must be examined in detail because it is a lie that we are trying to swap water for gold.” On 21 March 2019, ANM decided not to reverse its decision.²²⁷

188. On 17 October 2017, Trexs announced that the convertible note had been rescinded and that, following the rescission, Trexs was “*the owner of and has control and direction over 10,608,225 Shares, or approximately 9.9% of the Shares issued and outstanding following the rescission and the rescission of certain other Share issuances effected on the conversion of other Notes.*”²²⁸
189. On 10 November 2017, the Colombian Constitutional Court published **Judgment T- 361/17** (dated 30 May 2017) rendered in a *tutela* action, whereby Resolution 2090 was struck down and a re-delimitation of the Santurbán Páramo was required due to lack of public consultation.²²⁹ In this decision, the Constitutional Court asserted that MinAmbiente had “*acted in bad faith insofar as it interpreted the law in a manner that hindered access to information. This is so because it refused to provide the maps that were communicated on March 31, 2014 on the grounds that it had not yet issued the delimitation administrative decision, an argument that ignores the fact that the request concerned preparatory or provisional documents.*” However, the Constitutional Court determined that the unenforceability of Resolution 2090 would only become effective one year as from the date of notification of its Judgment. The Constitutional Court further directed MinAmbiente to issue a new resolution delimiting the Páramo in the Jurisdictions of Santurbán – Berlín, which administrative decision was to be issued as a result of a prior, participative, effective and deliberative proceeding, within one year following the notification of the Judgment.

²²⁶ Article RCN Radio “Gobierno frena decisión sobre licencia ambiental a Minesa” (21 November 2017) (**Exhibit C-262**). In this newspaper article, it is mentioned that: “A company from Abu Dhabi, United Arab Emirates, is behind Minesa, which is seeking to have the Environmental Licensing Authority – ANLA – give it the green light to mine gold in the province of Soto Norte in Santander.”

²²⁷ National Mining Agency, Resolution No. VSC 48 (21 March 2019) (**Exhibit C-421**).

²²⁸ Trexs, Press Release titled “Trex Investments, LLC – Early Warning Notification Re: Eco Oro Minerals Corp.” (17 October 2017) (**Exhibit R-4**).

²²⁹ Constitutional Court, Judgment No. T-361 (30 May 2017) (**Exhibit C-244**).

190. On 17 November 2017, the Attorney General requested the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) to include Colombian Páramo Ecosystems as a World Heritage Site.²³⁰ On 12 February 2018, during a Video Tweet,²³¹ the Attorney General confirmed that the Office was “*currently working so the request is accepted.*” The Attorney General also stated the following:

“Answer: ‘Good afternoon. The truth is that páramos are strategic ecosystems because they are the main matting that protects and allows the distribution of water in our country. We are lucky to have around 50% of all the páramos in the world here in Colombia. This is why the Administrative Prosecutor’s Office, through the head of environmental matters, adopted several measures to protect these ecosystems.

[...] Also, recently, we requested from the National Mining Agency the exclusion of all protected areas, particularly páramos, and that all works and activities conducted by concessionaires be immediately suspended and abandoned without compensation, as mandated by Article 36 of the current Mining Code.

And regarding the Santurbán páramo, in light of the Constitutional Court’s decision, we are following up on the discussions held with the Ministry of the Environment and, of course, we are working towards the páramo’s delimitation before the end of the current administration.’

Question: ‘What do you mean by ‘abandoned’?’

Answer: ‘I mean that, sometimes, mining areas overlap with protected areas because titles were granted on protected areas where mining cannot be conducted. So, pursuant to the applicable regulations, the Administrative Prosecutor’s Office has insisted on this because there are several titles currently in force that overlap with areas where mining is prohibited.’”

191. On 15 March 2018, the ANM again declared the Project as a PINE.²³²

²³⁰ Letter from Attorney General (Mr. Blanco Zuñiga) to Director General of UNESCO (Ms. Azoulay) (17 November 2017) (**Exhibit C-260**); Bulletin 928 “Procuraduría solicitó a la UNESCO declarar los páramos del país como Patrimonio Natural de la Humanidad” (21 November 2017) (**Exhibit C-264**); Article Vanguardia “Piden a la Unesco que el páramo de Santurbán sea patrimonio de la humanidad” (26 January 2018) (**Exhibit C-267**).

²³¹ Government of Colombia, Official Twitter Account of the Office of the Attorney General, Video Tweet (12 February 2018) (**Exhibit C-268**).

²³² National Mining Agency, Resolution No. VSC 204 (15 March 2018) (**Exhibit R-76**). See also Ministry of Mines website, Proyectos de Interés Nacional y Estratégico (PINE) (21 February 2019) (**Exhibit C-439**).

192. On 16 April 2018, the ANM confirmed its decision to reject Eco Oro’s suspension request.²³³
193. On 21 June 2018, Eco Oro informed ANM that it found itself prevented from fulfilling its obligation to submit a PTO before the end of the time period established by Articles 84 and 281 of the 2001 Mining Code (i.e., 21 June 2018), due to increased legal uncertainty regarding Eco Oro’s right to carry out mining activities in the area of Concession 3452 and the absence of information about the new boundaries of the Santurbán Páramo that were yet to be issued by MinAmbiente in compliance with Judgment T-361/17.²³⁴
194. On 30 August 2018, MinAmbiente applied to the Santander Administrative Tribunal for an extension of time to comply with Judgment T-361, stating: “[...] *the remaining period of approximately 2 months is insufficient to comply with that ordered, and it is therefore necessary to extend this term by an additional 8 months, which this Ministry considers suitable for the situation at hand and which will allow all phases of the participation process to be satisfied, guaranteeing an effective exercise of fundamental rights.*”²³⁵ This request was granted on 9 October 2018 by the Santander Administrative Tribunal which clarified that “*the new delimitation of the Santurbán-Berlín páramo which should be adopted by the Ministry of Environment may not be issued on a date later than eight months after the end of the term of one year set out in article 5 of the resolving part of Judgment T- 361/2017.*”²³⁶ That meant that the new delimitation should be issued by no later than 15 July 2019.
195. On 27 July 2018, **Law No. 1930** fixed páramos as strategic ecosystems and provided for its integral management.²³⁷ The development of mining exploration and exploitation activities is prohibited under Article 5 of this Law as follows:

“The development of projects, works or activities in páramos will be subject to the corresponding Environmental Management Plans. In any case, the following prohibitions will be taken into account:

²³³ ANM, Resolution VSC No. 343 (16 April 2018) (**Exhibit R-77**).

²³⁴ Letter from Eco Oro (Ms. Arenas Uribe) to the ANM (Ms. Habib) (21 June 2018) (**Exhibit R-104**).

²³⁵ Ministry of Environment, Extension Request filed before the Santander Administrative Tribunal (30 August 2018) (**Exhibit C-411**), p. 36.

²³⁶ Santander Administrative Tribunal Order (9 October 2018) (**Exhibit C-414**).

²³⁷ Republic of Colombia, Law No. 1930 of 2018 (27 July 2018) (**Exhibit R-51**).

1. Development of mining exploration and exploitation activities.”

196. On 30 August 2018, ANM granted Eco Oro a time extension until 30 November 2018 to comply with its duty to submit the PTO.²³⁸
197. On 23 November 2018, Eco Oro requested that the current deadline be extended until 15 October 2019 (3 months after the expiration of the deadline set in Judgment T-361/17 for the new boundaries of the Santurbán Páramo to be issued²³⁹). On 24 December 2018, ANM rejected Eco Oro’s request, asserting that there was no valid basis for extending the deadline for submission of the PTO.²⁴⁰ On 14 February 2019, ANM required Eco Oro, at risk of being fined, to submit the PTO within 30 days.²⁴¹
198. On 9 November 2018, the Attorney General’s Office and the Ombudsman’s Office prepared its third compliance report with respect to the actions taken by MinAmbiente pursuant to Judgement T-361 noting, *inter alia*, that MinAmbiente had “[...] *made no substantial progress in terms of compliance with the orders of the Honourable Constitutional Court.*”²⁴²
199. On 15 March 2019, the Attorney General’s Office and the Ombudsman’s Office prepared its fourth compliance report noting “[...] *Finally, the Public Ministry observes with concern the short time remaining to fulfil the pending phases of the schedule effectively, given that they are the most significant in accordance with the in the [sic] findings of law considered in granting protection under the constitutional claim [tutela] petition, namely: to guarantee full citizen participation rights.*”²⁴³
200. On 20 March 2019, the Santander Administrative Tribunal opened contempt proceedings against the Minister of Environment, Ricardo Lorenzo, on the ground that the delimitation

²³⁸ Letter from the National Mining Agency (Mr. García Granados) to Eco Oro (Ms. Arenas Uribe) (30 August 2018) (**Exhibit R-107 / C-410**).

²³⁹ Letter from Eco Oro (Ms. Arenas Uribe) to ANM (Mr. García Granados) (23 November 2018) (**Exhibit R-108**).

²⁴⁰ Letter from ANM (Mr. García Granados) to Eco Oro (Ms. Arenas Uribe) (24 December 2018) (**Exhibit R-109**).

²⁴¹ National Mining Agency, Resolution No. VSC 41 (14 February 2019) (**Exhibit C-418**).

²⁴² Letter from Attorney General’s Office (Ms Rodríguez Rojas) to Santander Administrative Tribunal (Dr. Blanco Villamizar) (15 March 2019) (**Exhibit C-419**).

²⁴³ Letter from Attorney General’s Office (Ms Rodríguez Rojas) to Santander Administrative Tribunal (Dr. Blanco Villamizar) (15 March 2019) (**Exhibit C-419**).

process was not being progressed, in violation of the constitutional mandate ordered in Judgement T-361.²⁴⁴

201. On 29 March 2019, after a presence of approximately 25 years in Colombia and a stated investment of over USD 250 million to develop the Angostura silver/gold deposit into one of the most substantial prospects in Colombia,²⁴⁵ Eco Oro, “*as a final act of mitigation*,”²⁴⁶ filed the **renunciation of Concession 3452** pursuant to Article 108 of the 2001 Mining Code.²⁴⁷
202. In an article dated 23 April 2019, reference was made to a consultation with the Vetas communities which took place the previous day and at which the then Minister of

²⁴⁴ “¿En qué va la nueva delimitación del Páramo de Santurbán?”, *Semana Sostenible* (23 April 2019) (**Exhibit C-426**), p. 2.

²⁴⁵ See, e.g., Letter from Eco Oro (Ms. Stylianides) to Minister of Environment (Mr. Vallejo López) (28 November 2014) (**Exhibit C-33**) and Tr. Day 1 (Mr. Blackaby), 14:6-8. In 2005, the Ministry of Mines anticipated that Eco Oro could become “*the largest goldmining company in Colombia*” – Ministry of Mines and Energy, Mining and Energy Planning Unit, *Monthly Mining and Energy Bulletin*, Issue No. 59 (May 2005) (**Exhibit C-285**).

²⁴⁶ Claimant’s Reply, para. 30.

²⁴⁷ Letter from Eco Oro (Mr. Orduz) to the Ministry of Mining and Energy (Ms. Suárez) (29 March 2019) (**Exhibit C-423**); Letter from Eco Oro (Mr. Orduz) to Ministry of Environment (Mr. Lozano) (29 March 2019) (**Exhibit C-424**); Letter from Eco Oro (Mr. Orduz) to the National Mining Agency (Ms. Daza) (29 March 2019) (**Exhibit C-425bis**). In the letters to MinMinas and to MinAmbiente, Exhibits C-423 (Letter to MinMinas) and C-424 (Letter to MinAmbiente), which have similar contents, Eco Oro states, *inter alia*, the following:

“As set out below, certain measures adopted by the Colombian government, particularly the ANM, have rendered ECO ORO’s Angostura Project in Concession 3452 unviable and left ECO ORO with no choice but to renounce Concession 3452 in order to mitigate its losses

[...]

5. Against this backdrop, ECO ORO commenced an arbitration against the Republic of Colombia under the Free Trade Agreement between Canada and the Republic of Colombia in order to seek compensation for the destruction of the value of its investments in Concession 3452 and the Angostura Project. In compliance with its obligations under international law, ECO ORO adopted measures to preserve the status quo with respect to Concession 3452 so as to protect all available options to mitigate its losses.

[...]

As a result, at present, the exploration phase of Concession 3452 has formally ended and thus ECO ORO has no choice but to formally renounce the Concession in order to mitigate its losses and thus among other things, (a) avoid the continuing costs related to the mine’s maintenance and safety; and (b) avoid a declaration of caducity (caducidad) that could impede the conclusion of the sale and transfer of certain mining titles by ECO ORO to Minesa.”

Environment, Ricardo Lorenzo, was present along with “[...] *more than a thousand people* [...]”, during which the Minister confirmed consultations had already been held in 25 municipalities, with nearly 300 proposals being submitted and further confirmed that “[...] *there is no intention of removing communities from their territories. On the contrary, [...] the goal is to work with them, as part of a democratic participation process that is meant to adequately delimit this ecosystem which is of strategic importance for the country.*” The article further summarised the views of the Mayor of Vetas, who explained that the inhabitants of the municipality were seeking a guaranteed right to work, to continue mining and low-impact agricultural and livestock activities.²⁴⁸

203. On 29 July 2019, ANM visited the site of Concession 3452.²⁴⁹

204. In November 2019, MinAmbiente issued a proposal for the new delimitation of the Santurbán Páramo.²⁵⁰ The new delimitation proposal was not significantly different from the one adopted in Resolution 2090.²⁵¹ The Santurbán Páramo has not definitively been delimited to this date.²⁵²

E. WITNESSES

205. During the course of these proceedings, the Tribunal received testimony from the following individuals having knowledge of the events giving rise to the Parties’ dispute:

²⁴⁸ “¿En qué va la nueva delimitación del Páramo de Santurbán?”, *Semana Sostenible* (23 April 2019) (**Exhibit C-426**).

²⁴⁹ National Mining Agency, “Informe Visita de Verificación de Estado y Condiciones de Seguridad de los Túneles Exploratorios La Perezosa y Veta de Barro en el Área del Contrato 3452 de Eco Oro” (29 July 2019) (**Exhibit MR-55**).

²⁵⁰ Ministry of Environment, Proposal for the new delimitation of the Santurbán Páramo (November 2019) (**Exhibit C-455**). See Claimant’s Rejoinder, fn. 218; and Respondent’s Post-Hearing Brief, para. 58(e) and fn. 90. See also Letter from Attorney General’s Office (Ms Rodríguez Rojas) to Santander Administrative Tribunal (Dr. Blanco Villamizar) (15 March 2019) (**Exhibit C-419**); and “¿En qué va la nueva delimitación del Páramo de Santurbán?”, *Semana Sostenible* (23 April 2019) (**Exhibit C-426**).

²⁵¹ Map comparing 2090 Delimitation with the 2019 Ministry of Environment’s delimitation proposal (2019) (**Exhibit C-454**).

²⁵² Tr. Day 1 (Mr. Blackaby), 17:1-2; Tr. Day 1 (Ms. Richard), 147:20-22 – 148:1-2; Tr. Day 1 (Mr. Adam), 354:1-2; and Tr. Day 2 (Cross-Examination of Mr. Javier García by Ms. Richard), 596:8-11. See also Claimant’s Post-Hearing Brief, paras. 34 and 118; and Respondent’s Post-Hearing Brief, para. 22.

- a. Mr. Mark Moseley-Williams, who held different positions at Eco Oro, notably that of President and Chief Executive Officer between 1 January 2016 and July 2017. He has continued to serve as a consultant to Eco Oro;²⁵³
- b. Mr. Wilmer González Aldana, who is Eco Oro's Environment and Occupational Health and Safety Director, having served as Eco Oro's Biodiversity and Conservation Manager and then as Environmental Manager between 2012 and 2015;²⁵⁴
- c. Ms. Brigitte Baptiste, who is the Director General of the IAvH;²⁵⁵
- d. Mr. Javier García Granados, who is the Vice-President of the Supervision, Control and Mining Safety division of the ANM;²⁵⁶
- e. Ms. Luz Helena Sarmiento, who was responsible for the evaluation and subsequent rejection of an environmental license requested by the Claimant in 2011 in her capacity as Director of Licenses, Permits and Environmental Procedures of MinAmbiente. On 11 September 2013, Ms. Sarmiento was appointed by President Juan Manuel Santos as Minister of Environment and Sustainable Development. Ms. Sarmiento currently works as a consultant on various environmental matters and is a member of several important Colombian companies' boards of directors;²⁵⁷
- f. Ms. María Isabel Ulloa, who acted as Vice-Minister of Mines from October 2014 to June 2016;²⁵⁸ and

²⁵³ First Moseley-Williams Statement, para. 3. See also Second Moseley-Williams Statement and Tr. Day 2 (Direct Examination by Ms. Richard; Cross-Examination by Mr. Mantilla-Serrano; Re-Direct by Ms. Richard; (Questions from the Tribunal), 409:5 – 506:2.

²⁵⁴ First González Aldana Statement, para. 1. See also Second González Aldana Statement and Tr. Day 2 (Direct Examination by Mr. Pomés; Cross-Examination by Mr. Adams; Questions from the Tribunal), 506:5 – 553:22.

²⁵⁵ First Baptiste Statement, para. 7. See also Second Baptiste Statement and Tr. Day 3 (Direct Examination by Ms. García Guerra; Cross-Examination by Mr. Blackaby), 701:12 – 788:20.

²⁵⁶ First García Granados Statement, para. 5. See also Second García Granados Statement and Tr. Day 2 (Direct Examination by Mr. Romero; Cross-Examination by Ms. Richard; Re-Direct by Mr. Adam; Re-Cross by Ms. Richard; Questions from the Tribunal; Additional Cross-Examination by Ms. Richard), 554:19 – 628:20.

²⁵⁷ Minister Sarmiento Statement, paras. 4-6. See also Tr. Day 2 (Direct Examination by Ms. García Guerra; Cross-Examination by Mr. Blackaby; Questions from the Tribunal), 629:2 – 694:12.

²⁵⁸ Ulloa Statement, para. 5. As mentioned in para. 53 above, Ms. Ulloa was unable to attend the hearing. The Claimant later confirmed that it did not wish to exercise its right to examine Ms. Ulloa: Tr. Day 5 (Mr. Blackaby), 1587:7-13.

- g. Mr. Carlos Enrique Sarmiento Pinzón, who worked at IAvH from 2009 to 2017. Mr. Sarmiento currently works for the U.S. firm ecoPartners LLC, as part of the Páramos and Forests program of USAID.²⁵⁹

206. The Tribunal has also received testimony from the following experts:

- a. Behre Dolbear, the Claimant’s mining and engineering experts;²⁶⁰
- b. Compass Lexecon, the Claimant’s damages experts;²⁶¹
- c. Professor Margarita Ricaurte, the Claimant’s legal expert;²⁶²
- d. Mr. Christopher Johnson, the Respondent’s mining and engineering expert;²⁶³
- e. Mr. Mario E. Rossi, the Respondent’s mining and engineering expert;²⁶⁴
- f. Charles River Associates (“CRA”), the Respondent’s damages experts;²⁶⁵ and
- g. Mr. Felipe de Vivero Arciniegas, the Respondent’s legal expert.²⁶⁶

²⁵⁹ Sarmiento Pinzón Statement, para. 3. See also Tr. Day 3 (Direct Examination by Ms. García Guerra; Cross-Examination by Mr. Pomés; Re-Direct by Mr. Adam), 789:4 – 845:13.

²⁶⁰ See First Behre Dolbear Report, Second Behre Dolbear Report, Third Behre Dolbear Report and Tr. Day 4 (Direct Presentation by Messrs. Bernard J. Guarnera, Mark Jorgensen and Robert Cameron; Direct Examination by Mr. Wilbraham; Cross-Examination by Mr. Pape), 1074:21 – 1144:16.

²⁶¹ See First Compass Lexecon Report, Second Compass Lexecon Report and Tr. Day 5 (Direct Presentation by Messrs. Pablo Spiller and Manuel Abdala; Examination by Mr. Wilbraham; Cross-Examination by Mr. Adam; Re-Direct by Mr. Rovinescu), 1383:17 – 1474:11.

²⁶² See Ricaurte Opinion and Tr. Day 4 (Direct Presentation; Direct Examination by Ms. Richard; Cross-Examination by Messrs. Mantilla-Serrano and Romero; Questions from the Tribunal; Re-Direct by Ms. Richard; Questions from the Tribunal), 858:17 – 983:5.

²⁶³ See Johnson Report, Tr. Day 4 (Direct Presentation), 1147:7 – 1176:1 and Tr. Day 5 (Direct Examination by Mr. Pape; Cross-Examination by Mr. Wilbraham), 1185:2 – 1250:5.

²⁶⁴ See First Rossi Report, Second Rossi Report and Tr. Day 5 (Direct Presentation; Direct Examination by Mr. Pape; Cross-Examination by Mr. Rovinescu), 1250:9 – 1382:13.

²⁶⁵ See First CRA Report, Second CRA Report and Tr. Day 5 (Direct Presentation by Messrs. James C. Burrows and Tiago Duarte-Silva; Direct Examination by Mr. Pape; Cross-Examination by Mr. Wilbraham), 1475:2 – 1570:15.

²⁶⁶ See Vivero Arciniegas Report and Tr. Day 4 (Direct Presentation; Question from the Tribunal; Direct Examination by Mr. Romero; Cross-Examination by Ms. Richard; Re-Direct by Mr. Mantilla-Serrano), 983:11 – 1074:17.

F. COSTS INCURRED BY ECO ORO

207. Eco Oro alleges having spent more than USD 250 million in advancing the Angostura Project.²⁶⁷
208. According to Compass Lexecon, “*Eco Oro spent approximately USD 258 million from 1997 to 2018 based on audited financial statements for Greystar and Eco Oro. [...] Exploration and evaluation costs totaled USD 198 million, of which USD 51 million are related to drilling, USD 56 million to exploration and technical studies, and USD 35 million to administrative purposes. General and administrative expenses totaled USD 58 million, of which USD 26 million went to audit, accounting and legal expenses and USD 11 million for salaries and benefits.*”²⁶⁸
209. Charles River Associates (CRA), in turn, proposed corrected calculations of the historical costs incurred by Eco Oro with respect with the Project, submitting that the “*revised estimate for the relevant time period is approximately \$40 million.*”²⁶⁹

V. APPLICABLE LAW

210. Article 832(1) of the FTA sets out the law applicable to this arbitration:

*“A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law. An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section, and any award or other ruling under this Section shall be consistent with the interpretation.”*²⁷⁰

²⁶⁷ See, e.g., Letter from Eco Oro (Ms. Stylianides) to Minister of Environment (Mr. Vallejo López) (28 November 2014) (**Exhibit C-33**) and Tr. Day 1 (Mr. Blackaby), 14:6-8.

²⁶⁸ Second Compass Lexecon Report, Appendix D; Compass Lexecon Historical Cost Summary (Undated) (**Exhibit CLEX-96**), paras. 116-117 (fns. omitted).

²⁶⁹ Second CRA Report, Appendix 5, para. 11.

²⁷⁰ Free Trade Agreement between Canada and the Republic of Colombia (signed on 21 November 2008 and entered into force on 15 August 2011) (**Exhibit C-22**; see also **Exhibit R-137**). Footnote 10 to Article 832(1) of the Treaty further provides that “[i]n accordance with international law, and where relevant and as appropriate, a Tribunal may take into consideration the law of the disputing Party. However, a Tribunal does not have jurisdiction to determine the legality of a measure, alleged to be in breach of this Agreement, under the domestic law of the disputing Party.”

211. The applicable law for the interpretation of this Treaty is public international law. The Tribunal agrees with the Parties that the relevant rule on the interpretation of treaties is that embodied in Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969 (the “VCLT”).²⁷¹ The supplementary means of interpretation of treaties is set out in Article 32 of the VCLT. Articles 31 and 32 provide as follows:

“Article 31. GENERAL RULE OF INTERPRETATION

1. *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*
2. *The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*
 - (a) *Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;*
 - (b) *Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*
3. *There shall be taken into account, together with the context:*
 - (a) *Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
 - (b) *Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
 - (c) *Any relevant rules of international law applicable in the relations between the parties.*
4. *A special meaning shall be given to a term if it is established that the parties so intended.*

²⁷¹ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S 331 (**Exhibit CL-3**). Canada and Colombia are both parties to the Vienna Convention.

Article 32. SUPPLEMENTARY MEANS OF INTERPRETATION

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) Leaves the meaning ambiguous or obscure; or*
- (b) Leads to a result which is manifestly absurd or unreasonable.”*

212. As mentioned above, Article 832(1) of the FTA provides that “[a]n *interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section, and any award or other ruling under this Section shall be consistent with the interpretation.*” It shall be noted that, on 24 October 2017, the Commission issued Decision No. 6 (“**Commission’s Decision**”),²⁷² providing, *inter alia*, as follows:

“The Joint Commission, acting under subparagraph 3(a) of Article 2001 of the Colombia-Canada Free Trade Agreement (hereinafter, the ‘Agreement’), reviewed Chapter Eight of the Agreement. In this respect, the Joint Commission decided that Articles 803, 804 and 805 be authoritatively interpreted as follows in order to clarify and reaffirm their meaning:

1. Investment and Regulatory Measures

For the purpose of Chapter Eight, the Parties reaffirm the right of each Party to regulate within its territory to achieve legitimate policy objectives, such as the promotion or protection of safety, health, the environment, cultural diversity or gender equality, or social or consumer protection.

2. National Treatment and Most-Favoured-Nation Treatment

(a) Whether treatment is accorded in ‘like circumstances’ under Articles 803 and 804 depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or covered investments on the basis of legitimate policy objectives.

²⁷² Joint Commission of the Free Trade Agreement Between the Republic of Colombia and Canada, Decision No. 6 (24 October 2017) (**Exhibit R-139**).

(b) The ‘treatment’ referred to in Article 804 does not include procedures for the resolution of investment disputes between investors and States provided for in other international investment treaties and other trade agreements. In addition, substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute ‘treatment’, and thus cannot give rise to a breach of Article 804, absent measures adopted or maintained by a Party.

3. Minimum Standard of Treatment in Accordance with International Law

(a) The concept of ‘full protection and security’ in Article 805 refers to a Party’s obligations relating to the physical security of investors and covered investments.

(b) If an investor of a Party submits a claim under Section B of Chapter Eight, including a claim alleging that a Party has breached Article 805, the investor has the burden of proving all elements of its claim, consistent with general principles of international law applicable to international arbitration. This includes the burden to prove a rule of customary international law invoked under Article 805, through evidence of the elements of customary international law referred to in footnote 2 of Chapter Eight.

CLOSING PROVISION

The adoption by the Joint Commission of this or any future interpretation does not indicate an absence of agreement between the Parties about other matters of interpretation of the Agreement.”

213. It shall be noted, nonetheless, that the Claimant challenges the applicability of the Commission’s Decision in the present case, as it was rendered almost a year after Eco Oro commenced this arbitration against Colombia. According to the Claimant, that would retroactively modify Article 805 of the Treaty, in violation of Article 28 of the VCLT.²⁷³ The Respondent, in turn, submits that the Claimant’s argument is without merit, as the Commission’s Decision “*merely confirms the meaning of the FTA as it already existed. It does not seek to modify the text in accordance with the existing international law jurisprudence.*”²⁷⁴

²⁷³ Claimant’s Reply, para. 415.

²⁷⁴ Respondent’s Rejoinder, para. 425.

214. As a result of the Tribunal’s application of public international law, the results it reaches in the interpretation and application of the FTA may differ from the results that would be reached through the application of municipal law in the courts of Colombia.

VI. PRELIMINARY MATTERS / JURISDICTION

215. The Tribunal’s jurisdiction has been invoked by the Claimant pursuant to Chapter Eight of the FTA.²⁷⁵ The Respondent submits that the Claimant bears the burden of establishing that its claims fall within the scope of the Tribunal’s jurisdiction and are admissible and raises a series of objections to the Tribunal’s consideration of the merits of the dispute.²⁷⁶ According to the Respondent, the Tribunal lacks jurisdiction to decide the present dispute²⁷⁷ on the grounds that:

- a. Colombia has validly denied the benefits of Chapter Eight of the FTA to Eco Oro in accordance with Article 814(2) of the Treaty (“**Article 814(2)**”);
- b. Eco Oro is not a protected investor under the FTA, because it assigned its claims to non-Canadian nationals;
- c. Eco Oro has failed to comply with four of the mandatory conditions precedent to arbitration provided for in Article 821 of the FTA, including failing to bring its claims within the limitation period;
- d. Eco Oro’s claims fall outside of the Tribunal’s jurisdiction *ratione temporis*; and
- e. Eco Oro’s claims fall outside of the Tribunal’s jurisdiction *ratione materiae*.

216. The Claimant rejects each of these objections and submits that the Tribunal has jurisdiction to –and should– proceed to render a decision on its claims.²⁷⁸

²⁷⁵ Claimant’s Memorial, p. 1.

²⁷⁶ Respondent’s Memorial, paras. 2-3.

²⁷⁷ Respondent’s Memorial, para. 2. See also Respondent’s Request for Bifurcation, paras. 18 *et seq.*; and Respondent’s Reply, paras. 2 *et seq.*

²⁷⁸ Claimant’s Rejoinder, para. 14.

A. WHETHER COLOMBIA HAS VALIDLY DENIED THE BENEFITS OF CHAPTER EIGHT OF THE FTA TO ECO ORO IN ACCORDANCE WITH ARTICLE 814(2) OF THE FTA

217. Article 814(2) provides as follows:

“A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of such Party and to investments of that investor if investors of a non-Party or of the denying Party own or control the enterprise and the enterprise has no substantial business activities in the territory of the Party under whose law it is constituted or organized.”

(1) The Parties’ Positions

(a) The Respondent’s Position

218. The Respondent submits that Article 814(2) permits State parties to deny the advantages of the Treaty, including access to international arbitration, to companies which are owned or controlled by nationals of third States and have no substantial business in their State of incorporation. This provision is similar to the counterpart provisions in NAFTA, CAFTA and certain BITs and serves to safeguard against “free-rider” investors.²⁷⁹

219. According to the Respondent, it validly exercised its right to deny Eco Oro the benefits of the FTA by letter dated 15 December 2016,²⁸⁰ on the grounds that Eco Oro (i) was owned or controlled by nationals of non-Parties (i.e., non-Canadians) and (ii) had no substantial business activities in the territory of Canada.²⁸¹

²⁷⁹ Respondent’s Memorial, para. 7, invoking *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdictional Objections (1 June 2012) (**Exhibit CL-118**) (“*Pac Rim*”) and *Limited Liability Company Amtó v. Ukraine*, SCC Arbitration No. 080/2005, Final Award (26 March 2008) (**Exhibit CL-107**) (“*Amtó*”).

²⁸⁰ Letter from the Republic of Colombia (Mr. Palau van Hissenhoven) to Eco Oro (Mr. Moseley-Williams) (15 December 2016) (**Exhibit R-20**).

²⁸¹ Respondent’s Memorial, para. 8.

(i) *Nationals of Non-Parties Owned or Controlled Eco Oro at the time Eco Oro Sought to Invoke the Protections of the FTA*

220. As at the date of its Request for Arbitration (i.e., 8 December 2016), Eco Oro had not satisfied the conditions stipulated in Article 814(2), so far as its ultimate ownership and control were concerned.²⁸²
221. Eco Oro’s incorporation in Canada is irrelevant: Colombia needs only to show that Eco Oro is either owned or controlled by investors of a non-Party. Indeed, Eco Oro does not even meet its own “*chosen*” definition that “ownership” and “control” exist if “*a non-Party owns more than 50% of its shares, or exercises de facto control over the company through the operation and the selection of members of its board of directors or any other managing body.*”²⁸³
222. Turning first to ownership, Eco Oro’s public filings confirm that, at the relevant time, Delaware corporations Amber, Paulson and Trexs, together with Bermudan corporation Harrington, owned 49.61% of Eco Oro’s shares as of December 2016.²⁸⁴ There is no requirement, either in the FTA or by reason of any authorities, that the ownership or control must be by a single non-Canadian entity or that if more than one entity, they must be shown to be acting in concert. Colombia relies on a plain reading of the Treaty: Eco Oro has not denied that a majority of Eco Oro’s beneficial owners were non-Canadian at the relevant time and, as 49.61% of its shareholding was owned by Delaware corporations (Amber, Paulson and Trexs) and Bermudan company (Harrington), “*the obvious inference is that a majority of Eco Oro’s shareholders were non-Canadian.*”²⁸⁵

²⁸² Respondent’s Memorial, para. 9. It is common ground that the relevant date to assess this is 8 December 2016: see para. 109 of the Claimant’s Response on Bifurcation, in which the Claimant makes reference to *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/97/3, Resubmitted Case, Decision on Jurisdiction (14 November 2005) (**Exhibit CL-103**), para. 61.

²⁸³ Respondent’s Reply, para. 92.

²⁸⁴ Respondent’s Memorial, para. 11; Eco Oro Notice of Annual General and Special Meeting of Shareholders and Management Information Circular (12 September 2017) (**Exhibit R-9**); Eco Oro Press Release “Eco Oro Completes Plan of Arrangement” (16 October 2017) (**Exhibit R-34**); and Press Release by Requisitioning Shareholders regarding Meeting to Reconstitute Board (10 February 2017) (**Exhibit R-32**).

²⁸⁵ Respondent’s Reply, para. 91.

223. Turning next to the question of control, the Investment Agreement entered into between Eco Oro and certain parties defined in the Investment Agreement as Participating Shareholders (including Trexs, Amber and Paulson and Ms. Stylianides, Eco Oro’s Board’s Executive Chair),²⁸⁶ is “*unorthodox and objectionable as a matter policy and principle.*”²⁸⁷ It gave control over Eco Oro to Trexs, Amber and Paulson, all being non-Canadian entities at this time. The Investment Agreement was rendered necessary because of Eco Oro’s “*financial position at the time, and its decision to abandon bona fide mining operations and instead focus on obtaining funding to bring this arbitration.*”²⁸⁸ In particular, Trexs was granted the following rights which gave it “*significant rights of control over Eco Oro, including the right to appoint a board member*”:²⁸⁹

- a. Secured Contingent Value Rights (“**CVRs**”) entitling Trexs to 51% of the gross proceeds of this arbitration and granting Trexs the benefit of covenants and rights in relation to Eco Oro;
- b. A veto right over the settlement or termination of this arbitration;
- c. A veto right over the incurrence by the company of further debt other than to fund this arbitration;
- d. The right to appoint a nominee to Eco Oro’s Board;
- e. The right to be consulted in relation to every material filing and other material step taken in this arbitration;
- f. The right to receive all relevant information concerning Eco Oro and its business, including in relation to this arbitration; and
- g. A USD 7 million unsecured convertible loan note.²⁹⁰

²⁸⁶ Investment Agreement between Eco Oro and Trexs (21 July 2016) (**Exhibit R-12**). See also Investment Agreement between Eco Oro and Trexs, Schedule A: Contingent Value Rights Certificate (21 July 2016) (**Exhibit C-452**).

²⁸⁷ Respondent’s Reply, para. 122.

²⁸⁸ Respondent’s Memorial, para. 13.

²⁸⁹ Respondent’s Reply, para. 92.

²⁹⁰ Respondent’s Memorial, para. 14.

224. In addition, each Participating Shareholder entered into a separate investment agreement pursuant to which they were issued CVRs granting them 19.3% of the proceeds of the arbitration such that the Participating Shareholders were together granted 70.93% of the proceeds of the arbitration. This gave them the right to control both Eco Oro and its claim. Whilst the terms of the CVRs are not public, an Eco Oro shareholder circular stated that:

“[A] change of control would not be possible without the consent of Tenor, and the CVRs in effect allow Tenor and the Participating Shareholders to have full control over the Arbitration and other operations of Eco Oro.

[...]

The Investment Agreement, including the issuance of the CVRs, differ from customary arrangements to finance the Arbitration in that they provide for: [...] control of the Arbitration vesting in Tenor and the Participating Shareholders rather than the Company; events of default that effectively prevent any change of control of the company or of management.”²⁹¹

225. Chapter 418, Article 1(1) of the British Columbia Securities Act defines a “control person” as follows:²⁹²

“[I]f a person or combination of persons holds more than 20% of the voting rights attached to all outstanding voting securities of an issuer, the person or combination of persons is deemed, in the absence of evidence to the contrary, to hold a sufficient number of the voting rights to affect materially the control of the issuer[.]”

226. Given the Participating Shareholders held (i) shareholdings in excess of the 20% threshold; and (ii) rights under their respective investment agreements, Eco Oro was controlled by the Participating Shareholders.

(ii) Eco Oro Had No Substantial Business Activities in Canada

227. At all material times, Eco Oro’s sole business focus has been the Angostura Project as evidenced, for example, by its Consolidated Financial Statements for the year ended

²⁹¹ Respondent’s Memorial, para. 16; Eco Oro, “Let’s fix Eco Oro” Shareholder Circular (27 March 2017) (**Exhibit R-39**), p. 4.

²⁹² Respondent’s Memorial, para. 17 (containing an incorrect reference to Exhibit R-50); Securities Act of British Columbia (Undated) (**Exhibit R-48 / C-436**).

31 December 2016,²⁹³ which state that its “*focus*” is on the Project’s development and Eco Oro’s Memorial, which provides that Eco Oro has been “*singularly focused*” on the Angostura Project.²⁹⁴ Eco Oro also described itself to the MinMinas as “*genuinely Colombian*.”²⁹⁵ The activities stated by Eco Oro to have been undertaken in Canada do not amount to “*substantial business activities*” whether or not taken individually or cumulatively: they are corporate, financing and administrative activities and not business activities and as such are “*ancillary, secondary activities that do not form a part of Eco Oro’s business*.”²⁹⁶ To be substantial requires “*at a minimum*” activities “*beyond the normal activities or functions required merely by the fact of its corporate existence [...]*.”²⁹⁷ Indeed, to have had substantial business activities in Canada, Eco Oro would have needed to have acquired mining titles in Canada²⁹⁸ and can only rely on its own activities and not on the activities of third parties in Canada.²⁹⁹

(iii) *Colombia Has Validly Denied the Benefits of Chapter Eight of the FTA to Eco Oro in Accordance with Article 814(2)*

228. Colombia validly exercised its right to deny the benefits of Chapter Eight to Eco Oro by its communication of 15 December 2016,³⁰⁰ which was issued one week after Colombia received Eco Oro’s Request for Arbitration. That was the time at which it should “*analyse whether the objective conditions for the denial are met and, if so, decide on whether to exercise its right to deny the benefits*.”³⁰¹ A ‘retroactive’ denial would not be contrary to the Treaty’s objective and purpose. Eco Oro knew that it had no substantial business activities in Canada and that it was owned or controlled by non-Canadians and so would have been

²⁹³ Eco Oro, Condensed Consolidated Interim Financial Statements (31 March 2016) (**Exhibit R-37**).

²⁹⁴ Eco Oro, Condensed Consolidated Interim Financial Statements (31 March 2016) (**Exhibit R-37**), sections 1 and 5, para. 1; Claimant’s Memorial, para. 1.

²⁹⁵ Letter from Eco Oro (Mr. Linares Pedraza) to the Minister of Mines (Mr. Acosta Medina) (25 November 2013) (**Exhibit R-94**).

²⁹⁶ Respondent’s Memorial, para. 24.

²⁹⁷ C. Baltag, *The Energy Charter Treaty: The Notion of Investor*, International Arbitration Law Library, Kluwer (2012) (**Exhibit RL-121**).

²⁹⁸ Respondent’s Reply, para. 95.

²⁹⁹ *Pac Rim*, Decision on Jurisdictional Objections (1 June 2012) (**Exhibit CL-118**), para. 4.66.

³⁰⁰ Letter from the Republic of Colombia (Mr. Palau van Hissenhoven) to Eco Oro (Mr. Moseley-Williams) (15 December 2016) (**Exhibit R-20**).

³⁰¹ *Guaracachi America, Inc. and Rurelec PLC v. Bolivia*, UNCITRAL Case No. 2011-17, Award (31 January 2014) (**Exhibit RL-13**) (“*Guaracachi*”), paras. 378-379.

aware that Colombia could exercise this right at the time it made its investment. The Treaty protections are thus conditional upon Colombia's right to deny Eco Oro such benefits.³⁰²

229. The FTA wording is clear and unambiguous: the ordinary meaning of the denial of benefits provision contains no express requirement that a denial of benefits may only be invoked prospectively and there is no compelling basis on which such a requirement should be implied. Indeed, there is no limitation in the FTA as to the time at which Colombia may exercise its right to deny the benefits of Chapter Eight, the only applicable time limit being that imposed by ICSID Arbitration Rule 41 requiring a respondent to submit its jurisdictional objections no later than the date fixed for the filing of the Counter-Memorial (which time limit Colombia complied with).
230. Further, the FTA is based on the Canadian model foreign investment promotion and protection agreement which includes a denial of benefits clause which reproduces the equivalent provision in NAFTA Article 1113(2), subjecting the State's exercise of denial of benefits to "*prior notification and consultation.*" As this specific prior notification and consultation language is omitted from the FTA, Canada and Colombia must have expressly decided not to subject the exercise of denial of benefits to "*prior notification and consultation.*" Eco Oro's response that the parties to the FTA thought these words were unnecessary or implied is unsupported by evidence, inherently improbable and based entirely on conjecture. The logical inference is that the parties to the FTA intended to omit the requirement.

³⁰² *Ulysseas Inc. v. Ecuador*, UNCITRAL – PCA Case No. 2009-19, Interim Award (28 September 2010) (Exhibit RL-86) ("*Ulysseas*"), para. 173.

231. In support of its submissions, in addition to the *Ulysseas* and *Guaracachi* decisions, Colombia also cites the decisions in *Pac Rim*³⁰³ and *Empresa Eléctrica del Ecuador*.³⁰⁴
232. The object and purpose of a treaty cannot give rise to limitations of the rights of a State through the imposition of new conditions for the exercise of its rights that are not provided for under such treaty.³⁰⁵ Canada and Colombia did not include any requirement as to the time by when such a denial should be invoked, hence no such requirement falls to be imposed.³⁰⁶
233. Finally, the reason the relevant time to assess compliance with the nationality requirements of ownership and control is at the time an investor files its Request for Arbitration is precisely because it is only at this time that a State can consider and exercise its denial of benefit rights; it would be unworkable for it to be expected to investigate the nationality of an investor's ownership or control each time an investment is made.³⁰⁷

³⁰³ In *Pac Rim*, El Salvador raised denial of benefits as an objection to jurisdiction over two years after the claimant had submitted its claim to arbitration. The United States filed a submission as a Non-Disputing Party, observing that any requirement that a DR-CAFTA Party invoke the denial of benefits clause before a claim is submitted to arbitration “would place an untenable burden on [that] Party [...] to monitor the ever-changing business activities of all enterprises in the territories of each of the other six CAFTA-DR Parties that attempt to make, are making or have made investments in the territory of the respondent.” Agreeing with this submission and applying Article 31(1) of the VCLT to the interpretation of the denial of benefits clause, the tribunal concluded that “[t]here is no express time-limit in CAFTA for the election by a CAFTA Party to deny benefits” and “the Respondent’s consent to ICSID Arbitration in CAFTA [...] is necessarily qualified from the outset by [the denial of benefits clause at] Article 10.12.2”. Having found that both the substantive and procedural requirements for the denial of benefits were met, the tribunal dismissed the claim for lack of jurisdiction. See *Pac Rim*, Decision on Jurisdictional Objections (1 June 2012) (**Exhibit CL-118**), paras. 4.56, 4.83, 4.90; and Respondent’s Reply, para. 83.

³⁰⁴ *Empresa Eléctrica del Ecuador Inc. v. Republic of Ecuador*, ICSID Case No. ARB/05/9, Award (2 June 2009) (**Exhibit RL-148**).

³⁰⁵ *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award (22 August 2012) (**Exhibit RL-152**), paras. 164-165.

³⁰⁶ Respondent’s Reply, para. 84.

³⁰⁷ Respondent’s Reply, para. 85.

(b) The Claimant's Position

(i) Colombia Cannot Deny Eco Oro the Benefits of the Treaty

234. Colombia cannot retrospectively deny Eco Oro the benefits of the FTA; in any event, Colombia has failed to show either that Eco Oro is owned or controlled by non-Party investors or that it has no substantial business activities in Canada.
235. The purpose of a denial of benefits provision is to give a State the opportunity to counteract nationality planning and protect itself from abuse by investors whose investment the State did not want to protect (i.e., free-riding or treaty shopping via corporate structuring). The present case is precisely the converse: Eco Oro is a Canadian company that has made investments directly into Colombia for over two decades, its Canadian nationality having been acknowledged by Colombia during the totality of this time and its investments in Colombia having been praised by Colombia.³⁰⁸ It is of note that Colombia has not even been able to identify the non-Party State whose nationals it claims own or control Eco Oro.

(ii) Colombia Cannot Retroactively Deny Eco Oro the Benefits of the Treaty

236. Article 814(2) must be interpreted in accordance with its ordinary meaning in light of the object and purpose of the FTA. The preamble of the FTA states that the object and purpose of the FTA is, *inter alia*, to “ensure a predictable commercial framework for business planning and investment.” Permitting a retroactive denial of the Treaty’s benefits would achieve precisely the opposite – a putative investor would have no certainty as to whether its investment would or would not be protected.
237. Article 25(1) of the ICSID Convention specifies that the date on which the Tribunal’s jurisdiction is to be evaluated is the date on which the Request for Arbitration is filed. Pursuant to the ICSID Convention, “[w]hen the parties have given their consent, no party may withdraw its consent unilaterally.” Colombia’s consent is provided for in the FTA and Eco Oro’s consent was given when it filed its Request for Arbitration. At that point, consent to arbitration was perfected and from that date, pursuant to Article 25(1) of the ICSID Convention, Colombia could not thereafter deny the benefits of the Treaty to Eco Oro insofar

³⁰⁸ Claimant’s Reply, paras. 690-691.

as they apply to the present dispute. This interpretation is supported by *Plama*³⁰⁹ and the vast majority of decisions that have been determined subsequently. The fact that most of these cases have been decided under the Energy Charter Treaty (the “ECT”) is irrelevant –the underlying principle and logic applied by the respective tribunals apply with equal force here. Just as Article 17(1) of the ECT (*i*) requires the relevant State to give notice of the denial to the investor (it sets forth a reservation of rights mechanism which to be effective must be exercised), (*ii*) is phrased in the present tense³¹⁰ and (*iii*) has, as its object and purpose, the need for certainty and predictability, the same applies to Article 814(2). The use of the word “*may*” in Article 814(2) indicates that the State has to take a decision which must be communicated to the investor. Once it is accepted that notice must be given, such notice can only have prospective effect.³¹¹

238. The words excluded from the Canadian model foreign investment promotion and protection agreement (the reference to “*prior notification and consultation*”) have no linkage with the retrospective denial of benefits. In any event, the mere absence of words is insufficient, without evidence, to draw any conclusion as to the joint intention of the parties to the FTA. An absence of requirement for prior notification for a denial of benefits is at odds with the object and purpose of the FTA; in any event, Colombia did give notice to Eco Oro and must therefore accept that provision of notice was a prerequisite to denying the benefits of Chapter Eight of the FTA.
239. Finally, whilst the relevant time for assessing the substantive requirements of Article 25(1) of the ICSID Convention was the date of filing of the Request for Arbitration, that does not mean Colombia did not need to raise its jurisdictional objections based on the denial of benefits provisions until it filed its Counter-Memorial. Referring back to the need for certainty, if Colombia could deny the benefits of the FTA to an otherwise putative qualifying investor without ever telling it so, such an investor would not be operating within a

³⁰⁹ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 February 2005) (**Exhibit RL-3**).

³¹⁰ “[...] [e]ach Contracting Party reserves the right to deny the advantages of this Part [...]” Energy Charter Treaty (signed on 17 December 1994; in force on 16 April 1998) (**Exhibit CL-155**), Art. 17(1).

³¹¹ Claimant’s Rejoinder, para. 50.

“predictable” framework and long-term business planning and investment would be frustrated.

(iii) *The Conditions For Invoking the Treaty’s Denial of Benefits Are Not Met*

240. The correct test as to whether a non-Party owns or control a majority of the voting stock is not 50% +1 but even if it were, Colombia has failed to meet it. To have the right to deny the benefits of the FTA to Eco Oro, Colombia must show either that the alleged non-Party or Parties have outright ownership of 100% of Eco Oro’s equity or, alternatively, that such investors are able to exercise *de facto* control by their ownership of more than 50% of the voting stock.
241. With respect to the test of “ownership”, the ordinary meaning of the word “own” implies outright ownership. In breach of the VCLT, Colombia imports into the text the concept of majority ownership. Eco Oro is owned by the holders of its common shares which were at the relevant time (and still are) traded on the stock exchange. Eco Oro is not required by law to maintain any record of the nationality of its shareholders. The same applies to its beneficial owners. Eco Oro is obliged³¹² to maintain a central securities register recording (i) the name and last known address of each registered shareholder and (ii) the number of shares held. However, this requirement does not apply to the beneficial owners of its shares. Pursuant to section 87 of the Securities Act of British Columbia, shareholders that own or control 10% or more of its issued shares must file a report which is publicly available disclosing the volume of shares owned or controlled.
242. Even if ownership included majority ownership, the three documents referenced by Colombia³¹³ do not evidence Colombia’s assertion that, according to its public filings, the share ownership percentage of three of its shareholders amounted to 49.61% as of December 2016. No inference should be drawn as to the nationality of its shareholding from the non-production of information to which Eco Oro has no access. Were Colombia’s

³¹² Business Corporations Act of British Columbia (Undated) (**Exhibit C-435**), Section 111(1).

³¹³ Eco Oro, Notice of Annual General and Special Meeting of Shareholders and Management Information Circular (12 September 2017) (**Exhibit R-9**); Eco Oro Press Release “Eco Oro Completes Plan of Arrangement” (16 October 2017) (**Exhibit R-34**); and Press Release by Requisitioning Shareholders regarding Meeting to Reconstitute Board (10 February 2017) (**Exhibit R-32**).

construction to be correct, if over 50% of Eco Oro’s stock were owned by non-Canadian investors, even if each such investor only owned a single share, on the basis that collectively they would own over 50%, Eco Oro would be held to be owned or controlled by investors of a non-Party. This is nonsensical. Investors cannot make decisions for Eco Oro; that is a matter that is determined by its governance structure. In any event, all non-Party investors must be from the same third country, as is clear from the text that specifies the investors must be from “*a non-Party*” (the Tribunal’s emphasis following Eco Oro’s argument). As its shares are listed on a liquid stock exchange, Eco Oro’s shareholders frequently change and it would generate significant uncertainty if the right to be assured of treaty protection depended on the dynamics of the stock market on any particular day.

243. With respect to “*control*”, at the relevant date, no shareholder owned (whether as the registered owner or beneficially) 20% or more of Eco Oro’s outstanding shares. Therefore, no one owned the 50% +1 threshold required to constitute control for the purposes of Article 814(2). Colombia has adduced no evidence in support of its assertion that the Participating Shareholders were acting in concert.
244. Colombia’s references to Canadian domestic law are irrelevant: the FTA must be interpreted according to the provision its ordinary meaning. However, even if Canadian domestic legislation were relevant, Colombia has referred to the wrong Canadian statute – the Securities Act of British Columbia (which does not address issues of control) instead of the Business Corporations Act of British Columbia, which provides as follows:

“[A] corporation is controlled by a person if (a) shares of the corporation are held, other than by way of security only, by the person, or are beneficially owned, other than by way of security only, by (i) the person, or (ii) a corporation controlled by the person, and (b) the votes carried by the shares mentioned in paragraph (a) are sufficient, if exercised, to elect or appoint a majority of the directors of the corporation.”³¹⁴

245. The question of “control” is fundamentally a question of corporate law and the correct statute is the Business Corporations Act of British Columbia.³¹⁵ No non-Party exercised *de facto*

³¹⁴ Business Corporations Act of British Columbia (Undated) (**Exhibit C-435**), Section 2(3); Claimant’s Reply, para. 711.

³¹⁵ Claimant’s Reply, para. 711.

control: at the relevant time the Board of Directors comprised eight members and no shareholder had sufficient shares to be able to control the appointment of directors to the Board. Pursuant to its Articles of Association,³¹⁶ Eco Oro is governed by two bodies: (i) the shareholders, who take decisions on either a two-thirds supermajority basis or a simple majority basis depending on the nature of the issue to be decided upon; and (ii) the board of directors, who are appointed by the shareholders and who take decisions on those issues delegated to it on a majority basis. Pursuant to these provisions, a shareholder would need to have appointed at least four of the six directors to be able to “control” Eco Oro and that could only be achieved by a shareholder holding in excess of 50% of the voting stock. On the relevant date (as detailed above) no shareholder held that percentage of voting stock.

246. The Investment Agreement did not give Trexs control over Eco Oro: whilst it required Eco Oro to take all commercially reasonable steps to appoint a Trexs nominee to the Board or, absent such appointment, to permit a Trexs nominee to attend board meetings as an observer, this type of provision is commonly required by capital providers making equivalent investments. Thus, whilst Trexs had a contractual right to have a candidate *considered* for appointment to the board (and at the relevant time had a nominee appointed to the board) such appointment was not guaranteed. In any event, the ability to appoint one member of a six-person board does not equate to control.
247. With respect to the provisions of the Investment Agreement, Trexs’ veto rights are standard negative covenants in corporate finance and, rather than an usurpation of control by Trexs, they are an exercise of the powers granted to Eco Oro’s board of directors under the Articles of Association. Again, the consultation rights and rights to receive information are not an assertion of control but a standard feature of financing agreements. Indeed, it is noteworthy that, having received the Trexs CVR, Colombia made no further submissions as to its giving of control, no doubt on the basis that the actual text was not supportive of Colombia’s initial submissions.
248. Eco Oro has substantial business activities in Canada. Whilst the words “*substantial business activities*” are not defined in the FTA, it is typically interpreted by tribunals to

³¹⁶ Articles of Incorporation of Eco Oro (5 May 2005) (Exhibit C-10).

require the investor-claimant to be more than a “*shell company*” with business activities that are “*nominal, passive, limited and insubstantial*”³¹⁷ and that “*substantial*” refers to the substance of the activity rather than its form.³¹⁸ The purpose of the denial of benefits provision is to ensure shell companies are not established and used to manufacture jurisdiction. Eco Oro has maintained its place of business in Canada since 1987 and, in that time, has bought and contracted for many services, including: mineral sample storage, laboratory testing, assay analysis, metallurgical test and resource estimation. In addition, it conducts corporate and commercial activities in Canada such as its finance and investor relations, it trades its shares on a Canadian stock exchange, complies with Canadian security filing obligations, raised equity funding, maintains active Canadian dollar denominated bank accounts with the Bank of Montreal in Canada and holds its annual general meetings in Canada. The fact its primary (or only) investment is outside Canada is irrelevant: it has continuously had substantial business activities in Canada and has also carried out exploration projects in Spain, Portugal, Brazil, Indonesia, the USA as well as Canada.³¹⁹

(2) The Tribunal’s Analysis

249. As an initial point, the Tribunal notes that Colombia does not assert that Eco Oro is a “*free rider*” or that it has made any attempt to treaty shop. It is not disputed that Eco Oro has maintained business functions in Canada since 1987 (the issue being whether or not those functions were substantial) and Colombia has from time to time acknowledged both Eco Oro’s Canadian nationality and referred, in positive terms, to the existence and importance of Eco Oro as a Canadian investor and to the importance of the Angostura Project itself.
250. The Tribunal first turns to Colombia’s contention that Eco Oro is owned or controlled by investors of a non-Party. The FTA does not refer to a majority or partial ownership, it simply specifies ownership and it contains no definition. The ordinary meaning of “*own*”, when not circumscribed by adjectives such as “*partial*” “*shared*” or “*majority*” connotes full or complete ownership. The Tribunal therefore construes “*own*”, as used in the FTA, to require

³¹⁷ *Pac Rim*, Decision on Jurisdictional Objections (1 June 2012) (**Exhibit CL-118**), para. 4.75.

³¹⁸ *Amto*, Final Award (26 March 2008) (**Exhibit CL-107**), para. 69.

³¹⁹ Claimant’s Rejoinder, para. 84.

100% ownership. An investor with less than 100% ownership falls to be considered in the second limb, namely whether they have the ability to exert control. Colombia has not asserted that 100% of Eco Oro's shares were, at the relevant date (8 December 2016) owned by a non-Party and the Tribunal therefore finds that Colombia has not shown that Eco Oro was owned by a non-Party.

251. Turning to the question of “*control*”, Colombia contends that the Tribunal should infer that 50% plus one shares were owned by investors of a non-Party given 49.61% of its shareholding was owned just by three Delaware corporations and one Bermudan company. Colombia says it is irrelevant whether or not such non-Party shareholders were acting in concert as there is no such requirement in the FTA: Eco Oro was controlled by investors of a non-Party.
252. It is not accepted by Eco Oro that 49.61% was owned by investors from a non-Party but, in any event, turning to the express wording of the FTA, the requirement is for ‘*control*’. This must mean, on an ordinary reading of the word, actual not putative control. It is insufficient that if all the non-Canadian investors were to act in concert, they would be able to exercise control. The Tribunal must make its decision on the basis of the facts – was Eco Oro controlled by investors of a non-Party? Whilst it may be that Amber, Trexs, Paulson and Harrington were acting in concert, even if they did collectively own 49.61%, this could not result in control. Colombia has adduced no evidence that any of the other non-Canadian shareholders were acting in concert, nor that there was any communication of any nature between them. The Tribunal cannot plausibly proceed on the basis that it should infer control in these circumstances. This is particularly so given the nature of Eco Oro's governance structure, which both requires shareholders to take decisions either by a simple majority or a two-thirds majority and provides that a shareholder may only appoint a Director to Eco Oro's Board if such shareholder holds in excess of 50% of the voting stock (Colombia has not adduced evidence to show any shareholder held that percentage on the relevant date).

253. There is further no provision in the Investment Agreement which evidences that Trexs was able to, let alone did in fact, control Eco Oro (and the Tribunal notes that, having received the CVRs, Colombia did not pursue its submissions that they gave the Participating Shareholders control over Eco Oro).
254. Having determined that Eco Oro was neither owned nor controlled by investors of a non-party on the relevant date, Colombia was not entitled to deny the benefits of Chapter Eight to Eco Oro. It is therefore unnecessary to consider Colombia's other submissions, but the Tribunal notes that those business activities described by Eco Oro (and which activities Colombia did not dispute took place) were sufficient to comprise substantial business activities in Canada. The Tribunal does not see there is any requirement for Eco Oro to have acquired a mining licence in Canada to meet this limb. It is further unnecessary for the Tribunal to consider whether, to be effective, any notice should have been served on Eco Oro notifying it of Colombia's exercise of its right to deny Eco Oro the benefits under the FTA nor by when such notice, if required, should have been exercised.

B. WHETHER ECO ORO IS A PROTECTED INVESTOR UNDER THE FTA

255. Article 838 of the Treaty provides as follows:

“[...] investor of a Party means a Party or state enterprise thereof, or an enterprise or national of a Party, that seeks to make, is making or has made an investment. A natural person who is a dual citizen shall be deemed to be exclusively a citizen of the State of his or her dominant and effective citizenship. A natural person who is a citizen of a Party and a permanent resident of the other Party shall be deemed to be exclusively a national of the Party of which he or she is a citizen.”³²⁰

³²⁰ Footnote 12 to Article 838 of the Treaty further provides that: “For greater certainty, it is understood that an investor ‘seeks to make an investment’ only when the investor has taken concrete steps necessary to make said investment, such as when the investor has duly filed an application for a permit or license required to make an investment and has obtained the financing providing it with the funds to set up the investment.” Free Trade Agreement between Canada and the Republic of Colombia (signed on 21 November 2008 and entered into force on 15 August 2011) (**Exhibit C-22**; see also **Exhibit R-137**).

(1) The Parties' Positions

(a) The Respondent's Position

256. The Tribunal lacks jurisdiction *ratione personae* because the true beneficiary of the claim is a Delaware-incorporated US company – Trexs – to whom Eco Oro assigned the benefit of its claim in July 2016.³²¹

(i) *Nationality under the FTA falls to be determined by reference to the true beneficiary of the claim*

257. It is a well-established principle of international law that only a real party in interest has standing to sue,³²² such that the nationality of a claimant falls to be determined by reference to the beneficiary party and not the nominal claimant.³²³ Indeed, this principle is reinforced by the provisions of Article 819 of the FTA which gives standing to a claimant to submit, “on its own behalf,” a claim that it “has incurred loss or damage” arising from an FTA breach. Therefore, it is not sufficient that Eco Oro is a Canadian incorporated company if it does not stand to benefit from the claim.

258. This principle is not overridden by the *lex specialis* regime created by certain of the FTA’s definitions. There is insufficient specificity in the FTA and Article 838 does not provide that complying with the definitions of “investor” and “investment” is a sufficient rather than just a necessary condition to establish a claimant’s standing to bring a claim. The FTA is subject to and consistent with principles of international law on standing and there is no clearly evinced intention that the contracting States intended to derogate from this.

259. Whilst no case has yet considered the issue, commentators observe that where, prior to the commencement of an arbitration, a funding arrangement is entered into which gives rise to a *de jure* or *de facto* assignment of the benefits of a claim to an entity that does not satisfy

³²¹ Respondent’s Memorial, para. 31. See Investment Agreement between Eco Oro and Trexs (21 July 2016) (**Exhibit R-12**) and Investment Agreement between Eco Oro and Trexs, Schedule A: Contingent Value Rights Certificate (21 July 2016) (**Exhibit C-452**).

³²² *Occidental Petroleum Corporation Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award (2 November 2015) (**Exhibit RL-98**); Respondent’s Memorial, fn. 41.

³²³ *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (26 June 2003) (**Exhibit RL-62**).

the nationality requirements, the tribunal will lack jurisdiction *ratione personae* as the nationality requirement should be considered by reference to the funder's nationality.³²⁴ The fact there are no prior cases applying this principle to this fact pattern is immaterial as third-party funding of this nature is of recent origin.

(ii) *The FTA's Nationality Requirement was to be satisfied at the date of the Request for Arbitration*

260. The FTA's nationality requirement falls to be determined at the date of the submission of the dispute to arbitration as that is when the agreement to arbitrate is formed both under the FTA and international law. This was 8 December 2016.

a. The Nationality Requirement was not satisfied at the date of the Request for Arbitration because Eco Oro had assigned its claim to Trexs

261. As of 8 December 2016, Eco Oro had already assigned the benefit of its claim to Trexs pursuant to the Investment Agreement which was "*in substance and effect an assignment of the benefit of the claim by which Trexs became its main beneficiary and the party in control of it.*"³²⁵

262. Trexs became the main beneficiary: not only was it granted 51% of the proceeds of the claim (whereas Eco Oro only stood to benefit by 22.7% of the proceeds), it was also granted certain rights enabling it to control the process of the claim. These include the ability to control all material aspects of the claim, including the right to veto any settlement or termination of the arbitration and the rights to appoint a member to the board of directors, to be provided with relevant information concerning the claim and to be consulted in relation to filings and certain steps in the arbitration.

263. In addition, the Investment Agreement itself recognised, by implication, that it was assigning the claim to Trexs by virtue of one of the representations and warranties which provided that

³²⁴ Respondent's Memorial, fn. 46.

³²⁵ Respondent's Memorial, para. 40.

Eco Oro had not “*other than pursuant to [the Investment Agreement] assigned all or any portion of [its claims under the FTA].*”³²⁶

264. Therefore, as at the date the arbitration was commenced, the actual beneficiary of the claim was Trexs, a Delaware corporation. Accordingly, the FTA’s nationality requirement is not satisfied.

(b) The Claimant’s Position

(i) Eco Oro is an “investor” with Canadian nationality as defined in Article 838 of the Treaty

265. Eco Oro complies with the requirements of the FTA: as accepted by Colombia,³²⁷ it was incorporated in accordance with the applicable laws of Canada and it is a qualifying investor for protection under the FTA in accordance with the definitions of “*investor of a Party*” and “*enterprise.*”³²⁸ That in itself is sufficient as the FTA only requires that an enterprise (Eco Oro) be “*constituted or organized*” under the laws of Canada (which Eco Oro is) and permits the submission of a claim to arbitration by any “*investor*” of one of the FTA’s contracting parties. Colombia has failed to identify any other provision requiring the application of additional criteria. The Treaty requirements are clear and precise and no additional requirements need to be implied; giving effect to the FTA as *lex specialis* is consistent with rules of international law.

266. Colombia’s argument to the effect that there is an established rule of international law that the beneficiary of a claim is the proper party to the claim such that the nationality of the claimant falls to be decided by reference to the nationality of such beneficiary is both illogical and misplaced: illogical because in the case of publicly traded entities there will rarely be a single beneficiary of a claim as such entity will have several economic stakeholders and the nationality of such stakeholders may change several times in any one

³²⁶ Respondent’s Memorial, para. 43; Investment Agreement, Section 13(s)(ii) (**Exhibit R-1**).

³²⁷ Respondent’s Memorial, para. 19.

³²⁸ Eco Oro notes it is a company constituted under Canadian law, therefore qualifying as an investor pursuant to Article 801(1) of the FTA. As required by Article 821(2)(d) of the FTA it included copies of: (i) its Certificate of Good Standing issued by the Registrar of Companies of the Province of British Columbia, Canada (Annex B); and (ii) The Certificate of Existence and Legal Representation of Eco Oro’s branch [*Sucursal*] in Colombia issued by the Chamber of Commerce of Bucaramanga (Annex C).

day; and misplaced because the nationality provisions in the FTA are *lex specialis*. Tribunals apply nationality criteria strictly; indeed, one of the commentators cited by Colombia notes that “*the nationality of the claimant would be unaffected by the fact that the proceeds of the award may go directly to a third party.*”³²⁹ Pursuant to international law, a corporation’s nationality is established by its place of incorporation³³⁰ and not by the ultimate destination of the proceeds of any claim.

267. Colombia misstates and misapplies the principle and legal authorities upon which it seeks to rely as each relates to the nationality of the beneficial owner of the underlying property the subject of the dispute (i.e., the investment that gave rise to the dispute) and not the beneficiary of the claim itself. It has not been disputed that Eco Oro has full legal title to Concession 3452.
268. Accordingly, Eco Oro is an investor pursuant to the provisions of the FTA and thus has standing to bring this arbitration.

(ii) *Eco Oro has not assigned its claims to Trexs*

269. Whilst irrelevant, Eco Oro has not assigned its claim to Trexs, it has merely granted an economic interest in its proceeds which has no effect on its own nationality. Trexs is just one of several equity and debt holders in Eco Oro and, as with other investors, it has provided capital to help both Eco Oro’s business in Colombia as well as to finance the arbitral proceedings. It is not a third-party funder, but even if it were, recent cases concerning third-party funding have concluded that in the absence of express wording in the relevant treaty to the contrary, tribunals should opt for “*informed indifference*” towards a funder’s involvement with respect to the admissibility of the claim.³³¹ In the present case,

³²⁹ P. Pinsolle, “Comment on Third-Party Funding and Nationality Issues in Investment Arbitration”, *Transnational Dispute Management* 639, Vol. 10 (2013) (**Exhibit RL-29**), pp. 644, 646.

³³⁰ Claimant’s Rejoinder, para. 26, invoking *Barcelona Traction Case*, ICJ Reports 3 (1970) (**Exhibit CL-200**) para. 71.

³³¹ Claimant’s Reply, para. 676, quoting J. von Goeler, “Third Party Funding in International Arbitration and its Impact on Procedure” (2016) (**Exhibit CL-125**), pp. 239-240. This author argues that the

“*[t]ransfer of economic interest (or ‘beneficial interest’) to a funder of a different nationality than the funded party before the initiation of the arbitral proceedings does not affect jurisdiction, unless relevant investment treaty contains clear language to this effect.*”

the FTA requires nothing more of Eco Oro than that it is an “*entity constituted under the laws of Canada*” which it is. The FTA definitions are clear: there is therefore no justification or necessity for the Tribunal to import any additional requirements into it.

270. It would be impractical and would “*eviscerate the distinct legal personality that comes with the incorporation of a business*”³³² if it were necessary to analyse how each stakeholder stands to benefit from the proceeds of an arbitration in order to determine the nationality of a claimant-enterprise. It would also be contrary to the object and purpose of the FTA which seeks to ensure a predictable commercial framework for business planning and investment if its qualification as an investor were to depend on the relative interests and priorities of its stakeholders.
271. There is a legal distinction between an assignment of a claim (after which the claim can only be brought by the assignee) and an investment into a publicly traded entity. The Investment Agreement achieves what it says it is, namely an investment; assignment is not its practical effect and Eco Oro is not a “façade.” The question of “control” is not relevant to the question of Eco Oro’s status as an investor and Eco Oro has full control over the arbitration; no steps can be taken without its consent. Trexs holds less than 10% of Eco Oro’s shares and the majority of Eco Oro’s directors have no links with Trexs such that Trexs has no command over Eco Oro’s decision-making process, including with respect to the arbitration. In any

That the claimant is a purely or partially nominal owner (and thus not the ‘real party in interest’) otherwise has no bearing on the requirements of ‘investor’ and ‘investment.’

This position finds support in a constant line of case law: CSOB v. Slovakia, Saluka Investments BV v. The Czech Republic, RosInvestCo UK Ltd. v. The Russian Federation and Quasar de Valores v. The Russian Federation. The arbitral tribunals deciding these cases took into account the presence of a third-party funder and, far from declining to ‘recognize the role of third-party funders’, opted for informed indifference towards the funder’s involvement as regards admissibility of the funded investor’s claim. This indifference has nothing to do with ‘ignoring the elephant in the room’, but rather constitutes the logical consequence of autonomous interpretation of investment treaty language. In the absence of clear treaty provisions to the contrary, the economic interest a funder obtains by virtue of the funding agreement as well as the motives behind its investment are not relevant for deciding on the legal question whether or not the funded party’s claim is admissible. This is not only the correct legal approach, but also corresponds with business reality. It would hardly make sense if, in a financially deeply interconnected world, [a]nything short of full and disclosed claim assignment to a third party might shed doubt on the identity of the actual claimant.”

³³² Claimant’s Reply, para. 674.

event, the directors all owe fiduciary duties to all the shareholders.³³³ Finally, certain words were omitted from the Investment Agreement provision quoted by Colombia: it should read “*other than pursuant to the Investment, [Eco Oro] has not disposed of, transferred, encumbered or assigned all or any portion of such Claim Proceedings (or any interest therein) or any proceeds thereof, whether by way of security or otherwise (including any set off or agreement to set off any amounts relating to the Claim Proceedings).*” (The words underlined are the words omitted by Colombia). When read in full, it is clear the purpose and meaning of the provision is to confirm that Eco Oro has not and would not convey the claim proceeds in any way. It does not infer that the Investment Agreement was in reality an assignment. Indeed, Colombia cannot complain that Eco Oro was obliged to seek funding as a direct result of Colombia’s own unlawful conduct.³³⁴

272. The CVR which was appended as Schedule A to the Investment Agreement provides that it “*does not derogate from or in any way limit or restrict [Eco Oro’s] ownership of the Claim Proceeding Rights and [Eco Oro’s] ability to prosecute the Claim Proceedings or otherwise result in the Holder owning or controlling the Claim Proceedings.*”³³⁵

(2) The Tribunal’s Analysis

273. It is not disputed that Eco Oro is incorporated in accordance with the applicable laws of Canada and is a Canadian enterprise. Accordingly, Eco Oro satisfies the express requirements set out in Article 838 of the FTA. The test in Article 838 is clear and specific: the Tribunal does not accept Colombia’s contention that there is insufficient specificity in the FTA. Colombia does not identify any provisions in the FTA requiring investigation into Eco Oro’s beneficial ownership and the Tribunal does not accept Colombia’s further

³³³ See paras. 220 *et seq.* above.

³³⁴ Claimant’s Reply, para. 685, invoking, *inter alia*, *Quasar de Valores SICAV S.A. and Others v. Russian Federation* (SCC Case No. 24/2007), Award (20 July 2012) (**Exhibit CL-77**), paras. 31-33.

³³⁵ Investment Agreement between Eco Oro and Trexs, Schedule A: Contingent Value Rights Certificate (21 July 2016) (**Exhibit C-452**). (“*Claim Proceeds*” are defined therein as “*all present and future value, order, award, entitlement or remuneration of any kind and in any form including, without limitation, any property, assets, cash, bonds, or any other form of payment or restitution, permit, license, consideration, refund or reimbursement of fees or similar right in each case paid, payable, recovered, owing to, due to, awarded to, ordered or otherwise received or to be received by the Company or any of its direct or indirect subsidiaries or affiliates of any kind, or any of their respective successors or assigns pursuant to or in respect of any settlement, award, order, entitlement, collection, judgment, sale, disposition, agreement or another monetization of any kind of, in any way relating to the Claim Proceedings.*”).

contention that as there is no provision in the FTA specifying that this is the only applicable test, the Tribunal must instead be guided by a principle of international law which requires consideration of the beneficial owner of the putative claimant. In the absence of such provisions, it is not apparent to the Tribunal why it should engage in an analysis of the beneficial owners of a listed company. The cases cited by Colombia do not relate to the beneficial owner of the claimant but to the beneficial ownership of the property the subject of the claim. Whilst this may not always be a distinction with any substance, in the present case, where there is no allegation (or evidence) that Eco Oro itself is not the 100% owner of the title to Concession 3452, the Tribunal is satisfied that Eco Oro is a protected investor for the purposes of Article 838 such that the Tribunal has jurisdiction *ratione personae*.

C. WHETHER ECO ORO HAS COMPLIED WITH THE CONDITIONS PRECEDENT TO ARBITRATION PROVIDED FOR IN ARTICLE 821 OF THE FTA

274. Article 821 of the Treaty (“**Article 821**”) provides as follows:

“Article 821: Conditions Precedent to Submission of a Claim to Arbitration

1. *The disputing parties shall hold consultations and negotiations in an attempt to settle a claim amicably before a disputing investor may submit a claim to arbitration. Consultations shall be held within 30 days of the submission of the Notice of Intent to Submit a Claim to Arbitration under subparagraph 2(c), unless the disputing parties otherwise agree. Consultations and negotiations may include the use of non-binding, third-party procedures. The place of consultations shall be the capital of the disputing Party, unless the disputing parties otherwise agree.*
2. *A disputing investor may submit a claim to arbitration under Article 819 or Article 820 only if:*
 - (a) *the disputing investor and, where a claim is made under Article 820, the enterprise, consent to arbitration in accordance with the procedures set out in this Section;*
 - (b) *at least six months have elapsed since the events giving rise to the claim;*
 - (c) *the disputing investor has delivered to the disputing Party a written notice of its intent to submit a claim to arbitration (Notice of Intent) at least six months prior to submitting the claim. The Notice of Intent shall specify:*

- (i) the name and address of the disputing investor and, where a claim is made under Article 820, the name and address of the enterprise,*
- (ii) the provisions of this Agreement alleged to have been breached and any other relevant provisions,*
- (iii) the legal and the factual basis for the claim, including the measures at issue, and*
- (iv) the relief sought and the approximate amount of damages claimed;*
- (d) the disputing investor has delivered evidence establishing that it is an investor of the other Party with its Notice of Intent;*
- (e) in the case of a claim submitted under Article 819:*
 - (i) not more than 39 months have elapsed from the date on which the disputing investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the disputing investor has incurred loss or damage thereby, and*
 - (ii) the disputing investor and, where the claim is for loss or damage to an interest in an enterprise of the other Party that is a juridical person that the disputing investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 819, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the applicable law of the disputing Party, provided that the action is brought for the sole purpose of preserving the disputing investor's or the enterprise's rights and interests during the pendency of the arbitration; and*
- (f) in the case of a claim submitted under Article 820:*
 - (i) not more than 39 months have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage thereby, and*

(ii) both the disputing investor and the enterprise waive their right to initiate or continue before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 820, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the applicable law of the disputing Party, provided that the action is brought for the sole purpose of preserving the disputing investor's or the enterprise's rights and interests during the pendency of the arbitration.

3. A consent and waiver required by this Article shall be in the form provided in Annex 821, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration. Where a disputing Party has deprived a disputing investor of control of an enterprise, a waiver from the enterprise under subparagraphs 2(e)(ii) or 2(f)(ii) shall not be required.

4. An investor may submit a claim relating to taxation measures covered by this Chapter to arbitration under this Section only if the taxation authorities of the Parties fail to reach the joint determinations specified in Article 2204 (Exceptions – Taxation) within six months of being notified in accordance with those provisions.

5. An investor of a Party who is also a national of a non-Party may not initiate or continue a proceeding under this Article if, as a national of the non-Party, it submits or has submitted, directly or indirectly, an investment claim with respect to the same measure or series of measures under any agreement between the other Party and that non-Party.”³³⁶

(1) The Parties' Positions

(a) The Respondent's Position

275. The Parties have not perfected their consent to submit the dispute to arbitration as Eco Oro has failed to comply with four of the mandatory conditions precedent set forth in Article 821 and the Tribunal therefore lacks jurisdiction.

³³⁶ Free Trade Agreement between Canada and the Republic of Colombia (signed on 21 November 2008 and entered into force on 15 August 2011) (**Exhibit C-22**; see also **Exhibit R-137**), Art. 821.

(i) *Consent to Arbitration under the FTA is conditioned on compliance with the Conditions Precedent in Article 821*

276. These requirements are conditions precedent and not mere formalities: pursuant to Article 823(1) of the FTA, Eco Oro's failure to comply with any of these conditions precedent results in nullification of Colombia's consent to arbitrate.

(ii) *Eco Oro has Failed to Comply with Four of the Conditions Precedent Listed in Article 821 of the FTA*

a. Article 821(2)(c)(iii)

277. The Notice of Intent did not state all the legal and factual bases for its claim, including each one of the measures at issue. The wording of the FTA is clear: it requires the Notice to contain, *inter alia*, "*the legal and the factual basis for the claim, including the measures at issue.*" This requires the listing of all the measures at issue, without limitation, to ensure Colombia is properly apprised of the existence, scope and subject matter of the controversy. It is insufficient for Eco Oro only to describe the "*basis*" of the claim in its Notice of Intent.

278. The cases cited by Eco Oro are irrelevant: none of the underlying Investment Treaties had equivalent provisions requiring either the listing of all measures or alternatively conditioned consent to arbitrate on compliance with such measures. Even if it were sufficient to describe the basis of the dispute without specifying the entirety of the measures at issue, Eco Oro's Notice of Intent is still not acceptable because Colombia could not have understood from the Notice of Intent that Eco Oro intended to bring claims with respect to measures that did not concern the Angostura Project or the delimitation of the Santurbán Páramo. Eco Oro is seeking to introduce "*by the back door*" claims not related to the original dispute. To the extent that claims were uncrystallized at the time the claim was submitted to arbitration, Eco Oro should have waited before filing its Request for Arbitration and it should have filed a new notice of intent to apprise Colombia of those new disputes which were not related to the Angostura Project or the process of delimiting the Santurbán Páramo. Accordingly, Eco Oro failed to comply with the condition precedent in Article 821(2)(c)(iii).

279. Eco Oro's reliance upon Article 46 of the ICSID Convention ("**Article 46**") does not assist it – a tribunal's powers under Article 46 to hear incidental or additional claims apply only to

a dispute falling within the scope of the consent of the parties and as Eco Oro has failed to comply with the conditions precedent contained in Article 821, there is no consent to submit the dispute to arbitration and thus Article 46 is of no avail.

b. Article 821(2)(b)

280. Eco Oro failed to comply with the six-month cooling-off period. Eco Oro, in its Request for Arbitration, refers to Resolution VSC 829, Resolution 48, Resolution VSC 906, Judgement T-361, Order VSC 195 and Colombia's decision to have the Colombian páramo declared UNESCO World Heritage Sites as all being contrary to Colombia's obligations under the FTA. However, even on Eco Oro's case, each of these measures was adopted less than six months before Eco Oro submitted its claim to arbitration and they were mostly adopted after the submission of the claim to arbitration. In particular, Eco Oro argues that it was deprived of "vital rights under Concession 3452" by Resolution VSC 829, however that was only adopted in August 2016. Thus, less than six months had passed between the date of the measures giving rise to the claim and the date of submission of the claim to arbitration. Again, this is a mandatory requirement which cannot be dispensed with. Whilst Eco Oro relies upon the *Crystallex* case,³³⁷ Colombia notes that the relevant Canada-Venezuela BIT did not contain an equivalent provision making the notice period a condition precedent.³³⁸ Therefore, Eco Oro failed to comply with the condition precedent in Article 821(2)(b).

c. Article 821(3)

281. Eco Oro failed to comply with the waiver requirements which are mandated to be in the form of Annex 821 and included in the submission of a claim to arbitration. This waiver must relate to measures that are alleged by Eco Oro to be in breach of the FTA and is submitted with the Notice of Intent. Eco Oro's waiver did not relate to all the measures alleged by Eco Oro in this arbitration to be in breach as some occurred after the waiver and Notice of Intent were submitted.³³⁹

³³⁷ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2), Decision on Bifurcation (23 May 2012) (**Exhibit CL-117**) ("*Crystallex*").

³³⁸ Respondent's Memorial, para. 69.

³³⁹ Respondent's Memorial, para. 85.

d. Article 821(2)(e)(i)

282. Eco Oro's Request for Arbitration was received by ICSID's Secretary General on 8 December 2016 and the mandatory cut-off date is therefore 8 September 2013 (the "**cut-off date**"), however Eco Oro had knowledge of all relevant alleged breaches and the resulting loss or damage before that date. The mining ban had been in force since Law 1382 came into effect on 9 February 2010 and Eco Oro has not had the right to mine in those areas of its Concession overlapping with the Santurbán Páramo since at least August 2012.

283. Eco Oro's knowledge arises, *inter alia*, from the following which occurred before the cut-off date (the "**pre cut-off Measures**"):

a. Law 1382 of 2010 which established an immediate mining ban in that area of Concession 3452 which overlapped with the Santurbán Páramo, being 54.42% (confirmed by Resolutions VSC 2 and 4) and Eco Oro knew or ought to have known that Concession 3452 was not protected by the transitional regime introduced. Colombia refers to the following as evidencing that knowledge:

- i. An email dated 24 April 2010³⁴⁰ from Mr. Kesler (Eco Oro's then President and CEO) noting that Eco Oro was "*led to believe that the Angostura project would benefit from 'grandfathering' regarding the new law*" which it submits shows that the grandfathering exemption had not materialised for Eco Oro;
- ii. An internal memorandum dated 3 May 2010 which confirms that Eco Oro knew it did not benefit from the transitional regime;³⁴¹
- iii. The rejection of its 2009 EIA pursuant to which Mr. Kessler noted in the same email of 24 April 2010 that "[t]his effectively stops the project [...]. *The project, with this condition, may not be feasible or economic.*";³⁴²

³⁴⁰ Email from S. Kesler (Greystar) to D. Rovig (Greystar) and others (24 April 2010) (**Exhibit R-180**).

³⁴¹ Greystar, Internal Memorandum (3 May 2010) (**Exhibit R-159**).

³⁴² Email from S. Kesler (Greystar) to D. Rovig (Greystar) and others (24 April 2010) (**Exhibit R-180**).

- iv. A report prepared by Mr. Kessler for Eco Oro’s board of directors noting that the impact of this on the share price was “*dramatic.*”;³⁴³
 - b. Resolution 937 of 2010 confirmed Law 1382 was enforceable by reference to the 2007 Atlas;
 - c. Resolution 1015 of 2011 rejected Eco Oro’s EIA referring to Resolution 937;
 - d. Law 1450 of 2011 re-enacted the mining ban established in Law 1382 and specified that the 2007 Atlas would serve as a “*minimum reference*” to enforce the mining ban;
 - e. Resolution 35 of 2011 upheld the denial of an environmental licence; and
 - f. Resolution VSC 4 of 2012, which definitively confirmed Eco Oro could not conduct mining activities in that part of Concession 3452 overlapping with the páramo. As this was unchallenged by Eco Oro it took effect as a definitive determination of Eco Oro’s rights under Concession 3452 through the application of Laws 1382 and 1450. Thus, Eco Oro must have known VSC 4 curtailed its ability to conduct mining activities in the páramo areas of Concession 3452.
284. Eco Oro sought to challenge these measures evidencing its awareness of them before the cut-off date.
285. Those measures enacted after the cut-off date on which Eco Oro relies (the **2014-2019 Measures**), do not give rise to a distinct, independent, self-standing cause of action; they merely continued the prohibition on mining in páramo areas and so do not trigger the limitation period:³⁴⁴
- a. Resolution 2090 did not increase or reduce the area of Concession 3452 overlapping with the Santurbán Páramo vis-à-vis Resolution VSC 4, which had been implemented before the cut-off date. Eco Oro is incorrect to say it benefitted from the transitional regime as it neither held an environmental license nor an

³⁴³ Greystar, CEO report to the Board of Directors (3 May 2010) (**Exhibit R-160**).

³⁴⁴ Respondent’s Memorial, paras. 129-130, invoking *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (30 May 2017) (**Exhibit RL-108**), para. 208.

equivalent environmental control and management document granted before 9 February 2010 as required by Article 5. The environmental managing plan Eco Oro possessed referred to a smaller project in a smaller mining title and not the area of Concession 3452 overlapping with the Santurbán Páramo.

- b. Resolution VSC 3 did not lift the suspension on mining activities imposed by VSC 4, it simply rejected Eco Oro's request to extend the suspension of activities in the exploration phase of Concession 3452 because the delimitation of the páramo pursuant to Resolution 2090 had been issued by the time the request was rejected.
- c. Law 1753 again confirmed the prohibition on mining activities in the páramo ecosystem and again Eco Oro did not qualify for the transitional regime as it neither had the requisite environmental licence nor environmental control and management plan.
- d. Judgment C-35 was irrelevant to Eco Oro as it could not have benefitted from the grandfathering exemption which the judgement struck down.
- e. Resolution VSC 829 did not curtail any of Eco Oro's rights because Eco Oro had not been able to mine in the areas of its Concession overlapping with the Santurbán Páramo since at least August 2012 when the ANM refused to extend Eco Oro's exploration phase with regard to such overlapping area. It extended the exploration phase only for areas that fell outside the Santurbán Páramo and the ANM had taken a substantially identical position in Resolution VSC 4.
- f. The CIPE minutes are irrelevant, merely confirming the existence of an overlapping portion of the title.
- g. Resolution VSC 906 rejected Eco Oro's request to suspend its obligations under Concession 3452 on the basis that Eco Oro's alleged uncertainty about the effects of Judgment C-35 were unfounded. The uncertainty alleged by Eco Oro related to whether or not mining was prohibited in páramo ecosystems and thus in the parts of Concession 3452 overlapping the Santurbán Páramo. However, this uncertainty existed before the cut-off date.

- h. Judgement T-361 annulled Resolution 2090. However, the annulment did not alter the ban on mining in the area delimited by the 2007 Atlas (being the “minimum reference” area) and Resolution 2090 was ordered to remain in force until the new delimitation was prepared, which new delimitation could not afford a lower level of protection to the páramo than that provided by Resolution 2090. Again, therefore, this judgment did not give rise to a self-standing cause of action.
 - i. Finally, Colombia’s application to UNESCO was a continuation of Colombia’s legislature’s policy decision to ban mining in the páramos and did not give rise to a self-standing cause of action.
286. In arguing that the Angostura Project survived notwithstanding the pre cut-off Measures, Eco Oro contends that Colombia provided continued support for the Angostura Project after the mining ban adopted in 2010 and that it was only the 2014 – 2019 Measures that destroyed the Angostura Project. These submissions are not supported by the actual facts.
287. The Terms of Reference for the underground mining project did not indicate support for the Angostura Project: they were accompanied by a letter from ANLA Director Ms. Sarmiento noting the requirement to take into account the ongoing process of delimitation of the Santurbán Páramo and further noting the adoption of the 2007 Atlas pursuant to Resolution 2090.³⁴⁵ It is correct that the letter referred to Decree No. 2820 of 5 August 2010 (“**Decree 2820**”),³⁴⁶ but such reference was not an indication that mining was not banned in the Santurbán Páramo. Decree 2820 did not specifically regulate the granting of environmental licences in páramo areas but instead provided a general framework for the processing and issuance of environmental licenses in Colombia. Further, it required a favourable opinion from the MinAmbiente as a precondition for the granting of an environmental licence and required the subject project to comply with applicable instruments for the conservation and sustainable use of the environment. The applicable instrument at the time of Eco Oro’s request for Terms of Reference was Resolution 937 which meant that the 2007 Atlas delimitation applied. Therefore, at this time (February 2012) Eco Oro should

³⁴⁵ Letter from ANLA to Eco Oro attaching terms of reference (27 February 2012) (**Exhibit C-24**).

³⁴⁶ Decree No. 2820 (5 August 2010) (**Exhibit C-129**).

have understood that it would not be able to mine in those areas overlapping with the Santurbán Páramo.

288. PIN and PINE designations were neither endorsements nor confirmation of the legal or environmental feasibility of the Project; they merely streamlined certain administrative processes or provided additional oversight and scrutiny to sensitive projects. Indeed, the Project was designated a PINE because of its anticipated adverse environmental impact, were it even to materialise.³⁴⁷
289. Surface canons were calculated with respect to the entire area of a mining title, not taking into account mining exclusion zones.³⁴⁸ Whilst it was open to Eco Oro to request a reconfiguration of the title to remove those areas where it could not conduct mining activities (for example mining exclusion zones), it did not do so. The ANM was unable itself to calculate the percentage of the area which did not overlap with the Santurbán Páramo until it received the polygon maps.³⁴⁹ It would not have been possible for an ANM official to determine the coordinates of the overlapping area in the absence of such a map as it would have engaged such official's personal responsibility. Eco Oro could have requested reimbursement of the overpaid sums if it had requested a reconfiguration of the title.
290. It is also incorrect to say that Eco Oro's rights were restored from the effects of the pre cut-off Measures because it benefitted from grandfathering provisions: it had none. The *raison d'être* of Article 5 of Resolution 2090 was to grandfather projects at the exploitation stage only. Eco Oro did not have the required documentation and so had not progressed to the exploitation stage: the transition regime did not apply to it.
291. The mining ban continued in force notwithstanding Constitutional Court Judgement C-366 as Judgement C-366's effect was expressly deferred by the court for two years. By the time its effects came into force, Law 1450 had been enacted which again contained a ban on mining in the páramo ecosystems. In the *Consejo de Estado* Advisory Opinion 2233 of

³⁴⁷ INGEOMINAS, Resolution No. DSM-28 (22 February 2011) (**Exhibit C-19**).

³⁴⁸ Law No. 685 (as amended) (8 September 2001) (**Exhibit C-8**), Art. 230; ANM Memorandum (17 September 2012) (**Exhibit R-192**), pp. 3-4.

³⁴⁹ Second García Granados Statement, para. 13.

11 December 2014 (“**Advisory Opinion 2233**”) the *Consejo de Estado* explained that this meant the mining ban had been continued without interruption since 9 February 2010.³⁵⁰ Indeed, it is telling that Eco Oro never took any steps towards preparing an EIA and PTO for its underground mine.

292. Resolution VSC 3 did not lift the mining ban over the entirety of the Concession area but merely confirmed Eco Oro could resume its activities pursuant to Resolution 2090. As Eco Oro had no grandfathered rights under Article 5, the suspension of mining was only lifted in relation to those areas that did not overlap the Santurbán Páramo as delimited by the 2007 Atlas.
293. Finally, as the Santurbán Páramo had already been delimited pursuant to Resolution 2090, Law 1753 was irrelevant and, in any event, as the Project was not at the exploitation stage, the transitional regime in Article 173 did not apply to Eco Oro.
294. It is incorrect for Eco Oro to say that its administrative challenges to the pre cut-off Measures are irrelevant because these measures did not result in a permanent deprivation of its rights: Laws 1382 and 1450 introduced a permanent definitive ban on mining in páramo ecosystems that is continuing. It is irrelevant that the ban was enforced through a provisional delimitation contained in the 2007 Atlas: Eco Oro could not reasonably have expected the ban to have been lifted and, whether or not the measures resulted in a formal deprivation of its Concession, the fact is that Eco Oro has been barred from conducting mining activities in the overlapping portion of its Concession area since August 2012, whether the overlap is defined with reference to the 2007 Atlas or Resolution 2090.

(iii) Colombia did not exacerbate the dispute following the submission of the Claim to Arbitration

295. Whilst Colombia denies that it took any steps which aggravated the dispute following submission of the Notice of Intent, even were the allegation to be correct, no argument has been raised, let alone identified by Eco Oro, which would support its contention that such aggravation would exempt it from compliance with the Article 821 requirements.

³⁵⁰ *Consejo de Estado* Advisory Opinion No. 2233 (11 December 2014) (**Exhibit R-135**), p. 11.

296. Eco Oro has identified certain measures that post-date the Notice of Intent which it asserts are “**Related Measures**” because they concern the same subject-matter of the dispute notified in the Letter of Intent and over which, it says, the Tribunal has jurisdiction on the basis they are “*incidental*” or “*additional*” claims relating to the same subject matter as that described in the Notice of Intent. These Related Measures are not related to the measures the subject of the Notice of Intent. The dispute described in the Notice of Intent was limited to Colombia’s “*unreasonable delay*” in delimiting the Santurbán Páramo and its “*persistent lack of clarity*” regarding Eco Oro’s right to continue developing its mining project. It neither concerned Resolution 48 (which related to another mining title) nor measures not concerning the delimitation of the Santurbán Páramo such as (i) the termination of the exploration period and Eco Oro’s renunciation of Concession 3452; (ii) the ANM’s decision to approve Minesa’s PTO; or (iii) the alleged delay in approving the transfer of certain of Eco Oro’s titles not relating to the Angostura Project to Minesa.³⁵¹

297. In particular:

- a. Resolution VSC 829 granted Eco Oro a two-year extension of the exploration period of that part of Concession 3452 which did not overlap with the Preservation Area of the Santurbán Páramo and thus confirmed its definitive delimitation.
- b. Resolution 48 did not contradict Resolution VSC 829 and thus did not create any additional uncertainty.
- c. By Resolution 906, the ANM rejected Eco Oro’s final request for a suspension of its obligations under Concession 3452 and this decision was upheld by Resolution 343. The ANM’s decision was reasonable and valid under Colombian law and therefore did not violate Eco Oro’s rights.
- d. Judgement T-361 did not have any impact on the 54% overlap of the páramo with Concession 3452.

³⁵¹ Respondent’s Reply, para. 104.

- e. As for the UNESCO application, firstly Colombia has done nothing additional to the announcement by the Attorney General and, in any event, Eco Oro has not substantiated how this declaration would have impacted upon Concession 3452.
- f. Finally, Eco Oro did not renunciate Concession 3452 due to actions by Colombia but to avoid being in breach of its own obligations as it had failed to submit a PTO within the three-month grace period granted by the ANM after the expiration of Concession 3452's exploration period.

298. Colombia therefore submits that the Tribunal lacks jurisdiction to judge such conduct.³⁵²

(iv) Article 46 of the ICSID Convention does not empower the Tribunal to adjudicate Eco Oro's "related measures" claims

299. As Eco Oro failed to comply with the Article 821 requirements in relation to these Related Measures, the Tribunal is not empowered under Article 46 ICSID Convention to hear them as they are not within the Tribunal's jurisdiction.

(b) The Claimant's Position

(i) Eco Oro complied with all of the Treaty's pre-arbitration formalities

300. The Parties' consent to arbitrate extends to all measures relating to the subject matter of the dispute, so long as any claim arising therefrom is made no later than the reply memorial.³⁵³ Colombia's consent to submit its investment disputes with foreign investors is provided in Article 822. The provisions in Article 822 are procedural requirements which were complied with by Eco Oro prior to the submission of its claim to arbitration. Therefore, the FTA requirements to submit the dispute to arbitration have been satisfied.

301. Eco Oro consented to submit the present dispute to arbitration in accordance with Article 821.

³⁵² Respondent's Reply, paras. 103 *et seq.*

³⁵³ Claimant's Rejoinder, para. 97, referring to Rule 40(2) of the ICSID Arbitration Rules, which provides as follows: "*An incidental or additional claim shall be presented not later than in the reply and a counter-claim no later than in the counter-memorial, unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding.*"

a. Article 821(2)(c)(iii)

302. All Colombia's breaches the subject of Eco Oro's claim are incidental to, and/or relate to the same subject matter as, the claims notified in its Notice of Intent. In particular, the Notice of Intent put Colombia on notice that (i) its claim concerned the impairment of Eco Oro's mining rights in relation to its Project within Concession 3452; (ii) it had a claim under Article 805; and (iii) reserved its rights under Article 811. Pursuant to the wording of Article 821(1)(c), the Notice of Intent is only required to specify the "basis" for the claim. This cannot require comprehensively detailing "every feature or element" of the claim, let alone future conduct relating to the claim which would be impossible to foresee at the time of submitting the Notice of Intent. The purpose of this requirement is to apprise the State of the subject-matter of the dispute, as Colombia itself accepts.³⁵⁴ Therefore, to satisfy the requirement, Eco Oro need only provide Colombia with sufficient information as to the subject-matter of the dispute, including the measures at issue.³⁵⁵ Nothing in the FTA supports Colombia's submission and it plainly cannot have been the intention of the drafters that a claimant should be obliged to launch new arbitration proceedings for each post-Notice of Intent measure, even if such measure is part and parcel of the same dispute. Indeed, by the terms of footnote 8 to the FTA, the FTA itself recognises that disputes, even once notified in the Notice of Intent, are not static such that administrative acts giving rise to a claim may be reviewed, confirmed or modified. It would make no sense were a claimant to be required to issue a new Notice of Intent each time such an administrative act was modified. Clearly, any such later measure reflecting the evolution of the claim would form a part of the dispute and fall within the scope of the Parties' consent to arbitrate. Whilst Colombia argues that the purpose is to exclude "premature or unripe" claims, it is simply unfeasible to expect an investor to wait until its claims were ripe – how could it know if the dispute would be further exacerbated? Indeed, postponing submission of a Notice of Intent would unnecessarily delay

³⁵⁴ Respondent's Reply, para. 107.

³⁵⁵ Claimant's Reply, para. 747, alluding to the following cases: *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur SA v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction (21 December 2012) (**Exhibit CL-121**), para. 123; *AIIY Ltd. v. Czech Republic*, ICSID Case No. UNCT/15/1, Decision on Jurisdiction (9 February 2017) (**Exhibit CL-191**), paras. 148-149; *Tulip Real Estate Investment & Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issues (5 March 2013) (**Exhibit RL-92**), paras. 83, 121-122; *Tenaris S.A. and Talta-Trading E Marketing Sociedade Unipessoal LDA v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award (29 January 2016) (**Exhibit CL-189**), paras. 243-244.

justice and the resolution of a *bona fide* dispute which is itself prejudicial and would cause procedural chaos. It is also unfeasible given the 39-month limitation period.

303. The Related Measures plainly concern the same subject-matter as the dispute (see below) and the Tribunal is entitled to exercise jurisdiction over the Related Measures.

b. Article 821(2)(b)

304. Eco Oro waited at least six months from Colombia's first measures giving rise to the present dispute before commencing arbitration. The purpose of a cooling-off period is to ensure that the State is aware that a dispute has arisen in respect of a specific subject-matter. Colombia cannot have been unaware of the subject-matter of the dispute given the content of Eco Oro's Notice of Intent. The cases relied upon by Colombia are of no assistance to Colombia. Whilst the tribunal in *Burlington Resources v. Ecuador* declined to extend jurisdiction over an alleged breach of which no notice had been given,³⁵⁶ Eco Oro gave notice of the existence of an investment dispute under Articles 805 and 811, being the provisions relevant to its case as finally pleaded, including the claim for Colombia's failure to accord its investment a minimum standard of treatment under Article 805. Eco Oro waited the requisite period after filing its Notice of Intent before commencing its arbitration proceedings.

c. Article 821(3)

305. Eco Oro's waiver is in compliance with Article 821 being in the precise form of a letter containing the contents as set out in Annex 821 and it applies to the entire scope of the dispute, including any future actions of Colombia as is clear from the wording that it applies to State measures "*that are alleged to be a breach*" of the FTA. The measures that post-date the Notice of Intent of which Eco Oro complains are closely related to the notified dispute. In any event, this objection appears to have been abandoned by Colombia in its Reply on Jurisdiction.³⁵⁷

³⁵⁶ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction (2 June 2010) (**Exhibit RL-6**), paras. 332-337; Claimant's Reply, para. 773.

³⁵⁷ Claimant's Rejoinder, para. 91.

d. Article 821(2)(e)(i)

306. Eco Oro waited more than nine months after delivering its Notice of Intent before commencing arbitration.
307. At the time of commencing arbitration, not more than 39 months had elapsed since Eco Oro first acquired, or should have acquired, knowledge of (i) those breaches by Colombia that form the subject of its claims in this arbitration and (ii) that it had incurred a loss resulting from those breaches.
308. As a jurisdictional objection, this issue should be decided on a *prima facie* basis, this being the “*universal*” approach when considering jurisdictional objections.³⁵⁸ Eco Oro refers to all the measures that were adopted by Colombia after 8 September 2013 and it does not found its claim on measures that occurred before that date. The first measure Eco Oro identifies as giving rise to a breach for which Eco Oro seeks recovery took place in 2014 which was within the 39-month time period. The events prior to this merely comprise years of delay on the part of Colombia to delimit the Santurbán Páramo, it was only the measures which took place in 2014 and thereafter which resulted in a permanent deprivation of its rights under Concession 3452 and the crystallisation of its losses.
309. In any event, Eco Oro had not been deprived of its mining rights as at the cut-off date. The pre cut-off Measures did not result in a breach of the FTA and thus did not have the effect of depriving Eco Oro of its Concession 3452 rights; they are merely part of the factual context. Eco Oro refers to the events that took place before the cut-off date merely as contextual factual background to its claim; these events have no impact on the Tribunal’s jurisdiction.

³⁵⁸ Claimant’s Reply, paras. 786-787, making reference to *Amco Asia Corp. and Others v. The Republic of Indonesia*, ICSID Case No. ARB/94/2, Decision on Jurisdiction (24 December 1996) (**Exhibit CL-93**) (“*Amco*”), para. 38; *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Jurisdiction (25 May 1999) (**Exhibit CL-94**) (“*Wena*”), pp. 890-891; *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction (17 July 2003) (**Exhibit CL-23**) (“*CMS Gas*”), para. 35; *Azurix Corp v. The Republic of Argentina*, ICSID Case No. ARB/01/12, Decision on Jurisdiction (8 December 2003) (**Exhibit CL-99**) (“*Azurix*”), para. 73; *SGS Société Générale de Surveillance SA v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction (6 August 2003) (**Exhibit CL-97**) (“*SGS Société*”), paras. 144-145.

310. The fact Eco Oro still had mining rights over the entire area of Concession 3452 at the cut-off date is demonstrated by the following:

- a. It had to pay surface canons over the entire area until July 2016, when the amount payable by Eco Oro was reduced by the ANM *pro rata* to the area falling outside the Preservation Zone of the Santurbán Páramo. Indeed, it is noteworthy that (i) Colombia has never offered to reimburse Eco Oro for the amounts allegedly overpaid up to July 2016 and (ii) it was only in August 2016 that CIPE concluded that the overlapping area was neutralised by State measures.³⁵⁹
- b. Law 1382 did not specifically prohibit mining activities in páramo areas: until the páramo was designated in accordance with the requirements of Article 3 (i.e., geographically delimited by the Environmental Authority based on technical, social and environmental studies) the mining restrictions could not take effect.
- c. Order 1241 and Resolutions 1015 and 35 denied Eco Oro's open pit mining project not because of mining restrictions but due to its disapproval of certain aspects of the open-pit project. Indeed, MinAmbiente confirmed at that time that it had not declared an exclusion zone over the páramo ecosystems.³⁶⁰
- d. Resolution 937 was illegal, as concluded by the MinMinas because it did not meet the requirements set out in Laws 1382 and 1450.³⁶¹
- e. Law 1450 required the Minister of Environment to delimit páramo ecosystems on a 1:25,000 scale based on technical, social and environmental studies and thus could only come into effect when the further delimitation exercise had been properly undertaken. The ANM did not impose a ban on Eco Oro pursuant to Laws 1450 and 1382, it imposed a temporary suspension of mining activities in the area of Concession 3452 overlapping the 2007 Atlas pending publication of the

³⁵⁹ Intersectoral Commission for Infrastructure and Strategic Projects (CIPE) Minutes of Meeting No. 5 [CONFIDENTIAL DOCUMENT] (16 August 2016) (**Exhibit C-397**).

³⁶⁰ Ministry of Environment, Resolution No. 35 (31 October 2011) (**Exhibit C-290**).

³⁶¹ Letter from Ministry of Mines (Ms. Díaz Lopez) to INGEOMINAS (Mr. Montes) (27 September 2011) (**Exhibit C-330**).

delimitation by MinAmbiente, at which point the suspension was lifted. There was no permanent deprivation of Eco Oro's mining rights under Concession 3452.

- f. Resolution VSC 4 again imposed a temporary suspension “*until the Ministry of Environment [...] issues the final delimitation to a scale of 1:25,000*”,³⁶² not a permanent exclusion. The suspension was lifted when Resolution 2090 released the delimitation at a scale of 1:25,000 at which point, as Concession 3452 was grandfathered, Eco Oro was permitted to undertake mining activities in the entire area of Concession 3452. Therefore, there was no permanent impairment of its rights.
 - g. In fact, Colombia continued to endorse and support the underground mining project in Concession 3452. It provided Eco Oro with terms of reference for the EIA, it twice nominated the Project and Concession 3452 as a PIN and it required Eco Oro to pay canons over the entire surface area of Concession 3452.
 - h. Resolution 2090 was issued after the cut-off date and did not contain a final delimitation of the Santurbán Páramo. However, as the Project was grandfathered, Resolution 2090 had limited effect, although it did curtail Eco Oro's rights in certain ways, for example by prohibiting the extension of the duration of Concession 3452. Resolution VSC 3, issued very shortly after Resolution 2090, lifted the mining suspension imposed by Resolution VSC 4 leaving Eco Oro free to pursue its mining operations over the entire area of Concession 3452.
 - i. Law 1753 again contained grandfathering provisions such that Eco Oro remained permitted to continue its mining operations.
311. Thus, the measures passed before the cut-off date were irrelevant and meaningless to Eco Oro's claim. It was only in 2016 that its rights under Concession 3452 became imperilled when the grandfathering provisions in Law 1753 were struck down as unconstitutional by Judgement C-35, although it was unclear whether the Constitutional Court's decision also applied to the grandfathering provisions in Resolution 2090. In August 2016, the ANM issued Resolution VSC 829 extending Concession 3453's exploration phase

³⁶² National Mining Agency, Resolution VSC-4 (12 September 2012) (**Exhibit C-25**).

only in respect of that part of Concession 3452 which did not overlap with the Preservation Zone of the Resolution 2090 delimitation but this was with reference to Judgement C-35 (and not to the pre cut-off Measures). It was only at this point that Eco Oro lost its rights to conduct mining activities in over 50% of its Concession.

312. The fact that Eco Oro made certain administrative challenges does not make Resolution 2090 and subsequent events a single continuous dispute arising from the pre cut-off Measures. Such challenges went only to the scope or effect of the Government act in question. As such measures did not permanently deprive Eco Oro of rights under Concession 3452, such challenges are irrelevant. In any event, as the measures which were effected after the cut-off date are separately actionable, pursuant to the decision in *Berkowitz v. Costa Rica*,³⁶³ the Tribunal has jurisdiction over them.
313. Eco Oro has also complied with the requirements contained in Articles 25(1) and (2) of the ICSID Convention as:
- a. There is a legal dispute arising from Colombia's breach of its obligations under the FTA;
 - b. The dispute arises directly out of Eco Oro's investments in Colombia, which investments are qualifying investments for the purposes of the FTA and the ICSID Convention;
 - c. The dispute has arisen between Colombia, an ICSID Contracting State and Eco Oro, a national of Canada, an ICSID Contracting State; and
 - d. Colombia has consented to submit the dispute to ICSID arbitration pursuant to Article 823 and, by filing its Request for Arbitration, Eco Oro consented to submit its dispute to ICSID arbitration in accordance with Articles 821 and 823.
314. Therefore, the Parties' consent to submit the present dispute to arbitration was perfected on 8 December 2016.

³⁶³ *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (30 May 2017) (**Exhibit RL-108**).

(ii) *The Related Measures*

315. Colombia does not argue that Eco Oro’s Notice of Intent was deficient nor does it assert that Eco Oro is claiming for any Government measures that pre-date its Notice of Intent and that were not referenced therein. Colombia’s objections are based on the fact that Eco Oro’s claim in the arbitration include the Related Measures which post-date the Notice of Intent.
316. These Related Measures all concern the same subject-matter as the dispute notified in the Notice of Intent, namely the impairment of Eco Oro’s mining rights in relation to the Angostura Project as a result of the delimitation of the Santurbán Páramo as encapsulated in the following paragraphs from the Notice of Intent:

“The dispute arises out of the Republic’s measures and omissions, which have directly impacted the rights granted to Eco Oro for the exploration and exploitation of the ‘Angostura’ gold mining project, located in the Soto Norte region of the Department of Santander, within the Vetás-California gold district, which Eco Oro has been developing since 1994 (the Angostura Project). [....]

The measures and omissions that have affected Eco Oro include (but are not limited to) the Republic’s unreasonable delay in specifying the boundaries of the Santurbán Páramo and whether they overlap with the Angostura Project, as well as its persistent lack of clarity regarding Eco Oro’s right to continue developing its mining project in light of further requirements which remain undefined and, later, as a consequence of Decision C-035 [Sentencia C-035] handed down by the Constitutional Court on 8 February 2016, which extended the prohibition of mining activities in páramo areas.”³⁶⁴

317. The Related Measures are thus a continuation of, exacerbation of, or otherwise related to the same subject-matter of, the dispute that was notified in the Notice of Intent.
318. Where a State has exacerbated a dispute after the arbitration has been filed, tribunals have routinely exercised jurisdiction over such later measures. To do otherwise would be unnecessary and inefficient. Where there has been an evolution of the same dispute, rather than two different disputes, given the link between the initial claim and the later measures, the pre-arbitration formalities performed for the initial claim also cover the later measures.³⁶⁵

³⁶⁴ Notice of intent to submit the claim to arbitration (7 March 2016) (**Exhibit C-48**).

³⁶⁵ *Crystallex*, Award (4 April 2016) (**Exhibit CL-85**), para. 455.

Colombia is incorrect to state that the *Crystallex* and other cases cited by Eco Oro are not on point because the underlying treaties did not make such requirements “conditions precedent” or require the notices of dispute to specify the “measures” at issue. Article XII(2) of the underlying treaty in *Crystallex* provides that prior to filing a claim the investor must deliver a notice “*alleging that a measure taken or not taken by the latter Contracting Party is in breach of this Agreement.*” Further, the language of the treaty evidences that submission of a claim is conditional upon compliance with the relevant procedural requirements and it is clear from the wording of the award that the tribunal considered the pre-arbitration formalities to be mandatory. The same approach was adopted by the tribunals in *Eiser v. Spain*,³⁶⁶ *Enron v. Argentina*,³⁶⁷ *Metalclad*,³⁶⁸ *Swisslion v. Macedonia*,³⁶⁹ *Teinver v. Argentina*,³⁷⁰ *Tenaris v. Venezuela*³⁷¹ and *Ethyl v. Canada*.³⁷² The approach followed by each of the tribunals in these cases was to consider whether the subsequent acts referred to related to a dispute that had already been notified. If so, it would be unreasonable and inefficient to “*require the dispute to be carved into multiple slices, with each new development requiring an additional request for negotiations and a subsequent request for a separate additional arbitration.*”³⁷³ Colombia has not cited a single case making a contrary finding.

³⁶⁶ *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award (4 May 2017) (**Exhibit CL-192**).

³⁶⁷ *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (14 January 2004) (**Exhibit CL-164**).

³⁶⁸ *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000) (**Exhibit CL-15**) (“*Metalclad*”).

³⁶⁹ *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award (6 July 2012) (**Exhibit CL-119**).

³⁷⁰ *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction (21 December 2012) (**Exhibit CL-121**).

³⁷¹ *Tenaris S.A. and Talta-Trading e Marketing Sociedade Unipessoal LDA v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award (29 January 2016) (**Exhibit CL-189**).

³⁷² *Ethyl Corporation v. The Government of Canada*, UNCITRAL, Decision on Jurisdiction (24 June 1998) (**Exhibit CL-157**).

³⁷³ *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award (4 May 2017) (**Exhibit CL-192**), para. 318.

319. It is also of note that in *Crystallex*, the tribunal noted that if the State’s argument were correct it “*would allow a state to continue to adopt new measures with a view to triggering new notices and amicable settlement requirements.*”³⁷⁴
320. The relationship between the Related Measures and the subject matter of the Notice of Intent can be seen as follows:
- a. Resolution VSC 829 justifies the refusal to extend the exploration phase of Concession 3452 in relation to those areas of Concession 3452 which overlapped with the Preservation Area of the 2090 Delimitation by reference to Judgement C-35. Judgement C-35 and the 2090 delimitation are specifically identified in the Notice of Intent and Resolution VSC 829 is therefore unequivocally linked to the subject matter of the dispute.
 - b. Resolution 48 addresses the effects of Judgement C-35 and the 2090 delimitation and whilst it concerns a different concession contract (Concession EJ-159 and not Concession 3452), it indicates that the ANM was issuing conflicting decisions exacerbating the uncertainty and lack of clarity described in Eco Oro’s Notice of Intent regarding Concession 3452 and thus is again related to the subject matter. The Tribunal is not asked to exercise any jurisdiction over Concession EJ-159, it is simply referenced as part of the facts relevant to Eco Oro’s claims regarding Concession 3452.
 - c. Colombia concedes that the ANM’s decision in Resolution 906 (and by association the rejection in Resolution 343 of Eco Oro’s appeal of the decision) relate to the subject matter, Resolution 906 having been described by Colombia as addressing “*the alleged uncertainty surrounding the delimitation of the Santurbán Páramo.*”³⁷⁵
 - d. By its content, Judgement T-361 created further uncertainty as to the scope of Eco Oro’s mining rights under Concession 3452 and therefore is clearly related to the subject matter of the dispute.

³⁷⁴ Claimant’s Rejoinder, para. 112; *Crystallex*, Award (4 April 2016) (**Exhibit CL-85**), paras. 455-456.

³⁷⁵ Respondent’s Reply, para. 102.

- e. The Attorney General's office, having initially deplored the legal uncertainty to which the mining industry had been subjected through the delimitation process and having urged the Government to respect existing and acquired mining rights so as not to incur State liability, then contradicted itself by stating publicly that Colombia intended to apply to UNESCO to have all its páramos formally declared World Heritage Sites, to ensure mining operations were prohibited in these areas. The Attorney General referred specifically to the Santurbán Páramo, explaining the objective was to prohibit mining in the delimited páramo areas without paying compensation to existing mining title holders. Again, this is clearly related to the subject-matter.
 - f. The letter ordering Eco Oro to submit a PTO for Concession 3452 within 30 days specifically addressed the ANM's views regarding the effect of the páramo re-delimitation on Eco Oro's ability to proceed with its obligations. Eco Oro's letters of renunciation referenced the ongoing uncertainty relating to the páramo delimitation and its effects on Concession 3452 since Resolution 2090. Hence the rationale for the renunciation is thus again related to the subject-matter.
 - g. Eco Oro had no alternative but to renunciate Concession 3452 given the acts of the ANM. Having taken contradictory positions in the latter half of 2018 with respect to whether or not Eco Oro should have received an extension for the filing of a PTO, on 14 February 2019 the ANM wrote to Eco Oro ordering it to submit a PTO within 30 days, failing which the Concession would be subject to forfeiture. Eco Oro would therefore be in breach of its obligations under the Concession resulting in the initiation of caducity proceedings which would trigger cross forfeiture of Eco Oro's other titles and frustration of the pending assignment of some of its titles to Minesa. It was not possible to prepare a PTO within the very short period of time allowed and thus renunciation was a mitigation of Eco Oro's losses.
321. Article 46 of the ICSID Convention empowers the Tribunal to hear "*incidental*" and "*additional*" claims "*arising directly out of the subject-matter of the dispute provided they are within the scope of the consent of the parties and are otherwise within the jurisdiction*

of the Centre.” ICSID tribunals have consistently applied Article 46 as well as Rule 40(1) of the ICSID Arbitration Rules to hear claims arising from State measures taken after an investor’s notice of dispute or after the commencement of arbitral proceedings.³⁷⁶

322. Whilst Colombia says Article 46 is inapplicable because Eco Oro’s failure to comply with the Article 821 requirements means there is no consent to arbitration, this argument is circular and unsupported by the text of the FTA. The issue between the Parties is whether the Parties’ scope of consent is limited exclusively to the measures listed in the Notice of Intent, or whether it extends to measures exacerbating the dispute notified and which post-date the Notice of Intent. Under Article 823, Colombia consented to having disputes submitted to arbitration so long as the pre-arbitration formalities were complied with. Once the dispute was submitted to ICSID, Article 46 of the ICSID Convention and Rule 40(1) of the ICSID Arbitration Rules gave the Tribunal jurisdiction to hear all claims that arise from the subject matter of the dispute.
323. The cases cited by Colombia to support its argument are inapposite. The tribunal in *Guaracachi*³⁷⁷ declined jurisdiction over the new claims as, *inter alia*, there was insufficient nexus between the old and new claims and the new claims all pre-dated the notice of dispute even though they were known to the claimant at the time the notice was issued. This is not the position in the present case. Equally, the tribunal in *Supervisión y Control S.A. v. Costa Rica*³⁷⁸ refused jurisdiction over new claims that were not mentioned in the Notice of Intent, nor “*directly related to those included in the Notice of Intent*” on the basis of non-compliance with the notification requirement. However, claims that were directly linked were held to be admissible.

³⁷⁶ Claimant’s Reply, paras. 762-764, invoking *CMS Gas*, Decision of the Tribunal on Objections to Jurisdiction (17 July 2003) (**Exhibit CL- 23**), paras. 116-120; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision of the Arbitral Tribunal on Objections to Jurisdiction (30 April 2004) (**Exhibit CL-165**), paras. 80-81; and *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Award (7 March 2017) (**Exhibit CL-127**), paras. 445-448.

³⁷⁷ *Guaracachi*, Award (31 January 2014) (**Exhibit RL-13**).

³⁷⁸ *Supervisión y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award (18 January 2017) (**Exhibit RL-107**), para. 346.

324. The Tribunal should therefore exercise jurisdiction over the Related Measures.

(2) The Tribunal's Analysis

(a) Article 821(2)(c)(iii)

325. Colombia's first objection is the adequacy of Eco Oro's Notice of Intent given its failure expressly to list the Related Measures in breach of Article 821(2)(c)(iii). This provision requires specification of "*the legal and factual basis for the claim, including the measures at issue.*" Given the context of Article 821 as a whole and considering the ordinary meaning of the provision, the purpose of this Article is to ensure the State is provided with sufficient detail to enable it to engage in constructive and informed discussions with the investor to enable a realistic possibility of achieving a settlement of the dispute before the arbitration is commenced. It was therefore not necessary for Eco Oro to include extensive detail in its Notice of Intent, provided "*the measures at issue*" were clear.
326. Colombia does not argue that Eco Oro wrongfully omitted relevant measures which took place before the Notice of Intent was issued. It is difficult to see how Colombia could reasonably expect Eco Oro to have identified measures that occurred after the date the Notice of Intent was issued (the Tribunal considers below whether it has jurisdiction over the Related Measures). The Notice of Intent identified that the harm suffered by Eco Oro arose as a result of Colombia's delays in delimiting the boundaries of the Santurbán Páramo in addition to the impact of Judgement C-35 in extending the boundaries of the mining ban. At the time the Notice of Intent was issued, it provided clear and full details of the measures out of which the dispute arose, namely the acts of Colombia specifically in relation to the delimitation of the Santurbán Páramo. Colombia cannot therefore reasonably argue that it was not properly apprised of the existence, scope and subject-matter of the controversy at the time the Notice of Intent was served.
327. It must also be borne in mind when considering the content and adequacy of the Notice of Intent that Eco Oro had to keep at the forefront of its mind two specific time periods when deciding when to file its Notice of Intent: the minimum six-month time limit in Article 821(2)(b) and the 39-month limitation period contained in Article 821(2)(e)(i). Eco Oro therefore had to judge the point in time at which its claim had crystallised but once

this point had been reached, it couldn't wait for an indeterminate period of time to see if Colombia effected any further measures exacerbating the dispute.

328. The Tribunal therefore turns to consider the Related Measures and specifically whether Eco Oro's inclusion of them in its submissions is bringing in "*by the back-door*" claims which were not included in the Notice of Intent. It is unclear whether Colombia says that the fact that these form a part of Eco Oro's case notwithstanding they were not referred to in the Notice of Intent renders the Notice of Intent invalid or whether Colombia's argument is that the Tribunal has no jurisdiction over Related Measures or both. As a preliminary point, it cannot be the case that a claim becomes frozen in time once a Notice of Intent is filed. Just because an investor takes the step of filing a Notice of Intent does not mean that a State will automatically cease its activity in relation to the disputed property. Claims are not static and Government action may continue in parallel with inter-party consultations and the progress of arbitral proceedings. An investor must be entitled to continue to seek remedies in relation to continuing activity which it asserts is (or may come to be) in breach of the relevant Treaty, even after it has commenced arbitration, insofar as those breaches are related to claims set out in the Notice of Intent. The alternative – to expect an investor to file a new Notice of Intent each time a further measure occurs – is hardly realistic or practical, as it would result in unnecessary waste of time and financial resources.
329. The Tribunal accepts that to the extent a measure is unrelated to the dispute but in relation to which Eco Oro sought to make a claim, such a claim should clearly be the subject of a new arbitration and the Tribunal would have no jurisdiction over such measure. However, if there is a clear nexus between the measures detailed in the Notice of Intent and the Related Measures then the Tribunal should be able to exercise its jurisdiction over the Related Measures. The Tribunal therefore considers each of the Related Measures to ascertain whether there is sufficient nexus between such measure and the claim as detailed in the Notice of Intent such that it is an evolution of the same dispute and it would therefore be inefficient to require repetition of the pre-arbitration formalities. In this regard, the Tribunal notes that the Notice of Intent is a detailed document (comprising 14 pages) with the last measure referred to being Judgement C-35.

330. The first Related Measure is Resolution VSC 829. This resolution extended Eco Oro's Concession rights only in the area which did not overlap with the Santurbán Páramo and, unlike the other extensions, made no reference to any temporary nature of the exclusion zone pending the publishing of a 1:25,000 scale delimitation. It refers to Judgement C-35 and accordingly has a nexus to the subject matter of the dispute as referred to in the Notice of Intent. The Tribunal therefore finds that it has jurisdiction over this measure.
331. Whilst Resolution 48 concerns a different concession contract, it again relates to the effects of Judgement C-35 and the Resolution 2090 delimitation and is relevant to Eco Oro's statement in the Notice of Intent as to the lack of clarity surrounding the consequences of both Judgement C-35 and the Resolution 2090 delimitation. The Tribunal notes Eco Oro's clarification that it is not asking the Tribunal to exercise any jurisdiction over Concession EJ-159 but is simply referencing it as part of the facts relevant to its claims and the Tribunal accepts that there is a sufficient nexus between it and Eco Oro's claim as detailed in the Notice of Intent.
332. Again, the Tribunal finds that Resolution 906 relates to the subject matter of the dispute as detailed in the Notice of Intent having been issued to resolve the uncertainty surrounding the delimitation of the Santurbán Páramo.
333. Constitutional Court Judgement T-361 is clearly an evolution of, and related to, the dispute.
334. Given that the Attorney General's office referred specifically to the Santurbán Páramo and explained the objective was to prohibit mining in the delimited páramo areas without paying compensation to existing mining title holders, the Tribunal again finds that the pronouncement is related to the subject-matter of the dispute.
335. The communications between Eco Oro and Colombia in relation to the requirement for Eco Oro to submit a PTO for Concession 3452 and Eco Oro's renunciation of its Concession are the final act of this evolved dispute. As such, the Tribunal finds it has jurisdiction over them.
336. In conclusion, the Related Measures are all sufficiently connected with the dispute as described in the Notice of Intent such that they each form a part of the continued unravelling

of Concession 3452. The Tribunal therefore has jurisdiction over them both pursuant to Article 46 of the ICSID Convention and as forming a continuing part of the dispute described in the Notice of Intent.

337. The Tribunal also finds that Eco Oro provided sufficient detail in its Notice of Intent such that Colombia was able to understand the basis of the case that was to be brought against it. Eco Oro therefore complied with its obligations under Article 821(2)(c)(iii).

(b) Article 821(2)(b)

338. The Tribunal next turns to Colombia's second objection, namely that Eco Oro did not respect the six-month cooling-off period. This objection is not persuasive. Eco Oro's Notice of Intent references Judgement C-35 as the final measure leading to the dispute. The date of this Judgement was 8 February 2016 and more than six months elapsed before Eco Oro commenced the arbitration. The fact the Related Measures occurred after this date and indeed continued to arise during the course of the arbitration is irrelevant; it cannot have been the intention of the drafters of the FTA that if there is a subsequent measure which exacerbates the dispute, this obliges the investor to start new arbitral proceedings and conversely it cannot be the case that a State could enable proceedings to be derailed by the simple process of effecting a further Related Measure after a Notice of Intent is issued. Accordingly, the Tribunal finds that Eco Oro is in compliance with its obligations under Article 821(2)(b). It should be noted that in coming to this determination with respect to the Tribunal's jurisdiction over the Related Measures, the Tribunal makes no findings as to the legal effect of any of these measures.

(c) Article 821(3)

339. It is unclear whether Colombia maintains its objection with respect to the alleged inadequacy of Eco Oro's waiver (if it does then it is with a notable lack of enthusiasm). The waiver issued by Eco Oro followed almost word for word the text contained in Annex 821 and the fact that it did not contain reference to the Related Measures is unsurprising given they only came into being after commencement of the arbitration. Given this and given the Tribunal's determination that the Related Measures are an evolution of the same dispute as that

described in the waiver, it is clear that the waiver is not defective. The Tribunal therefore finds that Eco Oro has complied with its obligations under Article 821(2)(e).

(d) Article 821(2)(e)(i)

340. Turning finally to Colombia’s limitation period objection under Article 821(2)(e)(i), it is common ground that the date from when the time period starts to run is the date on which Eco Oro obtained actual or constructive knowledge of the adoption of the measures the subject of the claim and became aware that a breach of the FTA could cause loss or damage to its investment. Eco Oro says it had mining rights over the entirety of Concession 3452 as at 8 September 2013 and that it was the measures which occurred after that which deprived it of these rights. It therefore does not rely on measures which took place before the cut-off date; the only relevant measures for the purposes of the Tribunal’s analysis being those which took place after the cut-off date. In these circumstances, the Tribunal cannot see how Eco Oro could be said to have known (or had constructive knowledge) of events which had yet to take place, notwithstanding Colombia’s allegations that these measures could hardly have taken Eco Oro by surprise given the measures that had been effected prior to the cut-off date. The fact that on Colombia’s analysis, Eco Oro should have anticipated such measures is not sufficient to comprise actual or constructive knowledge of the *specific* post cut-off date measures for the purposes of Article 821(2)(e)(i). The Tribunal therefore finds that Eco Oro is not in breach of Article 821(2)(e)(i).
341. In undertaking this analysis, the Tribunal has not considered whether Eco Oro did indeed have any mining rights as at the cut-off date which were capable of being expropriated; that analysis is to be performed when considering the merits of Eco Oro’s claims.

**D. WHETHER ECO ORO’S CLAIMS FALL WITHIN THE TRIBUNAL’S JURISDICTION
*RATIONE TEMPORIS***

342. Article 801(2) of the Treaty (“**Article 801(2)**”) provides as follows:

“Article 801: Scope and Coverage

[...]

2. For greater certainty, the provisions of this Chapter do not bind a Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.”³⁷⁹

343. Article 838 of the Treaty (“**Article 838**”) provides, *inter alia*, as follows:

“**covered investment means**, with respect to a Party, an investment in its territory of an investor of the other Party existing^[380] on the date of entry into force of this Agreement, as well as investments made or acquired thereafter[.]”³⁸¹

(1) The Parties’ Positions

(a) The Respondent’s Position

344. Eco Oro’s claims relate to the prohibition on mining in the páramo areas of Concession 3452 which has been in force since 2010. This is before the entry into force of the FTA on 15 August 2011 and the dispute between the Parties therefore arose before 15 August 2011. The measures which took place after that date are all a continuation of the mining ban in páramo areas which was enacted in 2010.

345. Eco Oro seeks to bring two claims against Colombia: (i) that Colombia unlawfully expropriated its investments by depriving it of “*the use and enjoyment of its right to mine the Angostura Project under Concession 3452*” and (ii) that Colombia denied Eco Oro fair and equitable treatment because it failed to “*abide by its commitments in Concession Contract 3452 and the 2001 Mining Code, including the commitment to a stabilized legal framework.*”³⁸² However, Eco Oro never had the rights it asserts and, even had it had such rights, they would have been curtailed by a series of laws and regulations prior to the FTA’s entry into force in August 2011.

³⁷⁹ Free Trade Agreement between Canada and the Republic of Colombia (signed on 21 November 2008 and entered into force on 15 August 2011) (**Exhibit C-22**; see also **Exhibit R-137**), Art. 801(2).

³⁸⁰ Pursuant to Article 106 (*Definitions of General Application*) of the FTA, “**existing means in effect on the date of entry into force of this Agreement.**” Free Trade Agreement between Canada and the Republic of Colombia (signed on 21 November 2008 and entered into force on 15 August 2011) (**Exhibit C-22**; see also **Exhibit R-137**).

³⁸¹ Free Trade Agreement between Canada and the Republic of Colombia (signed on 21 November 2008 and entered into force on 15 August 2011) (**Exhibit C-22**; see also **Exhibit R-137**), Art. 838.

³⁸² Respondent’s Memorial, paras. 74, 143.

346. In considering this, Eco Oro may only rely on those facts and matters which arose after the entry into force of the FTA; pursuant to Article 801(2) the Tribunal must disregard “*any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.*” Eco Oro’s rights to mine must be assessed at the time the FTA entered into force, however at this time Eco Oro’s mining rights had been curtailed both by the declaration of the Santurbán-Sisavita and the Santurbán Natural Regional Parks and by Resolution 937 which imposed the same mining restrictions on Eco Oro as did Resolution 2090. The dispute between the Parties therefore arose in 2010.
347. Under international law a dispute arises when a “*disagreement on a point of law or fact, a conflict of legal views or of interest between two persons*” occurs.³⁸³ The Parties have been in dispute as to Eco Oro’s rights to conduct mining activities in the Santurbán Páramo since at least April 2010, as evidenced by the following measures embodying Colombia’s policy in relation to mining activities in the páramo ecosystems and which Eco Oro opposed, namely:
- a. Law 1382;
 - b. *Concepto Técnico* 594 of 15 April 2010 by which MinAmbiente determined that a significant portion of Concession 3452 overlapped with the Santurbán Páramo;
 - c. Order 1241 of 20 April 2010 by which MinAmbiente rejected Eco Oro’s EIA on the basis that mining was prohibited in páramo ecosystems and that a significant area of Concession 3452 overlapped with the Santurbán Páramo;
 - d. Order 1859 of 27 May 2010 by which MinAmbiente determined that it would assess the merits of Eco Oro’s EIA;
 - e. Resolution 937;
 - f. Resolution 1015;
 - g. Law 1450; and

³⁸³ Respondent’s Memorial, para. 145; Respondent’s Reply, para. 23; *Mavrommatis Palestine Concessions (Greece v. U.K.)*, 1924 P.C.I.J. (ser. B) No. 3 (30 August 1924) (**Exhibit RL-45**).

- h. Eco Oro's EIA was rejected by MinAmbiente relying upon Law 1382 and which rejection was upheld by Resolution 35.
348. It can be seen from this that Resolution 2090 was not an isolated measure but instead a continuation of the mining ban established by Laws 1382 and 1450, both of which predated the FTA's entry into force. Whilst Law 1382 was struck down, the mining ban was re-enacted through Law 1450 and Eco Oro did not benefit from the grandfathering regime in Law 1382. Whilst environmental licenses could be issued for non-mining activities in the páramo, mining activities were not permitted.
349. Eco Oro did not have grandfathered rights and so had no rights to be curtailed by Law 1382 and its rights were not curtailed by Law 1450 because the mining ban did not become effective until the issuance of Resolution 2090.
350. Eco Oro's argument that to assess its jurisdiction *ratione temporis* the Tribunal should only look at the claims as framed by Eco Oro applying a *prima facie* test is wrong: an objective test should be applied.³⁸⁴ The authorities Eco Oro relies upon to support its argument are not of assistance as none relate to the question of *ratione temporis* but instead *ratione materiae*,³⁸⁵ *ratione personae*,³⁸⁶ or are otherwise inapplicable.³⁸⁷
351. Eco Oro's legitimate expectations must be derived from facts arising after the FTA's entry into force. However, in its submissions, Eco Oro says it formed legitimate expectations at two points in time: (i) when it originally acquired the mining titles which were consolidated into Concession 3452; and (ii) when the titles were in fact consolidated.³⁸⁸ These expectations are legally irrelevant and in any event must have ceased prior to the FTA

³⁸⁴ Respondent's Reply, para. 20; *Kingdom of Lesotho v. Swissbrough Diamond Mines et al.*, Judgment of the High Court of the Republic of Singapore (14 August 2017) (**Exhibit RL-157**).

³⁸⁵ Respondent's Reply, para. 16; A. Sheppard, "Chapter 23: The Jurisdictional Threshold of a Prima-Facie Case" in P.T. Muchlinski, F. Ortino, C. Schreuer (eds.), *The Oxford Handbook of International Investment Law* (2008) (**Exhibit CL-106**).

³⁸⁶ Respondent's Reply, para. 17; *Amco*, Decision on Jurisdiction (24 December 1996) (**Exhibit CL-93**); *Wena*, Decision on Jurisdiction (25 May 1999) (**Exhibit CL-94**); *Azurix*, Decision on Jurisdiction (8 December 2003) (**Exhibit CL-99**).

³⁸⁷ Respondent's Reply, para. 17; *CMS Gas*, Decision of the Tribunal on Objections to Jurisdiction (17 July 2003) (**Exhibit CL-23**); *SGS Société*, Decision on Objections to Jurisdiction (6 August 2003) (**Exhibit CL-97**).

³⁸⁸ Claimant's Reply, para. 470.

entering into force. As of 15 August 2011, Eco Oro could not legitimately have expected it would be permitted to mine in the entirety of the area of Concession 3452 as by then (i) its environmental licence application had been rejected due to the presence of the páramo ecosystem in the project area and (ii) the mining ban in páramo areas had been enacted by Laws 1382 and 1450. Pursuant to Article 801(2), legitimate expectations which arose and ceased prior to the FTA coming into force must be disregarded.

(b) The Claimant's Position

352. This objection was only advanced for the first time in Colombia's Reply on Jurisdiction and therefore should be excluded under Rule 41 of the ICSID Arbitration Rules. In any event it is wrong.³⁸⁹
353. The Tribunal must determine Colombia's jurisdictional objections on a *prima facie* basis, this being the "universal" approach when considering jurisdictional objections.³⁹⁰ Colombia is wrong to say this only applies to the evaluation of objections *ratione materiae*. In the commentary relied upon by Eco Oro, the author merely notes that the *prima facie* test was used "less frequently" and since publication of this article, the *prima facie* test has been used in a number of cases.³⁹¹
354. As a threshold matter, the events raised by Colombia do not form the basis of Eco Oro's claims and are accordingly irrelevant for the purposes of determining jurisdiction. Colombia says that prior to the entry into force of the FTA, Eco Oro's rights had already been curtailed by (i) the declaration of the Sisavita Regional Park; (ii) the declaration of the Santurbán Regional Park; and (iii) Resolution 937 which adopted the 2007 Atlas. Eco Oro's rights

³⁸⁹ Claimant's Rejoinder, para. 128.

³⁹⁰ Claimant's Reply, para. 787, making reference to *Amco*, Decision on Jurisdiction (24 December 1996) (**Exhibit CL-93**), para. 38; *Wena*, Decision on Jurisdiction (25 May 1999) (**Exhibit CL-94**), pp. 890-891; *CMS Gas*, Decision of the Tribunal on Objections to Jurisdiction (17 July 2003) (**Exhibit CL-23**), para. 35; *Azurix*, Decision on Jurisdiction (8 December 2003) (**Exhibit CL-99**), para. 73; *SGS Société*, Decision on Objections to Jurisdiction (6 August 2003) (**Exhibit CL-97**), paras. 144-145.

³⁹¹ See A. Sheppard, "Chapter 23: The Jurisdictional Threshold of a Prima-Facie Case" in P.T. Muchlinski, F. Ortino, C. Schreuer (eds.), *The Oxford Handbook of International Investment Law* (2008) (**Exhibit CL-106**), p. 960. See also *Eli Lilly and Company v. Government of Canada*, ICSID Case No. UNCT/14/2, Final Award (16 March 2017) (**Exhibit CL-128**), paras. 163 and 165; *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Procedural Order No. 2 (Revised) (31 May 2005) (**Exhibit RL-4**), para. 12; *Infinito*, Decision on Jurisdiction (4 December 2017) (**Exhibit RL-24**), paras. 185-187, 332-333.

were not curtailed by any of these three events. The Sisavita Regional Park did not overlap with the Angostura deposit at all and the Santurbán Regional Park only overlapped with a *de minimis* part of the Angostura deposit. The declarations of the two regional parks were not relied upon by Colombia as being relevant to Colombia's jurisdictional objections in its submissions prior to its Reply and their creation is irrelevant to Eco Oro's claim.

355. Colombia's argument that any legitimate expectations Eco Oro may have had must have ceased by the time the FTA entered into force is incorrect. The events referred to by Colombia did not deprive Eco Oro of its rights and therefore cannot have had any negative effect on Eco Oro's legitimate expectations. As Eco Oro's rights were only deprived by events which took place after the FTA entered into force, its legitimate expectations arising out of those rights could not have ceased to exist.
356. That should be the end of the investigation. If, however, Colombia's argument needs to be addressed in substance, it is clear that the real dispute between the Parties does not arise from events prior to the cut-off date but from after the FTA came into force.
357. Thus, it was only events after the FTA entered into force that caused Eco Oro to suffer a permanent loss and only those events which resulted in Eco Oro having knowledge of a breach of the FTA causing it loss and therefore triggering the FTA time limitation.

(2) The Tribunal's Analysis

358. Eco Oro says that in making its case it does not rely upon any acts or facts that arose before the entry into force of the FTA, namely on 15 August 2011. It states that it relies only upon those acts which took place thereafter.
359. Eco Oro further says its rights were only deprived by events which took place after the FTA entered into force, such that its legitimate expectations arising out of those rights could not have ceased to exist.
360. For the purposes of this jurisdictional objection, as Eco Oro relies only on post-15 August 2011 measures, that is sufficient to found jurisdiction over those measures: the Tribunal does not have jurisdiction to determine whether prior acts are compatible with the FTA, although

it is entitled to have regard to those acts in establishing the facts as they occurred after 15 August 2011, including the state of mind of the Parties, and the expectations they may have had at that time. Whether or not Eco Oro had protected rights will be considered below, but on the basis that Eco Oro's claim stands or falls on its reliance only upon facts and events which occurred after 15 August 2011, the requirements of Article 801(2) are satisfied.

**E. WHETHER ECO ORO'S CLAIMS FALL WITHIN THE TRIBUNAL'S JURISDICTION
RATIONE MATERIAE**

361. Article 2201(3) of the Treaty ("**Article 2201(3)**") provides as follows:

"Article 2201: General Exceptions

[...]

(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.*

[...]."³⁹²

³⁹² Free Trade Agreement between Canada and the Republic of Colombia (signed on 21 November 2008 and entered into force on 15 August 2011) (**Exhibit R-137**).

(1) The Parties' Positions

(a) The Respondent's Position

(i) Colombia has not consented to arbitrate claims arising out of measures which are expressly excluded from the scope of the FTA

362. Colombia argues that Article 2201(3) of the FTA should be construed as providing that nothing in the FTA is to be read as restricting the Contracting Parties' ability to adopt measures "*necessary [t]o protect human, animal or plant life or health*" and for "*the conservation of living or non-living exhaustible natural resources*". On that basis, Colombia asserts that it has not consented to arbitrate disputes relating to such measures, as Colombia's consent to arbitration set out in Article 823 of the FTA only extends to "*claim[s] by an investor of a Party that the other Party has breached [...] an obligation under Section A [of the FTA]*". There can be no breach of the FTA if the actions taken by Colombia are *(i)* necessary; *(ii)* do not constitute arbitrary or unjustifiable discrimination; and *(iii)* are not disguised restrictions on international trade.³⁹³ Article 2201(3) does not solely apply to limit a tribunal's right to award non-monetary damages.³⁹⁴ Further, given environmental measures were excluded from Chapter Eight in its entirety, it is not surprising that the more specific exclusion provided for in Article 837 does not reference them and the fact Annex 811(b) confirms that measures for the "*protection of the environment*" do not constitute indirect expropriation is equally unremarkable given their exclusion from the scope of Chapter Eight. The Parties have not consented to resolve through arbitration claims concerning measures that fall outside the scope of Chapter Eight and the Tribunal therefore does not have jurisdiction to adjudicate on these measures.

363. Support for this can be found in an opinion of the Court of Justice of the European Union ("**CJEU**"), stating that environmental exceptions in investment instruments act as a bar to jurisdiction over claims concerning measures for the protection of the environment.³⁹⁵

³⁹³ Respondent's Memorial, para. 157.

³⁹⁴ Respondent's Memorial, para. 158; Respondent's Reply, para. 124; Respondent's Post-Hearing Brief, paras. 44-49.

³⁹⁵ CJEU Opinion on CETA 1/17 (30 April 2019) (**Exhibit RL-173**).

364. Colombia further asserts that Article 2201(3) should be read consistently with GATT Article XX which is phrased in very similar terms to Article 2210(3) and on which the Environment Agreement and this carve-out are based. It is apposite to refer to GATT and WTO law in interpreting Article 2201(3),³⁹⁶ which support its construction.
365. Finally, Colombia posits that the second sentence in Article 2201(4) of the FTA does not appear in either of the treaties giving rise to the disputes in *Bear Creek*³⁹⁷ (the Canada-Peru FTA) and *Infinito*³⁹⁸ (the Canada-Costa Rica BIT), cited by Eco Oro in support of its interpretation of Article 2201(3). *Bear Creek* and *Infinito* are thus clearly distinguishable on this basis alone, and cannot inform the Tribunal's interpretation of Article 2201(3), which must be construed on its own terms, against the background of the other terms of the FTA, and in light of its particular object and purpose and all other important principles of international treaty interpretation.³⁹⁹

(ii) Eco Oro's claims fall squarely within the Environmental Exception of the FTA and therefore outside of the Tribunal's jurisdiction

366. The measures giving rise to Eco Oro's claims are all measures falling within the FTA's environmental carve-out because they were all necessary for the protection of human, plant and animal life, namely the páramo ecosystem and for the conservation of non-living exhaustible natural resources, namely water. These measures have not been applied "*in a manner that constitutes arbitrary or unjustifiable discrimination*" as they apply to all holders of mining rights located in areas which overlap the Santurbán Páramo. Indeed, Colombia notes that Eco Oro has not alleged discrimination.⁴⁰⁰

³⁹⁶ Respondent's Counter-Memorial, para. 425, making reference to *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award (5 September 2008) (**Exhibit CL-53**).

³⁹⁷ *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award (30 November 2017) (**Exhibit CL-91**) ("*Bear Creek*").

³⁹⁸ *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Decision on Jurisdiction (4 December 2017) (**Exhibit RL-24**) ("*Infinito*").

³⁹⁹ Respondent's Post-Hearing Brief, para. 49.

⁴⁰⁰ Respondent's Memorial, para. 162.

(b) The Claimant's Position

(i) Article 2201(3) of the Treaty has no bearing on Eco Oro's claims and Colombia's interpretation is incorrect

367. Article 2201(3) provides that “*nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures*” taken for any of the listed purposes that meet the qualifying criteria. The text of Article 2201(3) is explicit and specific: the ordinary meaning is that it does not prevent the payment of compensation (which payment does not prevent Colombia from adopting or enforcing measures to protect the environment) but only applies when a State is seeking to pass (adopt) or implement (enforce), *inter alia*, environmental measures.⁴⁰¹ Indeed, the payment of compensation, as a result of an internationally wrongful act such as a breach of the FTA, is a default rule under international law.⁴⁰² It is unnecessary for Article 2201(3) to state that this obligation remains in effect; to the contrary, it would require explicit and unequivocal text to restrict a State's obligation to pay compensation.⁴⁰³
368. Again, applying the VCLT rules on treaty interpretation, Article 2201(3) specifically applies to Chapter Eight. Article 834(2)(b) (in Chapter Eight) permits a tribunal to award restitution but the act of restitution may require what Article 2201(3) expressly prohibits. It cannot be correct that Article 2201(3) carves out environmental measures from the ambit of Chapter Eight: if it had there would have been no need to refer to them in Chapter Eight at all. For example, pursuant to Annex 811(2)(b), in “*rare circumstances*” environmental measures will amount to an indirect expropriation. Had environmental measures been excluded from

⁴⁰¹ See Claimant's Reply, fn. 1500, where Eco Oro asserts that “[a] similar provision appears at Article 1114 of NAFTA. It has been interpreted as serving the purpose of a general reminder to be ‘sensitive to environmental concerns.’ *Metalclad Corporation v The United Mexican States (ICSID Case No ARB(AF)/97/1*, Award, 30 August 2000, **CL-15**, para 98: ‘This conclusion is not affected by NAFTA Article 1114, which permits a Party to ensure that investment activity is undertaken in a manner sensitive to environmental concerns’; see also *SD Myers, Inc v The Government of Canada (UNCITRAL)*, Separate Opinion of Dr Bryan Schwartz, 12 November 2000, **CL-95**, paras 117-118: ‘Commentators on NAFTA have referred variously to Articles like 1114 as ‘tautologies’ or as ‘diplomatic, rather than legal’ statements. [...] I view Article 1114 as acknowledging and reminding interpreters of Chapter 11 (Investment) that the parties take both the environment and open trade very seriously and that means should be found to reconcile these two objectives and, if possible, to make them mutually supportive.’”

⁴⁰² See, e.g., Claimant's Rejoinder, para. 208; Claimant's Post-Hearing Brief, para. 117, where Eco Oro makes reference to Articles 27(b) and 36(1) of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) (**Exhibits CL-17 / CL-202 / RL-115**).

⁴⁰³ Claimant's Rejoinder, para. 208.

Chapter Eight this provision would not have been included. Again Article 807(2) carves out environmental measures, but had they been excluded in their entirety from Chapter Eight this would have been unnecessary. In any event the second sentence of this article specifically provides that an environmental measure will still be subject to the investment protections offered in Articles 803 and 804 (guarantees of National Treatment and Most-Favoured Nation Treatment): this is irreconcilable with Colombia's asserted construction.

369. A further argument against Colombia's construction is the absence in Article 837 of a reference to environmental measures. Article 837 refers to those matters excluded from the dispute settlement provisions of Chapter Eight as listed in Article 837, but environmental measures are not included in the list and nor are measures falling within the ambit of Article 2201(3). Colombia's argument that the alleged general carve-out of environmental measures contained in Article 2201(3) explains both the inclusion and exclusion of references to environmental measures is contradictory. It is also noteworthy that Article 2202, which takes, in part, the same form as Article 2201(3) and which contains an exception for national security, is explicitly referenced in the exceptions contained in Article 837.
370. This construction is supported both by the decisions in *Bear Creek*⁴⁰⁴ and *Infinito*.⁴⁰⁵ The tribunal in *Bear Creek* considered an identical provision to Article 2201(3) holding that it could not be interpreted in such a way as to absolve Peru of a liability to compensate the investor for breach of a provision in the Canada-Peru FTA, stating that “*since the exception in Article 2201 does not offer any waiver from the obligation in Article 812 to compensate for the expropriation, Respondent has also failed to explain why it was necessary for the protection of human life not to offer compensation to Claimant for the derogation of Supreme Decree 083.*”⁴⁰⁶
371. The CJEU authority referred to by Colombia is inapposite, (i) being contained in an opinion relating to the compatibility of CETA with EU law and not arising out of adversarial proceedings; and (ii) having been the product of teleological interpretation as opposed to the

⁴⁰⁴ Claimant's Reply, para. 821; *Bear Creek*, Award (30 November 2017) (**Exhibit CL-91**).

⁴⁰⁵ Claimant's Rejoinder, para. 212; *Infinito*, Decision on Jurisdiction (4 December 2017) (**Exhibit RL-24**).

⁴⁰⁶ *Bear Creek*, Award (30 November 2017) (**Exhibit CL-91**), paras. 477-478.

textual analysis required by the VCLT. Colombia's reference to decisions rendered pursuant to GATT Article XX is equally inappropriate. GATT Article XX only applies to Chapters Two to Seven and therefore cannot shed any light on the interpretation of Article 2201(3).⁴⁰⁷

372. Article 2201(3) permits an investor to seek compensation but not restitution for a breach of the FTA. As Eco Oro is not seeking restitution, only monetary compensation, Colombia is not prevented from “*adopting or enforcing*” the measures at issue and Article 2201(3) has no relevance to Eco Oro's claim.

(2) Canada's Non-Disputing Party Submission

373. In a non-disputing party submission dated 27 February 2020, Canada provided its views on Article 2201(3). It noted that the general exceptions in sub paragraphs 1 – 3 are standard in Canada's trade agreements and the language used is generally similar across its agreements. This enables States to “*differentiate between investments on the basis of a broad range of policy objectives without breaching the national treatment obligation*” meaning that “*legitimate regulatory actions will rarely need to be justified on the basis of the general exception on Article 2201(3) because they will not constitute breaches of the investment obligations in the first place.*” The general exceptions thus act as a “*final 'safety net' to protect the State's exercise of regulatory powers in pursuit of the specific legitimate objectives identified in the exceptions.*”⁴⁰⁸
374. Canada notes that these exceptions only apply once there has been a determination that there is a breach of a primary obligation in Chapter Eight. The exceptions in Article 2201 cannot broaden the scope of a State's primary obligations. For the exception to apply, the measure in question must (i) not be applied in a manner that constitutes arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment; (ii) relate to one of the policy objectives set out in paragraphs (a) – (c) (which includes the protection of the environment); and (iii) be “*necessary*” to achieve these objectives. If the general exception applies, there can be no

⁴⁰⁷ Claimant's Rejoinder, para. 216.

⁴⁰⁸ Canada's Non-Disputing Party Submission, paras. 19-20.

violation of the FTA and thus no State liability and, consequently, payment of compensation would not be required.

375. Canada further notes (in response to a question raised to the Parties by the Tribunal) that each sub-paragraph of Article 2201 has its own scope of application and should be read and construed without reference to any of the other sub-paragraphs.
376. Canada finally explains that the Contracting Parties to the FTA “*did not view their investment obligations as being at odds with the protection of environmental and social goals and their environment and human rights obligations.*” As provided for in Article 1701 of the FTA, the Contracting Parties “*affirmed that trade and environment policies are mutually supportive*” and that “*a good faith interpretation of investment obligations in their context and in light of the purpose and objective of the [FTA], will not be inconsistent with a State’s ability to adopt environmental protection measures. In this respect, in the context of an allegation that a regulatory measure is in breach of Article 811, a proper analysis of the measure in light of the guidance provided in Annex 811.2 (and if necessary under Article 2210(3)) will not limit the State’s ability to regulate in the public interest for the protection of the environment.*”⁴⁰⁹
377. In response, Eco Oro notes Canada’s acceptance that Article 2201(3) bears no relation to the question of Colombia’s consent to arbitrate. This is a matter addressed in Articles 818 – 837. Canada confirms Article 2201(3) only applies after determination of a breach of a primary obligation in Chapter Eight; this presupposes that a tribunal constituted under Chapter Eight will have had jurisdiction to hear claims based on, *inter alia*, environmental measures. Given the exceptions listed in Article 837 and its Annex do not include environmental measures, it is clear that Colombia has consented to arbitrate claims arising out of environmental measures; there is no wholesale exclusion of environmental measures from the scope of Chapter Eight.
378. Colombia concurs generally with Canada’s submission and notes the Tribunal should place “*significant weight*” on it. Colombia further notes with approval Canada’s submission that

⁴⁰⁹ Canada’s Non-Disputing Party Submission, paras. 24-25.

the Article 2201(3) exception operates as a “*safety net*” and that where it applies there is no violation of the FTA and no liability to pay compensation, which submission, it says, is irreconcilable with Eco Oro’s submission that Article 2210(3) only operates to prevent a tribunal awarding non-monetary relief. This is a “*highly persuasive*” basis to depart from the *Bear Creek* and *Infinito* judgements cited by Eco Oro (to the extent they are in any event relevant). Article 2210(3) is clearly a “*critical component*” in the FTA scheme providing for the balance between investment protection and environmental and human rights obligations.

(3) The Tribunal’s Analysis

379. The Tribunal is here considering the relevance of Article 2201(3) in terms of Colombia’s jurisdictional objection and not in terms of the merits of Eco Oro’s claim.
380. The Tribunal construes Article 2201(3) in accordance with its ordinary meaning pursuant to the VCLT to consider its applicability to the question of jurisdiction. The title of this Article is “General Exceptions” and Article 2201(3) commences with the words “*For the purposes of Chapter Eight [...]*.” Given these words, it is difficult to construe Article 2201(3) other than as in principle being of application when Chapter Eight is engaged, rather than applying to exclude the totality of the application of Chapter Eight. Had it been intended, as contended for by Colombia, that environmental measures *per se* were entirely outside the scope of Chapter Eight, the measures listed in Article 2201(3) would not be referred to as ‘exceptions’ to Chapter Eight; the words would be redundant. The fact that there is a detailed description of the specific purpose and necessity of the environmental measures provided for in Article 2201(3) (which list is a contained list and not just examples of measures that are to be regarded as exceptions) is inconsistent with Colombia’s construction. Were it intended that all forms of environmental measures are excluded from Chapter Eight, this level of detail would also be redundant. The Tribunal’s analysis is supported by Canada’s submissions that these exceptions only apply once there has been a determination that there is a breach of a primary obligation in Chapter Eight.⁴¹⁰

⁴¹⁰ Canada’s Non-Disputing Party Submission, para. 16.

381. Accordingly, the Tribunal does not accept Colombia’s submissions that this provision can operate as a bar to the existence or exercise of jurisdiction, and it therefore finds it has jurisdiction *ratione materiae*.

VII. SUBSTANTIVE CLAIMS

382. Having concluded that it has jurisdiction to determine Eco Oro’s claims, the Tribunal now turns to consider the merits of its substantive claims.

383. The Claimant submits that Colombia has breached Article 811 of the Treaty (“**Article 811**”) relating to expropriation, as well as multiple aspects of Article 805 of the Treaty (“**Article 805**”) relating to the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security. The Respondent denies having breached any provision of the Treaty.

A. ARTICLE 811 OF THE FTA AND EXPROPRIATION

384. Article 811 provides as follows:

“(1) *Neither Party may nationalize or expropriate a covered investment*^[411] *either directly, or indirectly through measures*^[412] *having an effect equivalent to nationalization or expropriation (hereinafter referred to as ‘expropriation’), except:*

⁴¹¹ Pursuant to Article 838 (*Definitions*) of the FTA, “**covered investment** means, with respect to a Party, an investment in its territory of an investor of the other Party existing on the date of entry into force of this Agreement, as well as investments made or acquired thereafter.” The same provision establishes that “**investment** means: (a) an enterprise; (b) shares, stocks and other forms of equity participation in an enterprise; (c) bonds, debentures and other debt instruments of an enterprise, but does not include a debt instrument of a state enterprise; (d) a loan to an enterprise, but does not include a loan to a state enterprise; (e) an interest in an enterprise that entitles the owner to a share in income or profits of the enterprise; (f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution; (g) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor’s property in the territory of the Party, including turnkey or construction contracts, or concessions, or (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise; (h) intellectual property rights; and (i) any other tangible or intangible property, moveable or immovable property, and related property rights acquired in the expectation or used for the purpose of economic benefit or other business purposes.”

⁴¹² Pursuant to Article 106 (*Definitions of General Application*) of the FTA, “**measure** includes any law, regulation, procedure, requirement or practice.”

- (a) *for a public purpose;*^{413]}
 - (b) *in a non-discriminatory manner;*
 - (c) *on prompt, adequate, and effective compensation in accordance with paragraphs 2 to 4; and*
 - (d) *in accordance with due process of law.*
- (2) *Such compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ('date of expropriation'), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. To determine fair market value a Tribunal shall use appropriate valuation criteria, which may include going concern value, asset value including the declared tax value of tangible property, and other criteria.*
 - (3) *Compensation shall be paid without delay and shall be fully realizable and freely transferable. Compensation shall be payable in a freely convertible currency and shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of payment.*
 - (4) *The investor affected shall have a right under the law of the expropriating Party, to prompt review of its case and of the valuation of its investment by a judicial or other independent authority of that Party in accordance with the principles set out in this Article.*
 - (5) *This Article shall not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with the WTO Agreement.*⁴¹⁴

385. Annex 811 of the Treaty (“**Annex 811**”) provides as follows:

“The Parties confirm their shared understanding that:

⁴¹³ Free Trade Agreement between Canada and the Republic of Colombia (signed on 21 November 2008 and entered into force on 15 August 2011) (**Exhibit C-22**; see also **Exhibit R-137**). Footnote 7 to Article 811 of the FTA provides that “[t]he term ‘public purpose’ is a concept of public international law and shall be interpreted in accordance with international law. Domestic law may express this or similar concepts using different terms, such as ‘social interest’, ‘public necessity’ or ‘public use.’”

⁴¹⁴ Free Trade Agreement between Canada and the Republic of Colombia (signed on 21 November 2008 and entered into force on 15 August 2011) (**Exhibit C-22**; see also **Exhibit R-137**), Art. 811.

- (1) *Paragraph 1 of Article 811 addresses two situations. The first situation is direct expropriation, where an investment is nationalized or otherwise directly expropriated as provided for under international law.*
- (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.”⁴¹⁵*

386. For ease of reference, in considering the Parties’ submissions, the Tribunal includes such detail as it finds helpful with respect to the facts contended for by each Party, the relevant laws and each Party’s contentions to the meaning and effect of each such law, notwithstanding that there may be some repetition of facts previously covered in the Factual Background section (section IV above).

387. The Tribunal first considers the nature of Eco Oro’s covered investment.

⁴¹⁵ Free Trade Agreement between Canada and the Republic of Colombia (signed on 21 November 2008 and entered into force on 15 August 2011) (**Exhibit C-22**; see also **Exhibit R-137**).

B. ECO ORO'S COVERED INVESTMENT

(1) The Parties' Positions

(a) *The Claimant's Position*

388. As at December 2014, Eco Oro's Treaty-protected rights arising out of Concession 3452 and its regulatory framework consisted of: (i) the exclusive right to explore and exploit mineral resources in the entirety of the Concession area;⁴¹⁶ (ii) the right to a stabilised mining legal framework such that only those new, more favourable mining laws enacted after the execution of Concession 3452 in February 2007 would apply to its Concession;⁴¹⁷ and (iii) the right to renew the Concession for an additional 30 years upon fulfilling the requisite conditions.⁴¹⁸
389. These rights initially arose out of Permit 3452. From 1997, Eco Oro carried out its mining activities in the area covered by Permit 3452 pursuant to an approved PMA.⁴¹⁹ Permit 3452 and Eco Oro's subsequent titles were granted under the 1988 Mining Code,⁴²⁰ which required a concessionaire to obtain an exploration licence and complete its exploration activities before obtaining an exploitation licence. Pursuant to Article 6 of the 1988 Mining Code, permits granted prior to the 1998 Mining Code (such as Permit 3452) and exploration and exploitation licences issued pursuant to the 1988 Mining Code constituted acquired rights. Article 10 of the 1988 Mining Code provided that mining activities could be carried out anywhere in Colombia, save for the restricted mining zones, which included

⁴¹⁶ Concession Contract No. 3452 (8 February 2007) (**Exhibits C-16 / MR-34**), Clause 4. Whilst in opening submissions, Mr. Blackaby appeared to concede that Eco Oro only had an acquired right to apply for an environmental licence and not an acquired right to exploit subject to obtaining an environmental licence (Tr. Day 1 (Mr. Blackaby), 31:6-7), in paragraph 3 of its Post-Hearing Brief, Eco Oro maintains its submission that it had valuable rights to exploit, which exploitation rights were expropriated by Colombia.

⁴¹⁷ By signing Concession Contract 3452, Eco Oro gained access to Article 46 of the 2001 Mining Code – Law No. 685 (as amended) (8 September 2001) (**Exhibit C-8**).

⁴¹⁸ Concession Contract No. 3452 (8 February 2007) (**Exhibits C-16 / MR-34**); Article 77 of the 2001 Mining Code – Law No. 685 (as amended) (8 September 2001) (**Exhibit C-8**).

⁴¹⁹ Environmental Management Plan for Gold Exploration in the Municipality of California, Santander, prepared by Geocol, Ltda. For Greystar (March 1997) (**Exhibit C-4**); CDMB, Resolution No. 568 (4 June 1997) (**Exhibits C-5 / R-64**); and Decree 1753 of 1994 (8 March 1994) (**Exhibit C-307**).

⁴²⁰ Decree No. 2655 of 1988 (Mining Code 1988) (23 December 1988) (**Exhibit C-64**) (as cited in Claimant's Memorial, para. 320).

“ecological, farming or livestock reserve areas in accordance with Article 9 [...]” Article 9 provided that:

“The Ministry may indicate areas in which prospecting, exploration or exploitation mining works should not be carried out according to existing studies, since these are incompatible with such works pursuant to the Renewable Natural Resources and Environmental Protection Code [...].

The indication referred to in the previous paragraph does not affect previously issued titles, while they remain valid.”

390. The mining titles that Eco Oro obtained had no existing environmental restrictions and two of the licences obtained (granted pursuant to the 1988 Mining Code) were converted into exploitation licences shortly after being acquired by Eco Oro.⁴²¹ Permit 3452 was not within a prohibited area and therefore Eco Oro had acquired rights to explore and exploit pursuant to Permit 3452 and its other exploration and exploitation licences over 92% of the Angostura deposit.
391. Article 6 of the 1988 Mining Code established what constituted acquired rights for the purposes of mining laws and regulations (namely duly executed and formalised concession contracts) and noted the difference between such acquired rights and mere expectations.⁴²² Thus, when the titles were consolidated under Article 101 of the 2001 Mining Code into Concession 3452, this gave Eco Oro acquired rights pursuant to Article 6 of the 1988 Mining Code. Eco Oro’s single unified title granted it the right (and obligation) to explore and exploit the entirety of the Concession area for up to 30 years and to obtain an extension of the Concession.⁴²³ Whilst seven of the ten titles were under exploitation at the time of integration, it is accepted that when Concession 3452 was granted, it reverted to being in the exploration phase.⁴²⁴ However, on being granted the unified title, the ANM approved Eco Oro’s Unified Exploration and Exploitation Program, confirming it had fully complied with the obligations set out in the various integrated titles. Eco Oro’s Concession 3452 had

⁴²¹ Exploration Licences 13356 and 47-68. See Greystar Resources Ltd., Consolidated Financial Statements for years ended December 31, 2004 and 2003 (9 March 2005) (**Exhibit C-96**), pp. 11-12.

⁴²² Decree No. 2655 of 1988 (Mining Code 1988) (23 December 1988) (**Exhibit C-64**), Art. 6.

⁴²³ Articles 45, 58 and 70, of the 2001 Mining Code. Law No. 685 (as amended) (8 September 2001) (**Exhibit C-8**).

⁴²⁴ Tr. Day 4 (Professor Ricaurte), 879-883.

a duration of 20 years because the ANM deducted the ten years of exploration that had been conducted under the oldest integrated title, namely Permit 3452.

392. Concession 3452 was a new contract and subject to a new legal regime but it was not a new title: the concessionaire was entitled to assume that mining would continue to be allowed as it had been allowed under the old regime.⁴²⁵ Although Concession 3452 was only registered on 9 August 2007, it came into effect on 8 February 2007 when it was executed.⁴²⁶

393. Eco Oro's rights pursuant to Concession 3452, included the following:

- a. To explore (clause 4(a)), which right entailed two reciprocal obligations on Eco Oro (i) to pay surface canons over the entire area and (ii) the obligation to explore. Eco Oro further had the right and obligation to apply for an environmental licence by submitting a PTO for approval of the mining authority and an EIA for the approval of the environment authority, prior to the expiry of the exploration phase. Upon being granted an environmental licence, Eco Oro was then permitted to commence exploitation activities;
 - b. The exclusive right to exploit in the concession area (clause 4(b));
 - c. The right to request an extension of the concession.
394. Eco Oro's right to undertake exploitation activities in the whole of Concession 3452 is an acquired right. Pursuant to Articles 58 and 197 of the 2001 Mining Code, Eco Oro had acquired rights under Concession 3452 to explore, to exploit (provided the relevant environmental regulations were complied with) and to obtain an extension of the Concession. This is confirmed by (i) an opinion of MinMinas in 2012;⁴²⁷ (ii) the *Consejo de Estado* in a 2017 judgement;⁴²⁸ and (iii) by Clause One of Concession 3452 which stated

⁴²⁵ ANM Memorandum (2 October 2014) (**Exhibit PMR-32**); Tr. Day 4 (Professor Ricaurte), 904:4-905:11.

⁴²⁶ Ricaurte Opinion, para. 27.

⁴²⁷ Ministry of Mines and Energy Opinion 2012026198 in response to question raised by the Attorney General's Office regarding Mining Concession Contracts (14 May 2012) (**Exhibit PMR-26**).

⁴²⁸ *Consejo de Estado*, Judgment No. 38338 (6 July 2017) (**Exhibit PMR-37**).

that the object of the agreement was “to undertake a project of economic exploitation [...] in the entire area set out in Clause Two of this agreement [...]”⁴²⁹

395. The fact that Eco Oro had to fulfil certain requirements (pre-conditions) before being able to exercise its exploitation rights (such as obtaining approval of its PMA and getting an environmental licence) does not change the fact these rights are acquired rights and not condition precedents. This is demonstrated, *inter alia*, by the 2005 MinAmbiente Decree governing the granting of licences (“the granting of an environmental licence is the pre-condition for the exercise of rights arising from [...] concessions”)⁴³⁰ and as stated in a letter from MinAmbiente to the *Consejo de Estado* dated 7 October 2014.⁴³¹ Thus, Concession 3452 gave Eco Oro acquired rights, the exercise of which was subject to obtaining the relevant approvals, permits and licences. This became part of Eco Oro’s patrimony and thus subject to legal protection. Eco Oro’s application for an environmental licence was entitled to be considered as if there was no blanket ban on mining.
396. For Eco Oro’s right to exploit to be subject to a condition precedent (a suspensive condition) as argued by Colombia, it would have had to have been expressly agreed to by both Parties. The provision in Concession 3452 that Eco Oro had to apply for an environmental licence was not a condition precedent but a legal requirement to be complied with to exercise a right under the Concession. There are many such requirements, for example the various permits and authorisations required for exploration activities as provided for in Article 198 of the 2001 Mining Code. This is clear from reading Articles 59, 197 and 199 of the 2001 Mining Code which refer to the exercise of a right.
397. In compliance with these rights and obligations, Eco Oro has invested over USD 250 million, over the course of 20 years, building: roads; over 1,000 drilling platforms from which it has drilled over 362 kilometres of cores; several kilometres of exploration tunnels to expand the existing network of tunnels that had existed when it acquired the underlying titles; and a

⁴²⁹ Concession Contract 3452 (8 February 2007) (**Exhibit C-16**), Clause 1.

⁴³⁰ Decree No. 1220 of 2005 (21 April 2005) (**Exhibit C-97**), Art. 5.

⁴³¹ Letter from the Ministry of Environment (Mr. Vallejo) to the *Consejo de Estado* (Mr. Hernandez) (7 October 2014) (**Exhibit C-348**).

water treatment plant to treat the water draining from these tunnels. It has also declared over 3.2 million ounces of resources.⁴³²

398. Pursuant to Article 45 of the 2001 Mining Code, Eco Oro carried these activities out and incurred expense at its own technical and economic risk; not at its own legal risk. The concession contract is an adhesion contract, established by the administrator. It is also a reciprocal State contract (as defined by Article 1498 of the Civil Code) and, as confirmed by Colombian jurisprudence, it is not aleatory.⁴³³ Its purpose is to provide clear and firm legal stability to those private parties that participate in exploration and exploitation activities, conferring rights and obligations, such that the applicable legal rules are those in force at the time the contract is perfected. Whilst it is accepted that certain subsequent public interest laws, for example environmental laws, may adversely affect such a contract pursuant to the principle that the public interest prevails over private interests, given the rights are acquired, compensation is payable if the rights are adversely affected.⁴³⁴ Article 90 of the Constitution provides that for the State to be liable to pay compensation, there are three requirements: *(i)* the existence of harm; *(ii)* the harm must be attributable to the State through either an action or omission by any public authority; and *(iii)* such harm must be unlawful. The compensable loss includes economic and non-economic losses, including loss of a chance; the valuation is governed by the principles of full reparation and equity.
399. Were Colombia's construction correct, it would entail Eco Oro renouncing its right both to compensation and to the re-establishment of the economic equilibrium of the concession. This would be impermissible under Colombian jurisprudence and doctrine as it would distort the commutative nature of the concession contract. Because these are reciprocal contracts, the only risks that can be validly transferred to the concessionaire are the economic risks of the project, never legal or regulatory risks.⁴³⁵

⁴³² Claimant's Reply, para. 82; Second Compass Lexecon Report, Appendix D; Compass Lexecon Historical Cost Summary (Undated) (**Exhibit CLEX-96**).

⁴³³ Administrative Tribunal for Cundinamarca Judgment (29 November 2018) (**Exhibit PMR-41**).

⁴³⁴ Tr. Day 4 (Professor Ricaurte), 865-869.

⁴³⁵ Tr. Day 1 (Mr. Blackaby), 39:11 – 41:15; Ricaurte Opinion, para. 63; Administrative Tribunal for Cundinamarca Judgment (29 November 2018) (**Exhibit PMR-41**); and S. Montes, "Concesiones viales, la

(b) The Respondent's Position

400. Eco Oro did not have an exclusive right to explore and exploit mineral resources in the entirety of the concession area arising out of Concession 3452. Its only right was the right to explore for minerals and to apply, within strict time limits, for the necessary permissions and licenses to construct mining infrastructure and exploit minerals, subject always to compliance with applicable licensing restrictions and other relevant laws.
401. Eco Oro identifies its covered investment as being those rights arising out of Concession 3452 and the regulatory framework and asserts that these rights were expropriated. Whilst Permit 3452 was an exploration and exploitation permit, it only covered 250 hectares out of Concession 3452's 5,000 hectares and all exploitation activities had been discontinued prior to Eco Oro's acquisition of it. Eco Oro had no acquired rights at the time of executing Concession 3452 to mine in the entirety of Concession 3452 or at all. All rights, including any exploitation rights it may have had under the 1988 Mining Code and Decree 2477 of 1986, were voluntarily relinquished upon its entry into Concession 3452, when its rights instead became subject to the 2001 Mining Code.⁴³⁶ Only mining titles governed by the 2001 Mining Code, or those in respect of which a conversion request to the 2001 Mining Code had been made, could be integrated. Therefore, upon integration of the ten titles pursuant to Article 349 of the 2001 Mining Code, all ten titles became subject to the same unified, modern, legal framework.⁴³⁷
402. In any event, the pre-2001 Mining Code titles did not confer any mining rights, the titles being licenses and permits and not concession contracts. Professor Ricaurte accepts that licenses and permits could be unilaterally modified by the Mining Authority without the concessionaire's consent.⁴³⁸ Being *titulus precarius*, they could be altered or withdrawn at any time without compensation being payable and their term was strictly limited with no

inadecuada distribución de los riesgos, eventual crisis de los contratos" (2000), 11 Revista de Derecho Público, Universidad de Los Andes (extract) (1 June 2000) (PMR-11), pp. 31-32 and 67-68.

⁴³⁶ INGEOMINAS, Resolution DSM No. 75 (2 February 2007) (Exhibit C-109 / R-68); Vivero Arciniegas Report, paras. 16-18; M. Ricaurte, Commentary to the 2001 Mining Code (2017) (Exhibit R-195), Art. 101; Tr. Day 1 (Mr. Mantilla-Serrano), 286-288.

⁴³⁷ Vivero Arciniegas Report, para. 10.

⁴³⁸ Ricaurte Opinion, para. 25(b); Claimant's Reply, para. 63(b).

right of renewal. The fact that INGEOMINAS was aware that some exploitation had been carried out under Permit 3452 is irrelevant, the entire Angostura Project was legally reset upon integration of all the titles.⁴³⁹

403. Whilst Eco Oro is correct that concession contracts under the 2001 Mining Code are, *inter alia*, bilateral and adhesion contracts, they are onerous contracts⁴⁴⁰ and as such can be aleatory or commutative. Colombian doctrine has held that concession contracts may be aleatory because the parties are subject to a contingency of profit or loss.⁴⁴¹ This contingency can be seen from Article 45 of the 2001 Mining Code, which provides that the concessionaire carries out the concession contract at its own expense and risk. Therefore, Concession 3452 is not commutative.
404. Professor Ricaurte is also incorrect to say that the principle of economic equilibrium applies to mining concession contracts; such concession contracts are governed by the 2001 Mining Code and not, pursuant to Article 53 of the 2001 Mining Code, by the General Public Procurement Code.
405. Concession contracts are multi-tiered agreements (*contratos escalonados*) such that the rights and obligations accruing to the concession holder change over the course of each phase of the concession.⁴⁴² Not every contractual right is an acquired right; to qualify as such the right must (i) have been perfected such that all requirements or pre-conditions to the vesting of the right have been fully satisfied; and (ii) not be revocable. Whilst the object and ultimate purpose of a concession contract is economic exploitation, its achievement is subject to compliance with the stipulated laws and regulations and Clause 1 of Concession 3452 does not provide that the right to exploit is an acquired right. The main purpose of the exploration phase was to allow Eco Oro to conduct such activities as would enable it to submit its PTO for approval from the relevant mining authority and apply for an environmental licence, but

⁴³⁹ INGEOMINAS, Resolution DSM No. 75 (2 February 2007) (**Exhibit C-109 / R-68**).

⁴⁴⁰ Article 1497 of the Civil Code – Código Civil Colombiano (extract) (Undated) (**Exhibit PMR-45**).

⁴⁴¹ A. Matson Carballo, “El contrato de concesión minera. Con comentarios y normatividad”, Librería Jurídica Sánchez R. Ltda., Medellín (2013) (**Exhibit PFDV-10**).

⁴⁴² Article 45 of the 2001 Mining Code details the phases. Law No. 685 (as amended) (8 September 2001) (**Exhibit C-8**), Art. 45.

there was no guarantee those applications would be successful. It is clear from the text of Clause One that the PTO, once submitted and approved, forms a part of the concession contract and defines the content of the object of the concession contract. Any application for an environmental licence for activities which failed to offset their effects on the environment must be rejected and the precautionary principle militates against issuing an environmental licence for activities whose effects on the environment are uncertain. In any event, an environmental licence can be revoked at any time without compensation if the relevant environmental authority finds that the project causes an adverse impact on the environment. A PTO may also be denied if it is not demonstrated that the project will be technically or economically feasible.

406. To acquire the right to exploit minerals under Concession 3452, pursuant to Articles 85 and 86 of the 2001 Mining Code and Clauses 5 and 6 of Concession 3452, Eco Oro had to, *inter alia*, submit a viable PTO and obtain an environmental licence,⁴⁴³ neither of which it did for the underground mining project (and its attempt to obtain an environmental licence for the open-pit mining project failed): in the absence of these, there is no right to carry out construction or exploitation activities. These requirements are suspensive conditions to which the existence of the right to fulfilment is subject; there is no right to exploit without satisfying them and as they are attached to the rights to construct and exploit, these rights cannot be acquired rights but are merely bare expectations which were not immune to subsequent changes in the laws and regulations. This is clear from the Civil Code which provides that: “*A condition is suspensive if, while it is not fulfilled, the acquisition of a right is suspended; it is resolutive if a right is extinguished when it is fulfilled.*”⁴⁴⁴ This is also confirmed by a Judgement of the Constitutional Court.⁴⁴⁵ Contrary to a bare expectation (*simples expectativas*), an acquired right can be transferred to a third party and is immune to subsequent laws or regulations. A right that is subject to a suspensive condition is deemed not even to exist until the condition is met.⁴⁴⁶

⁴⁴³ Article 85 of the 2011 Mining Code. Law No. 685 (as amended) (8 September 2001) (**Exhibit C-8**).

⁴⁴⁴ Articles 1530 and 1536 of the Civil Code. “Código Civil”, Arts. 1530, 1536 (Undated) (**Exhibit PFDV-1**).

⁴⁴⁵ Sentencia 15668 del 26 de marzo de 2008 de la Sección Tercera de la Sala de lo Contencioso Administrativo del Consejo de Estado. C.P. Ruth Stella Correa Palacio (26 March 2008) (**Exhibit PFDV-6**).

⁴⁴⁶ Article 1536 of the Civil Code. “Código Civil”, Arts. 1530, 1536 (Undated) (**Exhibit PFDV-1**).

407. As these conditions have not been satisfied, the right to exploit has not been perfected and so cannot be an acquired right.
408. Whilst Mr. De Vivero accepted in his oral testimony that the right to explore was an acquired right, even though to exercise this right required the obtention of permits and licences, he further testified that the same did not apply to exploitation. In the exploration phase, the entirety of the area is available to the concessionaire to carry out certain activities and that is the acquired right – it is correct that to exercise certain aspects of that right, permits or authorisations may be required, to enable trees to be cut down or to use water for example, but the whole of the concession area is available and accessible. At the exploitation phase, the concessionaire has no accessibility to any part of the concession area unless and until they get the environmental licence. This environmental licence is completely different to an environmental authorisation and without it there is no access at all to any area of the concession.
409. Upon being asked by MinAmbiente to clarify the nature of the exploitation right,⁴⁴⁷ the *Consejo de Estado* confirmed these rights were not acquired rights.⁴⁴⁸ The practical effect may be the same where there is an acquired right which requires compliance with a precondition to be exercisable and a suspensive condition,⁴⁴⁹ but if there is a requirement which must be complied with before the right can be exercised it cannot be an acquired right.⁴⁵⁰
410. Whilst Article 58 of the 2001 Mining Code grants the exclusive right, *inter alia*, to exploit minerals, it does not say that this is an acquired right. Again, Article 14 of the 2001 Mining Code does not say that, by entering into the concession, Eco Oro gained an acquired right to exploit, it merely provides that (*i*) concession contracts are the only type of mining contract

⁴⁴⁷ Letter from the Ministry of Environment (Mr. Vallejo) to the *Consejo de Estado* (Mr. Hernandez) (7 October 2014) (**Exhibit C-348**).

⁴⁴⁸ *Consejo de Estado*, Advisory Opinion No. 2233 (11 December 2014) (**Exhibit R-135**).

⁴⁴⁹ Tr. Day 4 (Mr. Viveros Arciniegas), 1056:10-13 and 1058:1-8.

⁴⁵⁰ Tr. Day 4 (Mr. Viveros Arciniegas), 1059:19-22.

permitted under the 2001 Mining Code; and (ii) mining titles issued prior to the effective date of the 2001 Mining Code are to remain in force.⁴⁵¹

411. Whilst Eco Oro had an acquired right to explore and an acquired right to apply for an environmental licence, given that Constitutional Court Judgement 339 of 2002 confirmed the possibility of establishing mining exclusion zones in the páramo pursuant to Articles 34 and 36 of the 2001 Mining Code, Eco Oro would have known its application would be refused and therefore it is not even as if Eco Oro has lost any opportunity.⁴⁵²
412. A “*right to a stabilized mining legal framework*” does not constitute a Treaty-protected investment, being merely a statutory right and not a contractual right.⁴⁵³ It is therefore not a covered investment capable of being expropriated.
413. Eco Oro’s acquired rights were therefore: (i) to the availability of that part of Concession 3452 that is not restricted by an environmental exclusion zone to conduct exploration activities, subject to the obtention, where applicable, of the necessary environmental permits (as these permits are different in nature to an environmental licence it does not change the nature of this acquired right); and (ii) to apply for an environmental licence.
414. The breach of an acquired right does give right to compensation, whereas the breach of a mere expectation does not.⁴⁵⁴ However, as Eco Oro had no acquired right to exploitation, it has no right to compensation.
415. Finally, Eco Oro does not have any right to renew its concession for an additional 30 years because such a right would only have vested had Eco Oro reached the exploitation phase; Eco Oro remained in the exploration phase, having not, *inter alia*, obtained an environmental licence.

⁴⁵¹ This is confirmed by Professor Ricaurte’s commentary to Article 14 - M. Ricaurte, Commentary to the 2001 Mining Code (2017) (**Exhibit R-194**), Article 14.

⁴⁵² Tr. Day 1 (Mr. Mantilla-Serrano), 295:9 – 298:18.

⁴⁵³ Respondent’s Counter-Memorial, paras. 329-330, invoking *Oxus Gold plc v. Republic of Uzbekistan*, UNCITRAL, Award (17 December 2015) (**Exhibits CL-84 / RL-99**) (“*Oxus*”).

⁴⁵⁴ Tr. Day 4 (Mr. Vivero Arciniegas), 1004:12-18.

(2) The Tribunal's Analysis

416. Eco Oro's right to exploit will only benefit from constitutional protection pursuant to Article 58 of the Political Constitution if it is an acquired right. Eco Oro says it is whereas Colombia says it is not. Article 58 provides as follows:

“All private property is guaranteed, together with other rights acquired in accordance with the civil laws, which may not be ignored or undermined by subsequent laws. When the application of a law passed for the purpose of public utility or social interest results in a conflict between the rights of individuals and the need recognized in said law, the private interest shall be subordinate to the public or social interest. Property has a social function that implies obligations. As such, an ecological dimension is inherent in it. The State will protect and promote associative and joint forms of property. Expropriation may be carried out for reasons of public utility or social interest defined by the legislature, subject to a judicial decision and prior compensation. The compensation will be determined by taking into account the interests of the community and of the individual concerned. In cases determined by the legislature, the expropriation may be carried out by means of administrative action, subject to subsequent litigation before the administrative law courts, including with regard to the value of compensation.”⁴⁵⁵

417. In Judgment C-529 the Constitutional Court drew the distinction between those rights protected by Article 58 and mere expectations, noting:

“[Page 9]

The provision [Article 58 of the Political Constitution] refers to consolidated legal situations, not those amounting to mere expectations. Given that in mere expectations the right has not been acquired, they are subject to future regulation introduced by law.

It is clear that an amendment or repeal of a given legal provision produces effects to the future, except for the principle of most favorable rule, such that situations which were consolidated under the amended or repealed provision may not be impaired. Therefore, pursuant to the constitutional provision, individual and concrete rights which have already been acquired by a person are not affected by the new rules, which can only apply to legal situations arising after the rules' entry into force.”⁴⁵⁶ [Tribunal's emphasis]

⁴⁵⁵ Political Constitution of Colombia (1991) (Exhibit C-65).

⁴⁵⁶ Constitutional Court, Judgment C-529 (24 November 1994) (Exhibit PMR-7).

418. The Constitutional Court further stated in Judgment No. C-168 that:

p. 11

“Private property and other acquired rights under civil law are guaranteed and cannot be disregarded or infringed by subsequent laws. When the application of a law issued to protect a public interest or a social interest results in a conflict between the rights of individuals and the interest recognized by the law, the private interest must yield to the public or social interest.....

[...]

acquired rights are the legal powers regularly exercised and the expectation of having legal powers that are not exercised at the time of the change in legislation”. (Explanations of Comparative Chilean Civil Law, Volume I, pp. 64 and following)

[...]

Bare expectations do not constitute rights, nor potential rights. They refer to factual situations rather than legal situations: they are interests that are not legally protected and that resemble ‘castles in the sky’...

[...]

As can be seen, case law as well as doctrine distinguish acquired rights from bare expectations, and ... the legislators, when issuing the new law, cannot harm or ignore them. The same does not occur with so-called ‘expectations,’ because as their name indicates, they are merely the probability or hope there is of one day obtaining a right; consequently, they can be changed at the lawmaker’s discretion.

Our Supreme Law expressly protects acquired rights, in article 58, and prohibits lawmakers from issuing laws that will hurt or ignore them, leaving so-called expectations, whose regulation is the competence of lawmakers, outside of this coverage, in accordance with the parameters of equity and justice that the very Constitution has laid out for the performance of their duty.

[...]

In conclusion: acquired rights are incorporated definitively to the equity of the owner, and are covered from any official act that might ignore them, because the Constitution itself guarantees and protects it; the same does not occur with expectations, which in general lack legal relevance, and consequently can be changed or extinguished by lawmakers.[...]⁴⁵⁷

[Tribunal’s emphasis]

419. Again in its Judgment C-314, the Constitutional Court stated:

⁴⁵⁷ Constitutional Court, Judgment No. C-168 (20 April 1995) (**Exhibit PFDV-5**) (USB drive provided at the Hearing).

“7. Acquired rights

In line with the decisions of this Constitutional Court, acquired rights are rights which have definitively become part of a person’s estate. Thus, a right has been acquired when the person asserting the right satisfies the requirements established in the law, i.e. when the legal premises are fully met. In line with this notion, non-consolidated legal situations, i.e. those where the factual requirements for the acquisition of the right have not been satisfied, do not constitute acquired rights but mere expectations.

[RESPONDENT’S TRANSLATION]

[p. 19]

In this regard the Court said:

The Court has indicated that acquired rights are violated when a law affects established legal situations that give rise to a right of a substantive nature that has definitively become part of a person’s estate. However, if the circumstances indicated have not been met, what exists is a mere expectation that can be modified or extinguished by the legislator. (Ruling C-584/97, M.P. Eduardo Cifuentes Muñoz)

With regard to their scope of protection, the Court has said that, by express provision of article 58 of the Constitution, acquired rights are intangible, which implies that they cannot be disregarded by subsequent laws, although subsequent laws may modify or even extinguish the rights over which individuals have mere expectations.

As the Court has emphasized, case law and doctrine have clearly differentiated between acquired rights and bare expectations, and they agree that the former are intangible and therefore the legislator, in issuing the new law, cannot harm or disregard them. This is not the case with the so-called ‘expectations’, because as their name indicates, they are only the probability or hope to one day obtain a right; consequently, they can be modified at the discretion of the legislator. (Ruling C-453 of 2002 Alvaro Tafur Gálvis)

[Page 20]

From the abovementioned jurisprudence it may be concluded that neither a law nor the administrative or judicial authorities may modify legal situations which have become consolidated under an earlier law, but they can do so where only mere expectations are concerned.”⁴⁵⁸ [Tribunal’s emphasis]

420. The Tribunal first considers the position as at the date on which Eco Oro’s ten titles were integrated into Concession 3452. Whilst Article 6 of the 1988 Mining Code provided that duly executed concession contracts and licences and permits are treated as giving rise to acquired rights, this is not relevant to the Tribunal’s analysis. Having voluntarily sought integration of its titles, Eco Oro relinquished all of the rights it held at that point pursuant to the provisions of Article 101 of the 2001 Mining Code. This is the consequence of

⁴⁵⁸ Constitutional Court, Judgment No. C-314 (1 April 2004) (Exhibit PMR-16) (USB drive provided at the Hearing).

acogimiento under Article 101, as described by Professor Ricaurte in her commentary to the 2001 Mining Code, and as advised by Mr. De Vivero.⁴⁵⁹

421. The Tribunal next looks for guidance in Concession 3452. Clause One of Concession 3452 provides that the object of the Concession is “*to undertake a project of economic exploitation [...] in the entire area set out in Clause Two of this agreement.*”⁴⁶⁰ The Tribunal notes there is no guarantee that economic exploitation will be achieved. Clause Five of Concession 3452 and Article 85 of the 2001 Mining Code specify that Eco Oro could not proceed to exploitation without having received approval of its PTO and having obtained an environmental licence. There is no provision which addresses the legal status of Eco Oro’s right to exploit Concession 3452, nor does the Concession agreement make any distinction between the right to explore and the right to exploit or their respective legal natures. Further, no provision provides whether the requirements to obtain an approved PTO and an environmental licence are suspensive conditions such that the right to exploit is only a bare expectation which does not vest until these conditions are satisfied. It is therefore unclear merely upon a review of the Concession whether Eco Oro’s right to exploit is an acquired right but which can only be exercised upon the obtention of the necessary approvals.
422. Both experts accept that Concession 3452 was subject to one legal regime, the 2001 Mining Code. In seeking to construe the relevant provisions of the 2001 Mining Code, it is of assistance to note the following. Firstly, the Congressional Gazette No. 113 (14 April 2000), summary of the Congressional discussions that preceded its issuance, states as follows:

*“The Concession Contract
Definition*

Given that, as a general rule, the only title granted by the State for the technical exploration and exploitation of mining resources shall hereafter be the concession contract, it is pertinent to define it and highlight its typical elements. This is not a mere theoretical intellectual exercise, but rather it constitutes a highly useful tool for its correct interpretation and for the appropriate resolution of conflicts and discrepancies arising out of their execution.

⁴⁵⁹ M. Ricaurte, Commentary to the 2001 Mining Code (2017) (**Exhibit R-195**), Art. 101.

⁴⁶⁰ Concession Contract 3452 (8 February 2007) (**Exhibit C-16**), Clause 1.

1. The definition of concession put forth in Article 49 of the Bill covers both a formal and a teleological approach. As regards the former, it confirms that a concession is a true contractual transaction, meaning that it is a meeting of the minds between the State and a private party. Perhaps on its face this might look like an unimportant or redundant assertion, but its purpose is nothing other than to legally rule out certain lines of thinking which to this day persist, according to which concessions of this kind are not true contracts but mere permits or authorizations unilaterally issued or granted by the State for exploiting the State's own resources.

The definition is also adopted with the criterion of identifying the object of the contract, which is to carry out the studies, mechanisms and works that have an exclusive purpose: to exploit the soil or the mining subsoil at the contractor's own expense and risk. Moreover, this latter aspect excludes, as an element of the contract, the performance of the contract in full or in part through state investments.”⁴⁶¹ [Tribunal's emphasis]

423. Secondly, MinMinas' explanatory statement in April 2000 to the Colombian Congress for the enactment of the 2001 Mining Code, *inter alia*, states that: “[...] *the Bill's aim is for the new Mining Code to become a useful and efficient tool for the [mining] industry's development and, as such, its greatest contribution is to offer, by means of categorical and express mandates, a clear and firm legal stability to the private parties that participate in the exploration and exploitation of mining resources.*”⁴⁶² [Tribunal's emphasis]. In June 2000, the Congressional Gazette also records that Article 46 of the 2001 Mining Code “*enshrined a principle that is essential for the legal stability required by the concessionaire, in addition to vesting the concessionaire with the right to be subjected only to favourable changes in legislation.*”⁴⁶³ Finally, in May 2001, the Colombian Congressional records as contained in the Report to the House of Representatives note that the 2001 Mining Code “*enshrines the principle of the stable contractual legal framework [Normatividad], which guarantees that throughout the contract's performance, and*

⁴⁶¹ Congressional Gazette No. 113 (14 April 2000) (Exhibit PMR-10).

⁴⁶² Statement of Reasons for Law 685 (Congressional Gazette No. 113) (14 April 2000) (Exhibit PMR-10 / PMR- 12).

⁴⁶³ Congressional Gazette No. 200 (12 June 2000) (Exhibit PMR-13), p. 7.

throughout any extension thereof, the applicable legal rules shall be those which were in force at the time the contract was perfected.”⁴⁶⁴

424. Turning to the 2001 Mining Code, several Articles refer to a concession agreement as providing the exclusive right to exploit as well as explore (Articles 15, 45 and 58 by way of example) however those articles refer to the right to exploit as being an exclusive right; there is no express provision in the 2001 Mining Code identifying which, if any, of the rights granted by a concession agreement are acquired rights. Article 58 details what rights are granted under the Concession:

“ARTICLE 58. RIGHTS UNDER THE CONCESSION.

The concession contract shall grant the concessionaire the exclusive power to perform, within the area granted, any such studies and works as may be necessary to establish the existence of the minerals that are the subject-matter of the contract, and to exploit them in accordance with the principles, rules and criteria inherent in the mining engineering and geology accepted techniques. The concessionaire shall also be entitled to install and perform, within and outside such area, the equipment, services and works required to efficiently exercise the easements referred to herein.”⁴⁶⁵ [Tribunal’s emphasis]

425. Eco Oro further cites Article 46 which provides:

“ARTICLE 46. APPLICABLE LAW

The mining laws in force at the time that the concession contract is perfected will be applicable throughout the term of its execution and extensions. If said laws are modified or added to at a later date, these laws will apply to the concessionaire only insofar as they broaden, confirm or improve its rights with the exception of those regulations that contemplate the modification of the anticipated economic revenues to the State or Territorial Entities.”⁴⁶⁶

426. Again, this Article does not expressly provide that the right to exploit is an acquired right. However, it is of note that the 2001 Mining Code does not provide that the right to explore is an acquired right. The terminology used to describe the right to explore is that it is an “exclusive power” and yet the Parties agree that the right to explore is an acquired right. The

⁴⁶⁴ Speech (Congressional Gazette No. 238) (22 May 2001) (**Exhibit PMR-14**), p. 7.

⁴⁶⁵ Law No. 685 (as amended) (8 September 2001) (**Exhibit C-8**), Art. 58.

⁴⁶⁶ Law No. 685 (as amended) (8 September 2001) (**Exhibit C-8**), Art. 46.

terminology with respect to the right to exploit is the same as that with respect to the right to explore, namely that it is an “exclusive power.” Accordingly, the Tribunal does not find that there is any relevance to the fact that the 2001 Mining Code does not provide that the right to exploit is an acquired right. It appears that at no time in the discussions leading to the issuance of the 2001 Mining Code was any distinction drawn between the rights to explore and to exploit, both being spoken of as rights obtained under a concession agreement.

427. The relevant authorities would also appear to have been acting under the belief that the right to exploit was an acquired right which was therefore protected by Article 58 of the Constitution. For example, in September 2011, MinMinas (Ms. Díaz Lopez) wrote to INGEOMINAS (Mr. Montes) stating:

*“Finally, the position of the control organs in relation to the protection of natural resources is clear to this Office. Thus, the precautionary principle constitutes one of the fundamental tenets of Colombian environmental policy. However, such principle cannot disregard acquired rights, in accordance with Article 58 of the Political Constitution.”*⁴⁶⁷ [Tribunal’s emphasis]

428. In providing this opinion, MinMinas noted that it was not commenting upon a specific case but giving a general opinion. In addition to raising serious doubts as to the legality of Resolution 937 of 2011, it considered the concept of acquired rights. However, in doing so, it did not address whether the rights it identified as acquired rights were merely exploration rights or exploration and exploitation rights. Had MinMinas been of the belief that exploitation rights were not acquired rights, it seems unlikely that it would have addressed the application of the precautionary principle on acquired rights. It has not been suggested that exploration rights should be excluded to protect the páramo.
429. In May 2012, MinMinas issued Opinion 2012026198 in response to a question raised by the Attorney General’s Office regarding Mining Concession Contracts stating: *“However, this is not the case with the concession contracts that have been duly granted, which at the time of execution give rise to acquired rights which become part of the concessionaire’s*

⁴⁶⁷ Letter from Ministry of Mines (Ms. Díaz Lopez) to INGEOMINAS (Mr. Montes) (27 September 2011) (Exhibit C-330).

patrimony subject to protection by the law.”⁴⁶⁸ Whilst no explanation is given as to the nature of the rights that are referred to as being acquired, again the Tribunal does not understand there to have been any distinction drawn between exploration and exploitation rights.

430. In a memorandum issued in December 2013, the ANM stated:

“[Page 20]

It is then undeniable that the notion of acquired rights and, naturally, consolidated situations are directly related to the application of the Law in time, as in no event may a subsequent Law produce retroactive effects intended, as suggested in this case, to deny a legal situation created and consolidated under an earlier Law.

[...]

[Page 23]

It is therefore clear that Mining Concession Contract No. 141, having been executed in strict observance of the law in force at the time, which, it is worth noting again, did not contain any prohibition on entering into a contract in the area that is the object of the present Contract, granted EXPLORACIONES CARBONIFERAS YERBABUENA LTDA a true right to exploit a coal deposit in the municipality of Zipaquirá, which constitutes an acquired right; that is to say, it consolidated a subjective legal right that must be respected despite the legislative changes that were to eventuate.

[...]

[Page 24]

It is particularly important to draw the attention of the Honorable Court to the fact that in the present matter, when Contract No. 141 was executed, it generated for the contracting parties a duly consolidated legal right and not a mere expectation, for which reason a subsequent provision cannot act as an impediment such that the right is ignored. This is the understanding of the Constitutional Court in Decision C-478 of 1998 [...].

[...]

[Page 26]

[...]

In accordance with the above considerations, it is relevant to highlight what the Ministry of Mines and Energy has said, precisely regarding the prevalence of acquired rights when the declaration of forest protection reserve areas occurs after the granting of a mining title. Accordingly, the Ministry expressed in a report filed under number 2012026647 of 16 May 2012, as follows:

[page 27]

⁴⁶⁸ Ministry of Mines and Energy, Opinion 2012026198 in response to a question raised by the Attorney General’s Office regarding Mining Concession Contracts (14 May 2012) (**Exhibit PMR-26**).

“...Thus, where an area is declared to be a forest protection reserve, in which it is not possible to carry out mining activities in accordance with article 34 of Law 685 of 2001, mining titles granted prior to the declaration of the area must in any case be respected, as those titles give rise to acquired rights on the part of the mining titleholders that cannot be ignored under subsequent laws.[...].”⁴⁶⁹

431. Again, in their letter to MinAmbiente, of 24 February 2014, the Mayors of Soto Norte and other Municipalities refer to the acquired rights of mining titleholders in circumstances in which the Tribunal understands the reference to be to exploitation as well as to exploration.⁴⁷⁰
432. Colombia supports its contention that the right to exploit is not an acquired right by reference to Advisory Opinion 2233. However, the *Consejo de Estado* does not state that a right to exploit is not an acquired right. The opinion considers the question of payment of compensation where a mining exclusion zone is declared over a concession area. The *Consejo de Estado* first considers the tensions between, on the one hand, the general interest in protecting the environment and, on the other hand, the private interest of those in possession of mining concessions which it held can be seen as “*a declaration of principle that [the mining] activity is one of general interest and is encouraged by the government itself, which is further supported by various sections of the Mining Code aimed at providing legal certainty and assurance to those conducting this activity in a legal manner that is compatible with the environment.*”⁴⁷¹

⁴⁶⁹ National Mining Agency Memorandum No. 2013-0725 (18 December 2013) (**Exhibit PMR-30**) (USB drive provided at the Hearing).

⁴⁷⁰ Letter from Mayors of Soto Norte *et al.* to Ministry of Environment (Minister Sarmiento) and CDMB (Mr. Anaya Méndez) (24 February 2014) (**Exhibit C-201**).

⁴⁷¹ *Consejo de Estado*, Advisory Opinion No. 2233 (11 December 2014) (**Exhibit R-135 redline**), para. 2.2.1.1.

433. The *Consejo de Estado* then details the rights granted by the mining concession, stating:

“The rights granted by the mining concession are indicated in two additional statutes from the Mining Code: (i) Article 15 indicates that the concession contract does not grant ownership over the minerals on site, but rather grants the right to ‘establish, exclusively and temporarily within the concession area, the existence of minerals in an exploitable quantity and quality, and to appropriate them by extracting or capturing them’; and (ii) Article 45, whereby the concession contract grants to the concession holder exclusive authority to conduct within the concession area the studies, works and projects necessary to establish the existence of the minerals to which the contract refers and to exploit those minerals, [...] at the risk and expense of the concession-holder, and the closing or removal of the corresponding works and sites.’

In this way the mining concession grants to its holder the right to explore and exploit the assigned areas and also to shut down and close the respective activities, all in strict adherence [...] to environmental regulations.

It is thus clear that those who have obtained from the government a mining concession, which is understood to have been granted for lands for which such activity is permitted (the code itself, in Article 36, excludes outright those areas for which mining is not permitted), are entitled to the expectation that their lawful activity will be respected and will be allowed to carry on during the term of the contract, which is 30 years (Article 70). Without a doubt, there can be medium- and long-term endeavors and investments should be recognized.”⁴⁷² [Tribunal’s emphasis]

434. The *Consejo de Estado* concludes that the private right of the investor must yield to the general interest in preserving the environment such that holders of concessions in areas where a mining exclusion zone is subsequently declared do not have a right to mine in that mining exclusion zone. However, whilst the *Consejo de Estado* does not expressly state that the right to exploit is, or is not, an acquired right (noting only that the concession agreement gives an exclusive authority to exploit), it continues by stating that *“the government must review on a case-by-case basis the need to reach agreements for economic compensation, in order to avoid legal claims”*, further noting that there would be no breach of any bilateral treaty agreement unless the State *“refuse[d] to provide the necessary compensation for the specific situations affected by the new law.”⁴⁷³*

⁴⁷² *Consejo de Estado*, Advisory Opinion No. 2233 (11 December 2014) (**Exhibit R-135**), para. 2.2.1.2.

⁴⁷³ *Consejo de Estado*, Advisory Opinion No. 2233 (11 December 2014) (**Exhibit R-135**), para. 2.2.1.4(c).

435. In understanding the meaning of this opinion, the Tribunal notes that Article 58 of the Constitution provides that the State may carry out expropriation “*for reasons of public utility or social interest [...] subject to a judicial decision and prior compensation.*”⁴⁷⁴ It would not have been necessary for the *Consejo de Estado* to refer to a need for compensation upon taking away a right to exploit if such right were merely a bare expectation that did not vest until the requisite suspensive conditions had been complied with. There would only be the need to undertake a case-by-case review to determine whether compensation were payable if the right to exploit were an acquired right, the loss of which would, *prima facie*, give rise to a right to compensation; the purpose of the review being to determine the value of the exploitation right lost in the light of the surrounding circumstances, no doubt including the progression and current status of the exploration activities undertaken at that time the zone was declared.
436. Eco Oro also cites in support of its submissions the *Consejo de Estado* judgements dated 3 February 2010 (which it says holds that the concession contract grants economic rights which are opposable to third parties and assignable in accordance with the law⁴⁷⁵), 14 May 2012⁴⁷⁶ and 6 July 2017.⁴⁷⁷ The 2017 decision⁴⁷⁸ states at paragraph 23 that:

“23. [the concession agreement] is evident that the mining title granted to the private respondent was previous to the declaration and delimitation of the special reserve area that overlapped with the concession, which is why it had an acquired right that could not be ignored. In fact, article 46 of [the 2001 Mining Code], which entails the National Government’s prerogative to declare these type of areas of special interest, clearly establishes that these cannot ignore titles that predate their establishment [...].

[...]

⁴⁷⁴ Political Constitution of Colombia (1991) (**Exhibit C-65**) [Tribunal’s emphasis].

⁴⁷⁵ *Consejo de Estado*, Judgment No. 33187 (3 February 2010) (**Exhibit PMR-21**).

⁴⁷⁶ *Consejo de Estado*, Judgment No. 57199 (24 January 2019) (**Exhibit PMR-27**).

⁴⁷⁷ *Consejo de Estado*, Judgment No. 38338 (6 July 2017) (**Exhibit PMR-37**).

⁴⁷⁸ *Consejo de Estado*, Judgment No. 38338 (6 July 2017) (**Exhibit PMR-37**).

24. *it must be noted that the claimant has insisted on the fact that the necessary activities for the delimitation of the reserve area began before the execution and registry of the title in favor of Mr Rendle. However it must not be overlooked that the final delimitation, for reasons of publicity to those interested in the mining titles of the area, only becomes binding with the issuance of the act that declares and delimits the special public interest area.*

25. *Moreover, this Chamber does not ignore that the claimant begun the proceedings to declare the nullity of the concession contract in light of the undeniable breach of the public interest. But even though it is clear that lawmakers wanted to restrict third parties' mining and exploration and exploitation expectations in reserve areas in order to protect the public interest, it is also evident that lawmakers wanted to prevent the public interest from impinging upon the acquired rights of private parties holding titles that predate the establishment of the area, which is precisely what has happened in the present case." [Tribunal's emphasis]*

437. Turning to the *Consejo de Estado* Judgment No. 52038,⁴⁷⁹ it was held that:

"4.5. On the other hand, a duly granted and registered mining title creates a consolidated legal situation, as a result of the principle of legal certainty. This grants an exclusive right to exploit the mining resources of the concession area, its appropriation through its extraction or collection and subsequent economic traffic.

4.6. Regarding legislation, that protection is reflected in the general rule that the contract is subject to those legal provisions that were in force at the time of its conclusion, which stands as an unobjectionable contractual and constitutional guarantee of acquired rights since, considering the decisions of the Inter-American Court of Human Rights, acquired rights are 'rights that have been incorporated into the estate of a person.'

4.7. Therefore, as to the practical aspect, the protection afforded by the law is reflected in instruments such as the mining protection action provided for in Articles 307 et seq.⁴⁸⁰ of the Mining Code, which affords onsite protection for exploration or exploitation works carried out by the mining title holder against any statements that disrupt, alter or affect the

⁴⁷⁹ *Consejo de Estado*, Judgment No. 52038 (29 January 2018) (**Exhibit PMR-38**) (USB drive provided at the Hearing).

⁴⁸⁰ There is no translation into English of these provisions. Article 307 of the 2001 Mining Code provides as follows: "*PERTURBACIÓN. El beneficiario de un título minero podrá solicitar ante el alcalde, amparo provisional para que se suspendan inmediatamente la ocupación, perturbación o despojo de terceros que la realice en el área objeto de su título. Esta querella se tramitará mediante el procedimiento breve, sumario y preferente que se consagra en los artículos siguientes. A opción del interesado dicha querella podrá presentarse y tramitarse también ante la autoridad minera nacional.*" Law No. 685 (as amended) (8 September 2001) (**Exhibit C-8**).

performance of the mining activities. This instrument is intended to guarantee the full enjoyment and exercise of the rights that the title holder has acquired by executing the concession contract.” [Tribunal’s emphasis]

438. In 2019, whilst not commenting specifically on the legal status of the right to exploit, the *Consejo de Estado* stated the following with respect to the nature of the rights granted by a concession agreement:

*“The Ministry of Mines and Energy issued the following opinion on the **rights stemming from the execution of a mining concession agreement:***

‘Before the State, the applicant only has an expectation of obtaining the respective title, given that due to the ongoing process of the concession proposal, while these are not fully finished, the interested parties will only have a mere expectation to obtain the title.

*However, **this is not the case with the concession contracts that have been duly granted, which at the time of execution give rise to acquired rights which become part of the concessionaire’s patrimony subject to protection by the law.**”⁴⁸¹ [Tribunal’s emphasis]*

439. Having reviewed all the documentation provided to the Tribunal by the Parties, including the congressional discussions with respect to the proposed 2001 Mining Code, communications from relevant State bodies and interested parties, Advisory Opinion 2233 and the judgements of the *Consejo de Estado* and the Constitutional Court which were referred to the Tribunal, it is clear to the majority of the Tribunal that whilst there is no express authority upon which it can rely, this arises from the general understanding that the rights a party acquired under a concession agreement were indivisible: a concessionaire is granted acquired rights to explore and to exploit, entitling it to compensation if its economic equilibrium was disrupted. The fact the exploitation right may be difficult to value, or indeed may be valueless in circumstances where it has almost no chance of getting an environmental licence, cannot and does not of itself mean it is not an acquired right.

440. Therefore, as at the date of entry into force of the FTA, the Tribunal finds that Eco Oro had acquired rights to explore in the totality of the area of Concession 3452 (Article 58 of the 2001 Mining Code and Clause 4 of the Concession 3452). The majority of the Tribunal finds

⁴⁸¹ *Consejo de Estado*, Judgment No. 57199 (24 January 2019) (Exhibit PMR-27).

that Eco Oro had acquired rights to exploit in the totality of the area of Concession 3452 (Article 58 of the 2001 Mining Code and Clauses 1 and 4 of Concession 3452), the exercise of such rights being subject to PTO approval and obtaining an environmental license; and extend the concession at the end of its term (Article 77 of the 2001 Mining Code and Clause 4 of Concession 3452).

C. WHETHER THERE WAS A MINING BAN OVER ANY PART OF CONCESSION 3452 IN EXISTENCE AS AT THE DATE THE FTA ENTERED INTO FORCE

441. Having determined the nature of Eco Oro’s covered investments at the time the FTA entered into force, the Tribunal now turns to consider whether there was a mining ban in force when the FTA came into existence.

(1) The Parties’ Positions

(a) The Claimant’s Position

442. Articles 34 and 36 of the 2001 Mining Code do not permit Colombia to ban mining in páramo areas with immediate effect on Concession 3452, without an express declaration that the concession falls within that area and upon notification of such restriction. Constitutional Court Judgement 339 of 2002 does not have the effect contended for by Colombia; it merely provides that the list of areas in Article 34 where exclusion zones can be established is not exhaustive and it just eliminates the phrase in Article 36 “*pursuant to the prior articles.*”

443. Article 34 provides that exclusion zones can only take effect once the three stated requirements in the article have been complied with, namely: *(i)* the mining exclusion is expressly provided for by law or regulation; *(ii)* the exclusion zone has been geographically delimited on the basis of technical, environmental, social and economic studies demonstrating the incompatibility of the area with mining activities; and *(iii)* the exclusion zone has been delimited with the collaboration of the mining authority. An exclusion cannot be lawful if not undertaken in accordance with these requirements.

444. Article 36 addresses the effect of an exclusion that has come into force either pursuant to Article 34 or from the application of another provision of the 2001 Mining Code. It is clear from the wording of Article 34 (and construing it in the context of Articles 31 – 35) that it

can only have an effect on a subsequently executed concession contract – an exclusion can only be expressly mentioned in a concession if such concession is already in existence at the time the concession is executed but the exclusion need not be “*expressly mentioned*” as the concessionaire would be aware of it. The purpose of specifying that such restriction need not be mentioned is that it may well be burdensome and impractical to expressly carve out of each mining title areas corresponding, for example, to roads, power lines and rural dwellings; indeed the mining authority may not even be aware of any excluded or restricted areas at the time the title is granted.⁴⁸² Therefore, the provision must be referring to pre-existing restrictions and exclusions. Article 36’s application to subsequent concessions is also clear from the fact that the “*renunciation of the applicant*” to the exclusion zone is not required – there is no purpose in an applicant renouncing the exclusion zone because it is excluded as of right. Further, the provision “*if in fact said zones [...] were to be occupied*” clearly refers to the situation where an exclusion exists, the concession is executed and yet the concessionaire continues to carry out mining activities in such area. In this situation, the activities would be illegal and the concessionaire would be forced to withdraw without compensation.

445. Establishing an exclusion zone after execution of a concession would breach the provisions of Article 46 of the 2001 Mining Code, which enshrines the principle of non-retroactivity of laws to acquired rights, a provision which stabilises mining laws. The effect of Article 46 was confirmed by the Constitutional Court as follows: “[...] *In fact, article 46 of law 685 of 2001, Mining Code, which entails the National Government prerogative to declare these type of areas of special interest, clearly establishes that these [areas] cannot ignore titles that predate their establishment [...].*”⁴⁸³ This principle of non-retroactivity of laws and the respect for acquired rights set out in Article 46 of the 2001 Mining Code is also enshrined in Article 58 of the Political Constitution.⁴⁸⁴

⁴⁸² Ricaurte Opinion, para. 79.

⁴⁸³ *Consejo de Estado*, Judgment No. 38338 (6 July 2017) (**Exhibit PMR-37**).

⁴⁸⁴ Political Constitution of Colombia (1991) (**Exhibit C-65**).

446. The same principle was confirmed by Advisory Opinion 2233.⁴⁸⁵ Thus, a mining exclusion zone delimited subsequent to the execution of a concession will apply to the concession (i) if enacted for reasons of public interest; and (ii) upon the payment of compensation.⁴⁸⁶ Pursuant to Article 90 of the Constitution, this compensation must include compensation for the actual damages suffered (*damnum emergens*), certain future losses (*lucrum cessans*) and the loss of a chance (uncertain future losses).⁴⁸⁷
447. Laws 1382 and 1450 also did not establish an effective mining ban in the páramos. Paragraph 1 of Law 1382 contained a grandfathering regime as follows:

*“If on the effective date of this law, any construction and assembly or exploitation activities are being undertaken subject to a mining title and an environmental licence or their equivalent in areas which were not previously excluded, such activities shall be allowed until their expiration, but no extensions shall be granted with regard to such titles.”*⁴⁸⁸

448. Law 1382 was struck down by the Constitutional Court in May 2011 as unconstitutional having been enacted in the absence of community consultations. Whilst Advisory Opinion 2233 stated that the first time páramo exclusion zones were established was by Law 1382,⁴⁸⁹ this did not mean that an immediately effective mining ban had been established in the Santurbán Páramo as a result of Law 1382. Article 3 required the mining exclusion zone to be delineated on the basis of technical, social and environmental studies and on the basis of cartographic information to be provided by the IAvH.⁴⁹⁰ Thus, the mining ban could not become effective until the páramos had been delineated in accordance with these requirements. The fact no mining ban had immediately become effective is demonstrated by the actions of Colombia in adopting Decree 2820,⁴⁹¹ Article 10 of which anticipated mining in páramo ecosystems. Further, Article 1 of INGEOMINAS Resolution 267 of

⁴⁸⁵ Consejo de Estado, Advisory Opinion No. 2233 (11 December 2014) (**Exhibit R-135**).

⁴⁸⁶ Ricaurte Opinion, para. 85.

⁴⁸⁷ Tr. Day 4 (Professor Ricaurte), 894-896 and (Mr. Vivero Arciniegas), 971-976.

⁴⁸⁸ Law No. 1382 (9 February 2010) (**Exhibit C-18**).

⁴⁸⁹ Consejo de Estado, Advisory Opinion No. 2233 (11 December 2014) (**Exhibit R-135**), p. 8.

⁴⁹⁰ Law No. 1382 (9 February 2010) (**Exhibit C-18**). The Tribunal notes that the actual text states “provided”, not “to be provided.”

⁴⁹¹ Decree No. 2820 (5 August 2010) (**Exhibit C-129**).

15 December 2010 extended the exploration phase of the entirety of the area of Concession 3452 for two years.

449. The 2007 Atlas did not entail a mining ban in the páramos. It had no normative content, was just an academic exercise and the purpose was “*to compile all information available at the time about the páramos and identify the actions taken to protect them.*” Indeed, the methodology used was inadequate for the purposes of validly determining a páramo ecosystem.⁴⁹²
450. Whilst the effects of the striking down of Law 1382 were deferred for two years, Law 1450 was enacted in June 2011, which required delimitation based on technical, social, environmental and economic criteria. Again, no mining ban could become effective until delimitation in compliance with these requirements had been undertaken. Therefore, Laws 1382 and 1450 did not ban mining in the areas of the Concession overlapping the 2007 Atlas, Eco Oro continued mining activities in those areas after this time and Colombia designated the Project a PIN, demonstrating that mining in the concession area had not been excluded.
451. Resolution 937 also did not create a permanent mining ban; it merely adopted the 2007 Atlas as a reference for the identification and delimitation of the páramo ecosystems (Article 1). This was explained in a letter from MinMinas to INGEOMINAS on 27 September 2011: “*Currently, the requirements for declaring páramo ecosystems in the country, as set out by current norms, are not met. Although the transitory provision of [Law 1450] orders that the cartography of [the 2007 Atlas] be used as a reference, at no point does it determine that the zones excluded from mining are established by such cartography.*”⁴⁹³ In any event, this Resolution failed to meet the requirements of Laws 1382 and 1450 in that it wasn’t based on technical, social, environmental and economic studies.⁴⁹⁴ It is also of note that this

⁴⁹² First Baptiste Statement, paras. 23 and 43. The Tribunal notes Ms. Baptiste’s statement provided that “[o]ne of the main challenges in determining the reference area was to develop a methodology to identify the transition zone between forest and the páramo.”

⁴⁹³ Letter from Ministry of Mines (Ms. Díaz Lopez) to INGEOMINAS (Mr. Montes) (27 September 2011) (Exhibit C-330), p. 2.

⁴⁹⁴ Letter from Ministry of Mines (Ms. Díaz Lopez) to INGEOMINAS (Mr. Montes) (27 September 2011) (Exhibit C-330), p. 11.

Resolution was only issued one week before Eco Oro’s application for an environmental licence for its open-pit mine was denied by the environmental authorities and yet such denial was not on the basis of Resolution 937 or the 2007 Atlas, but rather on detailed technical reasons.⁴⁹⁵

452. The fact there was no mining ban is further confirmed by:

- a. ANLA’s Resolution 35 of 31 October 2011, which stated that “[...] *the Ministry has not declared an exclusion zone for mining in the páramo ecosystem [...]*” and that the IAvH cartographic information had not been used to identify and quantify the area of the different bioclimatic levels within the area of interest.⁴⁹⁶
- b. Whilst Resolution VSC 2 only granted Eco Oro an extension over non-overlapping areas of Concession 3452, this was overturned by Resolution VSC 4 which stated that Article 202 of Law 1450 “*had not been developed*” so that the páramo could not be delimited “*with absolute certainty*” and that, therefore, the legal status of the overlapping area of Concession 3452 was “*uncertain*” as “*it cannot be said with complete certainty, due to the absence of technical parameters, that it is located within the páramo.*” As a result, the exploration phase for the entirety of Concession 3452 was extended for a further two years, albeit it was noted that no exploratory activities could be carried out in the páramo area pursuant to Article 202 of Law 1450 “*until the Ministry of the Environment and Sustainable Development or the entity acting in its capacity issues the final delimitation to a scale of 1:25,000.*”⁴⁹⁷

(b) The Respondent’s Position

453. Article 34 of the 2001 Mining Code empowers MinAmbiente to exclude areas from mining activities, including páramo areas as confirmed by Constitutional Court Judgement 339 of 2002. Páramos were defined in Resolution 769 of 2002 to include low high Andean

⁴⁹⁵ Claimant’s Reply, para. 143; Ministry of Environment, Resolution No. 1015 (31 May 2011) (**Exhibit R-16 / R-71**).

⁴⁹⁶ Ministry of Environment, Resolution No. 35 (31 October 2011) (**Exhibit C-290**), p. 5.

⁴⁹⁷ National Mining Agency, Resolution VSC-4 (12 September 2012) (**Exhibit C-25**).

forests.⁴⁹⁸ This exclusion zone could be achieved either through the creation of a national park or through the delimitation of a páramo ecosystem and the fact such zone was declared over all or part of an area where a concession had been granted is irrelevant. This should have been well understood by Eco Oro when it executed Concession 3452 and was a risk that Eco Oro voluntarily assumed.

454. Article 36 confirms that where a restriction on mining arises, it is immediately applicable, without the need for any express declaration, such that mining is prohibited *de jure* in those areas designated as a mining exclusion zone and is applicable to any existing concession, not just future concessions. Had it been intended that it was only to apply to future concessions this would have been explicitly provided for in Article 36. This was the case with Article 9 of the 1988 Mining Code which expressly provided that any exclusion zone declared would not affect mining titles which had already been granted. This construction is also clear from the fact that Article 36 provides that it is unnecessary for a concessionaire to waive any of its rights in order for the exclusion zone to take effect by operation of law. Eco Oro's construction makes no sense – it would be absurd to grant a mining concession over an area where a mining exclusion zone had been established. Colombia's construction is also supported by the 2002 Judgement C-339 of the Constitutional Court.⁴⁹⁹ Colombia does not say that at the time Concession 3452 was executed, the Santurbán Páramo had been designated and excluded. For it to succeed, Colombia does not need to show that there was an outright ban, Colombia was entitled to wait to see the nature of the mining proposed by Eco Oro before deciding whether or to introduce a mining ban.⁵⁰⁰
455. Article 46 of the 2001 Mining Code is not a stabilisation clause, it merely enshrines the basic general principle of non-retroactivity of the law and confirms that concession contracts are governed by the legislative framework in existence at the time the concession contract was entered into. Further, it makes no reference to environmental protection legislation, merely to mining laws and its lack of applicability to environmental protection legislation was confirmed by Advisory Opinion 2233 specifically referring to the protection of páramo

⁴⁹⁸ Ministry of Environment, Resolution No. 769 (5 August 2002) (**Exhibit C-9**).

⁴⁹⁹ Tr. Day 1 (Mr. Mantilla-Serrano), 274-276.

⁵⁰⁰ Tr. Day 1 (Mr. Mantilla-Serrano), 268.

ecosystems.⁵⁰¹ Indeed, Article 196 of the 2001 Mining Code specifies that all environmental provisions and regulations apply immediately to all mining activities and the *travaux* to the 2001 Mining Code note that Article 46 does not stabilise environmental laws, stating that “[...] *there can be rules following the concession contract, that must necessarily be applied to the concessionaire, e.g. technical and environmental laws and regulations [...]*.”⁵⁰² Indeed, these *travaux* have been cited with approval by Professor Ricaurte.

456. MinAmbiente’s exercise of a right expressly reserved under the 2001 Mining Code does not constitute a retroactive change of the law but is instead the application of an existing law which Eco Oro accepted on executing Concession 3452.
457. Law 1382 together with the MinAmbiente’s Resolution 937 of May 2011 banned mining in páramo ecosystems as delimited in the 2007 Atlas.
458. Although Law 1382 was struck down, the effect was suspended for two years such that the ban continued uninterrupted as per the following:
- a. MinAmbiente Resolution 937 of May 2011;
 - b. Law 1450 (which confirmed its immediate application);
 - c. Law 1753 of 2015; and
 - d. Law 1930 of 2018.
459. The fact the ban had been operative since 9 February 2010 was confirmed by Advisory Opinion 2233 which provided that, “*with respect to mining activities, the ban on undertaking them in páramo ecosystems has been operative in Colombia since February 9 2010.*”⁵⁰³

(2) The Tribunal’s Analysis

460. The 2001 Mining Code came into being against the backdrop of an increasing awareness of the need to protect the environment and of the importance and fragility of the páramo

⁵⁰¹ Consejo de Estado, Advisory Opinion No. 2233 (11 December 2014) (**Exhibit R-135**).

⁵⁰² Republic of Colombia, Draft Bill No. 269 for Senate debate (14 April 2000) (**Exhibit R-49**), p. 25.

⁵⁰³ Consejo de Estado, Advisory Opinion No. 2233 (11 December 2014) (**Exhibit R-135**).

ecosystem. This can be seen from the General Environmental Law, which was published on 22 December 1993, the Biodiversity Convention having entered into force in Colombia on 29 January 1996, the Ramsar Convention entering into force on 18 October 1998, and Colombia's adoption of its (green) Constitution. Article 1.1 of the General Environmental Law is of particular relevance, referring to the relevance of the Rio Principles, Principle 15 of which contained the precautionary principle (namely that “*where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation*”; also known as *in dubio pro ambiente*) and which was enshrined into Colombian Law by Article 1.6 of the said General Environmental Law.⁵⁰⁴ In addition, Article 1.4 provides that “*the páramo and sub páramo areas, water springs and aquifer recharge zones shall be the subject of special protection.*”

461. Before the 2001 Mining Code came into force, it is common ground that Permit 3452 was not in a prohibited area.
462. The key provisions of the 2001 Mining Code with respect to Colombia's right to impose a mining ban and the manner in which it is to be undertaken are Articles 34, 36 and 46.

(a) Article 34 of the 2001 Mining Code

463. Articles 34 and 36 are not easy to construe. Article 34 is titled “*Areas that may be excluded from mining.*” At the very least, this puts a potential investor on notice that it was in the mind of the legislator that certain mining activities could be banned in certain areas. The text might be construed to include areas in which mining has been excluded as well as those in which it may be excluded, i.e., a future delimitation. However, the phraseology is contradictory in the body of the article. The text first refers to areas where mining exploration and exploitation may not be carried out in areas “declared and delimited” (which

⁵⁰⁴ The *Consejo de Estado* in its Advisory Opinion, quoting Constitutional Court judgments C-703 of 2010 and C-988 of 2004, notes with regard to the precautionary principle that “*although it is part of the positive order, with legal rank, in any case 'it has been constitutionalized, since it is derived from the internationalization of ecological relations (Article 266 of the Constitution) and from the duties of protection and prevention contained in articles 78, 79 and 80 of the Charter' in addition to the fact that it derives from the duty imposed on the authorities 'to avoid damages and risks to life, health and the environment'*”. See *Consejo de Estado*, Advisory Opinion No. 2233 (11 December 2014) (**Exhibit R-135**).

could be construed as referring to the fact that areas are already excluded by operation of Article 34) rather than areas “*to be declared and delimited.*” This suggests the scope of the Article relates to areas that have been delimited by virtue of this Article. However, the text then provides that “*exclusion zones will be those constituted in accordance with the legal provisions in force, such as areas that comprise the system of natural national parks, regional natural parks and forest reserve areas*”; the wording that the exclusion zones “will be” not “are” those constituted in accordance with the legal provisions in force, and that the areas “should be” rather than “are” delimited by the environmental authority, indicates that this is providing for a future delimitation rather to an immediate existing ban. The inclusion of the phrase “such as” indicates this was not an exhaustive list and therefore, as stated in Judgement 339, páramo ecosystems may also be declared mining exclusion zones pursuant to Article 34.

464. In this regard, the Tribunal also notes that Law 1382 amended Article 34 by adding the following underlined words that the exclusion zones will be “*those that have been constituted or will be established in accordance with the legal provisions in force [...]*.”⁵⁰⁵ Law 1382 was struck down by Constitutional Court judgement C-366 of 2011 such that the underlined words are not applicable. This supports the Tribunal’s construction that Article 34 can only apply to future areas to be designated as mining exclusion zones.
465. Article 34 details the process by which mining exclusion areas are to be declared and delimited, namely where (i) such declaration and delimitation is undertaken in accordance with the legal framework currently in force for the protection and development of renewable natural resources or the environment; (ii) the delimited areas should be geographically delimited by the environmental authority on the basis of “*technical, social and environmental studies*” with the collaboration of the mining authority; and (iii) the act declaring a mining exclusion area must be expressly based on studies establishing the incompatibility of or need to restrict mining activities. Having regard to the language of Article 34 in its entirety, the Tribunal construes it such that it empowers MinAmbiente to publish, in the future, a mining exclusion zone but requires MinAmbiente to follow the

⁵⁰⁵ Law No. 1382 (9 February 2010) (**Exhibit C-18**) (USB drive provided at the Hearing).

specified process in order to achieve this, i.e., a future delimitation. The Tribunal does not understand this construction to be disputed by Colombia.⁵⁰⁶

(b) Article 36 of the 2001 Mining Code

466. Article 36 provides that where mining activities are prohibited, such areas are “*deemed excluded or restricted by operation of law [...] [and] this exclusion or restriction need not be declared by any authority whatsoever or be expressly stated in acts or stated in acts and agreements [...]*.” The question is whether, when an area is declared as a mining exclusion zone, does it only apply to future concessions or also to concessions that were already in existence at the time the exclusion zone is declared.
467. In construing Article 36, the Tribunal is mindful that, whilst Colombian law contains a general principle of non-retroactivity, it also allows a public purpose law to have retrospective effect provided that it is carried out with strict adherence to the principle of legality, with due process and with appropriate compensation where due. This retrospective effect is outlined in Advisory Opinion 2233 in which the *Consejo de Estado* explains (albeit with respect to the legal effect of Section 202 of Law 1450):

“3. Retroactivity and retrospectivity. Immediate general effect of public policy rules and their application in environmental matters

The Chamber has identified four general rules for this type of situations that relate to the application of law over time:

‘1. All laws are applied with respect to the future as of their effective date, on the understanding that they cannot disregard acquired rights or consolidated situations and that they produce immediate effects on mere expectations and ongoing situations.

2. Constitutionally, there are two explicit limits to the effects of new laws that must be respected by the legislature: the existence of rights acquired with just title in Article 58 of the Constitution [...]. As an exception that confirms the rule, Article 58 allows for the sacrifice of rights acquired under just title ‘for reasons of public utility or social interest’ subject to compensation.’

[...]

⁵⁰⁶ Tr. Day 1 (Mr. Mantilla-Serrano), 266:6-267:6.

A distinction is then made between retroactivity or application of new laws to situations consolidated (terminated) under a previous rule – which by constitutional principle is not permitted (Article 58 of the Constitution) – and retrospectivity or application of the new law to situations in progress at the time of its entry into force.

[...]

Based on the foregoing, it is possible to understand that the application of the new law to ongoing situations does not necessarily conflict with Section 58 of the Constitution: [...]

[...]

Therefore, in relation to new laws, it is possible to speak of an application that is ‘general, immediate and future-orientated, but with retrospectivity’, that is, with effects on the legal situations in progress at the time of its entry into force. In this way, unlike situations consolidated or defined under a previous law – over which a general principle of non-retroactivity applies – it can be accepted that the new law governs not only the legal situations arising from its entry into force, but also the present and future legal effects of those which arose under a previous law (retrospectivity).

This retrospective effect of the law is particularly important in relation to rules issued on the grounds of morality, public health or utility, in respect of which Act 153 of 1887 expressly provides for their immediate application, even when they restrict rights protected in the previous law. [...]

[...]

What has just been stated in relation to the immediate application of the rules of public or social order is even more relevant in environmental matters, whose provisions have this status by law.

[...]

It can then be concluded for the analyzed case that Section 202 of Law 1450 of 2011, being an environmental rule of public order and social interest nature, has immediate general effect and can be applied with retrospectivity, unless there is a constitutional reason of greater weight that prevents this or demands its moderation, as will be seen later.”⁵⁰⁷ [Tribunal’s emphasis]

468. The *Consejo de Estado* further notes that “since the sacrifice of individual and established situations does not constitute the general rule of State action and entails a clear afflictive

⁵⁰⁷ *Consejo de Estado*, Advisory Opinion No. 2233 (11 December 2014) (**Exhibit R-135**).

effect on citizens, their legal position is surrounded by a series of minimum guarantees such as (i) strict adherence to the principle of legality (compliance with constitutional requirements); (ii) observance of due process and (iii) payment of compensation to prevent the Administration's decision from becoming a 'confiscatory act, expressly prohibited by Article 34 of the Constitution.' [...] Therefore, the constitutional protection of legitimate expectations determines that normative changes are not made 'arbitrarily and suddenly without any consideration for the stability of the legal frameworks that govern the action of persons and to the detriment of the predictability of the consequences to individuals of adjusting their behavior to these rules.'"

469. The fact that certain provisions of the 2001 Mining Code may also be applied or relied upon to have retrospective effect is confirmed by Article 196 of the 2001 Mining Code. This Article states “[t]he legal provisions and regulations of an environmental nature” have a general and immediate application and Article 197 which refers to “*environmental requirements and conditions*”⁵⁰⁸ which, whether or not “set forth” (as translated by Colombia) or “contemplated by” (as translated by Eco Oro), must be complied with or met before the commencement and execution of mining works, in order to be permitted to exercise rights under the concession contract. These provisions require compliance with environmental regulations not necessarily contemplated at the time the 2001 Mining Code was enacted, but which are subsequently enacted. This makes clear that an investor who proceeded on the basis of the 2001 Mining Code, had clear notice that future environmental laws or regulations could be applied to have retroactive effect. This may be relevant to determining the nature and reasonableness of Eco Oro’s expectations.
470. The Tribunal therefore finds that, provided due process is followed with respect to the declaration of the mining exclusion zone, following the *Consejo de Estado*’s analysis with respect to the retrospective effect of Article 202 of Law 1450, Article 36 may be applied in a manner that has or allows for retrospective effect, subject to compensation pursuant to

⁵⁰⁸ The Tribunal notes the Parties have provided alternative translations of this Article but both refer to “*requirements and conditions*” being those that are environmental or of an environmental nature. Law No. 685 (as amended) (8 September 2001) (**Exhibit C-8**).

Article 58 of the Constitution (the Tribunal considers below whether due process was indeed followed when delimiting the Santurbán Páramo).

471. The Tribunal notes that when the 2001 Mining Code was published, Article 36 had been written on the basis that it referred to situations where mining activities had been prohibited “*pursuant to the above articles*” but this wording was deleted pursuant to the Constitutional Court Judgement 339 of 2002. In the Tribunal’s view, the removal of these words does not change the meaning of Article 36 in that any prohibition contemplated by Article 36 must have been carried out lawfully and must, therefore, be in compliance with Article 34. Article 36 therefore provides that, when an area is excluded from mining activities in accordance with the Article 34 requirements, it is deemed excluded with immediate effect.
472. There is a further contradiction between Article 34 –which expressly requires an “*act by which [the exclusion zones] are declared*”– and Article 36, which states that the “*exclusion or restriction need not be declared by any authority whatsoever.*”⁵⁰⁹ The Tribunal understands this to mean that for the delimitation to be lawful, there must be some form of declaration, for example the declaration of the creation of a national natural park, regional natural park, forest reserve area or páramo ecosystem, which declaration expressly excludes mining exploration and exploitation works and projects in accordance with Article 34. However, it is not then necessary for there to be a further declaration that the effect of the creation of the national natural park, regional natural park, forest reserve area or páramo ecosystem is that the area within such designated area is a mining exclusion zone. It is an automatic consequence of the Article 34 declaration that the area immediately becomes a mining exclusion zone without more.
473. The Tribunal next turns to consider whether Article 36 excludes the payment of compensation where a mining exclusion zone comes into being. The last sentence of Article 36 provides that “[...] *if such areas or plots of lands were actually the site of a concessionaire’s works, the mining authority shall order they be immediately removed and cleared without awarding any payment, compensation or damages whatsoever for this reason, notwithstanding the proceedings the competent authorities may commence in each*

⁵⁰⁹ Law No. 685 (as amended) (8 September 2001) (**Exhibit C-8**), Arts. 34, 36.

case where applicable.”⁵¹⁰ As is clear from the opening words of this sentence, the provision is directed to a situation where a concessionaire’s works are located in the areas delimited as mining exclusion zones. The Article provides that “*they*” shall be removed and cleared without compensation, but to what does the word “*they*” refer? Logically, this appears to be a reference to the concessionaire’s works that must be removed and cleared, such that no compensation is payable for the removal and clearance of the works themselves. However, the provision is silent as to whether or not compensation is payable for the loss of any underlying acquired rights due to any declaration of a mining exclusion zone. Given this silence, the Tribunal is guided by Article 58 of the Constitution, which provides that compensation is payable for loss of an acquired right, the quantum of which is to be determined “*by taking into account the interests of the community and of the individual concerned.*”⁵¹¹ The Tribunal therefore finds that Article 36 does not prohibit the right to compensation for the loss of an acquired right to exploit. The Tribunal’s construction is supported by the statements of the *Consejo de Estado* in Advisory Opinion 2233, as detailed above, which indicate that certain compensation may be required to be payable, in respect of the loss of an acquired right. The Tribunal’s construction ensures Colombian law is respected but balances any immediate potential harm to the environment by ensuring that “works” are removed from the area ensuring that the area in the exclusion zone is able to return to its natural state.

(c) Article 46 of the 2001 Mining Code

474. In undertaking its analysis in Advisory Opinion 2233, the *Consejo de Estado* also considers the meaning and effect of Article 46. It notes that “*the guarantee of legal stability and respect for legitimate confidence does not imply a rule prohibiting amendment of current statutes upon execution of a contract, but rather, it allows the possibility of economic claims in cases where the conditions of the investment have changed. Put another way, Article 46 of the*

⁵¹⁰ Law No. 685 (as amended) (8 September 2001) (**Exhibit C-8**), Art. 36.

⁵¹¹ Political Constitution of Colombia (1991) (**Exhibit C-65**).

Mining Code does not necessarily result in the applicability of the prohibition stipulated by lawmakers for the protection of páramo ecosystems.”⁵¹²

475. It is apparent from this language that Article 46 does not have the force of a stabilisation clause. Nevertheless, it tends to reinforce the *Consejo de Estado*'s finding that whilst a subsequent law may lawfully have a retrospective effect on Eco Oro, Eco Oro may retain the possibility of an economic claim against Colombia.
476. The Tribunal therefore finds that, pursuant to Article 34, Colombia was permitted to designate mining exclusion zones provided that the procedure set out therein was complied with. Article 36 provides that if the area is excluded pursuant to the procedure laid down by Article 34 then it becomes immediately effective and if existing works have to be removed this is at the cost of the concessionaire. However, an existing title holder may be entitled to compensation if it suffers loss of an acquired right.
477. Having construed the relevant provisions of the 2001 Mining Code, the Tribunal next considers Laws 1382 and 1450 and Resolution 937. The Tribunal first recalls the requirements set out in Article 34 which must be complied with before an exclusion zone can be declared, namely:
- a. The act by which the mining exclusion zones areas are declared and delimited must expressly state that it excludes mining exploration and exploitation works.
 - b. The exclusion zone must be geographically delimited on the basis of technical, social and environmental studies (this was the wording in effect at the time the 2007 Atlas was published, the requirement for economic studies not then having been added);
 - c. The act by which the exclusion zone is declared must be expressly based on studies that establish the incompatibility of or need to restrict mining activities; and

⁵¹² *Consejo de Estado*, Advisory Opinion No. 2233 (11 December 2014) (**Exhibit R-135**), para. 2.2.1.1(iv), last paragraph.

- d. The delimitation must have been prepared with the collaboration of the mining authority.

478. Colombia accepts that the 2001 Mining Code did not expressly create an exclusion zone over any part of Concession 3452⁵¹³ but says that Article 3 of Law 1382 of February 2010 and MinAmbiente Resolution 937 prohibited all mining in those páramo ecosystems delimited by the 2007 Atlas.

(d) Law 1382 of 2010

479. On a careful review of Law 1382, it does not seem to the Tribunal that it created a mining exclusion zone in the area of the 2007 Atlas.

480. Article 3 of Law 1382 amends Article 34 of the 2001 Mining Code such that Article 34 expressly refers to páramo ecosystems as an area which “*may*” be excluded from mining. This is consistent with Judgement 933. Article 34 continues by stating that “[*t*]he *aforementioned zones will be those that have been constituted or will be established in accordance with the legal provisions in force.*”⁵¹⁴ This suggests that exclusion zones could have been put in place by the time of the enactment of Law 1382, however, even on Colombia’s case, as of the date Law 1382 was published no exclusion zone had yet been created by the 2007 Atlas; Colombia argues that it was only the publication of Law 1382 which achieved this.

481. Law 1382 provides that such exclusion zones should be areas “*geographically delineated by the Environmental Authority based on technical, social and environmental studies. The páramo ecosystems shall be identified in accordance with the cartographic information provided by the [IAvH].*” Paragraph 3 of Article 3 further provides that “[*t*]he *declaration of the exclusion areas referred to in this section requires the Ministry of Mining and Energy’s prior non-binding opinion.*”⁵¹⁵

⁵¹³ Tr. Day 1 (Ms. Blanch), 266:22 – 267:1-6; Tr. Day 1 (Mr. Mantilla-Serrano), 262:15-18; and Tr. Day 1 (Mr. Mantilla-Serrano), 266:6-20.

⁵¹⁴ Law No. 1382 (9 February 2010) (**Exhibit C-18**) (USB drive provided at the Hearing).

⁵¹⁵ Law No. 1382 (9 February 2010) (**Exhibit C-18**) (USB drive provided at the Hearing).

482. Turning first to the requirement that exclusion zones must be delimited on the basis of the technical, social and environmental studies, Colombia adduced no evidence of any such studies having been undertaken before 2010. Indeed, Colombia accepts that the 2007 Atlas was not prepared on the basis of technical, social and environmental studies as such, having been created as a part of MinAmbiente’s 2002 páramo programme.⁵¹⁶ Colombia argues that the Article 34 studies were unnecessary as Resolution 937 specifies that the 2007 Atlas was to be adopted as a minimum reference. The Tribunal turns to Resolution 937 next, but for the purposes of Law 1382 it seems to the Tribunal that it does not make the 2007 Atlas an exclusion zone as it was not created in accordance with Law 1382’s requirements. What Law 1382 does is set out the conditions pursuant to which a mining exclusion zone can be created; the 2007 Atlas did not of itself comply with those conditions. Further there is no evidence that any “*prior non-binding opinion*” had been obtained from MinMinas. The Tribunal finds, therefore, that Law 1382 did not of itself create a mining exclusion zone.
483. Given this determination, the Tribunal does not need to consider whether the grandfathering regime applied to Eco Oro, as no mining exclusion zone had been effected over any area of Concession 3452.

(e) Resolution 937

484. The Tribunal next turns to MinAmbiente’s Resolution 937, Article 1 of which adopts the 2007 Atlas “*for the identification and delimitation of Páramo Ecosystems.*”⁵¹⁷ Colombia says the meaning of this is that the 2007 Atlas becomes the delimitation required by Article 34 of the 2001 Mining Code (as amended by Law 1382) which gives the 2007 Atlas the force of law as a mining exclusion zone.
485. The 2007 Atlas clearly identifies and delimits Páramo Ecosystems for certain purposes. The question is: does the delimitation meet the requirements of Article 34 of the 2001 Mining Code? Article 1 of Resolution 937 does not explicitly state the purpose for which the 2007 Atlas is adopted, indeed it does not state that the identification and delimitation is for the purposes of complying with the requirements of Article 34 of the 2001 Mining Code or Law

⁵¹⁶ Tr. Day 1 (Mr. Mantilla-Serrano), 259:21-260:1.

⁵¹⁷ Ministry of Environment, Resolution No. 937 (25 May 2011) (**Exhibit R-70**), Art. 1.

1382. Colombia accepts that the 2007 Atlas was not prepared on the basis of technical, social and environmental studies, notwithstanding that both Article 34 of the 2001 Mining Code and Law 1382 expressly require this for any delimitation to be valid. Further, Resolution 937 makes clear that, to the extent that environmental authorities may have undertaken their own delimitation in their own jurisdictions (as permitted by Article 1(1)), such delimitation must be at least as detailed as 1:25,000. This shows the importance of the delimitation being on a 1:25,000 scale, whereas the 2007 Atlas was on a scale of 1:250,000. The Tribunal therefore does not accept that the Santurbán Páramo became a mining exclusion zone with the adoption of Resolution 937. Something more was needed.

486. As an aside, whilst the Tribunal does not accept that Resolution 937 has the effect contended for by Colombia, it must have been clear to all interested parties that the parameters of the Santurbán Páramo, once delimited in accordance with the law, would not encompass an area less than that of the 2007 Atlas. The Tribunal so concludes because Article 1(1) of Resolution 937 further provides that delimitations carried out by the environmental authorities in their own areas of jurisdiction will be the legally binding delimitation “*for all purposes*” provided the cartographic scale used is at least as detailed as 1:25,000 delimitation with no higher elevation than that defined as the lower altitudinal limit for the ecosystem in the 2007 Atlas and with an area no less than that contained in the 2007 Atlas. It follows from this that, with the adoption of Resolution 937, Eco Oro was put on notice as to the future delimitation of the páramo, and the geographic extent of such delimitation being an area no less than that contained in the 2007 Atlas, although, as the Tribunal notes below (paras. 698 and 799), there was a lack of clarity as to what was meant by the words “*nor is the extent of the total established area decreased*”⁵¹⁸.

(f) Law 1450

487. The Tribunal next turns to Article 202 of Law 1450, adopted on 16 June 2011. Paragraph 1 provides that the páramo ecosystem should be delimited to a scale of 1:25,000 based on technical, economic, social and environmental studies, the delineation to be adopted by an administrative act of MinAmbiente or whoever acts in its capacity. Article 201(1) provides,

⁵¹⁸ Ministry of Environment, Resolution No. 937 (25 May 2011) (**Exhibit R-70**), Art. 1, para. 1.

inter alia, that no mining activities shall be undertaken on the páramo ecosystems and that, “for these purposes” the 2007 Atlas will be considered as “a minimum reference” until a more detailed scale cartography has been obtained. As noted in the previous paragraph, above, the reference to the area delimited in the 2007 Atlas is not without consequence, albeit a reference lacking in precision.

488. This provision is not easy to construe given the wording of Article 34 and the Tribunal accepts there is a tension between them. The Tribunal finds the proper construction of this Article is that it is calling for the requisite delimitation to be undertaken rather than stating that it has been undertaken by Resolution 937. This is evident from (i) the reference to the fact the páramo ecosystems “*should be*” delineated to a 1:25,000 scale, which suggests that, at that point, a delimitation at that scale had not been conducted (as indeed was the case); (ii) the wording that the delineation prepared “*will be*” adopted by MinAmbiente; and (iii) the fact that at the time this Resolution was passed (25 May 2011) there was no delimitation at a 1:25,000 scale – the closest was the 2007 Atlas which was not only a delimitation at a scale of 1:250,000 but had also not been prepared on the basis of technical, economic, social and environmental studies.
489. It is also of note that, in Law 1450, there was an addition of economic studies to be undertaken in determining the delineation of the páramo ecosystems. Again, no evidence was adduced of any technical, economic, social and environmental studies having been undertaken.
490. Colombia says that the reference to the 2007 Atlas serving as “a minimum reference” confirms the 2007 Atlas is, for preliminary purposes at least, the mining exclusion zone and its effect is permanent, at least until a 1:25,000 plan is published. Against this, Eco Oro says that Article 202(1) merely effects a temporary (or preliminary) suspension of mining within the 2007 Atlas, pending a lawful delimitation carried out pursuant to the requirements of the 2001 Mining Code (as amended by Law 1382), thus ensuring that no permanent damage can be caused to a potential area of the páramo ecosystem but which will have no effect once the 1:25,000 plan is published.

491. The Tribunal does not agree with Colombia's construction. Article 202(1) can only be construed such that a temporary suspension of mining activities in the páramo ecosystems comes into effect as delineated by the 2007 Atlas, which suspension will end once the required delineation at a scale of 1:25,000 and undertaken on the basis of technical, social and environmental studies has been published. Paragraph 1 of Article 202 does not create a permanent mining ban: it cannot when Colombia itself accepts that the 2007 Atlas does not meet each of the requirements of Article 34 of the 2001 Mining Code nor those of Article 3 of Law 1382. These requirements are essential to ensure any final delimitation is as reasonably accurate as possible to ensure that a proper balance is achieved between on the one hand protecting the páramo ecosystem and on the other protecting the livelihoods of those who work or live in areas which fall within the 2007 Atlas but may not fall within a delimitation undertaken in accordance with Article 34 and Law 1450. Clearly a delimitation at a scale of 1:250,000 will be less accurate than a delimitation at a scale of 1:25,000 and Colombia accepts there are errors in the 2007 Atlas which would be corrected by a more detailed delimitation. By way of example only, Colombia accepts that the 2007 Atlas had a potential margin of error of between 100-150 meters in altitude⁵¹⁹ which could be significant in terms of determining the parameters of the mining exclusion ban and the extent of the overlap with Concession 3452. Indeed, on Eco Oro's case, in a mountainous area such as where the Angostura Deposit is located, this altitudinal shift could result in a shift of up to 250 meters in the Resolution 2090 delimitation boundary such that almost all of the Angostura deposit might end up outside the Preservation Zone.⁵²⁰ This construction is supported by the text of Resolution VSC 4, which confirms "[...] *the delimitation of the páramo ecosystem based on the [2007 Atlas] is temporary until the competent environmental authority creates the final delimitation at a scale of 1:25,000 after carrying out the technical, economic, social and environmental studies referred to in Article 202 of Law No. 1450 of 2011.*" [Tribunal's emphasis]

⁵¹⁹ Ministry of Environment, Presentation "Delimitation of the Páramo of Santurbán" (December 2014) (**Exhibit C-217**), p. 43; IAvH, "Contributions to the delimitation of the páramo" (2014) (**Exhibit C-194**), p. 53. Colombia accepted there was a 5-13.9% margin of error in determining where the boundary should lie and the margin of error could be as much as 150 meters in altitude in certain areas, because the "*quality of the information has limitations.*" Respondent's Rejoinder, paras. 257-258.

⁵²⁰ Claimant's Reply, para. 274(b).

492. Therefore, even after the passage of Laws 1382 and 1450 and Resolution 937, Eco Oro is subject only to a temporary (or provisional) mining ban: there is no permanent mining exclusion zone over Concession 3452, just a mandatory suspension of mining activities pending the final delimitation of the Santurbán Páramo in accordance with all applicable rules at the time such delimitation is completed. This is the position under Law 1382 and this temporary suspension of mining activities continued as a result of the two-year suspension of the effect of the overturning of Law 1382. In this regard, the Tribunal notes that the reason for Law 1382 being overturned was its unconstitutionality for failure to consult, which tends to support the conclusion that, as at that date, no final delimitation had been carried out in accordance with the requirements of Article 34 of the 2001 Mining Code. Before the two year's suspension had expired, Law 1450 was published which, as the Tribunal has determined above, had the same suspensive effect.
493. The Tribunal's construction is further supported by the Constitutional Court which, in 2017, stated:

“[i]n the case at hand, under Laws No. 1450 of 2010 and 1382 of 2011, the Lawmaker prohibited mineral and hydrocarbon exploration and exploitation projects and activities in areas delimited as páramos. Furthermore, it imposed on the Ministry of the Environment and Social Development the obligation to make progress on the delimitation of páramos. However, the only páramo delimited when the prohibition was in place was Santurbán by way of Resolution No. 2090 of December 19, 2014. Therefore, even if the administrative acts whereby the environmental licenses and permits, and concession agreements, were granted remained valid, they had been deprived of their legal basis, as the Lawmaker placed limits on the private persons' freedom to carry out mining and hydrocarbon activities in páramos.”⁵²¹

⁵²¹ Constitutional Court, Judgment No. C-35 (8 February 2016) (**Exhibit C-42**), p. 97.

“Particularly, although páramos are ecosystems that, pursuant to the law, call for special protection, they are not protected areas per se, since the ‘protected area’ category is tied to a declaratory and implementation procedure by the environmental authorities. In other words, although these ecosystems have been identified as areas that require special protection, no category of specific or automatic protection has been regulated for such biomes. To that extent, at present there are páramo areas that have been declared to be protected areas and others that have not.”⁵²² [Tribunal’s emphasis]

“[W]e may conclude that, although there is a definition of páramo and the obligation to delimit it, determining the scope of protection is effected through such administrative acts as decided upon by the Ministry of the Environment and Sustainable Development on demarcating páramo areas.”⁵²³ [Tribunal’s emphasis]

494. In support of its construction of Law 1382, Resolution 937 and Law 1450, Colombia refers to Advisory Opinion 2233 and, in particular, the following statement which, on first review, appears contradictory to the statement of the Constitutional Court: *“Although Act 1382 of 2010 was only in force for a short period of time, the fact is that the deferred effect of its declaration of unconstitutionality allowed the exclusion of páramos from mining activity to continue over time, as it was later included in the general prohibition of Act 1345 of 2011 that we are now dealing with. Put differently, with respect to mining activities, the ban on undertaking them in the páramo ecosystems has been operative since February 9, 2010.”*⁵²⁴ [Tribunal’s emphasis]

495. In the Tribunal’s view, these two statements can be reconciled. In its judgment, the Constitutional Court is determining, *inter alia*, the actual date on which any specific mining ban came into force. Whilst the *Consejo de Estado* makes a general statement of the importance of protecting the páramos, the focus of its opinion is on considering the effect of a mining ban on *“persons and companies who were validly carrying out mining and agricultural activities in páramo zones prior to the Act’s passage.”* Given the “Act” that the

⁵²² Constitutional Court, Judgment No. C-35 (8 February 2016) (**Exhibit C-42**), p. 101.

⁵²³ Constitutional Court, Judgment No. C-35 (8 February 2016) (**Exhibit C-42**), p. 103.

⁵²⁴ *Consejo de Estado*, Advisory Opinion No. 2233 (11 December 2014) (**Exhibit R-135**). (*“Dicho de otro modo, en lo que se refiere a las actividades mineras, la prohibición de realizarlas en ecosistemas de páramos opera en Colombia desde el 9 de febrero de 2010.”*).

Consejo de Estado is referring to is Law 1450 (which was passed in 2011), when the *Consejo de Estado* refers to mining having been prohibited in páramo ecosystems pursuant to the 2001 Mining Code and Law 1382, it is effectively confirming that there is the power to exclude mining from areas where páramo ecosystems have been declared pursuant to the legal requirements contained in the 2001 Mining Code and Law 1382. The same must therefore be so with respect to Law 1450, such that it does not of itself bring in a permanent mining ban but ensures a suspension of mining pending a final delimitation in accordance with the law. Indeed, in defining the problem, the *Consejo de Estado* says, in paragraph 1, that Section 202 of Law 1450 “orders the delimitation of the country’s páramo ecosystems and prohibits the undertaking of mining and agricultural activities within them.” This is consistent with a construction that Law 1450 does indeed (i) order that mining is finally prohibited within the páramo ecosystems, once finally delimited and (ii) ensures that the condition of the páramo ecosystems is not adversely affected pending delimitation, by suspending mining within the 2007 Atlas pending such final legal delimitation.

496. In summary, the Tribunal understands Advisory Opinion 2233 to explain that, once a final delimitation has been undertaken in compliance with the requirements of Article 34 (as amended), a permanent mining ban becomes immediately effective and enforceable in the delimited area.⁵²⁵ Thus, the enactment of Law 1382 provided for the immediate applicability of a ban on any area once, but only once, it was lawfully declared as a páramo ecosystem in compliance with Article 34. If legitimately declared, such a ban would be continued by Law 1450 without a break. However, as the Santurbán Páramo had not been finally delimited in accordance with Article 34, Laws 1382 and 1450 did not create any permanent mining ban in Concession 3452. In other words, the term “páramo ecosystems” is being used as short-hand for areas which are to be permanently excluded from mining once delimitation has been lawfully undertaken, i.e., in compliance with the requirements contained in the 2001 Mining Code and repeated in Law 1450. Until this happens, mining is suspended, but this is not the same as a permanent ban.

⁵²⁵ *Consejo de Estado*, Advisory Opinion No. 2233 (11 December 2014) (**Exhibit R-135**), Section A 1 – The general protection of páramos in environmental legislation.

497. The Constitutional Court confirms this construction in Judgement C-35 stating that the Santurbán Páramo was the only páramo that had been delimited but that such delimitation took place only by Resolution 2090 on 19 December 2014.⁵²⁶
498. The Tribunal takes comfort that its construction is correct from the contemporaneous understanding of both MinMinas and MinAmbiente as well as other Government bodies. For example, MinMinas wrote to INGEOMINAS stating that whilst the 2007 Atlas was to be used as a reference it did not itself establish mining exclusion zones.⁵²⁷ Further, when Eco Oro’s application for an environmental licence for its open-cast mine was rejected in Resolution 1015, detailed technical reasons were provided rather than a simple statement that the mining activities planned were banned because they were intended to be carried out in a delineated páramo ecosystem.⁵²⁸ The latter would have been far simpler and the obvious thing to say had there been a mining exclusion zone in place. Again, ANLA confirmed in Resolution 35 dated 31 October 2011 that no mining exclusion zone had been permanently declared in the páramo ecosystem. The ANM Resolution VSC 4 noted that it was “undeniable” that at that point Article 202 of Law 1450 had not been developed such that there was not a more detailed map than the 2007 Atlas at 1:250,000 and that therefore the “legal status” of the area in Concession 3452 was “uncertain because it cannot be said with complete certainty, due to the absence of technical parameters, that it is located within the páramo.” The effect was that exploratory activities continued to be suspended “until the Ministry of Environment and Sustainable Development or the entity acting in its capacity issues the final delimitation to a scale of 1:25,000.”
499. The Tribunal therefore finds that as at the date of entry into force of the FTA, whilst mining activities had been suspended, there was no mining exclusion zone in force over any part of Concession 3452 and Eco Oro had acquired rights to explore in the totality of Concession 3452 (Article 58 of the 2001 Mining Code and Clause 4 of the Concession 3452). The majority of the Tribunal finds that Eco Oro had acquired rights to exploit in the totality

⁵²⁶ Constitutional Court, Judgment No. C-35 (8 February 2016) (**Exhibit C-42**), pp. 97 and 101.

⁵²⁷ Letter from Ministry of Mines (Ms. Díaz Lopez) to INGEOMINAS (Mr. Montes) (27 September 2011) (**Exhibit C-330**).

⁵²⁸ Ministry of Environment, Resolution No. 1015 (31 May 2011) (**Exhibit R-16 / R-71**).

of Concession 3452 (Article 58 of the 2001 Mining Code and Clauses 1 and 4 of Concession 3452), the exercise of such rights being subject to PTO approval and obtaining an environmental license; and extend the concession at the end of its term (Article 77 of the 2001 Mining Code and Clause 4 of Concession 3452).

500. The Tribunal now turns to consider whether Colombia's measures had the effect of indirectly expropriating Eco Oro's rights.

D. WHETHER COLOMBIA UNLAWFULLY EXPROPRIATED ECO ORO'S INVESTMENT

(1) The Parties' Positions

(a) The Claimant's Position

501. Article 811 provides for indirect expropriation. It is uncontroversial that contractual rights may be indirectly expropriated,⁵²⁹ seizure of title is not required and the measures do not need explicitly to express the purpose of deprivation of rights or assets, provided they have "a devastating effect on the economic viability" of the project and cause the claimant to "incur unsustainable losses"⁵³⁰ depriving the investor substantially of the use, value and enjoyment of its investment. Thus "[...] a measure or series of measures can still eventually amount to a taking, though the individual steps in the process do not formally purport to amount to a taking or to a transfer of title."⁵³¹ "The last step in a creeping expropriation

⁵²⁹ Claimant's Memorial, para. 245; *Phillips Petroleum Company Iran v. Islamic Republic of Iran*, Iran-US Claims Tribunal, Award No. 425-39-2 (29 June 1989) (**Exhibit CL-8**); *Libyan American Oil Company (LIAMCO) v. The Government of the Libyan Arab Republic*, Award (12 April 1977) (**Exhibit CL-4**); *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award (20 May 1992) (**Exhibit CL-11**); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/97/3, Award (20 August 2007) (**Exhibit CL-43**); *Eureko B.V. v. Republic of Poland, Ad Hoc Tribunal*, Partial Award (19 August 2005) (**Exhibit CL-33**); *Biwater Gauff (Tanzania) v. Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008) (**Exhibit CL-50**); *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award (6 February 2007) (**Exhibit CL-41**) ("**Siemens**"); *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award (13 September 2001) (**Exhibit CL-18**); *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award (8 December 2000) (**Exhibit CL-16**); *Southern Pacific Properties (Middle East Limited) v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award (20 May 1992) (**Exhibit CL-11**).

⁵³⁰ Claimant's Memorial, para. 236; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/97/3, Award (20 August 2007) (**Exhibit CL-43**), invoking *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003) (**Exhibits CL-22 / RL-61**) ("**Tecmed**").

⁵³¹ *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award (17 February 2000) (**Exhibit CL-14**), para. 76.

that tilts the balance is similar to the straw that breaks the camel's back. The preceding straws may not have had a perceptible effect but are part of the process that led to the break."⁵³² Intent is not a prerequisite, the issue is the effect of the measures in question.⁵³³ The form and purpose of the measures is irrelevant, the question being whether the measures are or are not expropriatory.

502. The measures in question comprise the totality of the events commencing with Resolution 2090 and concluding with the deprivation created by Resolution VSC 829 (the "**Challenged Measures**"). Colombia indirectly expropriated Eco Oro's entire investment in Colombia, the date of expropriation being 8 August 2016 when Resolution VSC 829 was issued by the ANM advising that, pursuant to Judgement C-35 of the Constitutional Court, it was only extending Concession 3452 for the areas that fell outside the Santurbán Páramo as delimited by Resolution 2090. The Challenged Measures deprived Eco Oro substantially of the use, value and enjoyment of Concession 3452. Colombia disputes this saying its actions, having been taken for the protection of the environment, do not constitute expropriation.

(i) *The Nature of the Assets Expropriated*

503. Eco Oro's rights to undertake exploitation activities in the totality of Concession 3452,⁵³⁴ as well as the right to extend the term of the Concession were expropriated, both rights being acquired rights.

(ii) *The Challenged Measures*

504. The key events are as follows.

a. Resolution 2090

505. Resolution 2090 is an administrative act. Article 1 provided for delimitation of the Santurbán Páramo "*in accordance with the technical, economic, social and environmental*

⁵³² *Siemens, Award* (6 February 2007) (**Exhibit CL- 41**), para. 263.

⁵³³ *National Grid p.l.c. v. The Argentine Republic*, UNCITRAL, *Award* (3 November 2008) (**Exhibit CL-54**).

⁵³⁴ Whilst during the oral hearing there was some debate as to whether the rights Eco Oro asserts it held at the time of the expropriating measures consisted of the right to exploit, the exercise of which was subject to fulfilling the necessary legal requirements or whether it was more limited, being the right to apply for an environmental licence to enable it to undertake exploitation activities, in its Post-Hearing Brief (paragraph 3), Eco Oro confirmed it asserted it had a right to exploit, which right was expropriated.

*studies conducted by the [CDBM and CORPONOR] and the contributions of the [IAvH]*⁵³⁵ (a 2014 document titled “*Contributions to the delimitation of the páramo through identification of lower limits of the ecosystem at a 1:25,000 scale and analysis of the social system of the territory*”⁵³⁶ (the “**Contributions Document**”) as cartographically represented on the map attached to the Resolution which was on a scale of 1:25,000 and was stated to be an integral part thereof (“**2090 Atlas**”).

506. Resolution 2090 did not “*confirm*” the 2007 Atlas delimitation. Ms. Baptiste confirmed that to delineate the páramos, the IAvH was required to prepare a new set of criteria and adequate methodology which differed from those used to prepare the 2007 Atlas.⁵³⁷ The delimitation was eight times larger than Santurbán Park, whereas previous indications (including from Ms. Baptiste⁵³⁸) had been that the boundaries of the area delimited by Resolution 2090 would be similar to those of Santurbán Park. Further, the Santurbán Páramo delineated at a 1:25,000 scale by the IAvH is approximately 56% larger than the total area identified in the 2007 Atlas and the total páramo area in Colombia under the 2012 Atlas⁵³⁹ was 47% larger than that in the 2007 Atlas.⁵⁴⁰ Pursuant to Resolution 2090, 50.7% of Concession 3452 overlapped with the preservation area, a further 3.9% overlapped with the restoration area and 32% of the Angostura deposit overlapped with the preservation area and 28% overlapped with the restoration area.
507. Resolution 2090 had limited impact on Eco Oro as Article 9 permitted mining activities in the restoration zone located, *inter alia*, in the municipality of California where Concession 3452 is located, subject to compliance with mining and environmental regulations and Eco Oro’s rights were grandfathered by Article 5⁵⁴¹ as Eco Oro’s PMA is an equivalent environmental management and control instrument. However, Article 5 deprived Eco Oro of its right to extend its concession beyond its initial term curtailing Eco Oro’s rights,

⁵³⁵ Ministry of Environment, Resolution No. 2090 of 2014 (19 December 2014) (**Exhibit C-34 / MR-35**).

⁵³⁶ IAvH, “Contributions to the delimitation of the páramo” (2014) (**Exhibit C-194**).

⁵³⁷ First Baptiste Statement, paras. 43 and 45.

⁵³⁸ Letter from IAvH, (Ms. Baptiste) to Mayor of Vetás and others (30 October 2013) (**Exhibit C-189**), p. 1.

⁵³⁹ IAvH, New Cartography of the Páramos of Colombia – Scale 1:100,000 (2012) (**Exhibit R-140**).

⁵⁴⁰ IAvH, “Forest-Páramo Transition. Conceptual Basis and Methods for its Identification in the Colombian Andes” (2015) (**Exhibit R-123**), p. 17.

⁵⁴¹ Ministry of Environment, Resolution No. 2090 of 2014 (19 December 2014) (**Exhibit C-34 / MR-35**).

although this still gave sufficient time to pursue a viable Project.⁵⁴² Further, Article 5's provision that the existing environmental licenses or equivalent environmental management and control instruments "*may be subject to revision and adjustments*" and further that regional and environmental bodies "*shall define more detailed guidelines, in the context of zoning and the determination of uses regulation, as well as in the corresponding environmental control and management documents*" created uncertainty; it was unclear what these detailed guidelines and documents would consist of and thus to what extent they would impact on mine planning or how PMAs of grandfathered projects would be amended and whether they would be made stricter.

b. Law 1753

508. Eco Oro again benefitted from the grandfathering provisions in Article 173 of Law 1753⁵⁴³ because Concession 3452 and the PMA both pre-dated 9 February 2010. This meant that Eco Oro's mining activities, including exploration and exploitation, could continue throughout its Concession area as the transitional regime did not only apply to exploitation activities. Whilst Law 1382 expressly exempted "*construction assembly or exploitation activities*", Resolution 2090 did not contain such language, instead referring to "*mining activities that have concession contracts [...] as well as [...] equivalent environmental management and control instrument.*"⁵⁴⁴ The rights to explore and to exploit are indivisible and, in any event, Law 1753 expressly refers to exploration as well as exploitation activities. The grandfathering regime in Law 1753 therefore allowed Eco Oro to continue carrying out those activities it was permitted to do pursuant to its Concession and PMA which was the right to explore and exploit up to the end of the Concession (subject to obtaining an environmental licence), it is grandfathering the existing Concession irrespective of the stage of activity the concessionaire has reached.
509. Colombia is also wrong to say that an "*equivalent environmental management and control instrument*" is a reference to an environmental licence – given the words immediately follow after the reference to an environmental licence that would render the term duplicative and

⁵⁴² First Moseley-Williams Statement, para. 29.

⁵⁴³ Law No. 1753 of 2015 (9 June 2015) (**Exhibit C-36**), Article 173, para. 1.

⁵⁴⁴ Ministry of Environment, Resolution No. 2090 of 2014 (19 December 2014) (**Exhibit C-34 / MR-35**).

deprive it of any legal effect (*effet utile*).⁵⁴⁵ An “*equivalent environmental management and control instrument*” is not an environmental licence but another different instrument. Given MinAmbiente Decree 2041 of 2014 (enacted just two months before Resolution 2090 was published) defines PMAs as an “*environmental management and control instrument*”⁵⁴⁶ it is clear that the reference in Resolution 2090 to an “*equivalent environmental management and control instrument*” is a reference to a PMA.

510. Eco Oro’s updated PMA was submitted in 2008 after integration of the mining titles and was associated with Concession 3452 (not Permit 3452 as was the position with the original PMA) and has been used by the CDMB to monitor Eco Oro’s activities since submission. It is clearly therefore an equivalent “*environmental management and control instrument*” for the purpose of the grandfathering regime.
511. The fact the Project was grandfathered is also evident from Colombia’s acts (i) in lifting the suspension of Eco Oro’s mining activities in all areas of the concession without any reference to any applicable mining restrictions in the concession area; (ii) the ANLA indicating that an underground mine could be licensed;⁵⁴⁷ (iii) calculating Eco Oro’s canon payments in relation to the entirety of the area; (iv) only reducing the area over which the canon payments were calculated 18 months after Resolution 2090 was issued once judgement C-35 had been published; (v) appointing a PINE official to look after the Project because it was “*the ‘VIP’ Project in the nation*”; and (vi) the President’s Minister and advisors telling an IFC representative in a meeting that “*ANLA was willing to evaluate the underground project under the páramo ecosystem [...]*”
512. If it is determined that the grandfathering regime did not apply to Eco Oro, this does not mean there was no indirect expropriation, it is just a timing issue and the effect is that the expropriation took place when Resolution 2090 was issued, rather than subsequently upon

⁵⁴⁵ Eco Oro notes that this principle is recognised under Colombian law – Constitutional Court Judgement C- 569/04 (8 June 2004) (**Exhibit C-316**), paras. 24, 26, 30-32, 75.

⁵⁴⁶ Decree No. 2041 (15 October 2014) (**Exhibit C-216**), Article 39.

⁵⁴⁷ Second Moseley-Williams Statement, para. 12.

the issuance of Resolution VSC 829, which effectively applied Resolution 2090 to Eco Oro without the benefit of the grandfathering provision.

513. Whilst Ms. Baptiste says in her testimony that the Resolution 2090 delimitation has not been criticised, this is incorrect.⁵⁴⁸ After publication of this delimitation, the IAvH accepted there could be a margin of error of 100 meters in altitude⁵⁴⁹ (it is unknown how this margin of error was determined as annex 8 in which this evaluation was carried out and in which it was reflected was not produced despite Colombia being ordered so to do). MinAmbiente estimated the margin of error to be even greater, as much as 150 meters in altitude in certain areas, because the “*quality of information has limitations*”, noting that further field studies should have been carried out to verify the information.⁵⁵⁰ Given that where the Angostura Deposit is located is mountainous, this altitudinal shift could result in a shift of up to 250 meters in the Resolution 2090 delimitation boundary such that almost all of the Angostura deposit would be outside the Preservation Zone. Additionally, the town of Vetas and certain densely populated areas of the municipality of Berlin fell within the delimited zone. MinAmbiente acknowledged that certain such areas should be removed from the Resolution 2090 delimitation⁵⁵¹ but no amendments were made. The CDMB also recommended amendments to it⁵⁵² (having undertaken the delimitation of Santurbán Park two years before) but again no amendments were made. Even the Constitutional Court noted that MinAmbiente may modify the delimitation on the basis that various participants had warned of errors in the delimitation.⁵⁵³

c. Judgment C-35

514. Further uncertainty was created when the Constitutional Court first announced and then published Judgment C-35.⁵⁵⁴ Whilst the grandfathering provisions in Law 1753 were struck

⁵⁴⁸ First Baptiste Statement, para. 56.

⁵⁴⁹ IAvH, “Contributions to the delimitation of the páramo” (2014) (**Exhibit C-194**), p. 53.

⁵⁵⁰ Ministry of Environment, Presentation “Delimitation of the Páramo of Santurbán” (December 2014) (**Exhibit C-217**), p. 43.

⁵⁵¹ Ministry of Environment, Presentation “Delimitation of the Páramo of Santurbán” (December 2014) (**Exhibit C-217**), p. 43.

⁵⁵² As referred to in Constitutional Court, Judgment No. T-361 (30 May 2017) (**Exhibit C-244**), p. 321.

⁵⁵³ Constitutional Court, Judgment No. T-361 (30 May 2017) (**Exhibit C-244**), pp. 261 and 321.

⁵⁵⁴ Constitutional Court, Judgment No. C-35 (8 February 2016) (**Exhibit C-42**).

down by this judgment, it didn't strike down the equivalent provisions in Resolution 2090. Judgment C-35 also provided that those provisions in Article 173 of Law 1753 which allowed MinAmbiente to deviate from the mapping carried out by the IAvH on the basis of criteria other than scientific (i.e., social and economic) were unconstitutional and the Ministry could only deviate if it could scientifically demonstrate that doing so would provide a higher degree of protection to the páramo.⁵⁵⁵ This raised concern that the delimitation in Resolution 2090 would also be struck down as unconstitutional since social and economic criteria had not been taken into account; indeed there was a challenge pending before the Constitutional Court. Additional uncertainty was created by the Constitutional Court raising concerns, *obiter dicta*, about underground mining in páramo areas.

515. This wide-spread level of uncertainty can be seen from the letter written by MinAmbiente to the Constitutional Court seeking certain clarifications,⁵⁵⁶ which the Court declined to provide.⁵⁵⁷ The ANM also sought clarifications which were not provided. The Minister of Mines noted the uncertainty which had been caused by this judgement and the CDMB explained to Eco Oro in a meeting on 21 November 2016 that these uncertainties prevented it from processing a request for an environmental licence. The ANM characterised the judgement as “radical” and “*an absolute interference with contractual rights and effects, from a mining point of view, contracts executed, and investments made, under the regulations in force at the time, which could potentially cause unlawful damages to those who, on the basis of the contract, and legitimate expectations, carried out investments which could be deemed to have been indirectly expropriated, as a consequence of the unconstitutionality decision. Evidently, this situation raises national and international concerns in light of investment protection treaties [...]*.”⁵⁵⁸ This uncertainty brought the project development to a standstill.⁵⁵⁹

⁵⁵⁵ Constitutional Court, Judgment No. C-35 (8 February 2016) (**Exhibit C-42**), para. 180, pp. 145-146.

⁵⁵⁶ Letter from the Ministry of Environment to the Constitutional Court (11 February 2016) (**Exhibit C-43**), pp. 10-11.

⁵⁵⁷ Decision 097/16 of the Colombian Constitutional Court (2 March 2016) (**Exhibit C-47**).

⁵⁵⁸ Letter from National Mining Agency to the Constitutional Court seeking clarification on the consequences of Constitutional Judgment C-35 (24 February 2016) (**Exhibit C-44**), pp. 7-8.

⁵⁵⁹ Second Moseley-Williams Statement, para. 30.

d. Resolution 829

516. Resolution 829 was issued by the ANM and extended the exploration phase for a further two years but only over the area which did not overlap the Preservation Zone pursuant to Judgment C-35.
517. Eco Oro was therefore not deprived of its rights in relation to 50.73% of Concession 3452 until (i) the ANM's letter to Eco Oro on 26 July 2016, requesting payment of the surface canon calculated only on the 49.27% of the area Concession 3452 which did not overlap with the Preservation Zone because that overlapping area was excluded from mining pursuant to its letter dated 19 May 2016⁵⁶⁰ (which cited Judgement C-35); and (ii) the notification from the ANM on 8 August 2016 that it had decided, in Resolution VSC 829, only to extend the exploration phase (as requested by Eco Oro) in respect of that area of the Concession which did not overlap with the Preservation Zone of the 2090 Delimitation, i.e., 49.27%.
518. Resolution 829 was not, as argued by Colombia, mere clarification that mining was not permitted in the concession area that overlapped with the páramo but was issued as a consequence of Judgement C-35. This can be seen from the following: "*páramo ecosystems must be excluded from mining activities by the operation of law, including those carried out pursuant to concession contracts that have already been granted and that are environmentally feasible, as indicated by the Honourable Constitutional Court in the constitutionality analysis carried out in judgement C-035 of 2016.*" The reference to "*concession contracts that have already been granted and that are environmentally feasible*" is a reference to grandfathered concession contracts.
519. Although pursuant to Resolution 829 it was clear mining would not be permitted in the Preservation Zone, there was considerable uncertainty as to what would be permitted in the Restoration Zone. This uncertainty was exacerbated when Eco Oro received Resolution 48 from the ANM (on 20 September 2016) which was in respect of another of its titles but which granted an extension over the entire concession area, notwithstanding that the area of

⁵⁶⁰ Letter from the National Mining Agency (Mr. García Granados) to Eco Oro (Ms. Arenas Uribe) (26 July 2016) (Exhibit C-50).

that concession overlapped with both the Preservation Zone and Restoration Zone but which further stated that mining activities were prohibited in both of these zones. The uncertainty continued when the Director General of the CDMB advised Eco Oro that it was unclear whether mining would be permitted in the Restoration Zone.⁵⁶¹ 27.6% of the Angostura Deposit overlapped with the Restoration Zone.

520. This uncertainty also extended to the balance of Concession 3452 that did not overlap with either the Preservation Zone or Restoration Zone. The pending Constitutional Court challenge to Resolution 2090 and the 2090 Delimitation raised concerns that the MinAmbiente could be required to re-delimit the páramo such that it encroached further into Concession 3452. There was clear confusion within the ANM (as evidenced by the ANM's technical report VSC 3) and the Director General of the CDMB advised Eco Oro that the CDMB would not be able to process any application for an environmental licence relating to Concession 3452 until the uncertainties were lifted.⁵⁶²
521. It is clear from the following that Eco Oro had not been deprived of its mining rights before Resolution 829:
- a. The ANM would not have needed to refer to grandfathered concession contracts in Resolution 829;
 - b. The ANM would not have extended the exploration phase over the entire concession area in both August 2012 and 2014;
 - c. Surface canons would not have been charged over the entire area in 2012 to 2015; in September 2015 the 2090 Delimitation had already been completed such that Judgment C-35 was the only intervening act between then and the ANM seeking surface canons over only 49.27%; and
 - d. The suspension of mining activities in Resolution VSC 4 would not have been lifted in January 2015, after the Resolution 2090 delimitation.

⁵⁶¹ First Moseley-Williams Statement, para. 63.

⁵⁶² First Moseley-Williams Statement, paras. 63-64.

522. In further support of Eco Oro's argument that it was only deprived of its mining rights by Resolution 829, it is clear from the CIIPE minutes of August 2016 that it was only upon receipt of Resolution 829 that Eco Oro learnt of its deprivation and that this deprivation was as a result of the declaration of the unconstitutionality of the grandfathering provision in Article 173(1) of Law 1753.⁵⁶³ The confusion as to whether the effect of Judgement C-35 was that mining was just banned in the Preservation Zone or whether it also extended to the Restoration Zone must also have been shared by CIIPE given the reference in the minutes to the loss of 60% of the area of Concession 3452 which corresponds to the overlap with both Zones. There was further uncertainty as to whether a buffer zone would be imposed further reducing the available area in which mining would be permitted or whether mining to the border of the 2090 Delimitation would be allowed.
523. Whilst Eco Oro sought to maintain the *status quo* after this indirect expropriation to preserve the possibility of future mitigation, the uncertainty never lifted and the further measures undertaken by Colombia between 2017 and 2019 thwarted its mitigation efforts. Indeed, Eco Oro had been hopeful that the remaining area of Concession 3452 had value to Minesa, a mining company whose concession was landlocked within Concession 3452 and which required the building of tunnels located within the non-overlapping portion of Concession 3452, such tunnels being indispensable to Minesa's project. However, this possibility of mitigating its losses was thwarted by the ANM granting to Minesa the right to tunnel through Concession 3452 without regard to Eco Oro's rights.
524. Colombia's denial of any further extension to file the PTO led to the expiration of the exploration phase of Concession 3452 and Eco Oro therefore had no alternative but to renounce the Concession in further mitigation of its losses, including the need to avoid the continuing costs associated with maintaining and securing the mine site and avoiding the declaration of forfeiture which could impede the completion of the sale and transfer of certain of its other mining titles to Minesa.

⁵⁶³ Intersectoral Commission for Infrastructure and Strategic Projects (CIIPE) Minutes of Meeting No. 5 [CONFIDENTIAL DOCUMENT] (16 August 2016) (**Exhibit C-397**), p. 3.

525. Eco Oro was therefore deprived of the value or control of its investment. The fact it retained the ability to mine just under half of the area of Concession 3452 is irrelevant as the loss in resources in the area lost to delimitation destroyed the economics of the project.⁵⁶⁴ Further, the uncertainty as to the extent of Eco Oro's rights to the remaining area which did not overlap with the Santurbán Páramo as then delimited (some of which overlapped with the Restoration Zone and some of which were not covered by the Resolution 2090 delimitation) rendered any remaining rights Eco Oro may have had valueless. There was considerable uncertainty as to the ability to mine in the Restoration Zone (and this encompassed 27.6% of Concession 3452's area) and it was further unclear whether any re-delimitation would encroach yet further into the non-overlapping areas of Concession 3452. Eco Oro's Terms of Reference obtained in 2011 are irrelevant to evaluating the uncertainty caused by Colombia's measures in 2016 and beyond. Whilst Eco Oro sought to maintain the *status quo* so as to preserve the possibility of mitigating its losses should the position become clearer, Colombia ultimately caused the expiration of the exploration phase leaving Eco Oro no option but to renounce its right to Concession 3452 in a further attempt to mitigate its losses.

(iii) Effect of the expropriating measures

526. Eco Oro was deprived of its rights under Concession 3452 by an arbitrary delimitation –Resolution 829 deprived Eco Oro of over 50% of the area of Concession 3452 which overlapped the Preservation Zone as delimited by Resolution 2090 and this loss of resources, coupled with the crippling uncertainty as to what could be achieved with the remaining area of the concession, destroyed the economic viability of the Project. But for the deprivation of its rights, Eco Oro would have produced an EIA showing that its mining project could have been carried out in an environmentally respectful way.

a. The FTA Does Not Establish the Primacy of Environmental Protection Over Trade and Investment

527. As a preliminary point, Colombia's contention that the State parties agreed to subordinate investment protection to environmental preservation in the FTA is wrong. Both ideals are mutually supportive, neither is subordinated to the other. They must be applied consistently.

⁵⁶⁴ First Moseley-Williams Statement, para. 59.

Eco Oro does not seek restitution but compensation for measures taken by Colombia as the measures taken were not for a legitimate purpose. This “*is a fair outcome that preserves a broad discretion for Colombia to regulate the environment whilst affording reparation in connection with the destruction of the acquired rights of Eco Oro.*”⁵⁶⁵

528. Colombia’s argument that legitimate expectations that arose before the entry into force of the FTA are not protected by Article 801 and Annex 811(2) is also wrong. Article 801(2) precludes any action arising out of a State measure that pre-dates the entry into force of the FTA (the action that frustrates the legitimate expectations), it does not preclude reliance on legitimate expectations formed before the FTA entered into force. This is clear from the definition of “*covered investment*” in Article 838 of the FTA which includes within the scope of the Treaty’s protection investments which existed on the date the FTA entered into force.

b. Annex 811(2)

529. Colombia’s action on 8 August 2016 had “*an effect equivalent to direct expropriation.*” Whilst it is correct that the Preservation Zone of the Santurbán Páramo only overlapped with 50.73% of the area of Concession 3452 and 32.4% of the Angostura Deposit, the economic effect of this was to destroy the viability of the Project.⁵⁶⁶ According to Eco Oro’s mining experts, Behre Dolbear, having considered three similar properties located immediately adjacent to the Angostura Project which were sold between 2011 and 2012, the Angostura Project had considerable market value prior to the measures. They value it at USD 696 million as of 8 August 2016. They further opine that there is no basis to assess the current actual value such that the loss to Eco Oro is 100% of the fair market value of the project. The value of Concession 3452 has thus been eviscerated.
530. It was also impossible for Eco Oro to pursue the Project in the light of the many legal uncertainties (summarised above) surrounding the extent or existence of Eco Oro’s rights in those parts of Concession 3452 which did not overlap the Santurbán Páramo

⁵⁶⁵ Claimant’s Reply, para. 357.

⁵⁶⁶ First Moseley-Williams Statement, para. 59.

as delimited in the 2090 Delimitation.⁵⁶⁷ This rendered any remaining rights to Concession 3452 valueless.⁵⁶⁸

531. Eco Oro’s rights were therefore indirectly expropriated applying the factors detailed in Annex 811(2)(a).
532. Colombia is incorrect to argue that its measures are excused by Annex 811(2)(b).
533. For this Annex even to apply, the measure in question must relate to the protection of the environment. Hence the following measures do not come within Annex 811(2)(b):
- a. The ANM’s refusal on 22 August 2017 to suspend Eco Oro’s obligations in light of the uncertainties surrounding the Project and its rejection of Eco Oro’s appeal; and
 - b. The ANM’s March 2019 deadline to submit a PMA.
534. The remaining measures are “*rare circumstances*” such that they constitute indirect expropriation for which compensation is payable.
535. Sub-paragraphs (a) and (b) of Annex 811 are interpretative aids describing the circumstances in which an indirect expropriation arises and they are to be read together: sub-paragraph (a) contains a non-exhaustive list of “*factors*” to be “*considered*” as part of a “*case-by-case, fact based inquiry*” to determine whether the measures constitute an indirect expropriation. These “*factors*” are not strict conditions to finding an indirect expropriation, but part of a holistic analysis, as is clear from the wording that the factors are to be “*consider[ed]*”; there is no provision that they are determinative. Sub-paragraph (b) contains further guidance for the inquiry initiated by sub-paragraph (a) by clarifying the types of measures that will not constitute indirect expropriation. A measure that is adopted in good faith, is non-discriminatory and is designed and applied to protect legitimate public welfare objectives will not be expropriatory; the three requirements are cumulative (reflecting the latter part of the sub-clause, (the “**811(2)(b) Rule**”). The first part of the sub-clause provides an exception

⁵⁶⁷ First Moseley-Williams Statement, paras. 48-62.

⁵⁶⁸ First Compass Lexecon Report, para. 13.

to this rule such that it does not apply where there are “*rare circumstances*” (the “**811(2)(b) Exceptions**”) and provides a non-exhaustive illustrative example of such a “*rare circumstance*.”

536. Colombia’s construction, which requires mutually exclusive analysis of the two sub-paragraphs, does not comport with the ordinary meaning of the text of these two sub-paragraphs. Firstly, the “*economic impact*” of a measure is a factor listed in sub-paragraph (a), however, in considering the severity of the measure to determine its proportionality pursuant to sub-paragraph (b), it is necessary to consider its economic impact. Again, sub-paragraph (a) lists the “*character*” of a measure as a factor however, to determine under sub-paragraph (b) whether that measure is “*non-discriminatory*” and the manner in which it is “*designed and applied*”, it is necessary to consider its character. The two sub-paragraphs are thus clearly to be considered in one joint, coterminous analysis. This is further demonstrated by the fact that the two sub-paragraphs consist of one long sentence joined together by a semi-colon. Further to this analysis, Eco Oro’s contentions with regard to the Annex 811(2)(a) factors is included in its submissions with respect to whether the measures were a valid exercise of Colombia’s police powers.
537. Annex 811(2)(b) is a codification of, and reflects, the customary international law doctrine of police powers, as was noted by the tribunal in *Philip Morris v. Uruguay*⁵⁶⁹ referring to the Canadian Model BIT whose provision is virtually identical to the sub-clause and as confirmed by Canada in *Lone Pine v. Canada*.⁵⁷⁰ This doctrine is not absolute: to meet the threshold of non-compensable and non-expropriatory government action, there are “*a number of conditions that a measure has to comply with, including non-discrimination, good faith, non-arbitrariness and proportionality.*”⁵⁷¹

⁵⁶⁹ Claimant’s Reply, para. 392; *Philip Morris Brand Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (8 July 2016) (**Exhibit RL-102**) (“*Philip Morris*”), paras. 300-301.

⁵⁷⁰ *Lone Pine Resources Inc. v. The Government of Canada*, ICSID Case No. UNCT/15/2, Respondent’s Counter-Memorial (24 July 2015) (**Exhibit CL-187**), paras. 511-513.

⁵⁷¹ UNCTAD, UNCTAD Series on Issues in International Investment Agreements II: Expropriation (2012) (**Exhibit CL-75**), p. 88.

538. Even if Annex 811(2)(b) does not reflect the customary international law doctrine of police powers, the position is still the same: those circumstances that give rise to exceptions to the police powers doctrine, such as measures that frustrate legitimate expectations or are not *bona fide*, reasonable or proportionate, or are arbitrary, capricious or otherwise not taken in good faith, would also qualify as “*rare circumstances*” under the ordinary meaning of Annex 811(2)(b).
539. The example of an 811(2)(b) Exception in Annex 811(2)(b) is purely illustrative (“when a measure is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted in good faith”). Colombia is wrong to term this a “severe and bad faith regulation”,⁵⁷² what is required is an assessment of proportionality: when is a measure or series of measures so severe in the light of its purpose? This analysis enables a determination of whether a measure can “be reasonably viewed as having been adopted in good faith” –this is the additive, aggravating element that makes a measure that would otherwise be covered by the 811(2)(b) Rule qualify as an 811(2)(b) Exception and is the factor that makes the circumstances “rare.” Annex 811(2)(b) does not mandate the finding of bad faith nor of severity and, as is clear from the inclusion in the provision of the words “such as”, other measures that “cannot be reasonably viewed as having been adopted in good faith” for reasons other than disproportionality must also qualify as an exception to Annex 811(2)(b). To argue that the only measures that can qualify as 811(2)(b) Exceptions are those that cannot be reasonably be viewed as having been adopted in good faith for reasons of disproportionality (and not for any other reasons) is nonsensical and would render the words “such as” in Annex 811(2)(b) devoid of meaning
540. The criterion that measures must be adopted in good faith aligns with the police powers requirement that the measure is *bona fide*. As well as being enshrined in the text of Annex 811, good faith is a fundamental principle of international law.
541. The principle of good faith has various manifestations when considering the manner in which States are to treat foreign investors but in summary encompass a State’s obligation not to act in a way that frustrates an investor’s legitimate expectations, to ensure regulatory

⁵⁷² Colombia’s Counter-Memorial, para. 337.

transparency with no arbitrariness or capricious in discretionary decision-making, of fairness, clarity, non-ambiguity and predictability.⁵⁷³ Whilst the reference cited from the Oxford Handbook on International Investment Law is in relation to fair and equitable treatment, the international law treatment of good faith is imported into the police powers doctrine by the express reference in Annex 811(2)(b) to the requirement that a measure be taken in good faith such that the analysis to be undertaken is the same whether being conducted with respect to the ability to rely on the police powers exception or a minimum standard of treatment analysis.⁵⁷⁴ Indeed, Annex 811(2)(a) expressly refers to reasonable investment-backed expectations as one of the three specified factors to take into account when considering whether there has been indirect expropriation.

542. When good faith is assessed for the purposes of the police powers exception in Annex 811(2)(b) (as the express wording of the sub-clause requires), it is necessary to understand what is meant by good faith in international law and it includes the failure to respect an investor's legitimate expectation; this is part and parcel of what is considered good faith and thus the failure to respect an investor's legitimate expectation forms a part of any assessment as to the relevance of Annex 811(2)(b).
543. In summary, Colombia's measures fall within the three 811(2)(b) Exceptions, each of which independently renders Colombia's measures compensable. They frustrated Eco Oro's legitimate expectations; are arbitrary and disproportionate; and resulted in a non-transparent and unpredictable regulatory regime or were not otherwise implemented in good faith. Colombia is therefore obliged to compensate Eco Oro for these measures which expropriated its mining rights.

⁵⁷³ Claimant's Reply, paras. 399 *et seq.*; T. J. Grierson-Weiler and I. A. Laird, "Chapter 8: Standards of Treatment" in: P. Mulchinski, F. Ortino and C. Schreuer (eds.), *The Oxford Handbook of International Investment Law* (2008) (**Exhibit CL-46**), p. 272; *Tecmed*, Award (29 May 2003) (**Exhibits CL-22 / RL-61**), para. 154; *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (1 June 2009) (**Exhibit CL-58**), para. 450.

⁵⁷⁴ Claimant's Memorial, paras. 277 *et seq.*; *Methanex Corporation v. United States of America*, UNCITRAL, Award (3 August 2005) (**Exhibit CL-32**) ("*Methanex*"), Part IV, Chapter D, p. 4, para. 7; *Glamis Gold Ltd. v. The United States of America*, UNCITRAL, Award (8 June 2009) (**Exhibit CL-59**) ("*Glamis*"), para. 356; *Oxus*, Award (17 December 2015) (**Exhibits CL-84 / RL-99**), para. 744; *Tecmed*, Award (29 May 2003) (**Exhibits CL-22 / RL-61**), para. 122.

(iv) *Eco Oro's legitimate expectations*

544. An expectation is legitimate when premised on “*assurances explicit or implicit, or on representations made by the State*”⁵⁷⁵ and such expectations must have been formed at the time the investment was made or, where the investment is made through several steps, “*legitimate expectations must be examined for each stage at which a decisive step is taken towards the creation, expansion, development, or reorganisation of the investment.*”⁵⁷⁶ Whilst a foreign investor may recognize a host State’s right to regulate, it would expect to be able to rely on specific undertakings made by that State.⁵⁷⁷ Colombia’s measures restricting mining activities in areas of Concession 3452 delimited by Resolution 2090 as páramo were in breach of specific commitments made by the Government on which Eco Oro had a right to rely.
545. The legitimate expectations formed by Eco Oro derived directly from: (i) Decree 2477 of 1986; (ii) the 1998 Mining Code which applied to Permit 3452; (iii) Permit 3452 itself which, on its face, contained an express acknowledgement from MinMinas that the area covered by the permit was not subject to any particular environmental delimitation; (iv) the 2001 Mining Code, pursuant to which Eco Oro’s mining titles were integrated into Concession 3452; and (v) the Colombian law doctrine of *confianza legítima* (legitimate expectations).
546. Of the ten titles integrated into Concession 3452, eight were exploitation titles which represented 92% of the Angostura Deposit, the owners of which had carried out extraction activities such that there was an expectation such activities could continue. The 1988 Mining Code applied when Eco Oro bought these titles and it provided that “*permits and licenses granted by means of a duly executed resolution, that remain in force and valid at the date of enacting of this Code*” constitute acquired rights.⁵⁷⁸ Whilst Article 10 excluded certain areas

⁵⁷⁵ Claimant’s Reply, para. 455, citing *Azurix*, Award (14 July 2006) (**Exhibit CL-35**), para. 318; A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009) (**Exhibit CL-56**), pp. 280-281; *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability (27 December 2010) (**Exhibit CL-68**) (“*Total S.A.*”), para. 117; *Glamis*, Award (8 June 2009) (**Exhibit CL-59**), paras. 620-622.

⁵⁷⁶ Claimant’s Reply, para. 455; *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL, Final Award (12 November 2010) (**Exhibit CL-67**), para. 287.

⁵⁷⁷ Claimant’s Memorial, paras. 276 *et seq.*; *Methanex*, Award (3 August 2005) (**Exhibit CL-32**); *Glamis*, Award (8 June 2009) (**Exhibit CL-59**); *Oxus*, Award (17 December 2015) (**Exhibits CL-84 / RL-99**).

⁵⁷⁸ Decree No. 2655 of 1988 (Mining Code 1988) (23 December 1988) (**Exhibit C-64**), Art. 6.

from mining, Article 9 provided that any areas indicated as prohibited to mining “*does not affect previously issued titles, whilst they remain valid.*” These acquired rights gave Eco Oro the expectation it would have the right to mine (including the right to exploit) in the entirety of the area granted under each title, subject only to those areas excluded at the time the title was issued and to complying with the applicable regulatory and licensing requirements. As a result of these expectations, Eco Oro commenced its investment in Colombia by carrying out exploration works and acquiring additional mining titles.

547. Although Eco Oro’s ten titles were consolidated into Concession 3452 pursuant to the 2001 Mining Code, that did not extinguish the constitutive rights associated with and acquired from the underlying mining permits. Instead, Eco Oro obtained additional acquired rights based on the terms of Concession 3452. Colombia is wrong to say that there was no basis for Eco Oro to have had an expectation it would be permitted to conduct exploitation activities over the entire area of the Concession –Clause One explicitly provided that the sole purpose of the Concession agreement was exploitation such that Eco Oro would have rights over the entirety of the Concession area.
548. Section 46 of the 2001 Mining Code further stabilised the legal framework applicable to mining projects. This applies to the provisions of the 2001 Mining Code and all norms specifically aimed at mining activities, including environmental norms. As provided by Advisory Opinion 2233, whilst Article 46 did not preclude the authorities from restricting rights to carry out mining activities in the páramo ecosystems, compensation could be payable.⁵⁷⁹
549. None of the prior laws such as the Environmental Law, those efforts commencing in 2002 for the protection of páramo ecosystems and the 2007 Atlas amounted to a restriction on mining activities in the area of Concession 3452. If they had, Eco Oro would not have been granted Concession 3452. Eco Oro legitimately formed expectations based on Clause One of Concession 3452 and Article 46 of the 2001 Mining Code.

⁵⁷⁹ Consejo de Estado, Advisory Opinion No. 2233 (11 December 2014) (Exhibit R-135), p. 52.

550. Whilst the licensing regime may have been exacting, Eco Oro was deprived of its acquired right to attempt to meet the applicable environmental licensing requirements during the term of Concession 3452.⁵⁸⁰
551. Eco Oro was induced by these measures to make its investment and form legitimate expectations and, prior to Colombia's measures, Eco Oro had legitimate expectations it would (i) have exclusive rights to carry out mining activities within Concession 3452; (ii) be permitted to use the entirety of the Concession area for the duration of any term extensions subject to complying with its obligations and obtaining the necessary environmental licenses or authorisations; and (iii) Concession 3452 was protected from legislative or regulatory developments as well as other governmental acts having the effect of reducing the scope of Eco Oro's rights.
552. These legitimate expectations were frustrated by: (i) Judgment C-35; (ii) Resolution 829; (iii) ANM's statements in late 2016 that mining would also be prohibited in the Restoration Zone of the Santurbán Páramo as delimited by Resolution 2090; and (iv) the suggestions from the CDMB and MinAmbiente that they would be unable to issue an environmental license, even for areas that had not been delimited by Resolution 2090 as páramo. Indeed, the Government itself recognised the illegitimacy of its interference with the expectations of investors such as Eco Oro. The ANM wrote to the Constitutional Court noting that Judgment C-35 would result in an absolute interference with the contractual rights of concessionaires equating to indirect expropriation. By frustrating Eco Oro's legitimate expectations, Colombia failed to act in good faith and thus the 811(2)(b) Exceptions cannot apply.
553. Colombia is wrong to say that Eco Oro should have known since at least 2007 that it would never be permitted to mine in the entirety of the Concession area. When Eco Oro first invested in Colombia with Permit 3452 there was no ban on mining in the páramos. Permit 3452 expressly stated it did not contain areas within which mining was prohibited. Whilst the General Environmental Law had been passed in 1993, it did not restrict mining in the páramos, merely stating that páramos, sub-páramos, springs and aquifer replenishing zones

⁵⁸⁰ Claimant's Reply, para. 488, citing *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award of Jurisdiction and Liability (17 March 2015) (**Exhibit RL-18**), paras. 603-604.

are subject to “*special protection*.” There was no guidance as to what that special protection consisted of, nor did it establish any restrictions on carrying out any activities in those areas (and indeed no other regulation contained any such restriction at that time). Whilst it required the granting of environmental licenses for the extraction of natural resources and required environmental authorities to take account of the precautionary principle when granting such licences, it is not correct, either as a matter of law or fact, that environmental authorities denied licences to any project where they could not establish with absolute certainty such project would not have an adverse effect on the páramo. Environmental licences were granted to mining projects in areas later delimited as páramos (including areas within the 2007 Atlas) throughout the late 1990s and the 2000s. Further, the Rio Declaration specifies that the precautionary principle only applies “*where there are threats of serious or irreversible damage*.” The General Environmental Law implemented the precautionary principle, stating that “[...] *the environmental authorities and the individuals will apply the precautionary principle according to which, where there is a threat of irreversible and grave harm, the lack of absolute certainty should not be used as a reason to postpone the adoption of efficient measures to prevent the degradation of the environment*.”⁵⁸¹

554. Advisory Opinion 2233 confirmed that the mere existence of a potential risk is insufficient to permit invocation of the precautionary principle, there must be scientific evidence that the activity presents a risk and that “*in general the duties of prevention that the Constitution assigns to the authorities in this field, do not mean that a product or process can only be used when it has been demonstrated that it has no risk, as it is impossible to demonstrate the absence of risk [...]. If there is no basic evidence of a potential risk, the precautionary principle cannot be arbitrarily invoked to inhibit the undertaking of specific commercial or investigative practices. Conversely, in cases where a potential risk has been identified, the precautionary principle obliges the authorities to assess whether or not the risk is tolerable and to determine the course of action on the basis of that assessment*.”⁵⁸²

⁵⁸¹ Law No. 99 of 1993 (General Environmental Law) (22 December 1993) (**Exhibit C-66**), Article 1(6) (as cited in Claimant’s Reply, para. 113).

⁵⁸² *Consejo de Estado*, Advisory Opinion No. 2233 (11 December 2014) (**Exhibit R-135**), p. 31.

555. The General Environmental Law did not impose a mining ban in the páramos and in any event there had been no delimitation of the páramos at that stage. Therefore, when Concession 3452 was granted there were no laws prohibiting or restricting mining in páramo areas. All that was in force was Decree 1220 of 21 April 2005,⁵⁸³ article 10 of which provided “[...] *when [mining projects] are intended to be developed in páramo ecosystems [...], the environmental authorities shall take into consideration the decisions taken on the matter regarding their conservation and sustainable use through the different administrative instruments of environmental management.*” Further, several environmental licences were issued in areas subsequently delimited as páramo around the same time. The fact that the 2007 Atlas had been published did not give the páramos any “*heightened importance*” such that “*obtaining an environmental licence [...] would have been an uphill task.*”⁵⁸⁴ Colombia’s assertion is also inconsistent with the fact that Colombia created the Vetas-California Mining District less than two years before Concession 3452 was executed, the purpose of which was to develop the mining industry there by “*increasing the participation of mining investors [...] both junior and development companies, as well as conglomerates and traditional mining companies to attract technical resources and national and foreign capital to the sector.*”⁵⁸⁵
556. Resolution 2090 did not “*confirm*” the 2007 Atlas delimitation. Firstly, Ms. Baptiste confirmed that to delineate the páramos required the IAvH to prepare a new set of criteria and an adequate methodology⁵⁸⁶ and, further, the Santurbán Páramo delineated at a 1:25,000 scale by the IAvH is approximately 56% larger than the total area identified in the 2007 Atlas and the total páramo area in Colombia under the 2012 Atlas was 47% larger than that in the 2007 Atlas.⁵⁸⁷ Indeed, the IAvH commented that regional environmental authorities used their own information with regard to the location of the páramos rather than using the 2007

⁵⁸³ Decree No. 1220 of 2005 (21 April 2005) (**Exhibit C-97**).

⁵⁸⁴ Respondent’s Counter-Memorial, para. 133.

⁵⁸⁵ Ministry of Mines and Energy, Presentation (1 December 2008) (**Exhibit C-115**) (as cited in Claimant’s Reply, para. 119).

⁵⁸⁶ First Baptiste Statement, paras. 43 and 45.

⁵⁸⁷ IAvH, “Forest-Páramo Transition. Conceptual Basis and Methods for its Identification in the Colombian Andes” (2015) (**Exhibit R-123**), p. 17.

Atlas⁵⁸⁸ and therefore Colombia is incorrect to say the 2007 Atlas was a “widely accepted” source of information on páramos.

557. It is also incorrect that Eco Oro should have understood it would not be permitted to mine in the Concession area as a result of the denial of its application for an open pit environmental licence in 2011. The denial was on the basis of certain technical concerns and not on the basis of Law 1382. Whilst MinAmbiente Order 1241 of 20 April 2010⁵⁸⁹ (ordering the return of Eco Oro’s application) required the new EIA to take the Santurbán Páramo into consideration as an area excluded from mining activities (pursuant to Law 1382 which was found to be unconstitutional), this Order was revoked pursuant to Eco Oro’s successful appeal with the effect that no mining ban was enforced pursuant to Law 1382.
558. By Resolution 1015 of 31 May 2011, MinAmbiente denied Eco Oro’s application for an open-pit licence application⁵⁹⁰ (thereby denying Eco Oro’s request to withdraw its open-pit licence application having decided instead to revert to an underground project) on the basis of the environmental impact of an open-pit mine pursuant to a 127-page analysis.⁵⁹¹ Such a detailed analysis would not have been required had there been a mining ban pursuant to Law 1382.
559. The purpose of appealing Resolution 1015 was only to seek certain clarifications regarding the implications of this decision for Eco Oro’s future activities. The result of the appeal was Resolution 35 from ANLA (which had newly been created and the Director General of which was Ms. Sarmiento). This clarified that the decision was “*purely technical, and never took into consideration any legal grounds.*”⁵⁹² Therefore, it was not based on Law 1382. It further confirmed there had been no reliance on the 2007 Atlas which was too imprecise to be used as a reference,⁵⁹³ the páramo delineation and regulation of land use within the

⁵⁸⁸ IAvH, Technical Report relevant to the Delimitation and Characterization of the Páramo System in the Area of Serranía de Santurbán (7 April 2011) (**Exhibit R-80 / R-81**).

⁵⁸⁹ Ministry of Environment, Order No. 1241 (20 April 2010) (**Exhibit R-14**).

⁵⁹⁰ Ministry of Environment, Resolution No. 1015 (31 May 2011) (**Exhibit R-16 / R-71**), Arts. 1 and 2.

⁵⁹¹ First Sarmiento Statement, para. 24; and Ministry of Environment, Resolution No. 1015 (31 May 2011) (**Exhibit R-16 / R-71**), p. 117.

⁵⁹² Ministry of Environment, Resolution No. 35 (31 October 2011) (**Exhibit C-290**), p. 35.

⁵⁹³ Ministry of Environment, Resolution No. 35 (31 October 2011) (**Exhibit C-290**), pp. 30 and 40.

páramo had yet to be carried out,⁵⁹⁴ and Resolution 1015 had not declared a mining exclusion ban over the páramo ecosystem.⁵⁹⁵ It ordered that the text of Resolution 1015 be amended to include the following: “*Likewise, it is important to note that this Ministry is competent to determine whether or not the project in question is environmentally viable, on the basis of the applicable technical and legal considerations [...] and not to determine, in light of the evidence of a páramo ecosystem, its limits and land use [...] which is under the direct purview of the regional environmental authority with jurisdiction over the said ecosystem.*”⁵⁹⁶

560. Eco Oro could not have been expected to understand from this that an application for an underground mine would be rejected: there was no general mining ban based on Laws 1382 and 1450; Resolution 1015 was specific to the open pit mine; and the environmental impact of the underground mine would be significantly reduced. Indeed, Eco Oro’s request for Terms of Reference for the underground mine was granted with no reference to any mining ban but simply a reference to the fact that the EIA should be prepared following the terms of reference and provisions of Decree 2820 of 5 August 2010 (which regulated the granting of environmental licences for mining projects in páramo areas) and that Eco Oro should take into account the fact the Santurbán Páramo was in the process of being delimited. This latter statement merely required Eco Oro to consider the nature of the ecosystems delimited within Concession 3452 in setting out its environmental mitigation measures in its EIA.
561. The ANM further did not apply a mining ban based on Law 1450. Eco Oro successfully appealed Resolution VSC 2 dated 8 August 2012,⁵⁹⁷ which had only granted Eco Oro’s request for a two-year extension of the exploration phase in respect of the non-overlapping areas of the Concession, pursuant to Law 1450. Thus, Resolution VSC 2 had provided for a permanent deprivation of Eco Oro’s rights in relation to the overlapping area. Resolution VSC 4 revoked Resolution VSC 2, acknowledging that the requirements for the

⁵⁹⁴ Ministry of Environment, Resolution No. 35 (31 October 2011) (**Exhibit C-290**), p. 48.

⁵⁹⁵ Ministry of Environment, Resolution No. 35 (31 October 2011) (**Exhibit C-290**), p. 28.

⁵⁹⁶ Ministry of Environment, Resolution No. 35 (31 October 2011) (**Exhibit C-290**), p. 48 (as cited in Claimant’s Reply, para. 148).

⁵⁹⁷ ANM, Resolution VSC No. 2 (8 August 2012) (**Exhibit R-72**).

application of a mining exclusion zone pursuant to Law 1450 had not been fulfilled,⁵⁹⁸ thereby extending the exploration phase for a two-year period over the entire Concession area. Resolution VSC 2 further temporarily suspended activities in the overlapping area “*until the Ministry of Environment [...] issues the final delimitation at a 1:25,000 scale.*”⁵⁹⁹ The effect of this is that it cannot be said that Eco Oro should have realised that the 1:25,000 scale delimitation would extend to no less an area than the 2007 Atlas given that the 2007 Atlas was to apply as a “*minimum reference*” per Law 1450. If that were correct, Resolution VSC 4 would not have extended the exploration phase for a two-year period over the entire Concession area, knowing that the overlapping area would have come within a subsequent delimitation on a 1:25,000 scale. Instead, Resolution VSC 4 acknowledged that, until the final delimitation was carried out, the legal status of the overlapping area was “*uncertain*” and it was “*impossible to confirm*” whether there was any overlapping area.⁶⁰⁰

562. Resolution VSC 4 shows that Law 1450 could not create a mining ban until the Santurbán Páramo had been delimited in accordance with the requirements contained therein and that the temporary suspension ordered was exactly that, temporary, lasting only until the delimitation of the páramo was published.
563. It is also noteworthy that Colombia supported the Project and induced Eco Oro to continue to invest in it by nominating it both as a PIN and a PINE in recognition of its “*high impact on the economic and social growth of Colombia [...]*”,⁶⁰¹ which designation gave the Project special government support to ensure such projects happen (as royalties were needed for development).⁶⁰² It is unrealistic to suggest that Colombia would have done this had it known that this Angostura Project had no prospect of being developed due to a ban on mining in the páramos. There were several other examples of Governmental support in 2015 and

⁵⁹⁸ National Mining Agency, Resolution VSC-4 (12 September 2012) (**Exhibit C-25**).

⁵⁹⁹ National Mining Agency, Resolution VSC-4 (12 September 2012) (**Exhibit C-25**), Art. 1.

⁶⁰⁰ National Mining Agency, Resolution VSC-4 (12 September 2012) (**Exhibit C-25**), Art. 1.

⁶⁰¹ Ministry of Mines website, “Proyectos de Interés Nacional y Estratégico PINE” (Undated) (**Exhibit C-439**).

⁶⁰² Article The Northern Miner “PDAC 2015: Mines Minister says Colombia is picking up the pace” (25 March 2015) (**Exhibit C-222**), p. 2.

early 2016, including comfort provided by President Santos with respect to the licensing process for the Project.⁶⁰³

(v) *Colombia's Measures were arbitrary, capricious and disproportionate*

564. The above also demonstrates that Colombia's measures were arbitrary, capricious and disproportionate. The FTA itself requires, as part of the objects of the Treaty, to ensure a predictable commercial framework for business planning and investment. Colombia should have conducted itself "*in a coherent manner, without ambiguity, transparently and maintaining an environment that is sufficiently stable to permit a reasonably diligent investor to adopt a commercial strategy that it can implement over time.*"⁶⁰⁴ Colombia's measures failed to do this, resulting in a non-transparent and unpredictable regulatory environment. Pursuant to the definition endorsed by the tribunal in *EDF v. Romania*, arbitrariness occurs where "*a measure that is not based on legal standards but on discretion, prejudice or personal preference*", "*a measure taken for reasons that are different from those put forward by the decision maker*" or "*a measure [is] taken in wilful disregard of due process and proper procedure.*"⁶⁰⁵ Further to be reasonable it must be proportionate to the public interest to be protected, i.e., to the policy objective sought, which policy must be rational.⁶⁰⁶ As stated by the *Tecmed* tribunal, in order to determine if measures were expropriatory, they considered "*whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality. [...] There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be*

⁶⁰³ Claimant's Reply, para. 184.

⁶⁰⁴ Claimant's Reply, para. 495; *L.E.S.I. S.p.A. et ASTALDI S.p.A. v. République Algérienne Démocratique et Populaire*, ICSID Case No. ARB/05/03, Award (12 November 2008) (**Exhibit CL-55**), para. 151 (as cited in Claimant's Reply, para. 495).

⁶⁰⁵ Claimant's Reply, para. 505; *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award (8 October 2009) (**Exhibit CL-174**) ("**EDF**"), para. 303. See also *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (14 January 2010) (**Exhibit CL-61**), para. 263; and *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Award (7 March 2017) (**Exhibit CL-127**), para. 523.

⁶⁰⁶ Claimant's Reply, paras. 507-509; *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award (25 November 2015) (**Exhibit CL-188**), para. 179; *Tecmed*, Award (29 May 2003) (**Exhibits CL-22 / RL-61**), para. 122; and *Azurix*, Award (14 July 2006) (**Exhibit CL-35**), para. 311.

realised by any expropriatory measure. To value such charge or weight, it is very important to measure the size of the ownership deprivation caused by the actions of the state and whether such deprivation was compensated or not.”⁶⁰⁷ The European Court of Human Rights followed the same approach noting that “*there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised [...]*.”⁶⁰⁸ Other tribunals to take the same approach include those in *LG&E v. Argentina* which noted that a State measure would be disproportionately severe if it resulted in a “*permanent, severe deprivation of [the investor’s] rights with regard to its investment, or almost complete deprivation of the value of [the investor’s] investment.*”⁶⁰⁹ Eco Oro submits that the effect of Colombia’s measures was exactly that: a severe and substantial deprivation of the value of its investment.

565. In addition to the inconsistent and chaotic approach of the various State bodies, the delimitation undertaken in Resolution 2090 was also undertaken in an arbitrary, shambolic and disproportionate manner. No documents have been disclosed showing how social-economic criteria were factored into the Resolution 2090 delimitation notwithstanding the legal requirement that the delimitation be undertaken on the basis of technical, environmental, social and economic studies.
566. Ms. Baptiste describes the methodology for preparing proposals for the delimitation of páramo ecosystems in her witness statement by reference to a document titled the “Forest Páramo Transition” publication,⁶¹⁰ which she describes as “*a reference for understanding the preparation of the biotic technical inputs used as a basis for the issuance by the [IAvH] of recommendations aimed at the delineation of páramos in the country.*” The methodology contained therein required the identification of the Transition Zone, based on statistical models populated with data obtained through, *inter alia*, data gathered in field studies and the accuracy of the modelling results would also be verified using field data studies. There

⁶⁰⁷ *Tecmed*, Award (29 May 2003) (**Exhibits CL-22 / RL-61**), para. 122.

⁶⁰⁸ Claimant’s Memorial, para. 288; *James and Others v. The United Kingdom*, 1986-I Eur. Ct. H.R., Judgment (21 February 1986) (**Exhibit CL-5**), pp. 19-21.

⁶⁰⁹ *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2003) (**Exhibit CL-38**), para. 200.

⁶¹⁰ IAvH, “Forest-Páramo Transition. Conceptual Basis and Methods for its Identification in the Colombian Andes” (2015) (**Exhibit R-123**).

was a detailed protocol for these field studies, consisting of 60 pages. Colombia further confirmed that the probabilistic models were supplemented and corrected to the extent necessary with targeted field studies. However, Colombia has confirmed that no field studies were undertaken for the purpose of the delimitation of the Santurbán Páramo. Colombia's assertion that the actual methodology was set out in the Contributions Document and not the Forest-Páramo Transition Document cannot be correct as the Contributions Document merely sets out the Páramo delimitation proposal and not its actual methodology.

567. Colombia says that targeted field studies would have been redundant because it used existing field records and secondary information to build the distribution models but again this cannot be right. The IAvH itself states, in a report dated 2013, that “[t]he extension of this [ecotone or transition] strip requires further verification with fieldwork, which will be the subject of subsequent phases, with greater levels of cartographic detail (1:25,000).”⁶¹¹
568. Finally, Colombia justifies itself by saying it did not have the financial and logistical resources to carry out fieldwork but this cannot be correct as, at the same time it was delimiting other páramos, such as the Pisba páramo, using extensive field studies. Even were it to have been correct, given that the Angostura Deposit consisted of just 0.1% of the delimited páramo,⁶¹² field studies could have been undertaken in that area. Alternatively, the ECODES Report could have been adopted which was prepared by over 50 professionals along transects from over 165 sites within and outside the Angostura Deposit and which concluded there was no páramo within the area comprising the Angostura deposit. Instead of using this however the IAvH relied upon historic databases, with no indication as to how the data was collected, together with a field study conducted as a part of a different study by a single undergraduate biology student who only visited seven plotted sites, and which was not carried out along transects and did not meet the requirements set out in the Forest Páramo Transition document. Additionally, the closest sample was taken 10 kilometers away from the Angostura Deposit. The IAvH also failed to use any field data to verify its results,

⁶¹¹ IAvH, “Contributions to the strategic conservation of the Colombian páramos: Updating the mapping of the páramo complexes to a scale of 1:100,000” (6 February 2014) (**Exhibit C-200**).

⁶¹² The Tribunal notes that, whilst in para. 26 of his first witness statement, Mr. Moseley-Williams refers to the percentage overlap as being 0.09%, in certain instances in Eco Oro's memorials (e.g., paras. 164, 199, 240 of Claimant's Reply) the reference is rounded up to 0.1%. The Tribunal does not find anything turns on this.

notwithstanding that Annex 8 to the Contributions Document noted that evaluation and validation would be undertaken with field data as well as satellite images from the technical delimitation proposal.⁶¹³

569. In addition, what was delimited was not the páramo ecosystem but the Transition Zone between the High Andean forest and the páramo ecosystem. Had the IAvH used the upper limit of the Transition Zone almost the entirety of the Angostura Deposit would have remained outside the delimited zone.⁶¹⁴ Further, the IAvH didn't even follow the Transition Zone boundary but instead simply followed the altitudinal contour lines, in particular the 3100 masl line, most often near the lower limit of the Transition Zone but sometimes significantly deviating to include areas neither in the páramo nor the Transition Zone and, in the case of Concession 3452, it just follows an altitudinal line such that only 50% of the area of the 2090 Delimitation corresponds to the páramo ecosystem. MinAmbiente did not scrutinise the IAvH's proposed delineation and it has been at least twice criticised by the Constitutional Court for lacking in adequate scientific criteria in certain respects⁶¹⁵ and for MinAmbiente's failure to properly conduct the required consultation process. It also took note of MinAmbiente's concession that serious errors were made in the delimitation process.⁶¹⁶

570. Implementation of the Resolution 2090 delimitation was also disproportionate to the legitimate interest in protecting it: the aim was to delineate on a scale of 1:25,000 based on technical, economic, social and environmental studies but instead, it employed excessive means in delimiting not the páramo but a different ecosystem which included not just the Transition Zone but in certain places, even areas below it. This particularly affected Eco Oro. The Angostura deposit overlapped with only 0.09% of the total delimited area, only approximately 6% of the Angostura deposit lies within the actual páramo ecosystem, with 65.11% lying within the Transition Zone, the remaining 29% is neither in the páramo

⁶¹³ Colombia confirmed that Annex 8 only used satellite images and not field studies, the reference to "*field studies*" in the title being an "*oversight*" by IAvH – see Letter from Latham & Watkins to Freshfields Bruckhaus Deringer (28 May 2019) (**Exhibit C-431**).

⁶¹⁴ By including the transition zone, the overlap with the Angostura Deposit increased from 6% to 60%.

⁶¹⁵ Constitutional Court, Judgment No. C-35 (8 February 2016) (**Exhibit C-42**).

⁶¹⁶ Constitutional Court, Judgment No. T-361 (30 May 2017) (**Exhibit C-244**), p. 261.

nor the Transition Zone. Less stringent measures could have been taken such as delimiting the páramo based on the location of the ecosystem as instructed by Law 1450, employing field studies, or using the ECODES Report and allowing Eco Oro to present its project to the environmental licensing authorities. The precautionary principle does not assist Colombia as it is not applicable as there is no existing threat of serious or irreversible harm –the mere existence of a potential risk is insufficient to permit Colombia to invoke the precautionary principle.

571. Finally, as Eco Oro had decided to mine using underground operations, the impact on the environment would have been minimised and the Government could have taken more circumscribed measures to protect the páramo.
572. In conclusion, the IAvH did not follow its own methodology (which placed heavy emphasis on conducting field studies to verify the results of probabilistic modelling) as it failed to conduct the required field studies and sampling.⁶¹⁷ Whilst Ms. Baptiste said this would have been “*inappropriate*” and not “*practicable*”, it was what the IAvH’s own methodology required and this methodology was followed when delineating another páramo system in 2013.
573. However, not only was the delimitation carried out in breach of the legal requirements, it was also carried out in bad faith and in a non-transparent manner, as evidenced by the significant delays in the Minister of Environment, Ms. Sarmiento, publishing the delimitation which the Constitutional Court found (Judgement T-361) to have been in “*bad faith.*” The Constitutional Court further criticised MinAmbiente’s actions finding that they “*violated the right to environmental participation of the petitioners and the entire community of the area of influence of the Santurbán Páramo in issuing Resolution No. 2090*”, denied access to information, failed to involve all parties affected by the delimitation to participate in the consultation exercise but instead specified the number of people to be invited even identifying the representative group from which they should be invited and failed to ensure “*prior, efficacious and effective forums*” for community

⁶¹⁷ IAvH, “Contributions to the delimitation of the páramo” (2014) (Exhibit C-194), pp. 37-38.

participation.⁶¹⁸ Indeed the Minister even gave an interview in which she promised that the páramo boundary would shortly be published, yet notwithstanding that she withheld the boundaries, she announced publicly that the Santurbán Páramo overlapped with Concession 3452.

574. Colombia has not produced the ANM's proposed páramo delimitation and memorandum summarising the reasons for its proposal, notwithstanding that Article 34 of the 2001 Mining Code requires the ANM's collaboration. Eco Oro requests that the Tribunal draws an adverse inference from Colombia's failure to produce this.
575. Finally, the community consultations did not happen as referred to by the Constitutional Court when striking down Resolution 2090.

(vi) There was no transparent or predictable regulatory environment

576. Eco Oro was also subjected to a regulatory turmoil as a result of:
- a. MinAmbiente announcing in late 2013 that the delimitation had been finalised but then refusing to provide the co-ordinates (provoking a letter from the Attorney General to MinMinas, MinAmbiente and the ANM deploring the legal uncertainty this caused to the mining industry⁶¹⁹);
 - b. the Resolution 2090 delimitation;
 - c. Resolution VSC 3;
 - d. whilst Article 5 of Resolution 2090 provided that regional environmental authorities such as the CDMB should issue more detailed environmental guidelines and PMAs for the páramos in their localities, this has yet to be done by the CDMB for the Santurbán Páramo;

⁶¹⁸ Constitutional Court, Judgment No. T-361 (30 May 2017) (**Exhibit C-244**).

⁶¹⁹ Letter from Attorney General (Mr. Ordóñez Maldonado) to Ministry of Environment, Ministry of Mines and National Mining Agency (9 September 2013) (**Exhibit C-28**), p. 4.

- e. Law 1753 (it is unclear how mining activities could be prohibited in practice for grandfathered projects (pursuant to Article 173, paragraph 1) if damage to the páramo ecosystem could not be avoided given that the CDMB has not issued the requisite environmental guidelines);
- f. Judgment C-35 only striking down the grandfathering exceptions in Law 1753 but not those in Resolution 2090 leading the Minister of Mines and Energy to say “*we have been left in a very serious situation: there are so many norms and we do not know what the rule is.*”;⁶²⁰
- g. the inconsistent decisions and communications from MinAmbiente and ANM;
- h. the ANM’s declaration on 8 August 2016 that Eco Oro was prohibited from mining in the Preservation Zone but with no reference to the Restoration Zone;
- i. Resolution VSC 906;
- j. Judgment T-361;
- k. the initial extension to file a PTO until the new delimitation was complete followed by the failure to agree a concomitant extension when the period for completing the delimitation was extended;
- l. Resolution VSC 906 (rejecting Eco Oro’s request for a further suspension) and requiring preparation of the PTO which, pursuant to the 2001 Mining Code, required identification of the “*definitive delimitation of the exploitation area*” yet in the absence of final delimitation of the Santurbán Páramo this was impossible. It should be noted that Resolution VSC 906 was predicated on the basis Judgment C-35 was foreseeable but Eco Oro could not have planned for the risk a legislative act would be struck down as unconstitutional. It was also arbitrary, unreasonable and discriminatory because firstly, the ANM had approved a suspension request for

⁶²⁰ Article El Mundo “Sector minero crece pese a la amenaza de la inseguridad jurídica” (11 May 2017) (Exhibit C-243).

a different mining company that had requested a suspension on the same basis⁶²¹ and, secondly, two weeks earlier the ANM had granted Eco Oro the same suspension request on the grounds of “*unforeseeab[ility]*” which had been made on the same grounds but for a different concession area (Concession 22346);

- m. ANM Resolution VSC 343 rejecting Eco Oro’s appeal was arbitrary and unreasonable and nonsensical given that Judgement T-361 required the re-delimitation of the 2090 Delimitation;
 - n. ANM’s letter dated 24 December 2018 refusing to grant an extension for filing the PTO was arbitrary, capricious and unreasonable in refusing to grant a concomitant extension for filing the PTO as was given for MinAmbiente to complete the re- delimitation; and
 - o. ANM Resolution VSC 41 ordering Eco Oro to submit its PTO within 30 days which was arbitrary, capricious and unreasonable given the ANM was aware that this was impossible for Eco Oro to achieve.
577. In conclusion, Colombia’s measures were not implemented in good faith as demonstrated by the following:
- a. The act of delineating areas of Concession 3452 as being within the páramo without conducting any supporting field study was arbitrary and non-transparent;
 - b. The withholding by MinAmbiente of the coordinates of the Santurbán Páramo for many months was, as described by the Constitutional Court, bad faith;
 - c. MinAmbiente’s failure both to consult with all potentially affected parties and to allow them to participate meaningfully in the delineation process;
 - d. The various inconsistent, unresponsive and confusing communications from the ANM;

⁶²¹ National Mining Agency, Resolution GSC 239 (5 August 2016) (**Exhibit C-396**).

- e. The ANM's refusal to suspend Eco Oro's obligations until the uncertainty ended;
 - f. The admission by MinAmbiente that the delineation in Resolution 2090 was deeply flawed and required correction, as endorsed by the Constitutional Court; and
 - g. The Government's failure to prevent illegal miners using mining and processing methods that pose a threat to the environment compared with professional miners such as Eco Oro demonstrates a failure to implement its policies in a consistent and coherent manner.
578. Thus, the day before Resolution 2090 was published, Eco Oro's Treaty-protected rights arising out of Concession 3452 and its regulatory framework consisted of: *(i)* the exclusive right to explore and exploit mineral resources in the entirety of the concession area; *(ii)* the right to a stabilised mining legal framework such that only those new, more favourable mining laws enacted after the execution of Concession 3452 in February 2007 would apply to its concession; and *(iii)* the right to renew the Concession for an additional 30 years upon fulfilling the requisite conditions.
579. Having demonstrated that Colombia's measures do not fall within the 811(2)(b) Exceptions and are compensable, it is also clear that taking into account the factors in Annex 811(2)(a), that there has been an indirect expropriation. Concession 3452 is valueless and thus the economic effect is equivalent to direct expropriation.
580. As no compensation has been offered, this expropriation is unlawful. Accordingly, Eco Oro seeks compensation and it elects the valuation date to be the date of the expropriation.

(b) The Respondent's Position

(i) The FTA Establishes the Primacy of Environmental Protection Over Trade and Investment

581. For Eco Oro to succeed it must show *(i)* that its mining rights were not curtailed by the mining ban established by Law 1382 because it had grandfathered rights and *(ii)* that its rights were not curtailed by the mining ban established by Law 1450 because it did not become effective until the issuance of Resolution 2090. Eco Oro cannot demonstrate either of these.

582. Eco Oro did not have grandfathered rights under Law 1382, Resolution 2090 or Law 1450 because grandfathering was only available to concessions which had already reached the construction or exploitation phase. This can be seen from the wording of the relevant provisions. Starting with Resolution 2090, it is undisputed Eco Oro did not have an environmental license, but neither was it in possession of “*the equivalent environmental control and management instrument duly granted before 9 February 2010.*”⁶²² The key word is “*equivalent*”, namely equivalent to an environmental license. To be the equivalent of the environmental licence it must have an equivalent effect to that of an environmental license, namely the right to exploit. Eco Oro’s PMA is not equivalent to an environmental license. The only PMA that was approved was dated in 1997 which was before Eco Oro had acquired all the titles which comprised Concession 3452. It did not permit exploitation but was expressly limited to the exploration phase and on its face stated that the relevant environmental license would need to be obtained to undertake exploitation activities. It only covered an area of 250 hectares whereas Concession 3452 comprised more than 5,000 hectares and its scope was very limited in terms of the work it covered, being only in relation to some roads and tunnels. Whilst Eco Oro provided an updated PMA in 2008 (notably again only in relation to exploration activities), it was also not approved. It should be noted that the 1997 PMA provided that any planned modifications had to be reviewed and approved. Further, at the time both the 1997 and 2008 PMAs were prepared, they were both in respect of the proposed open cast mine; they did not contemplate the underground mine.
583. The PMA was therefore not equivalent to an Environmental Licence and consequently Eco Oro did not benefit from the grandfathering provision. It is also of note that Eco Oro did not argue that its rights were grandfathered at the relevant time and, when ANM issued Resolution VSC 2 reducing Eco Oro’s concession area, it expressly noted that the transition regime did not apply, yet when Eco Oro appealed this decision, Eco Oro did not explicitly assert that its rights were grandfathered.
584. Turning to the construction of the FTA, on a good faith reading of Chapters Eight, Seventeen (particularly Article 1702) and Twenty-Two (particularly Article 2201(3)) the primacy of

⁶²² Ministry of Environment, Resolution No. 2090 of 2014 (19 December 2014) (**Exhibits C-34 / MR-35**).

environmental protection over trade and investment is clear. This is confirmed by the Government of Canada which stated that the FTA “*allow[s] the countries to take certain measures to protect human, animal and plant life or health which may be inconsistent with trade or investment obligations.*”⁶²³ In the absence of arbitrariness, unjustifiable discrimination or a disguised restriction on international trade or investment, a State cannot be held liable for adopting measures to protect the environment unfettered from any obligation to compensate investors. Whilst the preamble to the FTA does refer to the objective of ensuring a predictable commercial framework for business planning and investment, it is notable that this is to be done only in a manner that is consistent with environmental protection and conservation, as stated in Chapter Seventeen and the Canada-Colombia Environment Agreement (the “**Environment Agreement**”)⁶²⁴ which was intended to be complementary and *closely interrelated with the FTA pursuant to Article 1704(1) and is indeed expressly referred to in the Article 1703 of the FTA*. The statement of the Government of Canada must also be taken into consideration, providing: “[t]he *Environment Agreement, signed in parallel to the [FTA], reinforces the concept that free trade should not take place at the expense of the environment.*”⁶²⁵ This deliberate policy decision must inform the interpretation of Chapter Eight.

(ii) *Colombia Did Not Expropriate Eco Oro’s Investment*

585. As well as not having a covered investment (as Eco Oro had no acquired right to exploit), the measures complained of by Eco Oro did not have an effect equivalent to direct expropriation as there was no deprivation. Colombia had reserved to itself the right to designate Mining Exclusion Zones by Articles 34 and 36 of the 2001 Mining Code. This right is a contractual right, the exercise of which cannot constitute deprivation. Thus, up to the point at which Eco Oro acquired rights to exploit (which it never acquired) Colombia had the right to make that designation and remove areas from Concession 3452, the exercise of which could not constitute a violation of international law. Even if it were

⁶²³ Government of Canada, Information on the Canada-Colombia Environment Agreement (Undated) (**Exhibit R- 154**).

⁶²⁴ Canada-Colombia Environment Agreement (signed on 21 November 2008 and in force on 15 August 2011) (**Exhibit R-138**).

⁶²⁵ Government of Canada, Information on the Canada-Colombia Environment Agreement (Undated) (**Exhibit R- 154**).

found to be a deprivation, it occurred pursuant to VSC 2 and 4 of August and September 2012 and therefore it occurred prior to the mandatory cut-off date.

586. Further, the measures did not affect the totality of the concession area, indeed over a third of the Angostura Deposit remained unaffected such that substantial value in concession 3452 remained unadulterated. Eco Oro's loss was partial and therefore not expropriatory. Whilst Mr. Moseley-Williams asserted that the uncertainty over the remaining areas of Concession 3452 "*made developing plans impossible*",⁶²⁶ this was unsupported and, in any event, Eco Oro was not prevented from carrying out mining in those areas of the concession which did not overlap the páramo –it just had to comply with the applicable requirements. The possibility of Eco Oro obtaining a license but for Colombia's measures was remote at best given the lack of any evidence adduced (other than the bare assertions in Mr. Moseley-Williams' statement) as to the technical, economic or environmental feasibility of such a project. Indeed, it is "*overwhelmingly likely*" that any mining project would have been rejected in light of the precautionary principle which must be complied with by public agencies when assessing environmental impact and taking licensing decisions.⁶²⁷
587. Turning to the first stated factor in Annex 811(2)(a), there was no economic impact from the measures complained of by Eco Oro. Firstly, on 26 April 2010 Eco Oro's share price collapsed by more than half when its open cast mining licence application was rejected (from \$463 million on Friday 23 April to \$220 million on Monday 26 April 2010) and then dropping very significantly when Law 1382 was applied to Concession 3452 by Resolution VSC 4, in September 2012, with the entire enterprise value falling to below \$20 million. This was all before the measures complained of. Any economic impact of the alleged expropriatory measures would be demonstrated by a significant fall in Eco Oro's share price but there was no significant deterioration in the share price at the time of or after the measures complained of – that drop had already occurred, as a result of Laws 1382 and 1450 and Resolution 937. Additionally, the 2090 Atlas did not significantly increase the area which had already been delimited as páramo by the 2007 Atlas.

⁶²⁶ Claimant's Memorial, para. 260, citing First Moseley-Williams Statement, paras. 59, 65-69.

⁶²⁷ Minister Sarmiento Statement, para. 24; Respondent's Counter-Memorial, para. 325.

588. Turning to the second factor, it is important to note that this does not direct the analysis towards a frustration or violation of legitimate expectations; the provision is narrower, referring to the extent to which there is interference with reasonable investment-backed expectations. A reasonable investment-backed expectation is one held at the time of making the investment, it causes the investor to make the investment, and there is clearly an obligation on the investor to undertake due diligence both before making the investment and before making further investments.
589. Eco Oro cannot have had any distinct reasonable investment-backed expectations that it would have been permitted to undertake exploitation activities in the páramo.
590. Colombia did not give Eco Oro any specific assurance that measures would not be taken to protect the páramo within Concession 3452 and Eco Oro could not have held any reasonable investment-backed expectation that it would be permitted to mine in the entirety of Concession 3452. Such a belief could not have survived even basic due diligence. No commitments were given to Eco Oro, nor is there any evidence that Eco Oro made its investment in reliance upon any such commitment. No stabilization agreement was entered into and, by entering into Concession 3452, Eco Oro voluntarily subjected itself to the regime provided for under the 2001 Mining Code; it is irrelevant whether any previous regime did contain such a guarantee. The 2001 Mining Code and applicable legislation at that time did not contain any guarantees that measures would not be taken to protect the environment from the effects of mining exploitation. It merely confirmed that the laws applicable to the concession are the “*mining laws in force at the time that the concession contract is perfected.*”⁶²⁸
591. The environmental legislation in force in 2007 restricted Eco Oro’s ability to proceed with the Angostura Project due to the requirement to obtain an environmental licence before undertaking mining activities. Indeed, had Eco Oro undertaken even basic due diligence prior to investing in Concession 3452 it would have realised that mining would be prohibited

⁶²⁸ Law No. 685 (as amended) (8 September 2001) (Exhibit C-8), Art. 46.

as a significant portion of the area overlapped with páramo and Colombia had a long-standing policy to protect the páramo which is demonstrated by:

- a. Article 4 of the General Environmental Law which designated páramos as ecosystems subject to “*special protection*” as a general environmental principle and Article 1 refers to the Rio Principles, Principle 15 of which provides for the application of the precautionary principle which principle is directly enshrined into Colombian law by Article 1.6 of the General Environmental Law. Eco Oro must have known at the time it entered into the concession that the prospect of obtaining an environmental licence for a project located in the páramo ecosystem was very limited if non-existent.
 - b. Resolution No. 769 of 2002, pursuant to which CDMB and CORPONOR had engaged in significant efforts to delineate the Santurbán Páramo, assess its condition and take steps to protect it.
 - c. The 2007 Atlas which confirmed that the Santurbán Páramo overlapped a part of Concession 3452.
 - d. Eco Oro should further have been aware of the authorities’ approach to licensing applications pursuant to the precautionary principle (Colombia’s environmental authorities have never granted licences for projects adversely impacting páramo ecosystems) and could not have had any reasonable expectation that the authorities would derogate from this principle.
592. Eco Oro’s legitimate expectations could not have been frustrated by Judgment C-35 because Eco Oro had no grandfathered rights. The ANM’s August 2016 decision was fully in line with the then existing legislation to protect the páramo, including Laws 1382 and 1450. Eco Oro has not adduced any credible evidence that the statements it asserts were made by CDMB and MinAmbiente were in fact made and, even if they had been made, they could not have frustrated Eco Oro’s legitimate expectations as they were not made by the authority responsible for the licensing of Eco Oro’s project, namely ANLA.

593. Even had Eco Oro had legitimate expectations that Colombia would take measures to protect the páramo in a way that would prevent it from mining in the entirety of the concession area, as the facts upon which Eco Oro says it based its expectations all took place before the entry into force of the FTA, those facts are not binding on Colombia (Article 801(2)). Eco Oro knew by August 2011 that Colombia had decided to take measures to ban mining in the páramo areas delineated in the 2007 Atlas; this is why its application for an environmental licence for an open pit mine failed. It knew that even though the 2007 Atlas delineation was not definitive, mining in a significant part of its concession area would not be possible.
594. It knew open-cast mining would not be permitted (its application for a mining licence for this had been rejected) and there can be no violation of legitimate expectations where a State is just exercising an expressly reserved right.
595. Eco Oro would have been required to satisfy itself that the basis for its expectations were reasonable and accurate and yet it has adduced no evidence of having undertaken such due diligence. It was no secret that Colombia was seeking to protect the páramo in accordance with its international obligations so to do. Eco Oro could not have had any legitimate expectation that that right would not have been exercised. Eco Oro must have been aware that Colombia had been taking steps to protect the páramo “*in the strongest possible way*”⁶²⁹ and indeed by the time Concession 3452 took legal force upon registration, 54% of the Concession 3452 area had been designated as páramo pursuant to the 2007 Atlas. Eco Oro has adduced no evidence of any due diligence having been carried out in relation to this investment.
596. The *Bilcon* case is not applicable as, in that case, the concessionaire had already applied for an environmental licence (which was rejected forming the basis of the alleged deprivation) and in the relevant Treaty there was no express reservation of a right by the State to revoke part of the contractual entitlement of the concessionaire.

⁶²⁹ Tr. Day 2 (Mr. Pape), 374:15-18.

597. In summary, Eco Oro could not have formed any legitimate expectations that it would be permitted to conduct mining exploitation activities throughout Concession 3452 notwithstanding the existence of páramo ecosystems.
598. The third listed factor is equally of no avail to Eco Oro. The measures were regulatory measures taken pursuant to Colombia's long-standing policy to protect the páramo, resulting from the Ramsar Convention, the Biodiversity Convention and the laws Colombia implemented to give effect to these obligations. The measures were all *bona fide*, regulatory and non-discriminatory.
599. Only if the Tribunal finds a *prima facie* case for indirect expropriation can it then turn to apply Annex 811(2)(b). It is therefore not necessary to consider the meaning and application of Annex 811(2)(b) as Eco Oro doesn't succeed in showing that having investigated the facts surrounding Eco Oro's claim, considering the relevant factors, that it suffered deprivation of its rights.
600. However, even if Annex 811(2)(b) were relevant, Colombia's measures fall squarely within its ambit. Eco Oro has not established any "rare" circumstances supporting a finding that Colombia's non-discriminatory regulatory measures for the protection of the environment could amount to an indirect expropriation under the FTA.
601. Whilst Annex 811(2)(b) is the embodiment of the police powers doctrine, it clearly applies to the measures complained of as they were taken to protect the environment and were *bona fide* and not discriminatory (as accepted by Eco Oro); *prima facie* it must be common ground that the measures cannot constitute indirect expropriation. It is clear from (i) the object and purpose of the FTA; (ii) Canada and Colombia's mutual undertakings contained in Article 1702; and (iii) the provisions of the Environment Agreement, that non-discriminatory measures designed and applied to protect the environment would only constitute indirect expropriation in "rare circumstances." This is a high bar given the example contained in the provision, namely "a measure or series of measures so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted in good faith" and Eco Oro has failed to meet it, having identified no circumstances that it can identify as "rare." The delineation was conducted "responsibly, carefully, eminently

reasonably, in accordance with the methodology adopted by the IAVH at the time, in accordance with the [...] long standing legal definition of the páramo”⁶³⁰ such that no rare circumstances arise; the measures Colombia took were a legitimate exercise of its sovereign powers to protect the environment and no compensation is payable even if Eco Oro has suffered loss. As confirmed by the tribunal in *Tecmed*, it is “undisputable” that “the State’s exercise of its sovereign powers within the framework of its police power may cause economic damage to those subject to its power as administrator without entitling them to any compensation whatsoever.”⁶³¹ Colombia’s measures were taken pursuant to its legitimate right to regulate and were not expropriatory measures.

(iii) *Legitimate expectations*

602. It is incorrect that Annex 811(2)(b) incorporates the requirement that measures must be undertaken in good faith bringing in notions such as legitimate expectations, proportionality and transparency. Just because frustration of legitimate expectations is an exception to the police powers doctrine, does not mean it must equally be an exception to Annex 811(2)(b). Whilst Annex 811(2)(b) embodies the police powers doctrine, it is a *lex specialis*, is unambiguous and goes beyond the police powers doctrine to give effect to the contracting parties’ agreed intended subordination of investment protection to environmental concerns. The concept of interference with expectations comes into Annex 811(2)(a) and it would be nonsensical if, having addressed this in considering whether there is *prima facie* an indirect expropriation that one was then directed to reconsider exactly the same notion in considering whether the measure is excepted as being a “rare circumstance.” This would be “importing through the backdoor all of the broad notions of the fair and equitable treatment standard which form part of [...] the notion of good faith [...]”⁶³² Annex 811(2)(b) specifically is addressed at rare circumstances and so the provision must be construed narrowly.

⁶³⁰ Tr. Day 2 (Mr. Pape), 381:5-12.

⁶³¹ Respondent’s Counter-Memorial, paras. 374 *et seq.*; *Tecmed*, Award (29 May 2003) (**Exhibits CL-22 / RL-61**), para. 119. See also *Marvin Roy Feldman Karpa v. The United Mexican States*, ICSID Case No. ARB(AF)/99/01, Award (16 December 2002) (**Exhibit RL-60**), para. 103; and *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award (17 March 2006) (**Exhibit RL-71**), para. 255.

⁶³² Tr. Day 2 (Mr. Pape), 370:20-371:3.

603. However even if the frustration of legitimate expectations were covered by Annex 811(2)(b), Colombia's measures could not have frustrated Eco Oro's legitimate expectations as it had none (whether or not investment backed) as detailed above.

(iv) Colombia's Measures were not arbitrary, capricious nor disproportionate

604. A requirement of proportionality, lack of capriciousness and non-arbitrariness is also not enshrined in the text of the provision and the authorities cited by Eco Oro are of no assistance as Annex 811(2)(b) is *lex specialis*. Annex 811 does not refer to "bad faith" as a general exception, the requirement is for good faith which is not akin to fair and equitable treatment, and thus does not import requirements such as "fairness", "transparency", "[non]arbitrariness", "clarity", "[non]ambiguity" and "predictab[ility]." The FTA only provides for the more limited minimum standard of treatment in accordance with customary international law. Even were the requirement of good faith contained within the FTA, it carries a high burden which Eco Oro has failed to meet. Each of Colombia's measures was taken for the sole purpose of protecting the páramo.

605. Even again if that were not so, Colombia's actions were proportionate; there were no less stringent actions which it could have taken to protect the páramo. The fact that the overlapping area is small does not make it proportionate to allow mining activities which could be damaging to the páramo in that area. Eco Oro has not proposed what form such less stringent measures could have taken. Colombia's long-standing policy was to protect the entire páramo. Additionally, "[t]he delineation process was carried out scientifically by the IAVH in accordance with international standards, and with the input of many senior experts in the field [...] carrying out extensive field work to delimit the páramo ecosystem would have been inappropriate [...] and an impossible task [...] the IAVH developed – and submitted for peer review – a methodology which relied primarily on satellite imaging and altitude data, which was then subjected to probabilistic modelling."⁶³³ Targeted field studies confirmed and, as necessary, corrected the Transitional Zone delineation. This methodology

⁶³³ Respondent's Counter-Memorial, para. 346.

has not been the subject of serious challenge or debate and thus Colombia's measures were proper and proportionate.

(v) *The regulatory regime was transparent and predictable*

606. The delimitation process for Resolution 2090 was neither arbitrary nor non-transparent and was entirely predictable.
607. IAvH's proposal for the delimitation exercise resulting in the 2090 Atlas was contained in a peer-reviewed document titled "Contributions to the delimitation of the páramo" (i.e., the Contributions Document).⁶³⁴ This document was "*the sole scientific report that was produced in terms of a technical ecological delimitation of the páramo.*"⁶³⁵ The relevant extracts from the executive summary provide as follows:

"This document was produced [...] with the aim of providing elements of judgement in biophysical, economic, legal and social aspects that contribute to the delimitation at 1:25,000 scale of the Complex of páramos of the Santurbán-Berlín jurisdictions (CJSB) performed by the pertinent authorities.

[...]

For the construction of this document, the starting point was the delivery of the studies to the MADS by the appropriate CAR in November and December of 2012, with the assistance of different sources of supporting information, including research projects carried out by the [IAvH] in said complex, as well as the Páramos and Life Systems Project, financed by the European Union, studies conducted by universities, NGOs, private companies, and documents provided by the community in this process.

Therefore, we present, on one hand, a proposal for the identification of the lower strip of the Páramo ecosystem, outlined with the assistance of different techniques, which included fieldwork data collected from different sources, both recent and historical, models of potential distribution of the ecosystem and representative species, as well as high resolution spatial satellite imagery (5m) that attests to the current condition of the territory. The mapping systems implemented in this process are at 1:25,000 scale.

⁶³⁴ IAvH, "Contributions to the delimitation of the páramo" (2014) (**Exhibit C-194**).

⁶³⁵ Tr. Day 1 (Mr. Adam), 329:1-4.

The basic fact is that the boundaries between ecosystems are not presented as precise lines in the land, and their identification in a map is an abstraction exercise on an ecological process (transition) which is actually a gradual process and appears in the form of a strip, and its extension on the altitudinal gradient is variable and conditioned by topoclimatic features and the trajectory of the historical and recent transformations of the landscape. In line with the delimitation criteria laid down since 2010, this strip is deemed to show clear elements of the Páramo ecosystem (climate, soils, vegetation, etcetera) and is therefore undoubtedly part of the páramo in its different definitions (some of which are supported by law), and necessary for the preservation of its biodiversity and ecological functions.

Delimitation criteria of the páramos are call attention to the need to appropriately identify the lower limits of the ecosystem under the following consideration: 1) the lower páramo or sub-páramo is a part of the ecosystem and its altitudinal position is not homogenous (which has been observed by different experts and also recognised in Law 99 of 1993 and in Resolution MADVT 0769 of 2002 among other regulations) 2) the ecotones, defined as transitions to adjacent ecosystems 3) connectivity to other ecosystems.”

608. This document was created for the delimitation of the Santurbán Páramo and does not contain any reference to field studies needing to be undertaken but instead permits the use of existing field studies that were carried out under a previous project in 2013. The IAvH therefore followed properly the methodology contained in this document. Lessons learned from the Santurbán Páramo delimitation were included in the 2015 Forest Páramo Transition Conceptual Framework along with all the other work the IAvH had been doing and this formed the basis for the delineation of all subsequent páramos. However, the pilot, the Santurbán Páramo delimitation, was conducted pursuant to the 2014 document.
609. The Transition Zone was included in the original definition of the páramo in 2002 in Resolution 769 (the subpáramo or lower level of the páramo) being the low high-Andean forests which was deemed to be of fundamental importance to the integrity of páramo ecosystems as explained in the above extract from the IAvH proposal.
610. Whilst the Santurbán Páramo delimitation contained in Resolution 2090 was a pilot,⁶³⁶ the only scientific criticism of it was that raised by Eco Oro’s expert, Mr. Aldana. The IAvH could not have undertaken its study in the same manner as was undertaken by ECODES as

⁶³⁶ Tr. Day 1 (Mr. Adam), 326:8-9.

the area to be delimited by the IAvH was too large and it did not have the resources to undertake field studies in the entire area. In any event, the exercise was undertaken by the use of “*satellite imagery*” and the use of “*probabilistic distribution models using secondary data on vegetation, climate data and topographic data to capture [...] the integrity of the ecosystem, and determine[] the extension of the páramo, including páramo areas altered by human activity and atypical páramo patches*”⁶³⁷ which identifies not only where the páramo is but also where it had been disrupted which, the IAvH had determined, should still be included as páramo.

611. The ECODES Report was not able to assist IAvH as it was performed according to a different methodology, and it was of little utility as it related to the Angostura Polygon which had been affected by ongoing activities for many years. It would also have been inappropriate to use it as it would have been giving Eco Oro special treatment which IAvH clearly could not do.
612. Whilst the IAvH study for the Santurbán Páramo delimitation did not include field studies whereas the subsequent delimitation studies in the Pisba páramo did, this is because there was additional funding from the Fondo Adaptación which provided funds for páramos that had been affected by La Niña phenomenon. This did not apply to the Santurbán Páramo.
613. MinAmbiente did not withhold the Santurbán Páramo’s coordinates, they were published when MinAmbiente issued its decision to adopt them. The Constitutional Court neither found bad faith on the part of MinAmbiente nor that it had withheld the coordinates. Whilst it did find that it should have disclosed its preparatory work, this is a different matter.
614. The ANM’s Technical Report, VSC 3, was an internal document, not a communication to Eco Oro.
615. The ANM’s rejection of Eco Oro’s request to suspend its concession obligations was neither arbitrary nor unfair but carefully reasoned, concluding that there was no *force majeure* such that the requirements for a suspension were not satisfied.

⁶³⁷ Tr. Day 1 (Mr. Adam), 335:7-15, 339:19-20.

616. Finally, Eco Oro has presented no evidence of any failure by the Colombian authorities to prevent the alleged influx of illegal miners.

(2) Canada’s non-disputing party submission

617. In its non-disputing party submission, Canada confirms that Article 811 reflects and incorporates the customary international law with respect to expropriation.⁶³⁸ In applying this Article, the first step is to identify whether there is a valid (i.e., vested) property right capable of being expropriated: this is a threshold question. A conditional right is insufficient for the purposes of the FTA. The relevant law is the domestic law of Colombia, being the host State, and deference should be accorded to any interpretation by domestic courts on this issue.⁶³⁹ There must have been a taking of fundamental ownership rights, either directly or indirectly that causes a substantial deprivation of economic value of the investment; mere interference with the use or enjoyment of the benefits associated with the investment being insufficient. However a host State will not be required “*to compensate an investment for any loss sustained by the imposition of a non-discriminatory, regulatory measure designed and applied to protect legitimate public welfare objectives*” i.e., measures taken pursuant to its police powers.⁶⁴⁰ This police power is reflected in the FTA in Annex 811 which “*provides guidance on how to distinguish measures that constitute indirect expropriation from otherwise legitimate governmental action not requiring compensation.*”⁶⁴¹

618. Having determined the scope of the interest alleged to have been expropriated, determining whether indirect expropriation has occurred requires a “*case-by-case fact based inquiry that considers and balances a number of factors.*” The factors to be considered include those listed in Annex 811(2)(a). As none of these factors is determinative, nor can be considered

⁶³⁸ Canada’s Non-Disputing Party Submission, para. 4, citing to *Glamis*, Award (8 June 2009) (**Exhibit CL-59**), para. 354.

⁶³⁹ Canada’s Non-Disputing Party Submission, para. 6, citing to *Eli Lilly and Company v. Government of Canada*, ICSID Case No. UNCT/14/2, Final Award (16 March 2017) (**Exhibit CL-128**), paras. 221, 224; *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability (12 September 2014) (not available on the record), para. 583; and *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (8 April 2013) (**Exhibit RL- 93**).

⁶⁴⁰ Canada’s Non-Disputing Party Submission, para. 8, citing to *Methanex*, Award (3 August 2005) (**Exhibit CL-32**), para. 7; *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (13 November 2000) (**Exhibit RL-55**), paras. 281-282.

⁶⁴¹ Canada’s Non-Disputing Party Submission, para. 9.

in isolation, the impact of the measure on the investment is only one of the relevant factors to consider and ultimately if a measure falls within the provisions of Annex 811(2)(b) it will not constitute indirect expropriation “*reflect[ing] the deference given to States in their determination of the level of protection they seek to achieve and the regulatory choices to achieve these objectives. If the impact of a measure is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith, this may however indicate that an indirect expropriation is at issue not the exercise of police powers. The use of the phrase ‘except in rare circumstances’ and the reference to measures that ‘cannot reasonably be viewed as having been adopted and applied in good faith’ are consistent with the high degree of deference that States’ regulatory choices should be accorded. Therefore bona fide non discriminatory regulatory measures to protect the environment even if they are based on precaution (i.e. in dubio pro ambiente) will ordinarily nor require compensation even if they affect the value and/or viability of an investor of another party.*”⁶⁴²

(3) Colombia’s comments on Canada’s non-disputing party submission

619. As an over-riding point in response, Colombia notes that the Tribunal should place significant weight on Canada’s submission given (i) Canada has no interest in the outcome of the dispute; (ii) having been involved in negotiating the FTA, Canada has a “*unique perspective on how the treaty should be interpreted*”;⁶⁴³ and (iii) the systemic interest of States in ensuring consistency of interpretation.
620. Colombia then notes, with approval, Canada’s submission that Annex 811 reproduces a State’s police powers and that this (i) accords with Colombia’s submission that it should be afforded a “*wide margin of appreciation to the policy decisions*” of its regulatory authorities and (ii) that it is irreconcilable with Eco Oro’s submission that compensation is payable where the measure adopted is “*disproportionate*”, “*contrary to legitimate expectations*” or

⁶⁴² Canada’s Non-Disputing Party Submission, para. 11.

⁶⁴³ Respondent’s Response to Canada’s Non-Disputing Party Submission, section A, citing M. Kinnear, Transparency and Third Party Participation in Investor-State Dispute Settlement, delivered at Symposium Co-Organised by ICSID, OECD and UNCTAD - Making The Most Of International Investment Agreements: A Common Agenda (2005), p. 8, available at: <https://www.oecd.org/investment/internationalinvestmentagreements/36979626.pdf>.

“unreasonable.” Colombia further notes Canada’s submission that only a fully vested right can be the subject of expropriation and Colombia reiterates that Eco Oro had no such right. The determination of the “*existence, nature and scope of the ‘property right’*” must include any applicable limitation and Eco Oro’s rights were always limited by Colombia’s right to designate mining exclusion zones without payment of compensation pursuant to Articles 34 and 26 of the 2001 Mining Code.⁶⁴⁴

(4) Eco Oro’s comments on Canada’s non-disputing party submission

621. Eco Oro first observes that Canada supports its submission that Annex 811(2)(b) is a codification of the police powers doctrine applicable under customary international law and is not *lex specialis* going far beyond the police powers doctrine. This further means that, insofar as Annex 811(2)(b) reflects the police powers doctrine under customary international law, the recognised exceptions will apply under Annex 811(2)(b).⁶⁴⁵ In particular, a central tenet of the police powers doctrine is that the measure in question must be *bona fide* which, Eco Oro submits, is acknowledged by Canada.⁶⁴⁶
622. Eco Oro further notes Canada’s acceptance that Annex 811(2)(b) “*does not constitute an exception that applies after an expropriation has been found but is a recognition that the exercise of police powers does not engage State responsibility.*”⁶⁴⁷ This acknowledges that “*the determination as to whether the police powers doctrine applies must form part of the overall evaluation of whether there has been indirect expropriation*” such that Annex 811(2)(a) (identifying factors to be taken into account when determining whether there has been an indirect expropriation) and (b) (identifying circumstances where the measure will not be treated as indirect expropriation) must be “*applied holistically*

⁶⁴⁴ Respondent’s Response to Canada’s Non-Disputing Party Submission, pp. 2-3.

⁶⁴⁵ Claimant’s Response to Canada’s Non-Disputing Party Submission, para. 5; *Oxus*, Award (17 December 2015) (Exhibits CL-84 / RL-99), para. 744; *Tecmed*, Award (29 May 2003) (Exhibits CL-22 / RL-61), para. 122; *Philip Morris*, Award (8 July 2016) (Exhibit RL-102), para. 295.

⁶⁴⁶ Claimant’s Response to Canada’s Non-Disputing Party Submission, para. 6; Canada’s Non-Disputing Party Submission, para. 11 and fn. 7.

⁶⁴⁷ Claimant’s Response to Canada’s Non-Disputing Party Submission, para. 7; Canada’s Non-Disputing Party Submission, fn. 14.

and coterminously” which undermines Colombia’s argument that the analysis under Annex 811(2)(a) and (b) are entirely separate.

(5) The Tribunal’s Analysis

623. As the majority of the Tribunal has determined in paragraph 440 above, Eco Oro had certain vested rights capable of being expropriated, namely the right to explore, the right to exploit (albeit a right which could only be exercised upon its PTO being approved and obtaining an Environmental Licence) and the right to extend its concession at the end of the concession period. The Tribunal has further determined that no permanent mining exclusion zone had been established over the Santurbán Páramo at the time the FTA entered into force. Given this finding, the Tribunal does not need to consider here whether Eco Oro’s rights were grandfathered (whether pursuant to the transition regime adopted under Article 5 of Resolution 2090 or Article 173(1) of Law 1753): this is a question which goes to the date on which the expropriation, if there was one, occurred and thus to the quantum of damages and not to the question of whether an expropriatory act took place.
624. The Tribunal therefore turns to consider whether the Challenged Measures constitute an indirect expropriation of Eco Oro’s vested rights or a legitimate exercise by Colombia of its police powers.
625. Canada notes in its non-disputing party submission that “*the police powers of the State are expressly reflected in Annex 811*”⁶⁴⁸ and both Parties accept this. They disagree as to the applicability of the generally accepted international law exceptions to the police powers doctrine. Eco Oro contends that Annex 811(2)(b) reflects a State’s police powers as understood in international law such that the exceptions under international law apply, namely whether the measures violated specific commitments given by the State to the investor,⁶⁴⁹ were disproportionate to the public interest⁶⁵⁰ or not implemented in good faith being arbitrary, unnecessary or otherwise not *bona fide* requiring consideration of good faith tenets of fairness, transparency, non-arbitrariness, clarity, non-ambiguity and predictability.

⁶⁴⁸ Canada’s Non-Disputing Party Submission, para. 9.

⁶⁴⁹ *Oxus*, Award (17 December 2015) (Exhibits CL-84 / RL-99), para. 744.

⁶⁵⁰ *Tecmed*, Award (29 May 2003) (Exhibits CL-22 / RL-61), para. 122.

Colombia says that Annex 811(2)(b) is *lex specialis* such that the Tribunal does not need to consider these general international law exceptions.

626. The tribunal in *Philip Morris v. Uruguay*, having considered provisions similar to Annex 811(2)(b), held that such provisions reflect the more general doctrine of police powers in customary international law.⁶⁵¹ The Tribunal concurs. Annex 811(2) does not expressly exclude the application of general international law when seeking to understand and apply it. Indeed, parties to a Treaty cannot contract out of the system of international law.⁶⁵² When States contract with each other it is inherent that they do so within the system of international law. Therefore, in interpreting and applying the provisions of Annex 811(2), awards on the police powers doctrine under customary international law may provide some guidance (by analogy).
627. Whilst these awards indicate that various tribunals have taken different approaches on the order in which to analyse the issues –do you first determine whether the criteria for an indirect expropriation are met, and then determine whether the exception applies, or vice versa?– there is no clear consensus in the practise. One approach is to consider whether the relevant measure falls within the exercise of a State’s police powers before moving to a careful assessment of whether there may have been an expropriation, including consideration of deprivation. Applied to the text of Annex 811(2), this approach means considering subparagraph (b) before (a). The tribunals in *Methanex v. USA*,⁶⁵³ *Saluka v. Czech Republic*,⁶⁵⁴ *Investmart v. Czech Republic*,⁶⁵⁵ *WNC Factoring v. Czech Republic*⁶⁵⁶ and *AIYY v. Czech Republic*⁶⁵⁷ took this approach. A second approach is to consider the threshold issue of whether there has been a substantial deprivation, before turning to the question of whether

⁶⁵¹ *Philip Morris*, Award (8 July 2016) (**Exhibit RL- 102**), para. 301.

⁶⁵² *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009), para. 77 and fn. 48 (not available on record).

⁶⁵³ *Methanex*, Award (3 August 2005) (**Exhibit CL-32**), Part IV, Ch. D.

⁶⁵⁴ *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award (17 March 2006) (**Exhibits CL-104 / RL-71**) (“*Saluka*”), paras. 255-275.

⁶⁵⁵ *Investmart v. Czech Republic*, UNCITRAL, Award, 26 June 2009, paras. 497-504 (not available on record).

⁶⁵⁶ *WNC Factoring v. The Czech Republic*, PCA Case No. 2014-34, Award (22 February 2017), paras. 377-399 (not available on record).

⁶⁵⁷ *AIYY Ltd. v. Czech Republic*, ICSID Case No. UNCT/15/1, Award (29 June 2018), paras. 191-227 (not available on record).

the measures at issue were an exercise by Colombia of its police power. This approach was followed in *Tecmed v. Mexico*⁶⁵⁸ and *Chemtura v. Canada*.⁶⁵⁹ In both these approaches, tribunals have apparently proceeded on the basis that a decision on police powers is also a decision on whether there has been an indirect expropriation. In other words, the inquiry into indirect expropriation and police powers is not distinguishable. In reaching this conclusion, the following passage in *Saluka* is relied upon:

*“It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare.”*⁶⁶⁰

628. A third approach is to evaluate all the relevant facts and then make a decision on whether the relevant measures were expropriatory or an exercise of the State’s police powers. Rather than following a two-stage analysis as the first and second approaches summarised above do, this approach takes all factors into account before reaching a conclusion. This approach can be seen in *Marfin Investment Group and Others v. Cyprus*.⁶⁶¹
629. Whichever approach is adopted, the exception in Annex 811(2)(b) is best seen as a reflection or explanation of the factors that are relevant to the expropriation inquiry in Annex 811(2)(a). An assessment of whether there has been interference “*with distinct, reasonable investment-backed measures*” and “*the character of the measure or series of measures*” (in Annex 811(2)(a)) can only take place with reference to whether those measures “*are designed and applied to protect legitimate welfare objectives.*” This is most obvious in connection to the ‘character’ criterion but is also true of the ‘expectations’ criterion, as investors must be taken to understand that States retain the power to regulate in the public interest. The Tribunal further finds that the question of whether the measure has been adopted in good faith or *bona fides* is the same for both the inquiry into expropriation and that into police powers (or Annex 811(2)(b)) and necessitates consideration of the purpose

⁶⁵⁸ *Tecmed*, Award (29 May 2003) (Exhibits CL-22 / RL-61).

⁶⁵⁹ *Chemtura v. Government of Canada*, UNCITRAL, Award (2 August 2010) (Exhibit RL-84), paras. 257-267.

⁶⁶⁰ *Saluka*, Partial Award (17 March 2006) (Exhibits CL-104 / RL-71), para. 255. See also *Tecmed*, Award (29 May 2003) (Exhibits CL-22 / RL-61), para. 122.

⁶⁶¹ *Marfin Investment Group Holdings S.A., Alexandros Bakaselos and Others v. Republic of Cyprus*, ICSID Case No. ARB/13/27, Award (26 July 2018) (not available on record), in particular paras. 1031-1126.

of the measures and the degree to which the State's public policy concern is genuine as opposed to the process by which the measures were created. Having considered these alternative approaches, the Tribunal first considers whether the effect of the Challenged Measures was equivalent to direct expropriation. If so, it then considers whether the Challenged Measures were a legitimate exercise of Colombia's police powers or constituted an indirect expropriation.

630. It is clear that the measures had a level of adverse economic impact on Eco Oro's covered investment however was there a substantial deprivation of Eco Oro's rights? Eco Oro says that it was deprived of its right to exploit. This included the right to submit its proposed environmental measures, as detailed in the submitted PTO, for approval by the environmental authorities and to apply for an Environmental Licence. The Tribunal notes Eco Oro's application for an environmental license for an open-cast mining project was rejected on environmental grounds. Further, no application was made by Eco Oro for its proposed underground mining project. Finally, the Tribunal has not been provided with any evidence as to how this underground project would be acceptable from an environmental perspective. The difficulty as the Tribunal sees it is that once it was clear that a páramo ecosystem overlapped with a significant part of the Concession area, it would inevitably have been challenging for Eco Oro to satisfy the environmental authorities that it could undertake exploitation activities without damaging the páramo, particularly in circumstances where the precautionary principle had been enshrined into Colombian law. However, whilst no doubt a difficult proposition to sustain, Eco Oro says that such an application was not doomed to inevitable failure. In support of its contention that it could have satisfied the environmental authorities as to the way in which its underground mining project would have been environmentally satisfactory, Eco Oro says that 67 environmental licenses have been granted in areas overlapping páramo ecosystems since the General Environmental Law enshrined the precautionary principle, covering an area of 14,000 hectares, 29% of which titles had more than 90% of their surface area within the surface area of a páramo and a further

43 environmental licences were being processed (referring to section 6.4.3 of a study prepared by the IAvH using data as at 2011 for the 1:100,000 delimitation⁶⁶²).

631. Ms. Baptiste advised she did not have full knowledge of this. However, in paragraph 77(a) of its Post-Hearing Brief, Colombia says that: “[...] *in accordance with the information collected by the IAVH in 2011, there were 65 mining titles overlapping with the IAVH Atlas reference area of the Santurbán Páramo. However of those 65 mining titles, only 15 had obtained environmental authorisations to conduct mining exploitation activities. Further by December 2014, when Resolution 2090 was issued, the number of mining titles in the Santurbán Páramo had decreased to 54. Of these 54 mining titles, only 10 had environmental authorisations to conduct exploitation activities. None of the mining titles or environmental authorisations in force in December 2014 were issued after 9 February 2010, when the mining ban in páramo areas under Law 1382 entered into force. Furthermore, none of these authorisations were for large-scale industrialized mining projects. The footprint of these projects on the Santurbán Páramo was minimal. In fact, less than 1% of the Santurbán Páramo (a mere 174.5 hectares) was covered with mining titles with environmental authorisations issued prior to 9 February 2010.*”
632. Whilst Colombia says that only 10 of the 54 mining titles in existence at the time Resolution 2090 came into force had obtained exploitation authorisations and these did not relate to “*large-scale industrialised mining projects*”, Colombia has not explained the current status of the remaining 44 mining titles. It is unclear whether PTOs have been approved for exploitation activities and environmental licences issued in respect of any of the other 44 mining titles or indeed whether applications are currently under consideration. Given this, whilst it is unarguable that Eco Oro would have faced significant difficulties in obtaining an approved PTO and Environmental Licence for an underground mining project, the Tribunal cannot say that Eco Oro had no prospect of success. It cannot be said with certainty that an application for a PTO for an underground mine and an environmental licence will inevitably be rejected. As a result of the Challenged Measures, Eco Oro has lost such opportunity to apply for an approved PTO and an environmental licence in relation to that part of the

⁶⁶² IAvH, “Contributions to the strategic conservation of the Colombian páramos: Updating the mapping of the páramo complexes to a scale of 1:100,000” (6 February 2014) (**Exhibit C-200**).

concession which overlaps with the area delimited by Resolution 2090 to enable it to exercise its vested right to exploit.

633. Eco Oro next says that those areas of Concession 3452 which do not overlap Resolution 2090 were also rendered valueless by the Challenged Measures. Although no expert evidence was adduced in support of Mr. Moseley-Williams' testimony, Colombia did not challenge his testimony that whilst the Angostura Deposit only overlaps 0.09% of the 2090 Atlas, the effect of the Challenged Measures deprives Eco Oro of more than 50% of its mining rights such that the economics of the Angostura Project are destroyed. On this basis, Eco Oro has been deprived of its acquired right to exploit, pursuant to which right it has been deprived of the opportunity to obtain approval of a PTO and apply for an environmental licence with respect to the totality of the concession area.
634. Eco Oro's expectation in entering into the Concession was to make a profit. The purpose of the Concession was, as specified in Clause One, exploitation and it is typically only in the exploitation phase of a project such as this that significant economic benefits may be obtained, the costs of exploration having been incurred. It is indisputable that a deprivation of this right will have caused potential economic loss to Eco Oro, but does this comprise severe deprivation? Eco Oro's share price had already dropped significantly when its open-pit mining application was rejected in April 2010 (being before the cut-off date) and at this point there was certainly a devastating economic impact to Concession 3452. Whilst the share price did rise in early 2015 before again falling after implementation of the Challenged Measures, the decline in share value in April 2010 appears more significant than that caused by the Challenged Measures. However, Eco Oro suffered the complete deprivation of a potential right to exploit. Without a right to exploit, albeit a right which was dependent upon an approved PTO and environmental licence, there was no possibility of exploiting the Angostura Deposit such that the Concession became valueless. Whilst of course the actual economic value of the right to exploit in that area was uncertain, given the need to obtain a future approval of the PTO and to obtain an Environmental Licence in circumstances where the chances of making a successful application appear to be minimal, that exploitation right was lost in totality as a result of the Challenged Measures. The Tribunal finds that this loss

is capable of being considered to be a substantial deprivation, such as to amount to an indirect expropriation.

635. The Tribunal therefore turns to consider whether the Challenged Measures were a legitimate exercise of Colombia's police powers pursuant to Annex 811(2)(b): were they a non-discriminatory measure or series of measures designed and applied to protect the environment. If the answers to these questions are both yes, there is no indirect expropriation unless they comprise a rare circumstance.
636. Turning first to their purpose, it cannot be disputed that the Challenged Measures were for the protection of the environment, and it could not be argued the concern to protect the páramo was in all respects a legitimate one. Páramos have significant environmental importance, recognised at the national and international levels. Firstly, they provide ecosystem services, the most important of which is water supply (supplying 70% of Colombia's water) and the regulation of the water cycle. Páramos effectively act like sponges, taking in water from the atmosphere and enabling it to move down to the water tables and so the soil plays a critical role in absorbing and carrying the water. The Santurbán Páramo is a particularly humid páramo, providing water to about 2.5 million people in 68 surrounding municipalities. Secondly, páramos capture large amounts of carbon from the atmosphere.
637. Páramos are under threat from both human intervention and climate change. Due to the predominantly cold weather and low availability of oxygen, they have a very slow metabolism, which produces low growth and decomposition rates which makes their ability to recover particularly slow⁶⁶³ and there is "*consensus that the páramo's ability to recover from either open pit or underground mining activities is very low. Underground mining, for example, can modify water drainage systems and carries the risk of drying out or reducing water bodies and surface water flows.*"⁶⁶⁴ Indeed, in determining the EIA submitted by Eco Oro for its open pit mining project, Ms. Baptiste notes that "*mining activities are frequently harmful for biodiversity and soil recovery*" and, as detailed in IAVH's report

⁶⁶³ Constitutional Court, Judgment No. C-35 (8 February 2016) (**Exhibit C-42**), para. 155.

⁶⁶⁴ First Baptiste Statement, para. 36.

rejecting Eco Oro’s EIA, the IAvH noted that restoration measures would not be feasible or viable.

638. The Constitutional Court notes in paragraphs 155 and 158-160 of Judgment C-35 that:

“restoration or recovery of a páramo ecosystem is virtually impossible [...]. Therefore when the soil and subsoil ecosystem functions suffer negative impacts, such impacts are generally irreversible.

[...]

In a nutshell, given the different factors of vulnerability that may affect the subsoil, the soil, the flora, the fauna and the air in paramo ecosystems, we can conclude that they are vulnerable ecosystems. Such vulnerability increases if we take into account that their recovery capacity is slower than other ecosystems.

Apart from the vulnerability factors mentioned above, paramo ecosystems have very low resistance and resilience thresholds, that is to say they are fragile ecosystems [...].

Currently the most common disturbances in páramo ecosystems are: [...] (iv) open pit and underground mining [...].

Thus we should conclude that, owing to the vulnerability of the páramo ecosystems, and the role they play in the regulation of the water cycle and in carbon capturing, the páramo delimitation process carried out by the Ministry of Environment and Sustainable Development is of essential importance [...].”⁶⁶⁵

639. The Constitutional Court further noted in Judgment T-361 that:

“The right to environmental participation is reinforced in the páramos governance. This is due to the fact that such biomes are of great importance to the legal⁶⁶⁶ system because: (i) they are an ecosystem featuring great diversity that needs to be preserved; and (ii) they offer environmental services that are most significant for society life, such as the regulation of the hydrologic cycle and the sequestration of atmospheric carbon.

⁶⁶⁵ Constitutional Court, Judgment No. C-35 (8 February 2016) (**Exhibit C-42**).

⁶⁶⁶ The Tribunal notes that in both the Spanish original and English translation the word “legal” is used. “El derecho de la participación ambiental se refuerza en la gobernanza que recae sobre los páramos. Lo anterior, en razón de que ese bioma reviste gran importancia para el Sistema jurídico [...]”.

In turn that biome is exposed to multiple disturbances that can destroy it, such as crop farming, animal farming, mining or global warming, which processes would bring societal wellbeing levels down. Therefore, it is necessary to adopt tools that will preserve such natural environments: delimitation is an example of such environmental management. However, the protection of paramo ecosystems stands as a difficult task due to the debate concerning the concept of paramos and the delimitation of the boundaries separating paramos from the upper Andean forest. In view of this situation, paramo management should seek the sustainability of such ecological niches and take into consideration paramo interactions with other natural environments. An example of this is the inclusion of the forest paramo buffer zone (FPBZ) within its boundaries.”⁶⁶⁷

640. The Tribunal further does not understand it to be contended that the measures were discriminatory in any way. The measures affected all mining concessionaires whose concessions overlapped the Santurbán Páramo. The Tribunal understands that there were around 65 mining titles covering approximately 10% of the Santurbán Páramo which would potentially be affected by a mining ban, some locally owned and some owned by foreign companies. Whilst there was clearly a tension between the aspirations of MinMinas and MinAmbiente, the Tribunal does not find there was any evidence of an intention expressly to target Eco Oro, or that Eco Oro was inadvertently targeted. It is clear from the local demonstrations that many artisanal miners and local populations were equally concerned at the prospect of losing both their mining rights (to the extent they had such rights) and their livelihood, which had been dependent upon mining being undertaken in their localities. Indeed, the Mayors of Soto Norte and other relevant localities sent a letter to MinAmbiente and CDMB, with 70 pages of signatures attached, complaining of the lack of opportunity for them to participate in the consultation exercise, noting that (i) 90% of the population in the affected area relied directly or indirectly on mining activities; (ii) legal uncertainty with respect to delimitation had led to unemployment and illegal mining; (iii) any delimitation should not ignore the acquired rights of existing mining title holders; and (iv) that a transitional regime be established.
641. MinMinas and MinAmbiente therefore had to balance the competing interests of the environment and of the economic rights of private persons. In this regard, the Tribunal notes

⁶⁶⁷ Constitutional Court, Judgement No. T-361 (Exhibit C-244), pp. 253-254.

that whilst the artisanal miners and local populations were relocated or compensated by the State,⁶⁶⁸ no such offer was made to Eco Oro. The Tribunal also notes the Constitutional Court’s reference to the right of an affected holder of a mining title, such as Eco Oro, to seek compensation from the State. In response to questions from the Tribunal, Professor Ricaurte advised that, in her view, a private party, such as Eco Oro, which had suffered harm as a result of the State taking measures to protect the general interest in preserving the páramo, was entitled to make an application for compensation, the assessment of which would be conducted by the court. An action could be brought against the Government before the administrative courts claiming compensation for violation of such private contractual rights although, as explained by Professor Ricaurte, no such claims have yet reached the Colombian High Courts, as the declaration of excluded areas is quite recent and there are therefore no final judgements at the present time.⁶⁶⁹ This possibility of recourse is also supported by the *Consejo de Estado* in Advisory Opinion 2233. Whilst Eco Oro was required to, and did, waive such rights when commencing this arbitration, the Tribunal accepts there was a constitutional right available to Eco Oro to seek compensation from the State in the Colombian courts.⁶⁷⁰ Accordingly, whilst the solution to this “*balancing exercise*”⁶⁷¹ directly affected Eco Oro, the Tribunal does not find, on the basis of the evidence before it, that the solution adopted by Colombia in terms of the measures complained against could be said to have been targeted (negatively) against Eco Oro; instead, the measures had a positive objective, namely to preserve the páramo.

642. The majority of the Tribunal therefore finds that the Challenged Measures were non-discriminatory and designed and applied to protect a legitimate public welfare objective, namely the protection of the environment. They were adopted in good faith. The Challenged Measures were therefore a legitimate exercise by Colombia of its police powers unless they comprise a rare circumstance such that they constitute indirect expropriation pursuant to Annex 811(2)(a).

⁶⁶⁸ This can be seen from, for example, Art. 5 (1) of Law No. 1930 (**Exhibit R-51**).

⁶⁶⁹ Tr. Day 4 (Professor Ricaurte), 964:18-974:9.

⁶⁷⁰ *Consejo de Estado*, Advisory Opinion No. 2233 (11 December 2014) (**Exhibit R-135**).

⁶⁷¹ As designated by ANM in its Letter from National Mining Agency to the Constitutional Court seeking clarification on the consequences of Constitutional Judgment C-35 (24 February 2016) (**Exhibit C-44**).

643. In determining whether the Challenged Measures are a rare circumstance, the Tribunal is informed by the factors detailed in Annex 811(2)(a) as well as by the example contained in Annex 811(2)(b): are the measures so severe that they cannot reasonably be regarded as having been adopted in good faith. To be clear, whilst the Tribunal does not accept, if it were so contended, that it must make a finding of bad faith or disproportionality with respect to the effect of the measures taken, equally, a measure adopted in good faith is unlikely to comprise a rare circumstance for the purposes of Annex 811(2)(b). In undertaking this exercise, the Tribunal notes that the ordinary meaning of the word ‘rare’ in the context of ‘a rare event’ is one which seldom occurs, is unusual, uncommon, or exceptional (as detailed in the Oxford English Dictionary). Whilst the Oxford English Dictionary does not provide a definition of the word ‘severe’ in the context of a ‘severe’ measure, common uses of the word in such a context connote “*something bad or undesirable*”, “*harsh*”, “*brutal*”, “*serious*” or “*grave*” and the addition of the word ‘so’ before ‘severe’ emphasises the extreme nature of the severity contemplated. Accordingly, for the Challenged Measures to comprise an actionable indirect expropriation, as opposed to a legitimate exercise of a State’s police powers, there must be a very significant aggravating element or factor in the conduct of the State and not just a bureaucratic muddle or State inefficiency.
644. The Challenged Measures were clearly implemented to protect the páramo ecosystem. There was a recognised need to protect these ecosystems which was first highlighted a significant time before Concession 3452 was granted, as can be seen from the following:
- a. Article 79 of Colombia’s (Green) Political Constitution imposes on the State a legal duty to conserve areas of special ecological importance.
 - b. In 1992 Colombia signed the Biodiversity Convention.
 - c. In 1993 Colombia enacted the General Environmental Law (Law 99 of 1993) which provided that páramos were to be the subject of special protection.
 - d. In 1996 it ratified the Biodiversity Convention and in 1998 it ratified the Ramsar Convention.

- e. A “Programme for the Restoration and Sustainable Management of High Colombian Mountain Ecosystems: PÁRAMOS” was launched in 2001 and published in February 2002,⁶⁷² framed in accordance with the General Environmental Principles of the General Environmental Law. This programme was contained in a lengthy document which detailed the important cultural and economic functions fulfilled by the páramos and specified the aim of “*special protection of páramos, sub-páramos, springs and aquifer replenishing zones.*” Pursuant to Article 2.1, the general objective was “[t]o provide national, regional and local orientation for environmental management of Páramo ecosystems and promote actions for their sustainable management and restoration [...]” Article 2.2 detailed the specific objectives including, *inter alia*: “Perform environmental zoning and planning of the paramo ecosystems at a regional and local level and implement environmental management plans with an ecological approach” and “[p]romote the conservation of paramo ecosystems on the basis of ecologically, socially, and economically sustainable forms of land use.” Article 1.1 of the General Environmental Law referred to the relevance of the Rio principles, Principle 15 of which contained the precautionary principle (namely that “[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”) which was enshrined into Colombian Law by Article 1.6 and Article 1.4 of the General Environmental Law providing that “*the páramo and sub páramo areas, water springs and aquifer recharge zones shall be the subject of special protection.*”⁶⁷³
- f. The Ministry of Environment Resolution 769 (dated 5 August 2002) was issued titled “*Establishing provisions for páramo protection, preservation and sustainability*” pursuant to which MinAmbiente established a legal definition of “Páramo.” In particular it (i) identified the páramos it applied to as being those on the western cordillera from approximately 3300 masl, on the central cordillera from

⁶⁷² Ministry of Environment, “Program for the Restoration and Sustainable Management of High Mountain Ecosystems: Páramos” (February 2002) (**Exhibit R-113**).

⁶⁷³ Law No. 99 of 1993 (General Environmental Law) (22 December 1993) (**Exhibit C-66**), Art. 1.

approximately 3700 masl, on the eastern cordillera from approximately 3000 masl and in any other regions from approximately 3300 masl; (ii) noted that páramos comprise three strips (the sub-páramo, the páramo itself and the superpáramo); and (iii) noted that it included man-altered páramos. Article 3 provided for regional studies to be completed within one year of terms of reference being established detailing, *inter alia*, their geographical location and cartographic distribution and using GPS to ascertain the Gauss-Kruger and latitude-longitude coordinates and reporting on the current condition of the páramos in that region with the support of, *inter alia*, the IAvH and to prepare an Environmental Management Plan containing, *inter alia*, zoning and environmental organisation of páramos.

- g. On 13 July 2004 CORPONOR created the Regional System of Protected Natural Areas for the Department of Norte de Santander which was specified to include “*the páramo areas, sub-páramos, springs, and aquifer recharge areas.*”⁶⁷⁴
645. Therefore, both at the time Concession 3452 was originally entered into in 2007 and at the time the FTA came into force in 2011, well before the Challenged Measures were enacted, there was already significant understanding and awareness of the importance of protecting the páramo and its fragility. Indeed, Eco Oro should have been aware of this at the time it made its original investment in 1994. The intended purpose of the Challenged Measures as designed and applied is therefore clearly *bona fide*, even if all the necessary measures to achieve the underlying purpose have not yet been finally implemented.
646. The Tribunal next considers the manner in which the páramo ecosystem was delimited. Was it proportionate given its purpose? Whilst the Parties do not disagree as to the importance of protecting the páramo ecosystem, they disagree both as to the criteria to be applied in determining the boundaries of the Santurbán Páramo and as to whether the delimitation was in accordance with the requirements of Article 34 of the 2001 Mining Code. In this regard, the Tribunal notes that Annex 811(2)(b) does not impose an obligation to

⁶⁷⁴ CORPONOR, Directing Council Agreement No. 11 (13 July 2004) (**Exhibit R-143**).

comply with such domestic laws, although it is a relevant factor to consider in ascertaining the *bona fides* of the measures.

647. The IAVH’s study was the basis for the delimitation applied in the Challenged Measures. Whilst it is accepted by both experts that there is no single definition of a páramo, there is substantial agreement on the essential elements of the páramo. The main differences with respect to the boundaries of the páramo are, firstly, where the lower boundary of the páramo is to be delimited and, in particular, whether the transition area (the “**Transition Zone**”) is to be treated as páramo and, secondly, whether those areas which no longer exhibit the typical characteristics and functions of a páramo can be described as páramo or not: Eco Oro says no to both and Colombia says yes to both.
648. The Tribunal found both Parties’ experts to be honest and credible with respect to the importance of protecting the páramo. Ms. Baptiste is of the opinion that it is important to include the Transition Zone to ensure complete protection whereas Mr. Aldana took an arguably more technical definition of the páramo. It is not unusual for scientists to disagree but the Tribunal did not find either to be seeking to promote the interests of the Party which had appointed them. In considering the relevance of including the Transition Zone in the delimitation of the páramo, the Tribunal finds of assistance the following statement from the Constitutional Court in Judgment C-35:

“Then, as we can see, the criteria on which different scientists have relied to define the páramo differ, not only in quantitative terms –regarding their altitude above sea level– but also in qualitative terms –as to the factors or elements used to define the páramo. Some scientists adopt merely operative definitions, such as the location between forest ecosystems and eternal snow, while others add elements such as, inter alia, the type of vegetation, latitude and geological morphology. These definitions pose a challenge to delimitation –hence to the protection of these ecosystems. Yet some points of the definition converge, which are related to the ecological functions or services provided by these ecosystems, facilitating the adoption of some delimitation criteria. As we will see below, these ecological functions or services are the most efficient criterion in furtherance of certain legal interests that are protected by the constitution.

[...]

Two services stand out among the different environmental services provided by the páramos, which are fundamental to society. On the one hand, páramos are a cornerstone of the regulation of the water cycle (in terms of quality and availability), for they collect and provide drinking water of high quality and easy distribution. On the other, páramos are carbon ‘sinks’, that is they store and capture carbon from the atmosphere at least ten times as much as tropical forests, according to the most conservative calculations, contributing to mitigating the effects of global warming.

[The Constitutional Court then summarises the qualities of the páramos in performing these services:]

“After studying the characteristics and the main environmental services provided by páramos, we should indicate that ecosystems are not to be understood in a fragmented manner. In the case being analysed by the Court, the functioning of the páramo cannot be understood in isolation from that of the forests that surround it along the lower parts, since these two ecosystems interact with, and depend on, each other. This has been recognised by the CBD, which defines an ecosystem as ‘[...] a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit.’

To the extent that the different resources that form part of the páramo serve specific functions to the biological and chemical processes that develop in them, the scope of the measures to protect this ecosystem cannot be determined by a single criterion, for example their altitude, or the presence of frailejones. Likewise impacts on the ecosystem cannot be analysed in isolation, for an impact on the soil or on biological diversity may also result in an impact on water.

In addition, páramos should not be considered independent ecosystems, for they are closely related with the other adjacent ecosystems such as forests, mainly in connection with water. [...].”⁶⁷⁵

649. The extract cited above from Judgment C-35 demonstrates the difficulties in reaching a commonly agreed definition of a páramo ecosystem and whether the Transition Zone should be encompassed within the ecosystem boundaries. It is clear from this that Colombia’s alternative approach to determining the correct boundary of the páramo does not of itself equate to *male fides*.

⁶⁷⁵ Constitutional Court, Judgment No. C-35 (8 February 2016) (Exhibit C-42), paras. 137, 142, 152-154.

650. The Constitutional Court further noted in Judgment T-361 that:

“The right to environmental participation is reinforced in the paramos governance. This is due to the fact that such biomes are of great importance to the legal⁶⁷⁶ system because: (i) they are an ecosystem featuring great diversity that needs to be preserved; and (ii) they offer environmental services that are most significant for society life, such as the regulation of the hydrologic cycle and the sequestration of atmospheric carbon.

In turn that biome is exposed to multiple disturbances that can destroy it, such as crop farming, animal farming, mining or global warming, which processes would bring societal wellbeing levels down. Therefore, it is necessary to adopt tools that will preserve such natural environments: delimitation is an example of such environmental management. However, the protection of paramo ecosystems stands as a difficult task due to the debate concerning the concept of paramos and the delimitation of the boundaries separating paramos from the upper Andean forest. In view of this situation, paramo management should seek the sustainability of such ecological niches and take into consideration paramo interactions with other natural environments. An example of this is the inclusion of the forest paramo buffer zone (FPBZ) within its boundaries.”⁶⁷⁷

651. Mr. Aldana says that once there has been a disturbance in the Transition Zone, the páramo species descend and take over the areas previously occupied by the forest (paramisation) but the paramised area does not normally have the composition, structure and functions of a páramo and so may not be considered as páramo. Further, the Angostura area was an area where there had been significant intervention as a result of intensive development for hundreds of years of different activities such as grazing, agriculture and felling as well as traditional mining.

652. Ms. Baptiste on the other hand says that a páramo ecosystem should include areas which have been transformed by human activity: ecosystems are socio-ecological systems and it is not possible to proceed on the basis that a páramo ecosystem loses its nature when it has interacted with human activity. The question of whether or not to include the Transition Zone in the páramo depends on the definition adopted for the ecosystem, and “[n]o objective

⁶⁷⁶ The Tribunal notes the use in the English translation of the word “legal”: this is the same as in the Spanish original where the text also refers to the legal system. The provision is as follows: “El derecho de la participación ambiental se refuerza en la gobernanza que recae sobre los páramos. Lo anterior, en razón de que ese bioma reviste gran importancia para el Sistema jurídico [...]”

⁶⁷⁷ Constitutional Court, Judgement No. T-361 (Exhibit C-244), pp. 253-254.

response exists to the question of whether the transition zone is part of the adjacent ecosystem.” The IAvH believed the transition strip should be included as páramo as they are areas of maximum biological diversity in the high mountains and a key element for the páramos’ water regulation function. They also protect the connectivity between the páramo and the forest, preventing the isolation of certain species. This is consistent with the definition adopted by MinAmbiente in Resolution 769 of 2002 and “*from the ecological point of view, boundaries or limits correspond more precisely to transition zones. Delimiting an ecosystem, including this transition area with adjacent ecosystems, permits the protection of flows between ecosystems and thus guarantees comprehensive protection.*”⁶⁷⁸

653. Ms. Baptiste confirmed in her testimony that the IAvH provided MinAmbiente with a strip representing the Transition Zone together with a line that was the outside border of the transitional strip to protect it as much as possible. This required some, albeit minimal, field data and was effected by means of a probabilistic model with certain specific data. Ms. Baptiste further confirmed that the Transition Zone was subject to a slight degree of uncertainty (in an interview she confirmed it could move 50 meters up or 100 meters down) but that the IAvH recommended line maximised protection for the Transition Zone.
654. Given the evidence from both experts and as noted by the Constitutional Court, it is clear páramos require protection and it is also clear that once damaged it is uncertain whether or not they can be restored and, if so, the length of time such restoration will take. Whilst Eco Oro says that the precautionary principle is not applicable, it seems to the Tribunal that this is precisely the circumstance in which this principle –as for example reflected in the preamble to the 1992 Biodiversity Convention and set out in Principle 15 of the Rio Declaration on Environment and Development– does apply. As discussed above, concern with respect to the fragility of páramo ecosystems and the need to ensure “special protection” has been expressed since before Concession 3452. The Constitutional Court references a number of studies and reports authored by public and private entities which conclude that “*páramo ecosystems are very fragile and that mining may have negative consequences on the vegetation cover and geomorphological, chemical and physical*

⁶⁷⁸ First Baptiste Statement, para. 41.

*changes in the soil and subsoil [...].*⁶⁷⁹ and then summarises the “*vulnerability, fragility and capacity for recovery of the páramo ecosystem.*”⁶⁸⁰ The precautionary principle is clearly relevant when considering the effect and proportionality of the measures with respect to the protection of the páramos.

655. Whilst the Tribunal does not, for the purposes of this Decision, need to reach a determination of whether such a delimitation should or should not include the Transition Zone, it can conclude that it was certainly not unreasonable for the Transition Zone to have been included when delimiting the Santurbán Páramo, having regard to the precautionary principle. This is particularly the case in a circumstance such as this where (i) there is no certainty as to the damage that could be caused by mining activities and whether or not such damage would be irreversible and (ii) if not irreversible, the time it would take for the páramo to regenerate. The Tribunal further recognises the importance, as explained by the Constitutional Court, of ensuring the páramo is both able to interconnect with other ecosystems to ensure it can fulfil its environmental services but equally is protected from any potential adverse interaction with another natural environment. Accordingly, whether or not the delimitation was conducted in accordance with Article 34 of the 2001 Mining Code, it cannot be said to be disproportionate in terms of its purpose of protecting the páramo ecosystem to include the Transition Zone in the delimited area. The Tribunal considers below whether or not Colombia’s failure to re-delimit the Santurbán Páramo as ordered by the Constitutional Court was proportionate.
656. The Tribunal therefore does not find that including the Transition Zone in the Santurbán Páramo was unreasonable or evidences a lack of good faith, and cannot be said to amount an exercise of State power that is characterised by bad faith.
657. The Tribunal next turns to consider how the IAvH undertook its task of determining the lower boundary line of the Santurbán Páramo, specifically its lack of field studies. Whilst the Tribunal understands Eco Oro’s reservations given the impact of the IAvH’s determination on Concession 3452, it does not find the work undertaken by IAvH to have

⁶⁷⁹ Constitutional Court, Judgment No. C-35 (8 February 2016) (**Exhibit C-42**), p. 87 and fn. 82.

⁶⁸⁰ Constitutional Court, Judgment No. C-35, paras. 155-158 (**Exhibit C-42**).

been undertaken in breach of its agreed methodology. The study appears to have followed the methodology which (along with the proposal for the delimitation for the Santurbán Páramo) was contained in the Contributions Document.⁶⁸¹ This was published in 2014 together with Resolution 2090.

658. The executive summary prepared by Mr. Sarmiento notes that the aim of the document is to “*provid[e] elements of judgement in biophysical, legal and social aspects that contribute to the delimitation at 1:25,000 scale of the [Santurbán Páramo], performed by the pertinent authorities. In this respect, this document is a contribution requested by the environmental authority, after the formal delivery of the studies, and in accordance with the legislation.*” Ms. Baptiste confirmed that this document was a “*concept*”, being technical in nature and fully backed up by the quality of the scientists that issued it. Ms. Baptiste further confirmed that the IAvH was asked by MinAmbiente to “*contribute its capabilities, [...] research in connection with biodiversity and ecosystems. But it also has – this also has to do with the conditions in the communities and related to the people in the circumstances*”.⁶⁸² She explained that the IAvH “*worked with the people as well. We worked describing very well the conditions of infrastructure, demographics, population matters. These are factors that cannot be ascended from ecology [...]. We assessed all the work that had been developed in connection with mining, history and the region. [...] There shouldn’t be individuals that are adversely affected and improperly affected so we have documents. We conducted a very careful set of works to work with the persons and this apart from the other activities we conducted in the Santurbán Páramo.*” Ms. Baptiste confirmed that this was “[t]o determine the level of presence of persons, what kinds of activities there are” and she noted that she referred to these reports in her statement (paragraphs 38 onwards) such that there were brief references to this work in the reports and the content was to be found in the 2014 Contributions Document.⁶⁸³

659. This 2014 methodology did not refer to the necessity of undertaking new field studies, although it does provide for the use of field work studies that had previously been

⁶⁸¹ IAvH, “Contributions to the delimitation of the páramo” (2014) (**Exhibit C-194**).

⁶⁸² Tr. Day 3 (Ms. Baptiste), 715:18-716:2.

⁶⁸³ Tr. Day 3 (Ms. Baptiste), 717:21-723:20.

undertaken. The Tribunal notes that the methodology was peer-approved and that the only criticism it has been referred to is that from Mr. Aldana.⁶⁸⁴

660. Whilst Eco Oro criticises the study undertaken by the IAvH for not including any field studies, the Tribunal notes that a requirement for field studies was only included in a later methodology, the Forest-Páramo Transition Conceptual Framework (the “**Forest-Páramo Transition**”) and was not provided for in the Contributions Document methodology. The Tribunal understands that this may well have been because the Santurbán Páramo delimitation was a pilot exercise and the 2015 document contained a revised methodology partially updated to take account of lessons learnt from undertaking the Santurbán Páramo delimitation to be used in the subsequent delimitations.
661. The Tribunal also finds it understandable that Colombia did not follow a different methodology to give effect to any desire to ensure that the Angostura Deposit was not included in the delimited páramo. Any methodology applied to the area in Concession 3452 would have had to be applied to all other affected concessions and, given Colombia’s stated insufficient resources, it is understandable that this could not be undertaken. The Tribunal also accepts Colombia’s evidence that it could not have accepted the ECODES Report; it would have been inappropriate to expect Colombia to follow a different methodology with respect to the area overlapping with Concession 3452 or to adopt the delimitation prepared by Eco Oro’s own expert in a situation where there were a further approximately 64 titles affected by the delimitation exercise. Firstly, the IAvH needed to follow a methodology that could be applied homogeneously across all the páramos to be delineated, to ensure integrity in the delimitation process. Secondly, the IAvH could not have been seen to have adopted a concessionaire’s own report or accepted findings from Eco Oro which could have been said to have compromised IAvH’s impartiality and scientific integrity. The ECODES Report could also have been perceived as being self-serving, although the Tribunal emphasises that it found Mr. Aldana to be a genuine and honest witness and it was clear that the ECODES Report had been prepared with considerable resources and professionalism.

⁶⁸⁴ First González Aldana Statement, paras. 72, 103, 109, 118-119.

662. In conclusion, the Tribunal does not find that the IAvH's work in preparing its proposal of the Santurbán Páramo delimitation was not *bona fide* and certainly there is no evidence that the manner in which it was undertaken was so severe that it cannot be reasonably be viewed as having been adopted in good faith. The Tribunal found Ms. Baptiste to be a compelling and honest witness. IAvH followed the 2014 methodology. The Tribunal appreciates that given the sizeable area of the Santurbán Páramo there could have been shortages of logistical and financial resources preventing field studies being undertaken in the totality of the area to be delimited. It is clear that there are different views as to what a páramo comprises, but the Tribunal did not see any evidence that the exercise undertaken by the IAvH was done other than in a genuine attempt to determine the páramo boundaries in the prevailing circumstances. The Tribunal has sympathy with Eco Oro's submissions that had field visits been undertaken the delimitation may have been different and that had the margin of error been applied in Eco Oro's favour, the Angostura Deposit would not have been subject to the mining exclusion zone, however the Tribunal has to balance that with the enormity of the task which had to be undertaken, the difficulties in defining the páramo ecosystem as summarised by the Constitutional Court and the importance of protecting the páramo ecosystem. Whilst a wide boundary of the Transition Zone was included, considering that (i) damage to the ecosystem has very significant adverse effects; (ii) it is unknown whether damaged páramo ecosystem can be restored but that even if it can be restored, the length of time to achieve this is significant; and (iii) underground as well as open pit mining is believed to be a threat to the páramo ecosystem, the Tribunal does not find that there was any arbitrariness, unreasonableness or capriciousness in the way that the IAvH proposed the Resolution 2090 delimitation.
663. Whilst the Tribunal does not find reason for significant criticism of the manner in which the IAvH undertook its studies, it is, however, more troubled by the manner in which the delimitation was declared by MinAmbiente.
664. The Tribunal first notes the dearth of evidence that any form of reliable social and economic studies were undertaken in compliance with the requirements of Article 34 of the 2001 Mining Code. Article 34 of the 2001 Mining Code required delimitation "*by the environmental authority on the basis of technical, social and environmental studies with the*

collaboration of the mining authority.” It is further stated that the administrative act by which any exclusion zone is established must be “*expressly based on studies that establish the incompatibility of or need to restrict mining activities.*”⁶⁸⁵ In addition, Law 1450 added the necessity for an economic study in addition to the technical, social and environmental studies required when undertaking a delimitation of the páramo.

665. The Tribunal has reservations as to the legitimacy or adequacy of the social and economic studies that had to be undertaken; the only evidence that was adduced being the reference in a document titled “*Technical Specifications for the Territory’s Comprehensive Management for the Conservation of the Páramo Jurisdicciones – Santurbán – Berlin. Incorporation of Social and Economic Aspects*” (the “**Memoria Técnica**”).⁶⁸⁶ Whilst Colombia says that the socioeconomic inputs are “*described in detail*”⁶⁸⁷ in this *Memoria Técnica*, which accompanied Resolution 2090, the document merely states as follows:

“The water that originates in the ‘Páramo Complex Jurisdicciones – Santurbán – Berlin’ supplies the Zulia River Basin – which supplies the district of Riego Asozulia, which groups 1,400 associated bodies of water with a concession of 14.3 m³/s – and supports various activities: agricultural uses, the Tasajero thermal power station, and water supply for the population. Only in the Bucaramanga Metropolitan Area, the number of users of these waters for human consumption comes to one million. 30 percent of the water for the city of Cucurta comes from the páramo complex.

*Additionally, they emphasise that if the complex’s area of regional influence is defined based on seven hydrographic subzones, it consists of 68 municipalities in which approximately 2,500,000 people benefit directly or indirectly from the water sources that originate from there.”*⁶⁸⁸

666. Colombia provided no further evidence detailing the substance of the studies undertaken, despite being ordered to produce this. Whilst the document referred to above suggests that some technical, social and economic studies were undertaken, the Tribunal would have

⁶⁸⁵ Law No. 685 (as amended) (8 September 2001) (**Exhibit C-8**), Art. 34.

⁶⁸⁶ IAvH, “Technical Specifications for the Territory’s Comprehensive Management for the Conservation of the Páramo Jurisdicciones – Santurbán – Berlin. Incorporation of Social and Economic Aspects” (Undated) (**Exhibit R-133**).

⁶⁸⁷ Tr. Day 1 (Mr. Adam), 329:5-12.

⁶⁸⁸ IAvH, “Technical Specifications for the Territory’s Comprehensive Management for the Conservation of the Páramo Jurisdicciones – Santurbán – Berlin. Incorporation of Social and Economic Aspects” (Undated) (**Exhibit R-133**).

anticipated, if not the level of detail as was undertaken by the IAvH with respect to the environmental and technical aspects of the delimitation exercise, at least more sophisticated studies than appear to have been carried out as identified in the Technical Report. Indeed, Colombia itself accepts that there was significant criticism of the social and economic aspects of the delimitation, but not of the scientific exercise undertaken by IAvH.⁶⁸⁹

667. In its Post-Hearing Brief, Colombia says that the social and economic studies are specified at page three of Resolution 2090 and pages five to eleven of the Technical Report. Colombia says it provided these reports to Eco Oro during the document production stage, including the following: (i) studies prepared by the CDMB and CORPONOR assessing the physical, biological and socio-economic features of the páramo; (ii) corine land covers (being maps showing land cover in the areas identified as being páramo); and (iii) the information used by MinAmbiente to map the preservation, restoration and sustainable use areas of the Santurbán Páramo.⁶⁹⁰ These documents are not on the record and the Tribunal is therefore unable to clarify the level of detail or utility of such reports.
668. Colombia, in its response to Eco Oro with respect to Eco Oro’s document production request seeking “*documents demonstrating how, and the extent to which, the Ministry of Environment ‘factored social and economic criteria into the delimitation’ of the Santurbán páramo*” advised as follows:⁶⁹¹

“The social and economic criteria taken into consideration by the Ministry of Environment to conduct the delimitation of the páramo are set out comprehensively in the [Memoria Técnica], already on the record as Exhibit R-133. Pursuant to Request No. 6(e), Colombia produced all the underlying information cited in the Memoria Técnica, namely:

- *Corine land covers [...];*

⁶⁸⁹ Tr. Day 1 (Mr. Adam), 330:3-11.

⁶⁹⁰ Respondent’s Post-Hearing Brief, p. 31; IAvH, “Technical Specifications for the Territory’s Comprehensive Management for the Conservation of the Páramo Jurisdicciones – Santurbán – Berlin. Incorporation of Social and Economic Aspects” (Undated) (**Exhibit R-133**); Letter from Freshfields Bruckhaus Deringer to Latham & Watkins (20 May 2019) (**Exhibit C-429**), pp. 8-11; Claimant’s Request for the Production of Documents, pp. 7-10; 12-15.

⁶⁹¹ Letter from Latham & Watkins to Freshfields Bruckhaus Deringer (28 May 2019) (**Exhibit C-431**), pp. 5-7.

- *The information used by the Ministry of Environment to map the preservation, restoration and sustainable use areas of the Santurbán páramo [...];*
- *Map of the Berlín Integrated Management District [...];*
- *Landsat Satellite imagery included in Nicolai Ciontesu's study titled 'Análisis Multitemporal de Coberturas de la Tierra para el Proyecto Páramos Sistemas de Vida' of 13 november 2012 [...];*
- *Map of the páramo slopes, based on 30 m resolution imagery from NASA's Shuttle Radar Topography Mission [...];*
- *Slope steepness classification information from the Instituto Agustín Codazzi ('IGAC') [...];*
- *Polygons used by the Ministry of environment to carry out aggregation study [...]; and*
- *Basic cartography from the IGAC [...].*

Regarding the Claimant's allegations concerning the alleged deficiencies of Colombia's document production in Request No. 6, Colombia notes the following.

First, the 'technical, economic, social and environmental studies for the delineation of the Santurbán páramo submitted by the CDMB to the Ministry of Environment filed under number (radicado) 4120-E1-57045' requested by the Claimants under Request 6(a) were in fact produced by Colombia under Request No. 3 [...]. The IAVH (and not the Ministry of Environment) relied on these documents to prepare its proposal for the delimitation of the páramo. No other documents responsive to this request exist.

[...]

[...] Colombia confirms that, after an appropriate search within the relevant State entities, it was unable to locate the attachments to letter 20141000413491 from the ANM to the Ministry of Environment.

[...] *Colombia did not produce any of the documents referenced in ‘page 38 of Exhibit C-217’ (Request No. 6(g)) because Exhibit C-217 is simply a Power Point presentation prepared by the Ministry of Environment outlining the páramo delimitation process. As discussed above, Resolution 2090 and the Memoria Técnica comprehensively include the technical, social and economic information used by the Ministry of Environment to conduct the delimitation of the Santurbán páramo. No information outside that listed in these two documents was used for the delimitation of the páramo. The information referenced in page 38 of Exhibit C-217, but was not included in Resolution 2090 or the Memoria Técnica, does not constitute ‘socio-economic criteria taken into account for the delimitation’ and is therefore not responsive to request No. 6(g).*

In particular, the ‘studies to determine the economic value or ecosystems prepared by Fedesarrollo, the Universidad Industrial de Santander – UIS, among others’ are not referenced in Resolution 2090 and the Memoria Técnica. The Ministry of Environment reviewed but ultimately did not rely on these studies for the delimitation of the páramo. Colombia did not produce these studies because they are not responsive to the Claimant’s request.

[...].”

669. It appears to the Tribunal clear from this response that:

- a. the only social and economic criteria relied upon by MinAmbiente is that which was set out “*comprehensively*” in the *Memoria Técnica*, however the information contained therein is extremely sparse;
- b. the underlying information cited in the *Memoria Técnica* and listed in Colombia’s response to Eco Oro’s document production request is that which was listed (and quoted in the preceding paragraph) which appears to consist predominantly of biogeophysical data as opposed to social and economic data;
- c. the “*technical, economic, social and environmental studies for the delineation of the Santurbán páramo*” submitted by the CDMB were relied upon by the IAvH in preparing its proposal for the delimitation of the páramo – they were not relied upon by MinAmbiente; and
- d. no other documents responsive to Eco Oro’s request exist.

670. In this regard, the Tribunal also recalls that Ms. Baptiste confirmed in her oral testimony that the IAvH's capabilities extended to "*research in connection with the biodiversity and ecosystems*" which extended to "*conditions in the communities and related to the people in the circumstances*"⁶⁹² which entailed "*work[ing] with the people as well. We worked on describing very well the conditions of infrastructure, demographics, population matters. These are factors that cannot be ascended from ecology. [...] We assessed all the work that had been developed in connection with mining, history, and the region.*"⁶⁹³ Ms. Baptiste further confirmed that the nature of this type of work undertaken by IAvH was as described "*in the guide to disseminate the criteria for delimitation, well it defines three elements. This is at page 15, biogeophysical criteria for identifying the lower strip or the lower part of the ecosystem; the criteria of ecological integrity which define a reference area, which implies a connected and integral ecosystem; and, finally, socioeconomic and cultural elements which imply, considering the impact on the páramo of the presence of communities and their systems of production, considering also the areas of the páramo that have been totally or partially transformed, are the areas that have been 'paramised.'* In all the documents of the [IAvH], there were always chapters and materials concerning the social and economic conditions in the zone. [...] The first document where [the conclusion] is to be found explicitly is that on methodology, which I just explained, and then in the final reports that were produced for delimitation of the páramo [Contributions Document]." Ms. Baptiste then confirmed that all the elements she had described were contained in the final report, the Contributions Document.⁶⁹⁴ Upon being taken to paragraph 40 of her first statement where she stated that "*social and economic aspects have no technical impact on the ecosystemic analysis*" Ms. Baptiste explained that: "*[i]t is very important that the social and economic aspects do not become algorithms for constructing the proposal for a delimitation because they always entail specific interests. And in this way, the ecological line on the identification of the paramo could have become very chaotic. It wouldn't have been possible to draw or propose a line. In any event what the Institute provides is a reference area, a reference line,*

⁶⁹² Tr. Day 3 (Ms. Baptiste), 715:16-716:2.

⁶⁹³ Tr. Day 3 (Ms. Baptiste), 717:21-718:8.

⁶⁹⁴ Tr. Day 3 (Ms. Baptiste), 722:7-724:3.

*for the Ministry, I reiterate, as we begin to incorporate or consider the social and economic issues in keeping with its policies.”*⁶⁹⁵

671. The Tribunal understands from Ms. Baptiste’s evidence that whilst the IAvH did consider social and economic studies, it was solely for the purpose of undertaking its ecosystemic analysis as to the correct technical study as to the boundaries of the páramo. It was for MinAmbiente to review economic and social studies before determining the delimitation to be published in compliance with Article 34.
672. Minister Sarmiento, in her testimony, confirmed that the technical study required by Article 202 of Law 1450 was the final IAvH report, the Contributions Document.⁶⁹⁶ However she accepted she had no knowledge of the required economic study.⁶⁹⁷ With respect to the requisite social study, Minister Sarmiento explained her knowledge was limited to the following: different minutes were drawn up and a document was drawn up with the University of Los Andes as a result of meetings and there were also meetings with miners, farmers and the women of the Santurbán Páramo (led by Minister Sarmiento). However, she confirmed she was not aware of a single document that comprised the social study, explaining that the social aspect was included in a number of documents. Indeed, she explained that whether the women of the Santurbán Páramo could be paid for environmental services was a part of the economic aspect that she covered.⁶⁹⁸
673. Whilst Minister Sarmiento explained that the boundary line drawn for the lower altitudinal level was based exclusively on environmental and technical considerations, stating that “[t]he social and economic criteria do not delimit or cannot be part of the delimitation of an ecosystem”⁶⁹⁹ she then explained that the delimitation was a “complete exercise” as the State “could not set aside the impact that might happen on the paramo, particularly the social concerns around this limitation.”⁷⁰⁰ The State had to strike a balance in circumstances where

⁶⁹⁵ Tr. Day 3 (Ms. Baptiste), 724:4-725:11.

⁶⁹⁶ Tr. Day 2 (Minister Sarmiento), 657:12-658:7.

⁶⁹⁷ Tr. Day 2 (Minister Sarmiento), 660:6-10.

⁶⁹⁸ Tr. Day 2 (Minister Sarmiento), 661:7-662:13 and 665:14-666:4.

⁶⁹⁹ Tr. Day 2 (Minister Sarmiento), 662:14-20, 664:8-665:3 and 665:9-11.

⁷⁰⁰ Tr. Day 2 (Minister Sarmiento), 666:7-13.

there was confrontation between the people of the páramo and the people living in Bucaramanga and whilst “*the technical line is an ecosystem matter, but the State needs to take into consideration, among its obligations, how to handle the special and economic situation of the persons living there, particularly when there was such a high level of conflict and so many threats that we are -- were seeing in this regard.*”⁷⁰¹ She continued by saying that the process was not just about drawing the technical line, for the State “*it is an economic and social issue because it is an issue that goes to, overall, or integral development, which is what one always seeks in dealing with such matters.*”⁷⁰² Drawing the boundary line was part of a development question and, as such, social and economic actions would also have been taken as it is an integral process, also requiring consensus building and coordination with the mayors of the regions directly impacted. Having received the proposal from the IAvH, they received further inputs and so “*moved step by step both on the technical side and social side.*”⁷⁰³

674. Minister Sarmiento also explained that the involvement of MinMinas and the ANM was limited to participation in some meetings with the IAvH, that the Minister of Mines had attended one such meeting, and MinMinas and the ANM had provided some plans and documents.⁷⁰⁴
675. Minister Sarmiento testified that she visited “*on a weekly basis, [...] with the communities, the most vulnerable Parties, the ones that were going to be affected the most with the delimitation [and] organised the issue around the youth and women [and] started several processes with the miners [and] met on a weekly basis with the Mayors and also with [Eco Oro].*”⁷⁰⁵ However again the documentary evidence of economic and social studies was extremely limited and no documentary evidence was adduced demonstrating any collaboration of the mining authority.

⁷⁰¹ Tr. Day 2 (Minister Sarmiento), 666:19-667:4.

⁷⁰² Tr. Day 2 (Minister Sarmiento), 667:21-668:11.

⁷⁰³ Tr. Day 2 (Minister Sarmiento), 669:7-19; 671:11-12.

⁷⁰⁴ Tr. Day 2 (Minister Sarmiento), 662:21-663:21.

⁷⁰⁵ Tr. Day 2 (Minister Sarmiento), 689:9-15.

676. The Tribunal further notes the criticisms levelled by the Constitutional Court at the Minister of Environment for the lack of public consultation undertaken. The Constitutional Court explained as follows:

“the [MinAmbiente] has been vested by law with discretionary planning – regulatory/law-making powers to delimit páramos [...]. This power entails a flexible subjection to the legal system, as the authority enjoys freedom in performing such function, to an extent such that the administration need only wait for the maps prepared by the IAvH and is allowed to deviate from them if it provides a justifying reason aimed at protecting the páramo niche. However, the exercise of such discretionary powers is controlled by the legal system and does not entail a scenario where no law applies. In actual fact, in the páramo delimitation proceedings, the authorities are bound by basic rights and other constitutional principles such as the imperatives of optimising proportionality and reasonableness.

Illustrating this premise, the Ministry must guarantee the following parameters: (i) distributive justice i.e. an equal allocation of environmental burdens in the region of the Santurbán massif; (ii) participation in the delimitation proceeding and the planning, implementation and evaluation of measures affecting people; (iii) sustainable development through territory classification and the authorization or banning of activities; and (iv) the application of the precautionary principle in managing the area’s environment.

In connection with environmental participation, this Division notes that it must guarantee the principle’s normative contents, which criteria were specified [above]. We even outlined the specifics of such right in páramo delimitation [...]. These include: (i) access to public information; (ii) public and deliberative participation by the community; and (iii) the availability of administrative and judicial remedies to enforce such rights.”

677. The Constitutional Court held that MinAmbiente had not respected the principle of good faith by having denied protection of the rights to environmental participation, failed to provide access to information and not ensured the community’s active and deliberative participation. This finding supports the Tribunal’s concerns as to the manner in which MinAmbiente enacted the delimitation.

678. Considering the above, the Tribunal does not accept that the delimitation exercise undertaken by the MinAmbiente was compliant with the requirements of Article 34 of the 2001 Mining Code and Law 1450. However, whilst MinAmbiente was found by the Constitutional Court not to have respected the principle of good faith under domestic law in certain respects in

confirming the delimitation, the Tribunal finds by a majority that this does not mean the Challenged Measures themselves are of a sufficiently egregious nature to comprise a lack of *bona fides* on the part of Colombia. The importance of protecting the páramo ecosystems is unquestionable and there was no doubting the genuine motivation of those responsible to protect the environment. The purpose of the Challenged Measures is clearly not in bad faith and MinAmbiente's breaches in failing to consult were not directed towards Eco Oro but to the local farmers and miners. Thus, whilst the execution of the measures was not carried out in compliance with the domestic law requirements, the Tribunal does not find that such non-compliance, in itself, is sufficient to constitute a lack of *bona fides* on the part of Colombia, viewed in the context of the *bona fide* purpose of the measures and the *bona fides* of the IAvH in undertaking its analysis.

679. When considering the proportionality of the Challenged Measures, given the Angostura Deposit only overlapped with 0.09% of the delimited Santurbán Páramo the Tribunal can understand that moving the boundary, so as to ensure the Angostura Deposit was not subject to the mining ban, would seem to Eco Oro a minor and insignificant change. However, the Tribunal does not accept that it was disproportionate of Colombia not to move the boundary to ensure there was no overlapping with the concession area, or not to undertake field studies to verify the delimitation where it overlapped with the Santurbán Páramo. To undertake this with respect to Concession 3452 would have required Colombia to follow an alternative and unapproved methodology just for the area comprising Concession 3452, potentially to the detriment of other concession holders and other interested parties who were affected by the 2090 Atlas. Whilst the Tribunal appreciates that for Eco Oro the overlap with Concession 3452 was an insignificant part of the delimitation, the consequential ramifications could have been significant and it would have been in breach of the IAvH's integrity to change the limitation boundaries in one specific area to benefit one party. The Tribunal also accepts Ms. Baptiste's evidence that they did not have the resources to carry out the same field study checks in all areas subject to delimitation and again it would have been incorrect for the IAvH solely to carry out field studies in areas where concerns had been raised by one affected concessionaire.

680. A further criticism is that even to this day the Santurbán Páramo has not been finally delimited giving rise to considerable uncertainty. Whilst it is certainly correct that it has still not been delimited and Colombia must accept responsibility for this, it does not mean that the Challenged Measures themselves are disproportionate in the light of their purpose to protect the páramos. It has not been argued by Eco Oro that the páramos are not deserving of protection, the issue is whether the Challenged Measures are a proportionate way to achieve this.
681. In considering the Annex 811(2)(a) factors in carrying out this exercise, the Tribunal also considers whether the Challenged Measures interfered with any distinct reasonable investment-backed expectations. To determine this the Tribunal follows the test applied by the tribunals in *Methanex* and *Oxus*: did the State give specific commitments that it would refrain from the acts complained of. A distinct reasonable investment-backed expectation cannot be the same as a legitimate expectation and the Tribunal agrees with the answer given by Mr. Pape to Professor Sands at the Hearing that there must be an obligation on an investor claiming that its reasonable investment-backed expectations has been breached, to have undertaken its own due diligence before relying on any encouragement or support given by the Government in making its investment.⁷⁰⁶
682. Whilst the Tribunal appreciates that the individual permits were obtained a significant time ago and that Eco Oro had changed its corporate identity and direction in 2011⁷⁰⁷ such that it is not unreasonable that there may not now be any records of due diligence undertaken, even the most cursory due diligence even before Concession 3452 was granted would have revealed (i) the potential existence of a páramo ecosystem within the boundaries of Concession 3452; (ii) the Government's commitment and obligation to protect these ecosystems; and (iii) that such protection could be achieved by the imposition of a mining

⁷⁰⁶ Tr. Day 2 (Mr. Pape), 377:13 – 379:7.

⁷⁰⁷ See para. 136 above.

ban.⁷⁰⁸ Indeed, Eco Oro’s own initial reports acknowledged the presence of páramos within its concession area.⁷⁰⁹

683. The potential applicability of the precautionary principle to the páramo should also have been understood by Eco Oro. The precautionary principle was enshrined into Colombian Law by Article 1.6 of the General Environmental Law and Article 1.4 of the same Law states that “*the páramo and sub páramo areas, water springs and aquifer recharge zones shall be the subject of special protection.*” Constitutional Court Judgment C-293 of 2002 upheld the constitutionality of the precautionary principle such that private rights, including acquired rights, are not violated “*if, as a consequence of a decision made by an environmental authority that, applying the precautionary principle, within the limits enshrined by the legal provision itself, decides to suspend the work or activity carried out by a private person, by way of a grounded administrative act, harm or hazard to renewable resources or human health derives therefrom, even in the absence of any absolute scientific evidence to that effect.*”⁷¹⁰

684. In considering the consequences of this judgement, Professor Ricaurte accepted “*as impeccable reasoning*” Professor Sands’ summary that any investor would have known that the general right of the State to act to protect the environment prevails over the narrower particular right of the investor where the State’s resources are at issue and that a lawyer advising a reasonable investor would have had to say “*I’m bound to alert you to the*

⁷⁰⁸ Some examples include: Colombia’s (Green) Political Constitution, Article 79 which imposes on the State a legal duty to conserve areas of special ecological importance; the Biodiversity Convention; the General Environmental Law which provided that páramos were to be the subject of special protection; the Biodiversity Convention; the Ramsar Convention; the Programme for the Restoration and Sustainable Management of High Colombian Mountain Ecosystems: PÁRAMOS which was launched in 2001 and published in February 2002, detailed the important cultural and economic functions fulfilled by the páramos and specified the aim of “*special protection of páramos, sub-páramos, springs and aquifer replenishing zones*; and CORPONOR’s creation of the Regional System of Protected Natural Areas for the Department of Norte de Santander on 13 July 2004 which was specified to include “*the páramo areas, sub-Páramos, springs, and aquifer recharge areas.*”

⁷⁰⁹ Greystar (Mr. Macedo) presents the Works Program (*Programa de Trabajo y Obras -PTO*) to INGEOMINAS (Mr. Bautista) (23 September 2009) (**Exhibit R-44 / R-84**); and Angostura Project Environmental Impact Study (December 2009) (**Exhibit C-321** (Chapter 3) / **Exhibit R-158** (Chapter 1)).

⁷¹⁰ See reference in the Constitutional Court Judgement C-35 at page 98 citing with approval this extract from Judgement C-293 of 2002 upholding the constitutionality of section 85(20)(c) of Law 99 of 1993 providing for the application of the precautionary principle to suspend activities and works. Constitutional Court Judgment No. C-35 (8 February 2016) (**Exhibit C-42**), para. 128.

*possibility that, because you are investing in an area that concerns nonrenewable resource, you are subject to an overriding interest of the State to protect other interests, including environmental interests.”*⁷¹¹

685. Therefore, at the time Concession 3452 was entered into, there was already significant understanding and awareness of the importance of protecting the páramo and events subsequent to Concession 3452 being registered, but prior to the FTA coming into force, should further have given rise to an awareness on the part of Eco Oro of the potential for a mining exclusion ban to be imposed over a part of Concession 3452. These include the following:

- a. In July 2007 draft Senate Bill 010 of 2007 was introduced to amend parts of the 2001 Mining Code stating that *“the five years that have transpired since the approval of [the 2001 Mining Code] have allowed the detection of deficiencies which must be corrected and identification of the need to strengthen the Mining Authority in the exercise of its powers, especially its duty to manage the mining resources owned by the State in a rational and responsible manner.”*⁷¹²
- b. The 2007 Atlas had been published which overlapped 54% of Concession 3452.⁷¹³
- c. On 23 November 2007 CORPONOR and the CDMB created the Berlin Páramo Renewable Natural Resources Integral Management District.⁷¹⁴

⁷¹¹ Tr. Day 4 (Professor Ricaurte), 960:7-15.

⁷¹² Draft Senate Bill No. 010 (1 November 2007) (**Exhibit R-50**).

⁷¹³ The Tribunal notes that the 2007 Atlas was published in May 2007, which was after Concession 3452 was executed but before it was registered. Whilst Article 50 of the 2001 Mining Code provides that *“[i]n order to be concluded, and for proof thereof, it shall be registered in the National Mining Registry”*, the Tribunal also notes that the timing of this registration is entirely in the hands of Colombia and that, whilst it was not registered until after the 2007 Atlas was published, it had been executed beforehand, on 8 February 2007. It would be difficult, therefore, for Colombia to argue that there is any significance to the fact that the 2007 Atlas was published before Concession 3452 became legally effective given it was published after Eco Oro had entered into it. It was not suggested that having executed Concession 3452 Eco Oro could have withdrawn from it without penalty. Equally however it was issued many years before the FTA came into effect.

⁷¹⁴ CDMB Agreement No. 1103 and CORPONOR Agreement No. 17 (23 November 2007) (**Exhibit R-115**).

- d. In June 2008 the Santurbán-Sisivita Regional Park was created and 7.9% of Concession 3452 overlapped it.
- e. By the time the FTA came into force, Laws 1383 and 1450, Resolution 937, and the Santurbán National Regional Park had been created all of which evidenced the possibility that the delimitation of the Santurbán Páramo would overlap a significant area of Concession 3452.
- f. There was less than a 0.2% difference between the overlap created by the 2007 Atlas and the 2090 Atlas.
686. It is also clear that Eco Oro was aware that if a páramo was declared over any part of its concession, mining activities in such overlapping areas were at risk of no longer be permitted. This can be seen from the content of a letter dated 7 July 2011 pursuant to which Eco Oro renounced the part of its concession which overlapped with the Santurbán-Sisivita Regional National Park not only on the basis that “*there are no indicators that indicate the presence of precious metals in that area*” but also because of “*the impossibility of performing deeper exploration tasks because this is an environmentally-protected area.*”⁷¹⁵
687. The Tribunal has determined that Article 46 was not a stabilisation clause and, as found by the *Consejo de Estado* in Advisory Opinion 2233 (expressly with respect to Law 1450) laws may be applied retrospectively without breaching the Constitution where it is for a public nature such as protection of the environment, albeit that there may be an obligation to pay compensation. In particular, the *Consejo de Estado* advised in section 3 of its Advisory Opinion:

“[...] *It can then be concluded for the analyzed case that Section 202 of Law 1450 of 2011, being an environmental rule of public order and social interest nature, has immediate general effect and can be applied with retrospectivity, unless there is a constitutional reason of greater weight that prevents this or demands its moderation, as will be seen later.*”⁷¹⁶

⁷¹⁵ Letter from Greystar (Mr. Ossma Gómez) to INGEOMINAS (Mr. Neiza Hornero) (7 July 2011) (**Exhibit R- 88**).

⁷¹⁶ *Consejo de Estado*, Advisory Opinion No. 2233 (11 December 2014) (**Exhibit R-135**).

688. The Tribunal therefore does not find that Colombia made any specific commitment, either in the 2001 Mining Code or the Concession itself, that there would be no retrospective mining exclusion zone imposed on any part of the concession area. Indeed, the reverse was the case, as can be seen from the Tribunal's analysis of Articles 34 and 36 of the 2001 Mining Code and from Judgement C-293 of 2002.
689. Did Colombia make any other representations that gave rise to distinct, investment-backed expectations? It is correct that Colombia made representations to Eco Oro as to its support for the project. It was known by Colombia at the time Concession 3452 was granted to Eco Oro that the páramo overlapped with the concession area and yet not only was Concession 3452 granted to Eco Oro but Eco Oro also received significant encouragement from a number of different State bodies that it would be permitted to undertake exploitation activities throughout its concession area. For example, Eco Oro says that President Santos expressed his support at a meeting Eco Oro attended with him and his Chief of Staff in February 2016 during which he encouraged Eco Oro to apply for its environmental licence as soon as possible so that the Project could be showcased as a post páramo delimitation success story.⁷¹⁷ Whilst the only evidence of what was apparently said by President Santos was given by Mr. Moseley-Williams, it was not denied that this meeting took place. Indeed, two years before Concession 3452 was executed, the Vetás-California Mining District was created to attract foreign mining investment.
690. The Project was designated both a PIN and a PINE at various times to enable Eco Oro to receive "*special support*" to move the Project forward, as publicly confirmed by the then Minister of Mines (Mr. Gonzalez) in March 2015⁷¹⁸ in the context of Colombia's efforts to attract foreign mining investment.
691. Eco Oro itself received significant encouragement from MinMinas, which was keen to encourage mining companies to enter into mining concessions as a much-needed contribution to the country's economy. As well as actually being awarded Concession 3452,

⁷¹⁷ First Moseley-Williams Statement, para. 41.

⁷¹⁸ Statement made at the Prospectors and Developers Association of Canada ("PDAC") Annual Convention. Article The Northern Miner "PDAC 2015: Mines Minister says Colombia is picking up the pace" (25 March 2015) (Exhibit C-222), p. 2.

which clearly anticipated the possibility of exploitation activities in the totality of the concession area, Eco Oro says it received full support from the Minister of Mines immediately after the issuance of Resolution 2090,⁷¹⁹ According to Mr. Aldana, the day after Resolution 2090 was published, the Minister of Mines pledged his full support to assist Eco Oro in advancing the Project.⁷²⁰

692. Indeed, Eco Oro attended many meetings with Government officials in preparation for the environmental licensing process yet at no point did the relevant Government agency give any indication that the Project would not be possible as a result of the páramo delimitation. None of these events gave Eco Oro any indication that the Project would not be possible as a result of the páramo delimitation.
693. Even after Judgment C-35 was published, it was clear to Eco Oro that notwithstanding uncertainty as to its effect, MinAmbiente and MinMinas, the ANM and the Attorney General still believed that mining activities would be permitted in Concession 3452 and positively encouraged Eco Oro to maintain that belief.
694. It is concerning that Eco Oro received such support from parts of the government of Colombia at a time when Colombia was both well aware of the presence of the páramo within the concession area and was fully conversant with its obligations to protect the páramo given its commitment to protect the páramo. However, the Tribunal does not find these representations constitute specific commitments not to impose a mining exclusion zone in the area of Concession 3452; rather, they comprised nothing more than general expressions of support for the project. Given Eco Oro's apparent failure to undertake any due diligence before relying on such representations as were made to it by Colombia, the Tribunal does not find Eco Oro had any distinct reasonable investment backed expectations that exploitation would be permitted in the entirety of the concession area. The Tribunal appreciates that Eco Oro's failure to undertake due diligence would not have enabled it to predict Colombia's breach of its own, constitutionally mandated obligations to protect the

⁷¹⁹ First González Aldana Statement, para. 123.

⁷²⁰ First González Aldana Statement, para. 123.

páramos, but this *per se* is not relevant to whether Colombia made a specific commitment to Eco Oro that it would not subsequently prevent mining in any part of the concession.

695. The Tribunal finally turns to consider where there are any other circumstances that it should consider in determining Colombia's *bona fides* in designing and implementing the Challenged Measures. In this regard the Tribunal questions whether Colombia should bear any responsibility for its role in attracting investments through the enticement of a concession based on the agreement between the State and a private party in connection with an activity the legal regime of which is unilaterally controlled by the State and for its actions in granting Concession 3452. 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 1851.⁷²¹ 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 sensitive land. If the State did not have this foresight, it cannot be right to expect Eco Oro to have had it.
696. Further, surely Colombia should have anticipated (in compliance with its basic political and social obligations) the clash of interests between different sectors of its population (as testified by Minister Sarmiento) which in substantial part accounts for the State's meandering decisions regarding the páramo. This cannot be held to be the responsibility of Eco Oro and nor should Eco Oro be penalised for this. 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.
697. It is also of concern that as a result of Colombia's actions having implemented Resolution 2090, there have been instances of illegal mining in the area of Concession 3452 which have

⁷²¹ "El tal páramo de Santurbán sí existe", La Silla Vacía (8 September 2014) (**Exhibit R-110**).

not been prevented by Colombia and which pose a significant threat to the protection of the páramo.

698. The Tribunal must weigh in the balance all these factors in determining whether Colombia's actions in designing and applying the Challenged Measures were *bona fide*. Taking a step backwards, it is clear there was an (inevitable) tension between the needs of environmental protection and economic development and (as explained by the *Consejo de Estado* in its Advisory Opinion 2233) Colombia had to weigh up the balance between the private interest and the prevalence of the general interest; pursuing the protection of one could not always similarly protect the other. Does the failure of Colombia at all times to respect its obligations to preserve and protect the páramo in its interactions with Eco Oro rise to the level of a lack of *bona fides*? Whilst it is clear that there may have been failings, at times significant failings, on the part of Colombian State organs and officials in the manner in which they have sought to comply with their domestic and international obligations with respect to the protection of the páramo, the Tribunal's task under Annex 811(2) is to consider the Challenged Measures and not to judge Colombia's actions or its failure to act to preserve the páramo. As stated by Canada, "[...] *bona fide non-discriminatory regulatory measures to protect the environment even if they are based on precaution (i.e. in dubio pro ambiente) will ordinarily not require compensation even if they affect the value and/or viability of an investment of an investor of another Party.*"⁷²² The Tribunal accepts that there was a lack of clarity as to the meaning or effect of Resolution 2090, Judgment C-35, Resolution VSC 829 and Decision T-361 such that even now there is still no clarity as to whether or not there is a valid mining exclusion zone over any part of Concession 345 and no final delimitation of the Santurbán Páramo has been effected. The Tribunal also notes that notwithstanding the Constitutional Court's ruling in Decision T-361 that the delimitation carried out could be modified in the event of errors and the direction to delimit the Santurbán Páramo within one year, this has still not been undertaken with the consequence that any errors which may have had such a deleterious effect on Eco Oro remain uncorrected. However, the Tribunal asks itself: do these measures amount to a measure that is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted in good

⁷²² Canada's Non-Disputing Party Submission, para. 11.

faith? By a majority, the Tribunal does not find that the necessary element of severity is present given the undoubted *bona fide* purpose of these Challenged Measures and the overall proportionality of the current boundary of the delimitation when viewed against a reasonable (albeit not unanimous) scientific conclusion as to the need to include a Transition Zone in the delimited area, the size of the resulting páramo and the need to adopt a consistent methodology for the entirety of the area delimited. The fact that this does not result in compensation, notwithstanding that under Colombian law an acquired right cannot be expropriated without the payment of compensation, does not mean there was indirect expropriation for the purposes of Article 811. Given the measures were adopted as a part of Colombia's valid and legitimate exercise of its police powers, pursuant to Annex 811(2)(b), under international law, no compensation is payable.

699. The majority of the Tribunal therefore does not find the Challenged Measures to have been so severe that they cannot be reasonably viewed as having been undertaken in good faith. The majority of the Tribunal finds that they were motivated both by a genuine belief in the importance of protecting the páramo ecosystem and pursuant to Colombia's longstanding legal obligation to protect it. In sum, the Challenged Measures were adopted in good faith, are non-discriminatory and designed and applied to protect the environment such that they are a legitimate exercise of Colombia's police powers and do not constitute indirect expropriation.

E. ARTICLE 805 OF THE TREATY AND MINIMUM STANDARD OF TREATMENT

700. Article 805 of the Treaty provides as follows:

- “(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.”⁷²³*

701. The Tribunal notes that the factual matrix and many of the legal arguments contained in the Parties’ submissions with respect to Eco Oro’s claim that Colombia is in breach of Article 805 of the FTA are the same as those referred to in the Parties’ submissions with respect to Eco Oro’s claim for breach of Article 811. Accordingly, the Tribunal does not repeat these submissions either in its summary of the Parties’ positions or in its analysis of the merits of Eco Oro’s claim.

(1) The Parties’ Positions

(a) The Claimant’s Position

- (i) *Colombia Failed to Accord Eco Oro’s Investment Fair and Equitable Treatment and Full Protection and Security*

⁷²³ Free Trade Agreement between Canada and the Republic of Colombia (signed on 21 November 2008 and entered into force on 15 August 2011) (**Exhibit C-22**; see also **Exhibit R-137**). Footnote 2 to Article 805 of the FTA provides that “[i]t is understood that the term ‘customary international law’ refers to international custom, as evidence of a general practice accepted as law, in accordance with subparagraph 1(b) of Article 38 of the Statute of the International Court of Justice.”

702. The acts and omissions of the Colombian State referred to above do not comply with customary international law minimum standard of treatment of aliens, including the obligation to provide fair and equitable treatment (“FET”).
703. Colombia cannot rely on the content of the Commission’s Decision⁷²⁴ that specifies a claimant bringing a claim under Article 805 has “*the burden to prove a rule of customary international law invoked under Article 805, through evidence of elements of customary international law referred to in footnote 2 of Chapter Eight.*” Footnote 2 provides that customary international law refers to international custom as evidence of a general practice accepted as law, in accordance with subparagraph 1(b) of Article 38 of the Statute of the International Court of Justice. This decision was rendered nearly one year after this arbitration was commenced and is therefore inapplicable pursuant to Article 28 of the VCLT as it cannot retroactively modify Article 805. Even if it did apply, Colombia is wrong to say that Eco Oro has not proved the content of the MST it relies upon through the elements of customary international law, namely State practice and *opinio juris*. Eco Oro relied upon the decisions of international tribunals which are an acceptable source for establishing the existence and substance of rules of customary international law.⁷²⁵
704. The International Law Commission (“ILC”)’s study on the accepted sources of customary international law found that crucial evidence of State practice includes conduct in connection with treaties and that *opinio juris* may be ascertained through “*public statements made on behalf of States; [...] treaty provisions; and conduct in connection with resolutions adopted by an international organisation or at an intergovernmental conference.*”⁷²⁶ Additionally, decisions of international courts and tribunals are acceptable sources for determining customary international law. For example, as stated by Professor Reisman “[...] *the same formulas recur in many other BITs that are then interpreted by tribunals. Where there is a convergence of practice and opinio juris among a significant number of such tribunals, it may serve as evidence of customary international law. Hence, in the context of customary*

⁷²⁴ Joint Commission of the Free Trade Agreement Between the Republic of Colombia and Canada, Decision No. 6 (24 October 2017) (**Exhibit R-139**).

⁷²⁵ Claimant’s Reply, paras. 414 *et seq.*

⁷²⁶ International Law Commission, *International Law Commission Report on the Work of the Seventieth Session* (A/73/10) (2018) (**Exhibit CL-195**), pp. 140-41.

*international law in investment law, BITs and decisions of tribunals adjudicating the disputes arising from these investment treaties have come to play a significant role in the ongoing formation of law in this field. These two sources are particularly important [...] because much of international investment law is developed through them – they represent State practice and opinio juris in this area of law.”*⁷²⁷

705. Colombia is also incorrect to say that the customary international law MST is still rooted in *Neer*⁷²⁸; this standard has been overtaken such that the relevant standard is that investments of aliens are protected from, *inter alia*, unfair and inequitable treatment. As explained by Professor Weiler in the Oxford Handbook on International Investment Law:

*“From the perspective of the investor, the promise of ‘fair and equitable treatment’, or the prohibition found in some BITs against discriminatory or arbitrary interference, also amounts to a guarantee of freedom from arbitrariness or caprice in discretionary decision making. A customary international law formulation of the same freedom, conferred as a right in the treaty context, is the prohibition against abuse of authority (or abus de droit). Professor Bin Cheng devoted an entire chapter of his renowned treatise on the principles of international law to the manner in which the doctrine of abuse of rights rises, as understood in international law generally, from the general international law principle of good faith [...].”*⁷²⁹

706. In addition, treaty practice demonstrates that the fair and equitable treatment language was equivalent to the international minimum standard, as the connection is drawn between FET and customary international law in a number of treaties and model BITs of Canada, Colombia and the United States as well as the IISD Model International Agreement on Investment for Sustainable Development. Whilst repetition of treaty language on its own may be insufficient to give rise to a binding customary international law obligation, FET is distinct because it is almost universally included in contemporary treaties with similar language, model BITs and has been identified in a number of treaties as being a component of the MST under customary international law. This leads to the conclusion that FET has

⁷²⁷ W.M. Reisman, “Canute Confronts the Tide: States versus Tribunals and the Evolution of the Minimum Standard in Customary International Law”, Vol 30 ICSID Review (2015) (**Exhibit CL-185**), pp. 620, 622.

⁷²⁸ *L. F. H. Neer v. United Mexican States* (“*Neer*”), Award, IV RIAA 60 (15 October 1926) (**Exhibit RL-46**).

⁷²⁹ Claimant’s Reply, para. 430; T.J. Grierson-Weiler and I.A. Laird, “Chapter 8: Standards of Treatment” in: P. Mulchinski, F. Ortino and C. Schreuer (eds), *The Oxford Handbook of International Investment Law* (2008), (**Exhibit CL-46**), pp. 284-285.

become a widely recognised standard for the treatment of foreign investors and constitutes a part of the customary international law minimum standard of treatment.

707. Finally, case law also supports this conclusion. The ordinary meaning of the FET standard is a broad concept that cannot be summarised in a precise statement of legal obligation allowing for independent and objective determination of whether it has been reached. Many tribunals have expressed the view that there has been a substantive convergence of the FET standard and the MST under customary international law. For example, in *Waste Management II*, the tribunal concluded that “*the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety.*”⁷³⁰
708. There is therefore little material difference between MST under customary international law and the FET standard. To the extent this is not accepted, Article 804 guarantees that Colombia will accord Canadian investors and their investments “*treatment no less favourable*” than that which it accords to the investments of any other country. In its bilateral investment treaty with Switzerland, Colombia ensures the “*fair and equitable treatment*” of investments made by Swiss investors without reference to the minimum standard of treatment.⁷³¹
709. This standard has been described by an international arbitral tribunal as requiring States:

⁷³⁰ Claimant’s Reply, para. 450; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004) (**Exhibit RL-64**) (“*Waste Management*”), para. 98. See also *Merrill & Ring Forestry LP v. Government of Canada*, ICSID Case No. UNCT/07/1, Award (31 March 2010) (**Exhibit CL-176**) (“*Merrill*”); *Mobil Investments Canada Inc and Murphy Oil Corporation v. Government of Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and Principles of Quantum (22 May 2012) (**Exhibit CL-179**) (“*Mobil*”).

⁷³¹ Agreement between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments (17 May 2006; entered into force on 6 October 2009) (**Exhibit C-106**), Art. 4(2).

“[T]o provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. [...] The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities.”⁷³²

710. As it is a broad concept, conduct that is “*arbitrary, grossly unfair, unjust or idiosyncratic or is discriminatory*”⁷³³ is in breach of this obligation and Colombia is required to follow an approach that is: “*just*”, “*even-handed*”, “*unbiased*” or “*legitimate*.”⁷³⁴ Tribunals applying FET as part of customary international law have generally converged on interpretative criteria, including that a State must, *inter alia*, (i) not frustrate an investor’s legitimate expectations; (ii) provide a stable and transparent legal and regulatory environment; and (iii) act in good faith and not in a manner that is arbitrary, capricious, disproportionate or the like. With respect to this third limb, the principle of good faith is a central tenet to the minimum standard of treatment and Eco Oro relies upon the same arguments as it does with respect to Colombia’s breaches of Article 811: Colombia must not frustrate Eco Oro’s legitimate expectations and must act in good faith incorporating the concepts of fairness, transparency, (non)arbitrariness, clarity, (non)ambiguity and predictability.
711. Additionally, Colombia is to afford Eco Oro full protection and security entailing an obligation of “*due diligence*” or “*vigilance*” on the part of Colombia.
712. Colombia breached its obligations in three respects. Firstly, it breached Eco Oro’s legitimate expectations to explore and exploit in the entirety of Concession 3452. Eco Oro had received

⁷³² Claimant’s Reply, para. 400; *Tecmed*, Award (29 May 2003) (**Exhibits CL-22 / RL-61**), para. 154.

⁷³³ *Mobil*, Decision on Liability and Principles of Quantum (22 May 2012) (**Exhibit CL-179**), paras. 152-153.

⁷³⁴ Claimant’s Memorial, para. 305; *Azurix*, Award (14 July 2006) (**Exhibit CL-35**), para. 360; *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability (30 July 2010) (**Exhibit CL-65**), paras. 212-213; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award (25 May 2004) (**Exhibit CL-26**) (“*MTD Equity*”), para. 113; *Siemens*, Award (6 February 2007) (**Exhibit CL-41**), para. 290.

Colombia's encouragement for over 20 years and its rights were legitimate as they were premised upon explicit or implicit assurances or representations, contained in:

- a. Permit 3452;
 - b. The 1988 Mining Code, particularly Article 1 (the Code was enacted to “*encourage investment in [the mining] industry, and promote the development of the regions where [mining activities] are carried out*”), Article 6 (“*[p]ermits and licences granted by means of a duly enforceable resolution, that remain in force and valid as of the date of the entry into force of this Code*” constitute acquired rights) and Article 9 (environmental zones could not apply retroactively to previously issued titles);
 - c. The 2001 Mining Code, particularly Article 46 (a stabilisation clause); and
 - d. Concession 3452, particularly Clause One.
713. As explained above, it is incorrect that Eco Oro should have been aware both that it may not have had access to all parts of Concession 3452 for the duration of the concession or of the difficulties it would face in successfully obtaining an environmental licence. None of the instruments referred to by Colombia (the General Environmental Law, the Páramo Programme and the 2007 Atlas) amounted to a restriction on mining activities in the area of Concession 3452 and as a function of Colombia's measures, Eco Oro was deprived of the right to attempt to meet the applicable environmental licensing requirements during the term of the concession which was an acquired right.
714. The legitimacy of its expectations is reinforced by the Colombian law doctrine of *confianza legítima* which protects expectations formed by commitments or assurances given by the Government from subsequent Government actions that undermine those expectations (as referred to by the Attorney General in his letter to both the Ministries of Mines and

Environment and also to the ANM urging the delimitation process to respect existing and acquired mining rights so as not to incur State liability.⁷³⁵

715. These expectations were formed each time Eco Oro took a decisive step towards the “*creation, expansion, development, or reorganisation of the investment.*”⁷³⁶ It was reasonable for Eco Oro to rely on these assurances that purported to have a stabilising effect. As stated by Professor Reisman and Dr. Arsanjani: “[w]here a host state which seeks foreign investment acts intentionally, so as to create expectations in potential investors with respect to particular treatment or comportment, the host state should [...] be bound by the commitments and the investor is entitled to rely upon them in instances of decision.”⁷³⁷
716. These legitimate expectations were frustrated by those Government measures described in detail with respect to Eco Oro’s arguments above in relation to the breach of Article 811, but in summary: (i) Resolution 2090; (ii) Judgement C-35; (iii) VSC 829; and (iv) the opinions and decisions issued by the ANM indicating mining would be prohibited in the Restoration Zone as well as the Preservation Zone.
717. The FET standard also requires Colombia to maintain a stable and transparent investment environment in accordance with Eco Oro’s legitimate expectations and enabling Eco Oro to plan its business and investments in an orderly fashion.
718. Colombia failed to provide this. As described in more detail with respect to Colombia’s breach of Article 811, the delimitation was arbitrary, inconsistent and confusing, such that Eco Oro has been on a regulatory roller coaster and Colombia has not provided a stable legal and business environment. Colombia’s failures are numerous. Specific examples include its failure to delimit the páramo ecosystems in the Santurbán area as required by Law 1450 for more than four years at all times exhibiting an absolute lack of transparency, preventing Eco Oro from understanding the legal status of its investment in the Angostura Project.

⁷³⁵ Letter from Attorney General (Mr. Ordóñez Maldonado) to Ministry of Environment, Ministry of Mines and National Mining Agency (9 September 2013) (**Exhibit C-28**).

⁷³⁶ *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL, Final Award (12 November 2010) (**Exhibit CL-67**), para. 287.

⁷³⁷ W.M. Reisman and M. H. Arsanjani, “The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes” 19(2) ICSID Review 328 (2004) (**Exhibit CL-25**), p. 342.

Even the Attorney General of Colombia complained of the “*legal uncertainty*” caused by this failure to map out páramo ecosystems. The delay in the delimitation was followed by opaque and constantly changing rules with respect to Eco Oro’s ability to carry out mining activities within the Santurbán Páramo.

719. The principle of stability and predictability also protects against “inconsistency of action between two arms of the same government vis-à-vis the same investor”⁷³⁸ which requires a government to act “coherently and appl[y] its policies consistently.”⁷³⁹
720. Colombia’s measures have not been applied coherently nor consistently and there has been inconsistency between the different government bodies which has affected Eco Oro’s capability to take any material decision with respect to its investment. These acts have been described in detail above but comprise, *inter alia*:
- a. The delays to releasing the delimitation coordinates;
 - b. the Project being designated a PIN and PINE;
 - c. the suspension of mining activities being lifted over the entirety of Concession 3452 after Resolution 2090 was issued;
 - d. the failure of CDMB to issue the detailed environmental guidelines and environmental management plans for the Santurbán Páramo, or carry out the zoning required or issue an environmental management plan as required by Article 5 of Resolution 2090;
 - e. the fact Eco Oro was unable to carry out all the provisions of Law 1753 in the absence of the environmental guidelines required by Article 5 of Resolution 2090 being issued;

⁷³⁸ *MTD Equity*, Award (25 May 2004) (**Exhibit CL-26**), para. 163.

⁷³⁹ *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award (19 December 2016) (**Exhibit CL- 89**), para. 381.

- f. Judgement C-35 only striking down the grandfathering provisions in Law 1753 but not referring to the equivalent grandfathering provisions in Resolution 2090;
 - g. the failure of the Constitutional Court to provide clarification of the state of the law, notwithstanding the request from the ANM and Minister of Environment;
 - h. inconsistent decisions and communications from MinAmbiente and ANM with respect to where mining activities were and were not permitted;
 - i. unreasonable and arbitrary rejections of Eco Oro's requests for further suspensions of the deadline to complete the exploration phase and apply for an environmental licence;
 - j. the confusion resulting from the striking down of Resolution 2090; and
 - k. the final refusal to grant an extension to Eco Oro to file its PTO until such time as the new delimitation was complete; although the time for publishing the new delimitation was extended, Eco Oro was not given a concomitant extension by the ANM.
721. Not only is a transparent and stable legal and business environment a component of the obligation of FET, it is also a cornerstone of the FTA. The Preamble provides that the Contracting Parties resolve to ensure a "*predictable commercial framework for business planning and investment.*" Colombia cannot refer to any legal authority or other support for its contention that "*regulatory change taken specifically for the purposes of enhancing and/or enforcing environmental laws and regulations cannot therefore, in any view, violate the minimum standard in the absence of very specific undertakings to the contrary.*"⁷⁴⁰
722. Finally, Colombia has failed to act in good faith which is inherent in FET as it acted arbitrarily, capriciously and disproportionately.⁷⁴¹ Arbitrariness occurs where "*a measure*

⁷⁴⁰ Respondent's Counter-Memorial, para. 406.

⁷⁴¹ *Frontier Petroleum Services Ltd v. The Czech Republic*, UNCITRAL, Final Award (12 November 2010) (Exhibit CL- 67), para. 297.

[is not] *based on legal standards but on discretion, prejudice or personal preference.*”⁷⁴²

A measure also must be reasonable and thus proportionate, requiring the existence of a rational policy against which to measure the proportionality.

723. Colombia breached Article 805 by enforcing Resolution 2090, which was arbitrary and shambolic. There is no evidence of the socioeconomic studies having been undertaken, and the transition zone is not a part of the páramo ecosystem but is a different ecosystem and therefore should not have been included in the delimitation. Colombia delimited the Santurbán Páramo without undertaking the necessary field work, in breach of its methodology; this is particularly egregious in the area including the Angostura Project which was historically a mining district and where there had been significant foreign investment from Eco Oro and others. This is particularly so given the Angostura Deposit covered only 0.09% of the total area of the delimited Santurbán Páramo. Colombia also failed to delimit the páramo in accordance with specific criteria but just traced a line, most often near the lower limit of the Transition Zone, but sometimes deviating to include areas which were neither in the páramo nor in the Transition Zone. MinAmbiente accepted the IAvH delimitation without scrutiny and yet it has been criticised by the Constitutional Court both in Judgement C-35, for lacking adequate scientific criteria in certain respects,⁷⁴³ and Judgement T-361, for inadequate consultation. The Court further took note of MinAmbiente’s concession that serious errors had been made in the delimitation process.⁷⁴⁴
724. Implementation of Resolution 2090 was also disproportionate as the IAvH delineated a different ecosystem to the páramo ecosystem and Eco Oro was particularly affected by this. IAvH’s own data shows that the Angostura Deposit does not lie within a páramo ecosystem. Only approximately 6% of the deposit lies within the actual páramo ecosystem, 65.11% lies within the Transition Zone (which is not a part of the páramo ecosystem) and the remaining 29% is outside both the páramo ecosystem and the Transition Zone. However, the delimitation pursuant to the 2090 Atlas neutralised 32.4% of the deposit area.

⁷⁴² Claimant’s Reply, para. 505, quoting *EDF*, Award (8 October 2009) (**Exhibit CL-174**), para. 303.

⁷⁴³ Constitutional Court, Judgment No. C-35 (8 February 2016) (**Exhibit C-42**), paras. 140, 180.

⁷⁴⁴ Constitutional Court, Judgment No. T-361 (30 May 2017) (**Exhibit C-244**), p. 261.

725. There are other less stringent measures which could have been adopted by Colombia such as not including the Transition Zone in the area delimited, conducting field studies which would have shown that Concession 3452 was not in a páramo ecosystem, adopting the ECODES Report, or allowing Eco Oro to present its project and EIA to the environmental authorities and allowing them to determine the compatibility of the Project with the requisite environmental requirements. This could not have been undertaken invoking the precautionary principle as that can only be invoked where there exists a specific and scientifically proven risk of serious or irreversible harm; the mere existence of a risk being insufficient.
726. Further elements of bad faith are displayed by Colombia's significant delay in undertaking the delimitation exercise and then withholding in bad faith the coordinates for many months even after the exercise had been completed (as determined by the Constitutional Court in Judgement T-361). Since Judgement C-35, the Government has failed to give any clarity to Eco Oro as to what is permissible in the Restoration Zone nor what is the status of the remaining part of Concession 3452 which does not overlap the Santurbán Páramo. Notwithstanding that Eco Oro was advised on two occasions that so long as the regulatory uncertainty persisted, the Project would be unlicensable, Colombia refused to suspend Eco Oro's obligations pending resolution of the regulatory uncertainty.
727. Colombia also issued arbitrary, capricious and unreasonable regulatory decisions and orders, specifically (as explained in more detail in respect of Eco Oro's arguments as to Colombia's breach of Article 811):
- a. The ANM's refusal in Resolution VSC 906 on 22 August 2017 of Eco Oro's 7 March 2017 request for a suspension of its obligations pending clarification regarding the scope of its remaining rights;
 - b. The ANM's rejection in Resolution VSC 343 on 16 April 2018 of Eco Oro's appeal against VSC 906;

- c. The ANM's extension for Eco Oro to file its PTO to coincide with the date when the revised delimitation was issued but then the refusal to agree a further extension concomitant with the extended date by which the re-delimitation was to be issued;
 - d. The ANM's notification of 14 February 2019 ordering Eco Oro to submit its PTO within 30 days, the failure to do so leading to rendering the Concession liable to forfeiture.
 - e. In addition, without Eco Oro's knowledge or consent, Colombia granted rights to a third-party (i.e., Minesa) to tunnel through Concession 3452.
728. In summary, Colombia's acts and omissions have failed to satisfy Eco Oro's legitimate expectations that Colombia would respect the solemn stability commitments established in its 2001 Mining Code and apply in a consistent and non-arbitrary manner the Political Constitution and laws of Colombia in place at the time when it made its investments. Colombia has consequently breached Article 805 of the FTA.

(b) The Respondent's Position

(i) Colombia Treated Eco Oro's Investment in Accordance with the Minimum Standard of Treatment Under Customary International Law

729. It is clear from the text of footnote 2 to Article 805 that both FET and FPS under this Article do not require treatment "*in addition to or beyond*" the MST.
730. Eco Oro has firstly failed to prove the content of the standard it is relying on by reference to State practice and *opinio juris* pursuant to the Commission's Decision. The fact the Commission's Decision was issued after the commencement of this arbitration is irrelevant; it merely confirms the meaning of the FTA as it existed upon entering into force.
731. Investment treaty tribunal decisions are not acceptable sources, at best they only reflect State practice and *opinio juris*.⁷⁴⁵ This can be seen in Canada's non-disputing party submission in *Bear Creek*.⁷⁴⁶ Eco Oro cannot rely on decisions of tribunals interpreting an autonomous

⁷⁴⁵ Respondent's Rejoinder, para. 428; *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009) (**Exhibit RL-81**) ("*Cargill*"), para. 277.

⁷⁴⁶ Canada's Non-Disputing Party Submission in *Bear Creek* (9 June 2016) (**Exhibit RL-174**), para. 10.

FET standard that is not qualified by customary international law in order to prove the existence of rules of customary international law.

732. Legitimate expectations are not protected under MST under customary international law, as stated by both Canada and the United States in non-disputing party submissions⁷⁴⁷ and by numerous commentators such as Professor Dumberry in his study of the FET standard in the context of NAFTA.⁷⁴⁸ Equally, there is no guaranteed right to a stable and transparent legal and regulatory environment, indeed the MST must not be applied in any way that fetters a State's right to regulate; a high degree of deference must be extended to the right of a State to regulate matters within its boundaries.⁷⁴⁹ Finally, there is no general and consistent State practice and *opinio juris* establishing an obligation of transparency under the MST. All the cases cited by Eco Oro relate to tribunals applying the autonomous FET standard, not the MST under customary international law, and the Tribunal should disregard those cases not decided on the MST standard.
733. For there to be a compensable breach of MST, there must be conduct which is “*arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an unexpected and shocking repudiation of a policy's very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive; or involve[s] an utter lack of due process so as to offend judicial propriety.*”⁷⁵⁰
734. Were the Tribunal to determine, however, that a MST did encompass obligations of legitimate expectations, stable and transparent legal and regulatory environment, Eco Oro has failed to meet the very high bar it would need to succeed in its claim. Colombia does

⁷⁴⁷ Canada's Non-Disputing Party Submission in *Bear Creek* (9 June 2016) (**Exhibit RL-174**); and United States' Non-Disputing Party Submission in *Gramercy Funds Management LLC, And Gramercy Peru Holdings LLC v. Republic of Peru*, ICSID Case No. UNCT/18/2 (21 June 2019) (**Exhibit RL-175**).

⁷⁴⁸ P. Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (2013) (**Exhibit RL-170**).

⁷⁴⁹ Respondent's Rejoinder, para. 435; *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (13 November 2000) (**Exhibit RL- 55**), para. 263; *Mesa Power Group, LLC. v. Government of Canada*, PCA Case No. 2012-17, Award (24 March 2016) (**Exhibit RL-100**), para. 505; *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Award (26 January 2006) (**Exhibit RL-69**), para. 127; and *Mobil*, Decision on Liability and Principles of Quantum (22 May 2012) (**Exhibit CL-179**), para. 153.

⁷⁵⁰ *Cargill*, Award (18 September 2009) (**Exhibit RL-81**), para. 296.

not say that *Neer* still defines the standard for Eco Oro to meet but it does remain relevant to the interpretation of the MST FET standard and numerous tribunals subsequently have confirmed that the bar is high.⁷⁵¹

735. As already detailed above with respect to Eco Oro's claim for breach of Article 811, Colombia did not provide any specific or unambiguous assurances to Eco Oro that it would be permitted to mine in the páramo area of Concession 3452. As Eco Oro did not have any legitimate expectations, none could be frustrated.
736. Colombia's policy of protecting the páramo was consistent; there was no regulatory turmoil. In particular, even if there was a delay in publishing the 2090 delimitation, it did not cause legal uncertainty for Eco Oro as the MinAmbiente was not required to issue its delineation within any specific timeframe and merely gave advance notice to the mining companies as a matter of courtesy. It published the delineation when it was ready to do so and Eco Oro has not challenged this and in any event it was 99% identical to the 2007 Atlas. The delay in the CDMB publishing the guidelines is also irrelevant as Eco Oro has no grandfathered rights so would have been unable in any event to prepare a PTO for approval. Equally, all the measures relating to the grandfathering provisions are irrelevant to Eco Oro.
737. MinAmbiente and ANM's communications and decisions in relation to the treatment of the Restoration Area were neither inconsistent nor confusing as Eco Oro was never informed it would be able to mine in the Restoration Zone.
738. The ANM always responded to Eco Oro in a prompt and responsible manner and was justified in denying Eco Oro's request for an indefinite suspension pending the re-delineation of the Santurbán Páramo.
739. Eco Oro has adduced no credible evidence to support its contentions and it is clear that all arms of the government were working together towards one paramount goal, protecting the páramo.

⁷⁵¹ *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award (27 October 2015) (**Exhibit RL-154**); *Glamis*, Award (8 June 2009) (**Exhibit CL-59**); *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Award (26 January 2006) (**Exhibit RL-69**).

740. The FPS standard does not include legal protection and security as stated in the Commission's Decision and in any event this is clear as has been endorsed by numerous tribunals such as *Crystallex, Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v. The Argentine Republic* and *Gold Reserve Inc v. Bolivarian Republic of Venezuela*.
741. Finally, Colombia did not act arbitrarily, capriciously or disproportionately. The Resolution 2090 delimitation was not shambolic, nor disproportionate and ANM's decisions were all fully and properly justified.
742. In any event, given the substantial deference which should be given to Colombia's right to balance important policy decisions with those of private parties, to accept Eco Oro's claims would be for the Tribunal to second-guess Colombia's decision-making. It is not appropriate for a host State to be required to elevate unconditionally the interests of a foreign investor above all other considerations, where there is no evidence of irrationality or bad faith.⁷⁵² Clearly, Colombia had the right not to elevate unconditionally the interests of Eco Oro above the well-being of the páramo ecosystem.

(2) The Tribunal's Analysis

743. Colombia's obligation under Article 805 is to ensure treatment that meets the level of that required by the customary international law MST. The Tribunal must therefore ascertain what that level comprises and then apply it to the facts.
744. As a preliminary point, the Tribunal does not accept that the meaning of MST under customary international law must remain static. The meaning must be permitted to evolve as indeed international customary law itself evolves;⁷⁵³ it should be understood today to include today's notions of what comprises minimum standards of treatment under customary

⁷⁵² Respondent's Rejoinder, paras. 462-464, citing *Electrabel S.A. v. the Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012) (**Exhibit RL-153**), para. 8.35; and *Charanne and Construction Investments v. Spain*, SCC Case No. V 062/2012, Final Award (21 January 2016) (**Exhibit RL-155**), para. 573.

⁷⁵³ See, e.g., *Merrill*, Award (31 March 2010) (**Exhibit CL-176**), para. 193: "customary international law has not been frozen in time and that it continues to evolve in accordance with the realities of the international community. No legal system could endure in stagnation."

international law. Colombia correctly accepts that the Tribunal is not rigidly bound by the standard set out in *Neer*⁷⁵⁴ and it is the Tribunal's view that the standard today is broader than that defined in the *Neer* case.⁷⁵⁵

745. The Tribunal also accepts that Colombia is under no obligation to exceed this standard and, as it is not considering an autonomous treaty standard of FET but a “minimum” standard, the Tribunal further accepts the obligation should not be interpreted expansively. The Tribunal does not, however, accept that footnote 2 to Article 805 limits it as to what sources the Tribunal may refer to as evidence in analysing the meaning of MST under customary international law; the concept has been considered by several tribunals and where the Tribunal finds it to be of assistance in ascertaining what is the current meaning of MST under customary international law, it considers those decisions which it finds to be relevant. As stated by the tribunal in *Merrill*⁷⁵⁶ “*State practice and opinio juris will be the guiding beacons of this evolution.*”
746. In construing Article 805, the Tribunal is again guided by Article 31 of the VCLT,⁷⁵⁷ such that it is necessary to “*interpret[] [it] in good faith in accordance with the ordinary meaning to be given to the terms of the [FTA] in their context and in light of its object and purpose*”.

⁷⁵⁴ Respondent's Rejoinder, para. 441; *Neer*, Award, IV RIAA 60 (15 October 1926) (**Exhibit RL-46**).

⁷⁵⁵ See, e.g., *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (22 September 2014) (**Exhibit RL-96**), para. 567: “*It is the Tribunal's view that public international law principles have evolved since the Neer case and that the standard today is broader than that defined in the Neer case*”; *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award in Respect of Damages (31 May 2002 (not on the record), paras. 57-65; “*The Tribunal rejects this static conception of customary international law [...] It is a facet of international law that customary international law evolves through state practice. International agreements constitute practice of states and contribute to the grounds of customary international law. [...] since the 1920's, the range of actions subject to international concern has broadened beyond the international delinquencies considered in Neer to include the concept of fair and equitable treatment. [...] one must conclude that the practice of states is now represented by those treaties [i.e., BITs]*”; *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award (26 January 2006) (**Exhibit RL-69**), para. 194 (“*The content of the minimum standard should not be rigidly interpreted and it should reflect evolving international customary law.*”); *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentina Republic*, ICSID Case No. ARB/09/1, Award (21 July 2017) (**Exhibit CL-193**), para. 666 (“*The minimum standard of treatment is a customary international law principle that sets out the obligations owed by a State to aliens and, as such, evolves over time as State practice and opinio juris changes to include today's notions of minimum standards.*”).

⁷⁵⁶ *Merrill*, Award (31 March 2010) (**Exhibit CL-176**), para. 193.

⁷⁵⁷ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S 331 (**Exhibit CL-3**).

747. The ordinary meaning of ‘fair’ and ‘equitable’ is “*just*” “*even-handed*” “*unbiased*” and “*legitimate*.”⁷⁵⁸ Thus, actions that infringe a sense of fairness, equity and reasonableness will fall afoul of Article 805.
748. The Preamble to the FTA provides that its purpose is, inter alia, to “*ensure a predictable commercial framework for business planning and investment*” and “*enhance and enforce environmental laws and regulations, and to strengthen cooperation on environmental matters.*” Applying the ordinary meaning of Article 805 to the object and purpose of the FTA (as relevant to Eco Oro’s claim), Eco Oro was entitled to expect that Colombia would treat its investment in an even-handed and just manner to ensure a predictable business environment and foster the promotion of foreign investment but that, in doing so, it would ensure the enhancement and enforcement of environmental laws and regulations, such that neither investment protection nor environmental protection takes precedence.
749. This does not mean that Colombia was under an obligation to guarantee that the domestic regulatory environment would remain stable. The Tribunal has found that Concession 3452 did not contain a stability clause and it accepts that a State cannot be rigidly bound to those rules and regulations in force at the time the investment is made. Indeed, as noted by the tribunal in *Mobil Investments*:

⁷⁵⁸ Cfr., *inter alia*, *MTD Equity*, Award (25 May 2004) (**Exhibit CL-26**), para. 113, citing to the Concise Oxford Dictionary of Current English, fifth edition; *Saluka*, Partial Award (17 March 2006) (**Exhibits CL-104 / RL-71**), para. 297.

“This applicable standard does not require a State to maintain a stable legal and business environment for investments, if this is intended to suggest that the rules governing an investment are not permitted to change, whether to a significant or modest extent. Article 1105 may protect an investor from changes that give rise to an unstable legal and business environment, but only if those changes may be characterized as arbitrary or grossly unfair or discriminatory, or otherwise inconsistent with the customary international law standard. In a complex international and domestic environment, there is nothing in Article 1105 to prevent a public authority from changing the regulatory environment to take account of new policies and needs, even if some of those changes may have far-reaching consequences and effects, and even if they impose significant additional burdens on an investor. Article 1105 is not, and was never intended to amount to, a guarantee against regulatory change, or to reflect a requirement that an investor is entitled to expect no material changes to the regulatory framework within which an investment is made. Governments change, policies changes and rules change. These are facts of life with which investors and all legal and natural persons have to live with. What the foreign investor is entitled to under Article 1105 is that any changes are consistent with the requirements of customary international law on fair and equitable treatment. Those standards are set at, as we have noted above, at a level which protects against egregious behaviour.”⁷⁵⁹

750. Whilst *Mobil Investments* was an arbitration under NAFTA, the Tribunal agrees with the principle that Article 805 cannot act as a restraint upon Colombia’s legitimate ability to regulate matters within its borders.
751. The Tribunal further understands it is inevitable that, in exercising its police powers, a State will find itself at times having to make difficult and potentially controversial choices, particularly when considering issues of environmental protection and public health. The Tribunal therefore agrees with the tribunal’s statement in *Cargill* that *“an actionable finding of arbitrariness must not be based simply on a tribunal’s determination that a domestic agency or legislature incorrectly weighed the various factors, made legitimate compromises between disputing constituencies, or applied social or economic reasoning in*

⁷⁵⁹ *Mobil*, Decision on Liability and Principles of Quantum (22 May 2012) (**Exhibit CL-179**), para. 153. See also *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (11 September 2007) (**Exhibit RL-75**), para. 332: *“It is each State’s undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a stabilisation clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment. As a matter of fact, any businessman or investor knows that laws will evolve over time. What is prohibited however is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power.”*

a manner that the tribunal criticises.”⁷⁶⁰ In determining whether Colombia’s actions were in breach of Article 805, the Tribunal therefore does not seek either to second-guess Colombia’s decision-making nor to judge the calibre of the administration of Colombia’s governmental programmes.⁷⁶¹ Equally, deference to the State’s powers cannot require the Tribunal to condone actions that would otherwise comprise a breach of Article 805.

752. Eco Oro contends that good faith and the prohibition of arbitrariness are basic obligations of international law and the Tribunal is satisfied that FET encompassing concepts of non-arbitrariness, transparency and fairness are recognised elements of customary international law within the confines of reasonableness. Article 805 encapsulates the *bona fide* obligation upon a State and, as such, constitutes a guarantee to investors that whilst regulatory changes may be made, any such changes will be consistent with the requirements of FET under customary international law and not made in an arbitrary or otherwise egregious fashion. The regulatory changes effected by Colombia will therefore amount to a breach of Article 805 if Colombia has acted in a way which is “*arbitrary or grossly unfair or discriminatory, or otherwise inconsistent with the customary international law standard*”⁷⁶² always bearing in mind how these terms are understood in the context of customary international law.
753. A similar approach has been followed by other tribunals. For example, the tribunal in *S.D. Myers*⁷⁶³ noted that the starting point for analysis is that such a violation occurs “*only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the*

⁷⁶⁰ *Cargill*, Award (18 September 2009) [Redacted] (**Exhibit RL-81**), para. 292.

⁷⁶¹ See, e.g., *Philip Morris*, Concurring and Dissenting Opinion of Gary Born (8 July 2016) (**Exhibit RL-102**), para. 137: “*It is important to recognize that the fair and equitable treatment standard, and the protection against arbitrary measures, does not empower this, or any other, tribunal to second-guess legislative or regulatory judgments. On the contrary, it is well-settled that the judgments of national regulatory and legislative authorities are entitled, under the fair and equitable treatment guarantee, to a substantial measure of deference.*”; *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/17, Award (19 December 2013) (**Exhibit CL-184**), para. 493: “*although the role of an international tribunal is not to second-guess or to review decisions that have been made genuinely and in good faith by a sovereign in the normal exercise of its powers, it is up to an international arbitral tribunal to sanction decisions that amount to an abuse of power, are arbitrary, or are taken in manifest disregard of the applicable legal rules and in breach of due process in regulatory matters.*”

⁷⁶² *Mobil*, Decision on Liability and Principles of Quantum (22 May 2012) (**Exhibit CL-179**), para. 153.

⁷⁶³ *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (13 November 2000) (**Exhibit RL-55**), para. 263.

treatment rises to the level that is unacceptable from the international perspective. That determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.” Although a case determined under NAFTA regarding a breach of Article 1105, this supports the proposition that there is a high threshold for finding a violation of the MST.

754. Reviewing past decisions, concepts such as transparency, stability and the protection of the investor’s legitimate expectations play a central role in defining the FET standard, as does procedural or judicial propriety and due process and fairness, refraining from taking arbitrary or discriminatory measures, or from frustrating the investor’s reasonable expectations with respect to the legal framework affecting the investment. Unjust or idiosyncratic actions,⁷⁶⁴ a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith have all been found to be in breach of FET.⁷⁶⁵ A State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.⁷⁶⁶
755. Having reviewed the relevant decisions, whilst malicious intention, wilful neglect of duty or bad faith are not requisite elements of MST under customary international law, there must

⁷⁶⁴ *Waste Management*, Award (30 April 2004) (**Exhibit RL-64**), para. 98; *Saluka*, Partial Award (17 March 2006) (**Exhibits CL-104 / RL-71**), para. 288; *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/17, Award (19 December 2013) (**Exhibit CL-184**), para. 454.

⁷⁶⁵ *Bayindir Insaat Turizm Ticaret ve Sayani A.Ş. v. Pakistan*, ICSID Case No. ARB/03/29, Award (27 August 2009) (**Exhibit RL-79**), para. 178; *Metalclad*, Award (30 August 2000) (**Exhibit CL-15**), para. 76; *Waste Management*, Award (30 April 2004) (**Exhibit RL-64**), para. 98; *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award (3 September 2001) (**Exhibit RL-59**), para. 221; *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (18 August 2008) (**Exhibits CL-52 / RL-77**), para. 378; *Total S.A.*, Decision on Liability (27 December 2010) (**Exhibit CL-68**), paras. 109-110; *Alex Genin, Eastern Credit Limited, INC. and A.S. Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2 (“*Genin*”), Award (25 June 2001) (**Exhibit RL-57**), para. 367.

⁷⁶⁶ *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Final Award (11 October 2002) (**Exhibit CL-161**), para. 116; *The Loewen Group Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)98/3, Award (26 June 2003) (**Exhibit RL-62**), para. 132; *Azurix*, Award (14 July 2006) (**Exhibit CL-35**), paras. 391-392; *Siemens*, Award (6 February 2007) (**Exhibit CL-41**), para. 318; *Glamis*, Award (8 June 2009) (**Exhibit CL-59**), para. 627; *Bayindir Insaat Turizm Ticaret ve Sayani A.Ş. v. Pakistan*, ICSID Case No. ARB/03/29, Award (27 August 2009) (**Exhibit RL-79**), para. 181; *Cargill*, Award (18 September 2009) [Redacted] (**Exhibit RL-81**), para. 296; *Merrill*, Award (31 March 2010) (**Exhibit CL-176**), para. 208; *Total S.A.*, Decision on Liability (27 December 2010) (**Exhibit CL-68**), para. 110; *Abengoa, S.A. y COFIDES, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award (18 April 2013) [Redacted] [Spanish], para. 644; *Ioan Micula and others v. Romania I*, ICSID Case No. ARB/05/20, Award (11 December 2013) (**Exhibit CL-183**), para. 519; *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award (6 March 2018), para. 7.57.

be some aggravating factor such that the acts identified comprise more than a minor derogation from that which is deemed to be internationally acceptable. The conduct in question must engender a sense of outrage or shock, amount to gross unfairness or manifest arbitrariness falling below acceptable standards,⁷⁶⁷ or there must have been a lack of due process which has led to an outcome which offends a sense of judicial propriety.⁷⁶⁸ The treatment complained of must therefore be unacceptable from an international perspective whilst set against the high measure of deference that international law extends to States to regulate matters within their own borders.

756. Eco Oro asserts that Colombia acted in an arbitrary manner. Tribunals have wrestled with the meaning of ‘arbitrary’ and ‘arbitrariness.’
757. According to the Oxford English Dictionary, ‘arbitrary’ means “[d]ependent on will or pleasure” or “[b]ased on mere opinion or preference as opposed to the real nature of things, capricious, unpredictable, inconsistent.”⁷⁶⁹ A similar definition is found in Black’s Law Dictionary which defines the word ‘arbitrary’ as “[d]epending on individual discretion; of, relating to, or involving a determination made without consideration of or regard for facts, circumstances, fixed rules or procedures” and ‘arbitrary’ (of a judicial decision) is defined as “founded on prejudice or preference rather than on reason or fact.”⁷⁷⁰
758. The starting point for this analysis is the decision of the International Court of Justice in *Elettronica Sicula S.p.A. (“ELSP”)*:

⁷⁶⁷ *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Award (26 January 2006) (**Exhibit RL-69**), para. 200.

⁷⁶⁸ *The Loewen Group Inc and Raymons L. Loewen v. United States of America*, ICSID Case No. ARB(AF)98/3, Award (26 June 2003) (**Exhibit RL-62**), para. 132; and *Waste Management*, Award (30 April 2004) (**Exhibit RL-64**), para. 98.

⁷⁶⁹ See also Oxford English and Spanish Dictionary, Synonyms, and Spanish to English Translator, available at <https://www.lexico.com>, where ‘arbitrary’ is defined as “[b]ased on random choice or personal whim, rather than any reason or system”.

⁷⁷⁰ Black’s Law Dictionary, 9th ed. (2009), p. 119.

*“Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. This idea was expressed by the court in the Asylum case, when it spoke of ‘arbitrary action’ being ‘substituted for the rule of law’ [...]. It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.”*⁷⁷¹

759. In considering what is meant by a sense of juridical propriety, the Tribunal again turns to the definitions contained in the Oxford English Dictionary and Black’s Law Dictionary. There is no definition of ‘juridical impropriety’ in Black’s Law Dictionary. The Oxford English Dictionary defines ‘impropriety’ as “*the quality of being improper*” such that there is a “*want of accordance with the nature of the thing, or with reason or rule, incorrectness, erroneousness, inaccuracy*” or “*want of accordance with the purpose in view; unsuitableness, unfitness, inappropriateness.*” Turning to Black’s Law Dictionary, impropriety is “*behaviour that is inappropriate or unacceptable under the circumstances.*”
760. Of further guidance are the indicia of arbitrary measures which were formulated by Professor Christoph Schreuer when acting as an expert in *EDF (Services) Limited v. Romania*⁷⁷² and which have been cited with approval, most recently⁷⁷³ by the tribunals in *Teinver v.*

⁷⁷¹ *Eletronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, 1989 I.C.J. 15, 76 (Judgment of 20 July 1989) (**Exhibits CL-153 / RL-50**), para. 128. See also *Asylum Case (Colombia v. Peru)*, [1950] ICJ Reports 266 (Judgment of 20 November 1950) (**Exhibit RL-139**), para. 284, cited to in *ELSI*: “*In principle, therefore, asylum cannot be opposed to the operation of justice. An exception to this rule can occur only if, in the guise of justice, arbitrary action is substituted for the rule of law. Such would be the case if the administration of justice were corrupted by measures clearly prompted by political aims. Asylum protects the political offender against any measures of a manifestly extra-legal character which a government might take or attempt to take against its political opponents. The word “safety”, which in Article 2, paragraph 2, determines the specific effect of asylum granted to political offenders, means that the refugee is protected against arbitrary action by the government, and that he enjoys the benefits of the law*”.

⁷⁷² *EDF*, Award (8 October 2009) (**Exhibit CL-174**), para. 303. See also C. Schreuer, “Protection against Arbitrary or Discriminatory Measures”, in: *The Future of Investment Arbitration* (C. A. Rogers, R.P. Alford eds.) 183 (2009) (not available on record).

⁷⁷³ See also *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (14 January 2010) (**Exhibits CL- 61 / RL-82**), para. 262; *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award (7 July 2011) (**Exhibits CL-71 / RL-88**), para. 188; *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award (18 November 2014), para. 585 (not available on record); *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award (10 March 2015), para. 494 (not available on record);

Argentina,⁷⁷⁴ *Glencore v. Colombia*,⁷⁷⁵ and *Global Telecom v. Canada*.⁷⁷⁶ These indicia are:

- a. a measure that inflicts damage on the investor without serving any apparent legitimate purpose;
- b. a measure that is not based on legal standards but on discretion, prejudice, or personal preference;
- c. a measure taken for reasons that are different from those put forward by the decision-maker; and
- d. a measure taken in wilful disregard of due process and proper procedure.

761. In assessing whether there has been a breach of Article 805, it is necessary to consider all the facts and circumstances. As determined in *Gold Reserve v. Venezuela*, “even if a measure or conduct by the State, taken in isolation, does not rise to the level of a breach of the FET, such a breach may result from a series of circumstances or a combination of measures.”⁷⁷⁷

762. To establish a violation of Article 805, Eco Oro must therefore firstly show that Colombia either (i) breached Eco Oro’s legitimate expectations as such expectations were, or should

⁷⁷⁴ *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Award (21 July 2017) (**Exhibit CL-193**), para. 923, fn. 1116.

⁷⁷⁵ *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award (27 August 2019), para. 1449 (not available on record).

⁷⁷⁶ *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Award (27 March 2020) [Redacted], para. 561 (not available on record).

⁷⁷⁷ *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (22 September 2014) (**Exhibit RL-96**), para. 566, making reference to the fact that cumulative effects of State’s measures or conduct as integrating a breach of the FET had been considered in *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011) (**Exhibit CL-73**), para. 459. On point is also the *dictum* in *William Ralph Clayton and others v. Government of Canada*, PCA Case No. 2009- 04, Award on Jurisdiction and Liability (17 March 2015) (**Exhibit RL-18**), para. 593: “Canada is one entity for the purposes of NAFTA responsibility. There is a saying that sometimes ‘the left hand does not know what the right hand is doing’. For the purposes of state responsibility the combined impact of its left hand and right hand can be determinative even if the actions of either in isolation do not rise to the level of a breach.” See also *Bayindir Insaat Turizm Ticaret ve Sayani A.Ş. v. Pakistan*, ICSID Case No. ARB/03/29, Award (27 August 2009) (**Exhibit RL-79**), para. 181 (“a breach need not necessarily arise out of individual isolated acts but can result from a series of circumstances, and that it does not presuppose bad faith on the part of the State”).

have been, informed by the exercise of due diligence; or *(ii)* failed to provide at all times a stable and transparent investment environment; or *(iii)* did not act in good faith as required by international law. Secondly, if such a breach is found, it must be determined whether Colombia's actions are unacceptable from an international law perspective.

763. The Tribunal now turns to apply this standard to the facts.

(a) Legitimate Expectations

764. The Tribunal has already found that Colombia did not make any specific representations to Eco Oro that it would not bring in a mining exclusion ban in any part of Concession 3452 with retrospective effect. Did Eco Oro have other legitimate expectations that were frustrated by Colombia? Eco Oro says that Colombia created its legitimate expectations and induced its investment, referring to the mining permits it obtained which were consolidated into Concession 3452, the Concession itself, and the legislation pursuant to which the permits and Concession 3452 were issued.

765. In the context of considering whether Colombia is in breach of Article 811, the Tribunal determined by a majority that Eco Oro did not have any investment-backed legitimate expectations on the basis that the statements made in Permit 3452 and the 1988 Mining Code did not constitute legitimate representations on which Eco Oro could rely in making its investment. The Tribunal has also determined by a majority that Article 46 of the 2001 Mining Code is not a stabilisation clause and, had Eco Oro undertaken appropriate due diligence, it would have been advised that Colombia could retrospectively impose a mining ban on all or part of Concession 3452 to protect a páramo ecosystem.

766. However, Eco Oro says Colombia made other representations. It granted Concession 3452 to Eco Oro in full knowledge that a significant part of the concession area overlapped the Santurbán Páramo (there was a general awareness of the existence of páramo in the area where Concession 3452 was granted since 1851⁷⁷⁸), that mining exploitation activities were

⁷⁷⁸ Article La Silla Vacía “El tal páramo de Santurbán sí existe” (8 September 2014) (**Exhibit R-110**).

being conducted in the Santurbán Páramo area (and indeed had been for centuries⁷⁷⁹) and of the likely adverse effect of mining on the páramo which it had accepted responsibility to protect pursuant to Law 373 of 1997,⁷⁸⁰ the General Environmental Law,⁷⁸¹ Articles 8, 58, 79 and 80 of the Political Constitution,⁷⁸² as well as the environment-related international conventions it had signed up to such as the Ramsar Convention⁷⁸³ and the Biodiversity Convention.⁷⁸⁴ Indeed the Constitutional Court observed in Judgement T-411/92⁷⁸⁵ that Colombia had a “[...] *duty to safeguard the environment due to a fundamental constitutional right.*” Thus, at the time Concession 3452 was granted to Eco Oro in 2007, Colombia knew both that the Santurbán Páramo existed and that it had an obligation to protect it. Colombia could have chosen not to grant a mining concession over this area. Colombia had the power to delimit the páramo and, pursuant to section 16 of Law 373 of 1997, it was obliged to acquire páramo areas such as the Santurbán Páramo “*as a priority*”⁷⁸⁶ as well as to initiate a recovery, protection and conservation process to ensure protection of the páramo. However, Colombia did not take the necessary action it was legally required to take to protect the Santurbán Páramo; instead, it granted a mining concession over the area in question. Indeed, notwithstanding Colombia’s obligation to protect páramo ecosystems, the Tribunal notes there was a considerable increase in the granting of mining titles in páramo ecosystems between 1990 and 2009 with an approximate consequential 555% increase in investments in the mining sector.⁷⁸⁷

767. Indeed, even after the grant of Concession 3452, notwithstanding the subsequent laws, resolutions and court decisions (as described above) mandating the final delimitation of the

⁷⁷⁹ See Constitutional Court Judgment No. T-361 (30 May 2017) (**Exhibit C-244**), e.g., pp. 214-215, where the Constitutional Court acknowledges that gold mining “*has always been connected to [the great Department of Santander] and its populations*”.

⁷⁸⁰ Law No. 373 of 1997 (6 June 1997) (**Exhibit C-68**).

⁷⁸¹ Law No. 99 of 1993 (General Environmental Law) (22 December 1993) (**Exhibit C-66**).

⁷⁸² Political Constitution of Colombia (1991) (**Exhibit C-65**).

⁷⁸³ Ramsar Convention on Wetlands of International Importance (2 February 1971) (**Exhibit RL-31**).

⁷⁸⁴ Decree No. 205 of 1996 (29 January 1996) (**Exhibit R-54**). See also United Nations, UN Agenda 21, Chapter 18, Protection of the Quality and Supply of Freshwater Resources: Application of Integrated Approaches to the Development, Management and Use of Water Resources (1992) (**Exhibit R-142**).

⁷⁸⁵ Constitutional Court of Colombia, Judgment T-411/92 (17 June 1992) (**Exhibit R-134**).

⁷⁸⁶ Law No. 373 of 1997 (6 June 1997) (**Exhibit C-68**), Art. 16.

⁷⁸⁷ “Minería: ¿seguridad jurídica o soberanía?”, El Espectador (26 March 2016) (**Exhibit C-227**).

páramo, no such delimitation was undertaken, yet Eco Oro continued to receive encouragement from Colombia with respect to Concession 3452. Examples include statements to the effect that Colombia supported the Project and wanted to ensure successful exploitation as the Angostura Project was a ‘VIP’ project, on one occasion from President Santos and, on other occasions, from various ministers and other government officials. Further, the repeated nominations of Concession 3452 as a PIN/PINE all led to Eco Oro’s understanding that the Angostura Project was supported by Colombia. Given these circumstances, Eco Oro’s belief that the Santurbán Páramo did not overlap the Angostura Deposit, as concluded by the ECODES report, is therefore reasonable and gave rise to a legitimate expectation that the Angostura Project was supported by Colombia.

768. Could reliance on these representations have been displaced by due diligence? Whilst there is no evidence on the record of the due diligence actually undertaken by Eco Oro, it cannot be disputed that proper due diligence would have notified Eco Oro of the presence of páramo within the area of the Concession. Equally, due diligence would have alerted Eco Oro to the fact that páramo presence had been known to Colombia since 1851⁷⁸⁸ and Eco Oro would also have been alerted to the fact that Colombia had had the duty to protect páramo ecosystems since Law 373 of 1997 but had not taken any action. Eco Oro should also have been aware that given the terms of Constitutional Court Judgment C-293 of 2002, its rights pursuant to Concession 3452 were subject to the overriding interests of the State to protect the environment. Against this, however, Eco Oro should also have been aware of Article 58 of the Political Constitution, the Colombian law principle of ‘*confianza legítima*’ (legitimate expectation) and Colombian law relating to acquired rights (such as Eco Oro’s right to exploitation) which, as confirmed by the *Consejo de Estado* in its Advisory Opinion 2233, ensures that in the event of a retroactive application of the law leading to loss of an acquired right, compensation must be paid, such compensation including compensation for actual damages suffered as well as certain future losses and the loss of a chance.
769. In weighing up the various factors, it is also relevant to note that Colombia encouraged foreign miners into the country and held up Eco Oro as an example of a successful investor.

⁷⁸⁸ “El tal páramo de Santurbán sí existe”, La Silla Vacía (8 September 2014) (**Exhibit R-110**).

These statements were clearly made to encourage foreign investment, although again basic due diligence would have alerted any potential investor of the need to clarify whether the proposed concession overlapped any suspected páramo ecosystem and of the potential risk of a mining exclusion ban being imposed. Indeed, a disclaimer was included in the December 2015 brochure published by the ANM,⁷⁸⁹ alerting investors to the risk that the applicable rules could be amended at any time and that prospective investors should verify whether the proposed title was or was not within the prohibited areas for mining and/or in an environmental exclusion zone.

770. In considering Eco Oro’s legitimate expectations, regard must also be had to the object and purpose of the FTA: Colombia was obliged to ensure a predictable business environment. Indeed, predictability is essential in enabling an investor properly to plan its business strategy and ensure its compliance with the rules and regulations which will govern its business. Eco Oro was entitled to an expectation that “*its business may be conducted in a normal framework free of interference from Government regulations which are not underpinned by appropriate policy objectives*”⁷⁹⁰ whilst recognising that Colombia could not be rigidly bound to those rules and regulations in force at the time the investment was made.
771. Equally, Eco Oro was not entitled to any guarantee of success: mining is inherently uncertain and given the nature and location of the project it must have been foreseeable to Eco Oro that it would inevitably face significant challenges in seeking successfully to explore and then exploit the concession area, but such anticipated challenges would have related to the nature of the project itself and not to Colombia’s actions.
772. At the heart of the matter is Colombia’s failure to comply with its legal obligations to delimit the Santurbán Páramo pursuant to the provisions of Colombian law. Did Colombia ensure that the regulatory changes it both instituted and, of equal relevance, failed to institute with respect to the designation of the Santurbán Páramo were consistent with its treaty obligations to ensure a predictable business environment and with the requirements of customary international law minimum standard of treatment of aliens, including the obligation to

⁷⁸⁹ National Mining Agency Brochure “Exploring Opportunities” (December 2015) (**Exhibit C-294**), p. 4.

⁷⁹⁰ *Merrill*, Award (31 March 2010) (**Exhibit CL-176**), para. 233.

provide fair and equitable treatment, and not made in an arbitrary or otherwise egregious fashion?

773. Since at least 1991, Colombia has been subject to a legal duty to conserve areas of special ecological significance⁷⁹¹ as evidenced by its signatory of the Biodiversity Convention in 1992 and the passing of the General Environmental Law. Colombia has thus committed itself to the protection of the páramo and its actions were, it submits, undertaken pursuant to its obligation to protect the páramo. The FTA also emphasises this environmental obligation. Any analysis of whether Colombia's actions, viewed as a whole, were the result of reasoned judgement and were related to and reasonably proportionate to Colombia's articulated objectives or were instead arbitrary, grossly unfair, unjust or idiosyncratic must be undertaken in this context.
774. The existence of the Santurbán Páramo had been known since 1851 and although Colombia had been under an obligation to delimit and acquire all páramos since the passing of Law 373 in 1997, at the time the Concession was granted in 2007, the Santurbán Páramo had not been delimited. Further, whilst Colombia was aware that the Santurbán Páramo overlapped at least a part of Concession 3452, it took no steps to issue a mining exclusion zone over this area at the time the Concession was granted. At the time Eco Oro made its investment, Colombia had therefore failed to comply with its constitutional obligations to protect the páramo.
775. Since Concession 3452 was granted and to this day, no lawfully compliant final delimitation of the Santurbán Páramo has been effected, such that the legal status of the páramo remains in a state of paralysed confusion. Colombia was and is well aware of the temporary nature of the delimitation; for example, the ANM concluded in Resolution VSC 4 (issued on 12 September 2012)⁷⁹² that the 2007 Atlas delimitation was only temporary and the suspension of the mining activities in those areas identified as páramo would be maintained *“until the [MinAmbiente] issues the final delimitation to a scale of 1:25,000.”* This recognition that the delimitation is temporary in nature can also be seen from the

⁷⁹¹ Political Constitution of Colombia (1991) (**Exhibit C-65**), Art. 79.

⁷⁹² National Mining Agency, Resolution No. VSC-4 (12 September 2012) (**Exhibit C-25**).

Attorney General’s Video Tweet on 12 February 2018 when he stated that Colombia was “[...] *working towards the paramo’s delimitation before the end of the current administration.*”

776. It is also clear that some of Colombia’s actions appear to facilitate or support mining in areas of páramo; for example, Decree 2820 (5 August 2010) provides, *inter alia*, that environmental licences could be issued for mining exploitation activities in special ecosystems, including páramo areas (Article 10). Again, whilst Colombia says that ANM’s designation of Concession 3452 as a PINE on 22 February 2011 (and again on 19 June 2013) was due to the potential environmental implications of the Project, the express wording of the designation provides that it is given not only due to the relevant project’s “*environmental impact*”, but also on the basis, *inter alia*, of its “*social importance*” and “*its important reserves destined for international markets.*”⁷⁹³ Indeed, of the seven criteria listed (a project must meet at least one to be designated a PINE) only one relates to the environmental impact of the project whilst the remaining six relate to economic and socio-economic reasons (the declaratory resolution does not state the reasons for which the PINE designation was awarded to Concession 3452). It is unclear whether the Project was designated a PINE due to its economic importance to Colombia or for reasons of environmental sensitivity.
777. The failure to carry out a delimitation at 1:25,000 also means that the inevitable errors in both the 2007 Atlas and the 2090 Atlas remain uncorrected such that the Angostura Deposit cannot be said with any certainty to be within the Santurbán Páramo. Ms. Baptiste explained that the 2007 Atlas was not a delimitation and was so large scale and imprecise that the area of Concession 3452 was “*invisible.*”⁷⁹⁴ It is inevitable that the 2007 Atlas would have given rise to significant confusion as to what mining activity would be permitted and where it would be permitted within the concession area. Again, the ANM noted in Resolution VSC No. 4 that “*it cannot be said with complete certainty, due to the absence of technical parameters, that [the concession area] is located within the páramo.*”⁷⁹⁵

⁷⁹³ INGEOMINAS, Resolution No. DSM-28 (22 February 2011) (**Exhibit C-19**).

⁷⁹⁴ Tr. Day 3 (Ms. Baptiste), 730:13-18.

⁷⁹⁵ National Mining Agency, Resolution No. VSC-4 (12 September 2012) (**Exhibit C-25**).

778. It is also uncontroversial that the lengthy and continuing delay in publishing a final delimitation of the Santurbán Páramo led to considerable uncertainty for Eco Oro and indeed for the mining industry more generally, as to what mining operations would and would not be permissible in potentially affected areas. This can be seen, for example, from a letter dated 9 September 2013 written by the then Colombian Attorney General, Alejandro Ordóñez Maldonado, to the Minister of Mines, the Minister of the Environment and the President of the ANM.⁷⁹⁶

779. The Attorney General noted that pursuant to Law 1450 the mining sector was one of the cornerstones for the financing of the Development Plan and that “[t]he many reforms required by the State to make the mining industry the ‘locomotive’ contributing to Colombian prosperity were based on this assumption.” He further noted that there was a responsibility under the Constitution to develop mining in a responsible manner, however, he then referred to the failure of the Environment Ministry to delimit the páramos (and also its failure to delimit the reserve forests which failure continued even 54 years after the enactment of the relevant law) and stated that this delay had “hindered not only the execution of mining activities in these areas but also the implementation of social measures by the State [...]” He then explained that these delays and consequential issues:

“created an uncertain legal environment that resulted in the discussion becoming ideological, which made it seem in some respects that the development of an environmentally responsible mining industry is incompatible with the conservation of the environment, which criminalizes the activity, exaggerating its effects and creating suspicions about any decision taken by the mining or environmental authorities.”⁷⁹⁷

780. The Attorney General concluded by stating as follows:

“In short, the Ministries and ANM are hereby compelled to take appropriate action in order to:

- 1. Coordinate efforts to comply with their obligations as established by law and the Constitution;*

⁷⁹⁶ Letter from the Attorney General to the Ministry of Environment, Ministry of Mines and National Mining Agency (9 September 2013) (**Exhibit C-28**).

⁷⁹⁷ Letter from the Attorney General to the Ministry of Environment, Ministry of Mines and National Mining Agency (9 September 2013) (**Exhibit C-28**), p. 4.

2. *Whenever possible and as mandated by the Political Constitution, settle existing queries given that there are mining areas that had been granted to black and native communities in some of the areas intended to be regulated;*
3. *Avoid ideologization of the debate and make decisions based on comprehensive supporting studies;*
4. *Regularly share any progress made in the zoning and delimitation process for the sake of transparency;*
5. *Recognize any consolidated situations and vested rights to prevent the filing of legal claims against the Colombian state;*
6. *The National Mining Agency is required to proceed with caution to refrain from rejecting proposals or terminating agreements if there are conditions – such as the decisions made by the Ministry of the Environment and Sustainable Development – that may threaten citizens and companies that, relying on the principle of *confianza legitima*, have approached the State to propose or develop mining concessions.”⁷⁹⁸*

781. It can be seen that Colombia’s inconsistent approach continued, however. Whilst Minister Sarmiento announced on 30 November 2013 that the delimitation of the Santurbán Páramo had been completed, she did not publish the coordinates. Instead, although she had announced that the coordinates had been agreed, she then initiated consultations with affected communities, an action which contributed to the Constitutional Court’s finding of bad faith on the part of the Environment Ministry. Even after these consultations had concluded, the coordinates were still not released. On 30 March 2014, Minister Sarmiento announced she would be publishing the coordinates to put an end to the uncertainty, but although a map was published, it did not contain coordinates. Instead, Minister Sarmiento publicly stated that the delimited páramo would be four times bigger than Santurbán Park and that there was an overlap between Concession 3452 and the delimited páramo. Whilst Eco Oro says it was advised that the official coordinates would be released “*in the coming days*” this still did not transpire. Minister Sarmiento then announced the coordinates would be published by 1 August 2014 but again this did not happen and shortly thereafter Minister Sarmiento was replaced as Minister of Environment by Mr. Gabriel Vallejo, the fifth environment Minister in less than four years.

⁷⁹⁸ Letter from the Attorney General to the Ministry of Environment, Ministry of Mines and National Mining Agency (9 September 2013) (**Exhibit C-28**), p. 5.

782. The uncertainty and confusion as to what the parameters of the Santurbán Páramo should be can also be seen from the following. Whilst the IAvH was progressing with the delimitation of the Santurbán Páramo, it submitted a formal opinion to the CDMB as a part of the process by which the CDMB created the Santurbán Park on 16 January 2013. Eco Oro’s submission during this arbitration to the effect that this Park comprised 11,700 hectares and only overlapped with a small fraction of the Angostura Deposit and would not have impeded its development was not contested. Article Two of CDMB’s Decision declaring this Regional National Park, noted that the preservation purposes for which the Park was declared included the preservation of the “*ecosystems of the páramo, sub páramo and Andean forest*” and to “*guarantee the connectivity of the páramo ecosystems and the High Andean forests of the Santurbán ecoregion, which extend up to the department of Norte de Santander.*”⁷⁹⁹ Article Four expressly provided that no mining exploration or exploitation activities could be authorised in the Santurbán Park. The Tribunal notes that Ms. Baptiste wrote to the Mayors of each of the affected regions advising that whilst the delimitation of the páramo and the delimitation of a Regional Park are different processes from a legal and technical standpoint, she was “*certain that the lines of both figures will be similar because they involve a páramo ecosystem [...]*.”⁸⁰⁰ It is therefore not only inconsistent but also no explanation has been given why, when the coordinates were released as the 2090 Atlas, the Santurbán Páramo at 98,950 hectares was approximately eight times bigger than the Santurbán Park resulting in approximately 50.7% of Concession 3452 laying within the preservation area, 3.9% within the restoration area, 32% of the surface area of the Angostura Deposit overlapping with the preservation area and 28% located beneath it.
783. The 2090 Atlas also did not satisfy the requirements of the 2001 Mining Code and therefore did not create a permanent mining exclusion zone as it was not a delimitation for the purposes of the 2001 Mining Code. Whilst it must have been clear to Eco Oro (and to the mining community and local population) that when the 2001 Mining Code compliant delimitation was finally undertaken, it was likely that it would be no smaller in overall size than the 2090 Atlas, given (*i*) that the Angostura Deposit only comprised 0.1% of the overall delimited

⁷⁹⁹ CDMB Directing Council Agreement 1236 (16 January 2013) (**Exhibit C-175**).

⁸⁰⁰ Letter from IAvH (Ms. Baptiste) to the Mayor of Vetás and others (30 October 2013) (**Exhibit C-189**).

area;⁸⁰¹ (ii) Colombia accepted there was a 5-13.9% margin of error⁸⁰² in determining where the boundary should lie and the margin of error could be as much as 150 meters in altitude in certain areas, because the “*quality of the information has limitations*”;⁸⁰³ and (iii) there were clear errors in the 2090 Atlas boundaries with towns included within the boundaries, Eco Oro cannot have been expected to assume with any certainty that the Angostura Deposit would be determined to be within a mining exclusion zone. This clearly would have given rise to uncertainty as to in which parts of Concession 3452 Eco Oro could undertake mining activities.

784. This confusion as to whether the Angostura Deposit would or would not fall within the delimited area can only have been compounded by subsequent acts of the government and its officials. Firstly, the Minister of Mines gave Eco Oro a pledge of full support to assist it in advancing the Angostura Project.⁸⁰⁴ The Tribunal notes no evidence was adduced by Colombia to dispute this and Mr. Aldana was not cross-examined on this point.
785. Secondly, although a further two-year extension was granted for the exploration phase limited to that area of Concession 3452 which did not overlap the páramo (Resolution VSC 727 dated on 6 August 2014),⁸⁰⁵ only 5 months later, pursuant to Resolution VSC 3 (dated 6 January 2015),⁸⁰⁶ the ANM lifted the suspension on mining activities in the totality of Concession 3452, basing its decision on the following conclusion reached by the “*Office of the Vice-President of Mining Supervision, Control and Safety (Technical Opinion No. VSC-088 of November 22, 2013)*”:

“3. CONCLUSIONS AND RECOMMENDATIONS

⁸⁰¹ Claimant’s Reply Memorial, para. 199; Respondent’s Rejoinder Memorial, para. 235.

⁸⁰² Respondent’s Rejoinder, para. 258.

⁸⁰³ Ministry of Environment Presentation, “Delimitación del Páramo de Santurbán” (December 2014) (**Exhibit C-217**).

⁸⁰⁴ First Witness Statement of Wilmer González Aldana, para. 123.

⁸⁰⁵ National Mining Agency, Resolution VSC No. 727 (6 August 2014) (**Exhibit C-212**).

⁸⁰⁶ National Mining Agency, Resolution VSC No. 3 (6 January 2015) (**Exhibit C-35**).

3.1. After review of the technical considerations submitted by the company holding title with respect to the requested stay of exploration activities, it is hereby deemed technically feasible to grant such request because the arguments raised by ECO ORO are found to be reasonable. Indeed, to conduct hydrogeological and geotechnical studies, information should be gathered **both in unrestricted and in restricted areas**, for the construction of the hydrogeological model is highly relevant to this project, due to the environmental implications it has, **considering the location of the contract area having an impact on the páramo, which relates to the aquifer recharging zone and its location on the La Baja Creek basin, a tributary of the Surata river.** The Geotechnical Model is based on the Geological and Structural and the Hydrogeological Models, and similarly require a **comprehensive evaluation of the rock massif that is part of both the restricted and unrestricted areas.**

A pending water concession application, and the difficulty caused by the lack thereof for the development of exploration activities, constitutes an additional argument in support of the foregoing, given that the alternatives ECO ORO considered are economically unfeasible, a situation which negatively impacts on the execution of the exploration program.”⁸⁰⁷ [Tribunal’s emphasis]

786. Thirdly, Concession 3452 was again designated a PINE and in March 2015 the then Minister of Mines, Mr. Tomas Gonzalez stated publicly in March 2015 at the Prospectors and Developers Association of Canada (“PDAC”) Annual Convention that:

“[PINEs such as Eco Oro] will receive special support from the government so that they can move forward as fast as possible. Under the new system, the responsible ministers meet every week and look at the projects with that designation, and see how each one is progressing. The meetings include the ministers of Mines and Energy, Environment, Defence, Labour and the Interior. We sit around the table and look at what issues face each project, and then assign tasks to the various ministers. In the following meeting, we then evaluate each task, and see how the project has progressed. [...] We need to make sure these projects happen, because we need royalties for development.”⁸⁰⁸

787. This statement is against a backdrop of Colombia’s efforts to attract foreign mining investment. In the previous annual PDAC Conference, in early 2012, the Minister of Mines

⁸⁰⁷ As cited in National Mining Agency, Resolution VSC No. 3 (6 January 2015) (**Exhibit C-35**). Technical Opinion No. VSC-88 of 22 November 2013 is not available on the record.

⁸⁰⁸ Article The Northern Miner “PDAC 2015: Mines Minister says Colombia is picking up the pace” (25 March 2015) (**Exhibit C-222**).

had referred to “*a transition to a new era in which mining and energy are going to lead economic growth for the coming decades.*”⁸⁰⁹

788. Fourthly, the new four-year national development plan, Law 1753 of 2015, declared that the CIIPE may confer PINE status upon projects regarded as being of social interest and serving a public purpose and that PINES would be subject to licensing and administrative processes before national rather than regional authorities.⁸¹⁰
789. Finally, on 8 February 2016, Eco Oro received support for Concession 3452 from President Santos who explained Eco Oro should apply for its environmental licence as soon as possible to enable Colombia to “*showcase*” the Angostura Project as a post-páramo delimitation success story.⁸¹¹
790. It cannot be said that the purpose of these actions of Colombia was in support of its stated aim to protect the páramo; it is clear they were supporting and facilitating the continuation of the Angostura Project. Had protection of the páramo been Colombia’s aim, it would have ensured delimitation of the Santurbán Páramo was completed reasonably promptly and in a manner compliant with the 2001 Mining Code. It is not unreasonable that on the basis of the above, Eco Oro believed that Colombia was supportive of the project and that the regulatory framework would enable it to proceed to explore and exploit the Angostura deposit.
791. Given this and given what then happened as described below, the Tribunal finds Eco Oro’s description of being on a regulatory roller-coaster to be apt.
792. The same day that President Santos expressed his support, the Constitutional Court issued a press release announcing it had reached a decision on the challenge to Law 1753, striking down as unconstitutional certain provisions, including Article 173(2) of Law 1753 such that MinAmbiente could only deviate from the IAvH’s mapping insofar as it could scientifically demonstrate that its decision would result in a higher degree of protection of the páramo

⁸⁰⁹ Article Dinero “Colombia tranquiliza a inversionistas sobre futuro de la minería” (3 June 2012) (**Exhibit C- 162**).

⁸¹⁰ Law No. 1753 (9 June 2015) (**Exhibit C-36**).

⁸¹¹ The Tribunal notes that Mr. Moseley-William’s testimony was not challenged in this regard by Colombia.

(Judgment C-35). It is clear that this press release exacerbated the already present confusion amongst both the mining and environmental authorities and provided no clarity as to whether or not mining activities could be carried out in Concession 3452. The position was not assisted as the actual judgment was not released for several months after the press release.

793. The extent of this confusion can be seen from the statement of the then Minister of Mines, German Arce Zapata in his speech to the third National Mining Congress that “*we have been left in a very serious situation: there are many norms and we do not know what the rule is. We fill legal loopholes with decrees. [...] The Court is breaking a golden rule by legislating. The Court is legislating and laws are made by Congress.*”⁸¹² In its request to the Constitutional Court for clarification (which request was denied), the ANM noted that:

“The Constitutional Court itself understands that its decision may be controversial and decides in favor of the protection of páramos given the ecosystem fragility that makes them extremely vulnerable to human intervention and mining or hydrocarbon activities.

Nonetheless, the Constitutional Court admits there is a wide array of mining methods, and sustains that proper environmental monitoring could mitigate mining adverse effects.

*This leads to a practical legal problem: **the decision of the Constitutional Court, regardless of its relative and surmountable nature, thanks to the use of increasingly sophisticated methods or systems aiming at guaranteeing environmentally friendly and sustainable respectful mining as well as the application of increasingly efficient monitoring tools, could result in the acceptance of mining even in fragile ecosystems such as páramos.***

The paragraphs declared unenforceable were intended to promote the above: tolerance for mining under environmental neutral conditions, guaranteed through administrative acts that made exploration and mining conditional on the observance of strict environmental protection standards by those title holders that obtained said titles before the entry into force of the legal prohibition of mining in páramos.

⁸¹² “Sector minero crece pese a la amenaza de la inseguridad jurídica”, El Mundo [English Translation] (11 May 2017) (Exhibit C-243).

In a state governed by the rule of law, a legislative decision that responded to an initiative of the Executive smoothly translated into an act of government: not allowing mining in páramo ecosystems unless a prior mining contract has been executed.

The existence of a mining contract forced the Legislature and the Executive to permanently safeguard public heritage from potential monetary claims for wrongful damage attributable to the Legislature. At the same time, the rule provided for the protection of the ecosystem through legal instruments such as the issuance of environmental licenses and the implementation of monitoring tools. [...]

Notwithstanding the above, the Court has handed down its opinion and it is final. Legal enforcement agencies such as the Mining Authority are now abiding by a legal provision that, as certain subsections of the first paragraph of Article 173 of Law No. 1753 are no longer enforceable, amounts to an absolute interference with contractual rights and affects, from a mining point of view, contracts executed, and investments made, under the regulations in force at the time, which could potentially cause unlawful damages to those who, on the basis of the contract, and legitimate expectations [confianza legítima], carried out investments which could be deemed to have been indirectly expropriated, as a consequence of the unconstitutionality decision.

Evidently, this situation raises national and international concerns in light of investment protection treaties. Therefore, the judgment handed down by the Constitutional Court needs to be clarified so that the applicable (environmental, mining or hydrocarbon) enforcement agency can perform its duties in a proper manner and in compliance with the law, through the implementation of the administrative act that best suits the purpose of protecting the páramo, at all times mitigating the potential damage that may be caused to those adversely affected by the declaration of unconstitutionality.”⁸¹³ [Tribunal’s emphasis]

794. Eco Oro sought clarification from both the ANM and ANLA as to the effect of this judgment on its concession but none was forthcoming. The Tribunal does not find this surprising given the obvious confusion this judgment created in both MinMinas and MinAmbiente as well as in the ANM and indeed more widely. This can be seen, for example, from the unchallenged evidence of Mr. Moseley-Williams⁸¹⁴ and from a statement from the Environment Minister in March 2016, that pursuant to Judgement C-35, all existing environmental licenses shall

⁸¹³ Letter from the National Mining Agency to the Constitutional Court seeking clarification on the consequences of Constitutional Judgment C-35 (24 February 2016) (**Exhibit C-44**).

⁸¹⁴ First Witness Statement of Mark Moseley-Williams, paras. 46-47.

“cease to be in force” and that they were working with MinMinas “to make a decision regarding [mining] titles currently in force to have them terminated on the basis of the Constitutional Court decision.”⁸¹⁵ Again, in a letter dated 11 May 2016, MinAmbiente advised that by analogy with Judgement C-35, the grandfathering provision in Law 1753 must be treated as having “disappeared from the legal framework since” Judgement C-35 was entered.⁸¹⁶

795. It is further clear that there was utter confusion as to whether mining activities were permitted in the restoration and sustainable use areas of the páramo. The relevance of this for Eco Oro was that the Restoration Zone covered nearly 30% of the area of the Angostura Deposit.
796. This confusion can be seen from the following differing and untransparent approaches of MinMinas, MinAmbiente, CIPE and the ANM:
- a. MinAmbiente advised that restoration areas in traditional mining communities and sustainable use areas were not encompassed by the prohibition enacted by Judgment C-35.
 - b. The approach of MinMinas and the ANM was not consistent with MinAmbiente’s approach (indeed it was not even internally consistent) as can be seen from the manner in which Eco Oro’s request for its final extension of the exploitation period was dealt with:
 - i. By Resolution 839 dated 2 August 2016, Eco Oro’s application to extend Concession 3452 was only granted in respect of that area which did not overlap the preservation area, with no reference to what it was and was not permitted to do in the restoration area. Resolution 839 referred to a technical opinion dated 1 August 2016 on which it had relied, which differentiated between the Santurbán Páramo area and the restoration zone but which further concluded that in addition to the ban on exploration

⁸¹⁵ “Minería: ¿seguridad jurídica o soberanía?”, El Espectador (26 March 2016) (**Exhibit C-227**).

⁸¹⁶ Letter from the Ministry of Environment (Mr. Rincón Escobar) to (Ms. Figueroa Cortés) (11 May 2016) (**Exhibit C-231**).

activities in the páramo, the ban should also be applied to mining activities within the restoration zone.⁸¹⁷

- ii. However, a contradictory approach was adopted by the ANM with respect to another mining title of Eco Oro (EJ1-159) which also overlapped the preservation and restoration areas of the delimited páramo, yet the ANM's Resolution 48 dated 7 April 2016 (but only notified to Eco Oro on 20 September 2016) granted an extension of the exploration phase over the entire area of the Concession. This indicates further confusion within the ANM as to the status of the restoration zone.
 - iii. Upon seeking clarification, the ANM advised with respect to title EJ1-159 that Eco Oro could carry out mining activities in those areas that did not overlap the preservation areas. Thus, with respect to Concession 3452, Eco Oro could not undertake exploration activities in the restoration zone whereas with respect to title EJ1-159 it was permitted to undertake exploration activities in the restoration zone. This is clearly completely contradictory.
 - iv. This inconsistent behaviour can further be seen in ANM Resolution 683 of 9 August 2017 which stated that Eco Oro could not undertake mining activities in any overlapping sustainable use areas in another of Eco Oro's Concessions, number 22346.⁸¹⁸
- c. The CIPE (which included the Minister of the Environment and the Vice Minister of Mines) understood that the mining ban covered the preservation and restoration zones of the 2090 Atlas.

797. The level of uncertainty as to what was and was not permitted can also be seen from a statement made by the Director General of the CDMB who, albeit expressing a personal view, stated that mining activities would be permitted in the restoration zone but not in the

⁸¹⁷ National Mining Agency, Technical Report No. VSC 169 (1 August 2016) (**Exhibit C-51**).

⁸¹⁸ National Mining Agency, Resolution VSC 683 (9 August 2017) (**Exhibit C-248**).

preservation zone and that he was unsure whether any buffer zone would be required or whether mining activities would be permitted up to the boundary of the delimited area. However, he noted that the uncertainty would prevent the CDMB from processing an application for an environmental licence for Concession 3452.⁸¹⁹

798. A further example of the inconsistent treatment received by Eco Oro relates to the sums charged by way of surface canons. Up to July 2016 (thus including a period after the 2090 Atlas had been issued), the ANM had claimed, and Eco Oro had paid, surface canons based on the total area of Concession 3452. On 6 July 2016, after Judgment C-35 had been handed down, the ANM changed its policy and sought payment only in respect of that part of the concession area which did not overlap the preservation area of the Santurbán Páramo (49.27% of the concession area).
799. In a final twist, Constitutional Court Decision T-361 struck down Resolution 2090 and thus also the 2090 Atlas, and ordered that a new delimitation of the Santurbán Páramo be undertaken. Whilst it was stated that the new delimitation was to take into account the criteria set out in Resolution 2090, there was a marked lack of clarity as to the true meaning and effect of this decision given the vague terms used and a number of questions were raised. What was the status of the Santurbán Páramo at this point? It was unclear precisely what was meant by the Constitutional Court's requirement that the protection offered by the new delimitation to be carried out cannot be lower "*as to the protection of the environment*" than that provided by Resolution 2090. Given it also specified that the demarcation of the Santurbán Páramo could be modified in the event of errors (and it was accepted that the 2090 Atlas contained errors), could this mean the boundary lines could not be reduced at any point? Or did it mean that where there were accepted errors, the boundary could be redrawn even if it meant a reduced area of protection? Or indeed did it mean that if the páramo boundary was reduced in one area it had to be increased in another area so as to ensure the total area within the páramo stayed the same or was even increased? Indeed, how could it be verified whether any subsequent demarcation provided lower or higher protection – the páramo is the páramo and once it is fully protected it surely cannot be protected to an even

⁸¹⁹ First Witness Statement of Mark Moseley-Williams, paras. 63-64; Letter from Eco Oro (Mr. Moseley-Williams) to CDMB (Mr. Carvajal) (5 December 2016) (**Exhibit C-57**).

greater extent? The Constitutional Court further stated that any ensuing modification could not adversely affect measures to protect or safeguard the páramo “*in global terms*” without providing any clarification as to what this meant. Yet more uncertainty was generated by this decision and yet the Constitutional Court’s order to MinAmbiente that the delimitation be completed within one year was not complied with.

800. A week after the publication of Judgment T-361, the Environment Minister stated that pursuant to this decision, no environmental licenses could be issued for mining projects in the vicinity of the Santurbán Páramo until the new delineation had been completed and yet, even as of now, no delimitation has been undertaken and there is still no certainty as to where the boundary of the Santurbán Páramo falls and the extent to which there is overlapping with Concession 3452.
801. The effect of this on Eco Oro can be seen from the fact that, after Judgment T-361 had been issued, the ANM refused to give Eco Oro an extension for its exploration phase to enable it not to have to take any further steps until after the boundaries of the páramo were certain. This meant that Eco Oro had to submit its PTO by June 2018 failing which it would forfeit its concession. However, until the delimitation was published, it was uncertain in what areas of Concession 3452 mining activities would or would not be permitted. The Tribunal fails to comprehend how Eco Oro could have been expected to undertake this exercise given Colombia’s continued failure finally to delimit the páramo. And yet, whilst Colombia was refusing to give any extension of time to Eco Oro, it was itself seeking an eight-month extension of time to comply with the time limit imposed by the Constitutional Court to complete the delimitation of the Santurbán Páramo.
802. Further failure to act can be seen from the fact that whilst Article 5 of Resolution 2090 required regional environmental authorities such as CDMB to issue more detailed environmental guidelines and environmental management plans for the páramo in their locality, again this has yet to be undertaken with respect to the Santurbán Páramo. This failure renders the provision in Article 173 of Law 1753 that mining activities would not be permitted in páramo ecosystems if environmental damage could not be avoided difficult to apply in practice.

803. In considering the level of consistency (or inconsistency) in Colombia’s actions the Tribunal also notes that various laws, resolutions and court decisions, commencing with Law 373 of 1977, imposed on Colombia an obligation to acquire (and hence first delimit) páramo areas in compliance with its constitutional duties.⁸²⁰ Colombia did not do this. It is approximately twenty years since the 2001 Mining Code set out the regulatory regime to achieve a final delimitation of the Santurbán Páramo and yet the Santurbán Páramo has still not been finally delimited and no reason for this has been given. Indeed, the Constitutional Court noted in Judgment T-361 that “*according to the information provided by the Alexander von Humboldt Institute, there are currently 385 mining concessions in force related to páramo areas that have not been delimited by the Ministry of the Environment.*”⁸²¹
804. The Tribunal notes that its analysis with respect to Article 805 is as to legitimate expectations and not “*reasonable investment-backed expectations*”, as is the case with an Article 811 analysis. Having weighed up the respective positions of the Parties, the majority of the Tribunal finds that Eco Oro had legitimate expectations that (i) it would be entitled to undertake mining exploitation activities in the entirety of Concession 3452; (ii) in the event the State were to expropriate Eco Oro’s acquired rights, compensation would be payable; and (iii) that Colombia would ensure a predictable commercial framework for business planning and investment. The majority of the Tribunal finds that Colombia’s actions in refusing to allow mining exploitation activities to take place in the entire area of Concession 3452 without payment of compensation, its inconsistent approach to the delimitation of the Santurbán paramo and its ultimate (and continuing) failure to delimit the Santurban Paramo frustrated Eco Oro’s legitimate expectations.
805. A majority of the Tribunal finds that Colombia’s actions, including its failure finally to delimit the Santurbán Páramo in circumstances where Eco Oro was advised that no environmental licenses could be issued for mining projects in the vicinity of the Santurbán

⁸²⁰ This obligation was also contained in Article 8 of Resolution 769 of 2002, Advisory Opinion 2233 at pp. 7-8, Art. 14 of Law 1930 of 2018 and Constitutional Court Decision T-361 at para. 15.3.4. Ministry of Environment, Resolution No. 769 (5 August 2002) (**Exhibit C-9**), Art. 8; *Consejo de Estado*, Advisory Opinion No. 2233 (11 December 2014) (**Exhibit R-135**), pp. 7-8; Law No. 1930 (27 July 2018) (**Exhibit R-51**), Art. 14; Constitutional Court, Judgment T-361 (30 May 2017) (**Exhibit C-244**), para. 15.3.4.

⁸²¹ Constitutional Court, Judgment T-361 (30 May 2017) (**Exhibit C-244**).

Páramo until the new delineation had been completed and the failure to give Eco Oro an extension to submit its PTO, comprise conduct that failed to provide Eco Oro with a stable and predictable regulatory environment.

(b) Are Colombia's actions unacceptable from an international law perspective?

806. The Tribunal now turns to consider whether Colombia's frustration of Eco Oro's legitimate expectations is unacceptable from an international law perspective. In this regard, it should be noted a finding of bad faith is not required.⁸²² The fact the majority of the Tribunal found Colombia did not act in bad faith in implementing the Challenged Measures does not mean, *per se*, that Colombia is not in breach of Article 805. Whilst the intention of the Challenged Measures may have been in good faith, the delimitation is still not finally completed such that Eco Oro was left in limbo for a very considerable period of time, with no certainty as to where the final boundaries of the delimited boundary would be sited, and yet equally not granted an extension of time to file its PTO and seek an environmental licence pending Colombia's publication of the final delimitation undertaken in compliance with Colombian law.
807. Colombia will be in breach of Article 805 if it has acted in an unjust or arbitrary manner as understood under customary international law.
808. Colombia saw an exponential increase of the granting of mining titles in páramo areas at a time where it was clear from legislation (international and domestic) and Colombian caselaw that páramos should be subject to special protection. According to the Indicators of Mining

⁸²² See *The Loewen Group Inc and Raymons L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (26 June 2003) (**Exhibit RL-62**), para. 132; *Glamis Gold, Ltd v. The United States of America* (UNCITRAL), Award (8 June 2009) (**Exhibit CL-59**), para. 627 (“*The Tribunal emphasizes that, although bad faith may often be present in such a determination and its presence certainly will be determinative of a violation, a finding of bad faith is not a requirement for a breach of Article 1105(1)*”); *Bayindir Insaat Turizm Ticaret ve Sanayi A.Ş. v. Pakistan*, ICSID Case No. ARB/03/29, Award (27 August 2009), para. 181; *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009) [Redacted] (**Exhibit RL-81**), para. 296 (“*the Tribunal emphasizes that although bad faith or willful neglect of duty is not required, the presence of such circumstances will certainly suffice*”); *Merrill*, Award (31 March 2010) (**Exhibit CL-176**), para. 208; *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability (27 December 2010) (**Exhibit CL-68**), para. 110; against this view see, e.g., *Neer*, Award, IV RIAA 60 (15 October 1926) (**Exhibit RL-46**), para. 61; *Genin*, Award (25 June 2001) (**Exhibit RL-57**), para. 371.

in Colombia, Monitoring the National Mining Development Plan 2007-2010: “*The National Government’s policies, such as Decree 4743 of 2005, have boosted this result and have given continuity to the Vallejo Plan, which, since 1967, has granted a series of tariff exemptions to imports of machinery and equipment used in the mining cycle, as well as to activities related to the exploration and exploitation of hydrocarbons. [...] Similarly, in the mining sector, investments increased from US\$466 million in 2002 to approximately US \$3.054 billion in 2009, an increase of 555%.*”⁸²³

809. In Judgment C-35, Constitutional Court commented on Colombia’s continued failure to protect the páramo ecosystems by delimiting the páramos as follows:

“135. [...] although páramos are ecosystems that, pursuant to the law, call for special protection, they are not protected areas per se, since the ‘protected area’ category is tied to a declaratory and implementation procedure by the environmental authorities. In other words, although these ecosystems have been identified as areas that require special protection, no category of specific or automatic protection has been regulated for such biomes. To that extent, at present there are páramo areas that have been declared to be protected areas and others that have not.

[...]

140. [...] Therefore, to the extent that the protection of the páramo ecosystem depends directly on strict compliance with the delimitation duty by the Ministry of the Environment and Sustainable Development, the Court shall integrate the regulatory unit with the first two subsections of section 173 of Law No. 1753 of 2015 since, to the extent that the responsibility to delimit páramo areas lies with the Ministry of the Environment, the decision to be adopted would be completely ineffective, especially if we take into account that the Ministry of the Environment has delimited only one páramo.

[...]

⁸²³ Indicators of Mining in Colombia, Monitoring the National Mining Development Plan 2007-2010 (December 2010) (Exhibit C-277).

165. First, the Court would like to note that the Legislature is currently working on two bills in the Chamber of Representatives and the Senate to establish a general framework to protect páramo ecosystems. At the speech for the second debate before the Plenary Session of the Senate to discuss Bill No. 45 of 2014 (Senate), the legislature acknowledged that '[p]áramos should be protected permanently, because they are not isolated and are related to other systems that have suffered serious impacts in terms of thaw levels and loss of vegetation cover and glacier masses. Páramos are closely related to glaciers, and specialized literature has warned that in 30 years' time, approximately, snow would no longer occur in the country if current conditions persist. In that regard, the IDEAM has warned that, while Colombia had 17 glaciers in 1850, at present only 6 glaciers continue to exist, decreasing from 374 km² to 45.3 km², and this phenomenon has accelerated over the last 30 years.'

In turn, at the speech for the first debate on the Bill No. 106 of 2015 (Representatives), note was made of '[...] the importance of relying on a regulatory instrument to assert greater legal and technical strictness regarding the conservation and protection of páramo complexes and páramo ecosystems in Colombia. Such bill should be in line with the current environmental and socio-economic conditions in those areas, reiterating their nature as strategic ecosystems, as an integral part of the Protected Areas National System. With a view to the foregoing, it should include a clear definition of the financing sources for the implementation and application thereof. Likewise, the participation and mandatory and priority cooperation of the different administrative authorities in the different orders, not only in the declaratory process, but also in the execution of the respective environmental management plans [...].'

Notwithstanding the foregoing, this was not the first attempt to create a legal provision concerning the exclusive protection of páramos. Indeed, over the last decade there have been several attempts to expand a law to design páramo protection measures, but such attempts have proven fruitless, and the bill has been disregarded and all of the projects have been shelved. [...]

166. Based on the considerations made above, it is clear that, at present, páramos as ecosystems are not subject to special protection, nor has the use thereof been defined, nor has an authority specifically responsible for their administration, management and control been appointed. In spite of all the attempts to create regulations to protect páramos, the truth is that there is a statutory and regulatory deficit in complying with the constitutional mandate to protect areas of special ecological importance, in this case, páramo ecosystems.

[...]

167. [...] *there is no present guarantee that páramos are being protected.*
[...].”⁸²⁴

810. Whilst the Tribunal accepts that Article 805 cannot be invoked to restrain Colombia from regulating matters within its borders, it can be invoked where the State acts in an arbitrary manner. Even viewed in isolation, it is difficult to comprehend on what basis the delimitation of the Santurbán Páramo has still not been undertaken. No reason has been given by Colombia and, although the Tribunal understands that a paucity of resources may have contributed to the length of time taken to prepare the 2090 Atlas, this cannot excuse the fact the delimitation has still not been concluded so many years after the process was initially commenced. Indeed, the fact that, even after the Constitutional Court ordered the Environment Ministry to complete the delimitation within a year of Decision T-361, such delimitation has still not been completed is grossly unfair to those such as Eco Oro whose rights depend upon knowing where mining is and is not permitted. Even after the Santander Administrative Tribunal opened contempt proceedings against the Minister of Environment for failure to progress the delimitation in violation of Judgement T-361, the delimitation has still not been concluded. This failure is also clearly troubling in the light of the FTA’s express terms as to the importance of environmental preservation. Had the delimitation been undertaken in accordance with Judgment T-361 it could be understood that Colombia was acting pursuant to a legitimate purpose, but this is not the case with respect to a failure to delimit the páramo whilst suspending rights granted under the Concession.
811. The Tribunal also notes that, when considering the reasonableness of both Colombia’s actions and more particularly its failure to act, it is of relevance that the Angostura Deposit comprised less than 1% of the Santurbán Páramo as delimited by the discredited 2090 Atlas and thus, whilst the Tribunal accepts the applicability of the precautionary principle, it should also not be ignored that it is not possible accurately to determine the actual threat of damage to the páramo. Indeed, whilst of course Eco Oro could have reached certain assumptions as to the likely parameters of the Santurbán Páramo, the Tribunal does not

⁸²⁴ Constitutional Court, Judgment C-35 (8 February 2016) (**Exhibit C-42**), pp. 101, 104, 111 and 112.

believe it is reasonable to expect Eco Oro to prejudge the boundaries of the final delimitation in circumstances where Colombia has itself failed to determine the boundaries.

812. The Tribunal also does not accept Colombia's submission that all arms of the Government were working towards the same objective, namely the preservation of the páramo.

813. The Constitutional Court acknowledged in Judgment C-35 that:

*“Long-term environmental effects, that is, the environmental sustainability of a legal provision, is a decisive factor for constitutionality review. It is up to the legislative and executive branches of the Government to meet the population's immediate needs, and from this standpoint, they are especially concerned with guaranteeing that the Government obtains revenue from the fees and taxes on extraction activities. However, in a democratic system, it is up to the constitutional courts to counterbalance the short-term importance valued by the other branches of government, especially if elected democratically. In this way, although the constitutional courts shall not discard the short-term effects, they should consider especially the long-term effects, which offer a full panorama of the constitutional problem and the tension with legally protected interests. Thus, it should give special weight to the effects of mining and hydrocarbon activities on páramo ecosystems.”*⁸²⁵

814. Given the increasing and dominant focus on the protection and preservation of the environment, as seen from the Constitutional Court judgments referred to above, the actions of Government officials, including even President Santos, in supporting a mining project which undoubtedly was in or neighbouring an area which Colombia had undertaken to protect is hard to comprehend other than that such actions were supportive of Eco Oro mining the Angostura Deposit. It is recognised that Colombia saw the mining industry as key to its economic growth but the existence of the Santurbán Páramo was known at that time to Colombia. Whilst MinMinas' objective of promoting foreign investment into the mining sector, providing support to Eco Oro and wanting the Angostura Project to succeed in order to encourage other foreign investment is understandable, the support to Concession 3452 and indeed to the other foreign mining companies and those local mining communities ran directly contrary to the parallel obligation to ascertain the correct delimitation of the Santurbán Páramo and take the necessary steps to protect it. The conflicting motivations of

⁸²⁵ Constitutional Court, Judgment C-35 (8 February 2016) (Exhibit C-42), para. 176.

MinMinas (in its drive for investment) and MinAmbiente (seeking the protection of the páramos) could not be clearer.

815. It can be seen from the above review that not only were there at all times two competing approaches within the Colombian ministries, on the one hand the need for the economic benefits derived from a vibrant mining industry and on the other a belief in the need to protect the páramo, but there was also a complete lack of agreement or even co-ordination in any part of the Government as to what should be done with respect to the delimitation of the Santurbán Páramo. This did not need to be the case. As stated by the Attorney General, the delay in completing the delimitation of the páramo created an environment in which it appeared that *“the development of an environmentally responsible mining industry is incompatible with the conservation of the environment [...]”*⁸²⁶
816. The effect of this has been a near total failure to resolve the competing demands of the relevant interests: the environment, the need for water in the surrounding areas, the livelihood of the local farmers and artisanal miners, protection of jobs provided by the foreign mining companies and the rights of those mining companies. It has also contributed to the existence of illegal mining with the inevitable harmful impact on the páramo.
817. The Tribunal notes that there are a number of contemporaneous records detailing the existence of illegal mining. By way of example:
- a. Various articles were published describing the emergence of illegal mining in the Santurbán Páramo including one published in Portofolio on 6 February 2014 titled *“Illegal mining creeps into parts of Santurbán”* in which it was noted that the towns of Vetás and California *“have been the most seriously affected”* and that mercury and explosives were being used in these operations and another dated 1 August 2014 reporting that the number of illegal miners illegally entering the tunnels of

⁸²⁶ Letter from the Attorney General to the Ministry of Environment, Ministry of Mines and National Mining Agency (9 September 2013) (**Exhibit C-28**), p. 4.

those mining companies that had had to suspend mining (such as Eco Oro) was in the region of 1,000.⁸²⁷

- b. Eco Oro issued a communique on 25 February 2014 to the community of Soto Norte containing a “*respectful but firm call to the people*” to refrain from carrying out illegal mining operations;⁸²⁸
- c. Minister Sarmiento was reported to have assured the mayors that tough measures would be announced to clamp down on such illegal mining.⁸²⁹
- d. A letter from the Municipality of Vetas to the Attorney General dated 20 February 2015 seeking his intervention before the MinAmbiente for assistance for the local community and noting that “*illegal mining is increasingly becoming the only option for workers to make a living.*”⁸³⁰
- e. On 2 June 2016 a Ms. Uribe (citizen of Bucaramanga) wrote to the Vice President, Mining Supervision, Control and Safety of the ANM seeking to be added to the petition in respect of illegal mining within the area of Concession 3452,⁸³¹
- f. The minutes of CIIPE meeting number 5 dated 16 August 2016 in which it was noted that the Angostura Project “*is being affected by illegal mining activities. Inter-institutional coordination between the National Government and territorial entities is required to address this.*”⁸³²; and

⁸²⁷ Article Portafolio “Minería ilegal se toma una zona de Santurbán” (6 February 2016) (**Exhibit C-40**); Article La Razón “Vetas está preocupado por la llegada de la ilegalidad” (14 March 2013) (**Exhibit C-179**); Article El Espectador “En Colombia, el 88% de la producción de oro es ilegal” (2 August 2016) (**Exhibit C-52**).

⁸²⁸ Eco Oro News Release regarding “Galafardeo” (unauthorized mining activities) in California (25 February 2014) (**Exhibit C-202**) (Tribunal’s translation).

⁸²⁹ Article Portafolio “Al menos mil mineros operan ilegalmente en Santurbán” (1 August 2014) (**Exhibit C-211**), p. 3.

⁸³⁰ Letter from the Municipality of Vetas to Attorney General (Mr. Ordóñez) (20 February 2015) (**Exhibit C-363**), p. 2.

⁸³¹ Letter from Eco Oro (Ms. Arenas Uribe) to the National Mining Agency (Mr. García Granados) (2 June 2016) (**Exhibit C-236**).

⁸³² Intersectoral Commission for Infrastructure and Strategic Projects (CIIPE) Minutes of Meeting No. 5 [CONFIDENTIAL DOCUMENT] (16 August 2016) (**Exhibit C-397**).

- g. The minutes of CIPE meeting number 9 dated 21 November 2016 in which it was noted that: *“As regards illegal mining, different strategies are being implemented, given that in the case of Angostura illegal miners are operating inside the páramo area Illegal miners are permanently intruding in the mines left by Eco Oro in order to exploit them. Inter-institutional roundtables have been established with formal companies in order to adjust their PTO. In any event illegal mining activities in the páramo area require more decisive planning based on the CONPES (Colombian Council of Economic and Social Policy). Coordination with the National Planning Department (DNP) and the Ministries of Environment, of Mines and Energy and of Defence shall be progressed in order to define a schedule and action plans regarding any paramos to be delimited in the future.*

[redacted text]

*As regards security issues, the Ministry of Defence has requested that the companies strengthen their private security. Furthermore it was noted that the Ministry of Mines and Energy and the Governor’s Office are working on a productive change programme which will include 5,000 people in Vetás and 2,000 people in California.”*⁸³³

- h. ANM decided a suspension request submitted by Eco Oro with respect to Concession Contract No. 22346 concluding that Eco Oro’s obligations should be suspended on the basis of *force majeure*, considering *“the presence of illegal groups and the carrying out of illegal mining activities in the area of the mining title.”*⁸³⁴

818. Indeed, Colombia accepts that *“illegal mining has been always a problem in Colombia, and not only in páramo areas, all over Colombia. So, illegal mining is something that the Government takes very seriously, and it is attacking the illegal mining. And I make a*

⁸³³ Intersectoral Commission for Infrastructure and Strategic Projects (CIPE) Minutes of Meeting No. 9 [CONFIDENTIAL DOCUMENT] (21 November 2016) (**Exhibit C-399**).

⁸³⁴ National Mining Agency, Resolution 683 (9 August 2017) (**Exhibit C-248**) (USB drive provided at the Hearing).

parentheses because it is not only linked with ancestral mining, in areas where mining has taken place since forever, but also because it has some links in some instances to a grave situation and to natural consequences. So, it is something that Colombia takes extremely serious, and it is something that is not exclusively related to the páramo. Actually, it is less marketed in páramo areas than in other areas in the country. I will not dwell on that. But the second point is also very important because precisely I mentioned it before, that Colombia's interpretation of páramo has enacted clearly that, even if they, through human intervention has been deterioration in the páramo, that doesn't take out the qualification of páramo, and, actually, on the contrary, that insists that this sort of restoration area, areas in which the páramo has been degraded and, therefore, has to be reinstated to whatever kind of measures can be taken. And on the measures taken is, first of all, try to avoid illegal mining, try to prevent alternatives to the people because there is not only illegal mining, there is literature--there is other aspects of human intervention that may deteriorate the páramos. So, that's the situation in Colombia.”⁸³⁵

819. It is not in dispute that illegal mining is generally far more harmful to the environment than mining undertaken lawfully in compliance with an approved EIA. In circumstances where it is acknowledged that the páramo is fragile and in need of special protection such that the State has determined no mining activities should be permitted in the páramo ecosystem, as well as taking steps to prevent mining activities lawfully undertaken pursuant to a legal title, Colombia should have taken steps to prevent the more damaging activities carried out by illegal miners. Whilst it is clear that Colombia was aware of the issue, proposing inter-institutional coordination and establishing inter-institutional roundtables, the Tribunal has not seen any evidence as to actual action taken by Colombia other than to require the companies to strengthen their private security.⁸³⁶

820. The majority of the Tribunal finds that Colombia's actions with respect to the delimitation of the Santurbán Páramo have been grossly inconsistent and given rise to considerable

⁸³⁵ Tr. Day 1 (Mr. Mantilla-Serrano), 263:14-265:2.

⁸³⁶ See Tr. Day 2 (Mr. Moseley-Williams), 504:17-21 (“*the irony of it all is that that material will get mined, and mercury will be used, and so, the whole idea of protecting the water ecosystem is—it’s sad, but that’s exactly what is going to happen.*”).

confusion and uncertainty as to (i) what activities may and may not be undertaken within the páramo as currently delimited; (ii) what the final boundaries will comprise; and (iii) when the final delimitation will be announced. The Tribunal therefore asks itself whether Colombia's conduct amounts to gross unfairness or manifest arbitrariness falling below acceptable standards. The majority of the Tribunal answers this in the affirmative. Colombia's failure to lawfully and finally delimit the Santurbán Páramo in breach of the Constitutional Court's judgement is a wilful neglect of Colombia's statutory duty and caused harm to Eco Oro as it was made clear that no environmental licenses could be issued for mining projects in the vicinity of the Santurbán Páramo until the new delimitation had been completed. Colombia's refusal to allow Eco Oro a concomitant extension of time to submit its PTO, in circumstances where the páramo boundary had not been finally determined such that Eco Oro had no certainty as to where the páramo overlapped with the Angostura Deposit, if at all, and where Colombia itself was being given extensions of time to complete the delimitation, can only be viewed as grossly unfair. This comprises conduct that was arbitrary and disproportionate, and which has inflicted damage on Eco Oro without serving any apparent purpose, falling within Professor Schreuer's first indicium.

821. Whilst the bar is a high one and the Tribunal does not expect that Colombia should have elevated unconditionally Eco Oro's interests above its obligation to protect the páramo, equally Colombia should have ensured that its various arms took the necessary steps to comply with Colombia's constitutional obligation to protect the páramo such that they acted in parallel and in a coordinated manner with respect to Concession 3452. It should be reminded that, for purposes of attribution, "[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State."⁸³⁷ It is clear from the above review of Colombia's actions, viewed as a whole, that Colombia's approach to the delimitation of the Santurbán Páramo was one of arbitrary vacillation and inaction which inflicted damage on

⁸³⁷ International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (2001) (Exhibits CL-17 / CL-202 / RL-115), Art. 4(1).

Eco Oro without serving any apparent legitimate purpose. Colombia was not willing to address and manage the widely disparate interests of those impacted by where the boundary of the Santurbán Páramo was drawn; it found itself torn between the competing interests of protecting the páramo and obtaining much needed royalties. It has failed to act coherently, consistently or definitively in its management of the Santurbán Páramo and in so doing has infringed a sense of fairness, equity and reasonableness and indeed has shown a flagrant disregard for the basic principles of fairness. This is more than just inconsistency or inadequacy by Colombia and its officials. Colombia has not accorded Eco Oro's investment treatment in accordance with the customary international law minimum standard of treatment of aliens, including the obligation to provide fair and equitable treatment, and the Tribunal therefore finds by a majority that Colombia is in breach of article 805 of the FTA.

F. ARTICLE 2201(3) OF THE TREATY AND THE FTA'S ENVIRONMENTAL EXCEPTION

822. Article 2201(3) of the Treaty⁸³⁸ provides as follows:

- “(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.”*

⁸³⁸ Free Trade Agreement between Canada and the Republic of Colombia (signed on 21 November 2008 and entered into force on 15 August 2011) (**Exhibit R-137**).

(1) The Parties' Positions

(a) The Claimant's Position

823. Eco Oro's position is set out in paragraphs 367 *et seq.* above.

(b) The Respondent's Position

824. Colombia's position is set out in paragraphs 362 *et seq.* above.

(c) Canada's Non Disputing Party Position

825. Canada's position is set out in paragraphs 373 *et seq.* above

(2) The Tribunal's Analysis

826. The Tribunal does not accept Colombia's construction of Article 2201(3).⁸³⁹

827. Pursuant to Article 31(1) of the VCLT, the Tribunal's task is to interpret this provision "*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*"⁸⁴⁰

828. The Preamble to the FTA details, *inter alia*, that its object and purpose is to ensure a predictable commercial framework for business planning and investment in a manner that is consistent with environmental protection and conservation.⁸⁴¹ Canada accepts that "*the Parties [to the FTA] did not view their investment obligations as being at odds with the protection of [...] their environment and human rights obligations.*"⁸⁴² and that "*trade and environment policies are mutually supportive [...]*".⁸⁴³ In determining the ordinary meaning of Article 2201(3) it is therefore necessary to understand, as has been held by the Tribunal,

⁸³⁹ See Respondent's Memorial, paras. 155-163; Respondent's Counter-Memorial, Section VI.D; Respondent's Reply, paras. 123-126; Respondent's Rejoinder, Section IV.C.1; Respondent's Post-Hearing Brief, paras. 44- 49.

⁸⁴⁰ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S 331 (**Exhibit CL-3**).

⁸⁴¹ Free Trade Agreement between Canada and the Republic of Colombia (signed on 21 November 2008 and entered into force on 15 August 2011) (**Exhibit C-22**; see also **Exhibit R-137**).

⁸⁴² Canada's Non-Disputing Party Submission, para. 24.

⁸⁴³ Canada's Non-Disputing Party Submission, para. 25.

that neither environmental protection nor investment protection is subservient to the other, they must co-exist in a mutually beneficial manner.

829. In the context of the FTA's object and purpose, the Tribunal construes Article 2201(3) as being permissive, ensuring a Party is not prohibited from adopting or enforcing a measure to protect human, animal or plant life and health, provided that such measures are not arbitrary or unjustifiably discriminatory between investment or between investors or a disguised restriction on international trade or investment. Such a construction is consistent with the FTA's objective of environmental protection: by prohibiting an investor from applying for restitution pursuant to Article 834(2)(b), the State is not precluded from adopting or enforcing the measure in question. Equally, however, there is no provision in Article 2201(3) permitting such action to be taken without the payment of compensation. Given that the FTA is equally supportive of investment protection, had it been the intention of the Contracting Parties that a measure could be taken pursuant to Article 2201(3) without any liability for compensation, the Article would have been drafted in similar terms as Annex 811(2)(b), namely making explicit that the taking of such a measure would not give rise to any right to seek compensation under Chapter Eight. In this regard, it is of note that there is no reference in Article 2201(3) to claims for breaches of the FTA. Indeed, given that the Contracting Parties drafted other provisions, such as Annex 811(2)(b), to include an express stipulation as to the circumstances in which a measure is not to constitute a treaty breach, 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).
830. The Tribunal therefore construes Article 2201(3) such that whilst a State may adopt or enforce a measure pursuant to the stated objectives in Article 2201(3) without finding itself in breach of the FTA, this does not prevent an investor claiming under Chapter Eight that such a measure entitles it to the payment of compensation.
831. This construction comports with Colombian constitutional law (as described above). Further, if all measures that were not arbitrary, not unjustifiably discriminatory between investment or between investors or were not a disguised restriction on trade and which were taken to protect the environment gave rise to no liability on the part of the State, it would

render certain provisions of Chapter Eight redundant. For example, the reference to environmental measures in Article 807(2) would be otiose. Such a construction also conflicts with Annex 811(2)(b) which expressly acknowledges that in certain circumstances a measure taken for the protection of the environment may constitute indirect expropriation. If Colombia's construction were correct, there would be a clear conflict between Article 2201(3) and Annex 811(2)(b): a State would refer to Article 2201(3) asserting that as a result it had no liability to pay any compensation, whereas the investor would refer to Annex 811(2)(b) in support of its right to claim damages. Colombia did not explain this inconsistency.

832. Colombia also provided no justification as to why it is necessary for the protection of the environment not to offer compensation to an investor for any loss suffered as a result of measures taken by Colombia to protect the environment, nor explained how such a construction would support the protection of investment in addition to the protection of the environment.
833. The Tribunal's interpretation is reinforced by the title of this Article, namely "General Exceptions" and the fact it expressly refers to being an exception to Chapter Eight. To be an exception to Chapter Eight must equally mean there are applicable provisions in Chapter Eight, such that there must be circumstances in which an investor needs to seek recourse to arbitration with respect to a measure which comes with the meaning of Article 2210(3), which can only be to claim compensation for losses suffered as a result of such measure.
834. The Tribunal's analysis is supported by the decision of the tribunal in *Bear Creek* which considered an identical provision. Whilst Colombia refers to this as a single decision,⁸⁴⁴ this does not lessen its validity as supporting the Tribunal's construction of the provision.⁸⁴⁵

⁸⁴⁴ Respondent's Rejoinder, para. 466.

⁸⁴⁵ The second case cited by Eco Oro, *Infinito*, relates only to whether Article 2201(3) acts as a jurisdictional hurdle and is therefore of no relevance to this issue.

835. The Tribunal’s analysis is further supported by the provisions of Articles 27(b) and 36(1) of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (“**ILC Draft Articles**”),⁸⁴⁶ which establish as follows:

“Article 27

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.

[...]

Article 36

Compensation

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.”

836. Canada, in its non-disputing party submission, says that if the measure in question meets the requirements of Article 2201(3) then “[...] *there is no violation of the Agreement and no State liability. Payment of compensation would therefore not be required.*”⁸⁴⁷ Whilst the Tribunal accepts that the State cannot be prohibited from adopting or enforcing an environmental measure in accordance with Article 2201(3), it cannot accept Canada’s statement that in such circumstances payment of compensation is not required. This does not comport with the ordinary meaning of the Article when construed in the context of the FTA as a whole and specifically in the context of Chapter Eight, as analysed in the preceding paragraphs.

⁸⁴⁶ International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (2001) (**Exhibits CL-17 / CL-202 / RL-115**). See also Claimant’s Rejoinder, para. 208; Claimant’s Post-Hearing Brief, para. 117.

⁸⁴⁷ Canada’s Non-Disputing Party Submission, para. 16.

837. Accordingly, the Tribunal does not find that Article 2201(3) operates to exclude Colombia's liability to pay compensation to Eco Oro for its damages suffered as a result of Colombia's breach of Article 805.

VIII. DAMAGES

838. Article 834(2) to (4) of the Treaty provides as follows:

“2. Where a Tribunal makes a final award against the disputing Party, the Tribunal may award, separately or in combination, only:

- (a) monetary damages and any applicable interest;*
- (b) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution.*

The Tribunal may also award costs and attorney's fees in accordance with this Section and the applicable arbitration rules.

3. Subject to paragraph 2, where a claim is made under Article 820:

- (a) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise;*
- (b) an award of restitution of property shall provide that restitution be made to the enterprise; and*
- (c) the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law.*

4. A Tribunal may not order a disputing Party to pay punitive damages.”

A. CAUSATION

(1) The Parties' Positions

(a) Respondent's Position

839. Pursuant to Article 31 of the ILC Draft Articles, Colombia is only required to make full reparation for damage “*caused by*” the wrongful act.⁸⁴⁸ Eco Oro must adduce “*persuasive*

⁸⁴⁸ International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (2001) (Exhibits CL-17 / CL-202 / RL-115).

evidence” that its loss was proximately caused by Colombia’s actions.⁸⁴⁹ This, Eco Oro has failed to do.

840. Firstly, as explained in detail in Colombia’s submissions on the merits, at the time the FTA came into force a mining ban was in existence over 54% of the Concession area such that the value of Eco Oro’s Concession was already compromised and the post cut-off date measures did not cause any further loss.

841. Secondly, the burden is on the Claimant to prove the certainty of its damages but Eco Oro’s claim is inherently speculative. The Angostura Project did not progress beyond the conceptual exploratory stage despite approximately twenty years of exploration activities, the asset was non-operative at the time of the alleged wrongful conduct and Eco Oro had no acquired right to exploit. The Discounted Cash Flow (“DCF”) calculation performed by Golder Associates (“Golder”) in Eco Oro’s Preliminary Economic Assessment (“PEA”) purporting to show the economic viability of the Angostura Project is “*utterly flawed and speculative*”.⁸⁵⁰ Colombia’s underground mining expert, Mr. Johnson, adjusted Golder’s DCF to correct for its flaws, to show the Angostura Project yielded a negative net present value. Mr. Johnson’s assessment is corroborated by the economic behaviour of actual buyers. Thus, Eco Oro has failed to discharge its burden of proving the economic viability of the Angostura Project.

842. It is not to the point that the cases on which Colombia rely for its proposition that damages should not be awarded for “speculative” projects all relate to damages calculated on a DCF and not fair market value basis: Behre Dolbear’s expert opinion as to the viability of the Angostura Project is based on a DCF calculation performed by Golder in Eco Oro’s PEA.

⁸⁴⁹ Respondent’s Counter-Memorial, paras. 441 *et seq.* citing to *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (13 November 2000) (**Exhibit RL-55**), para. 316; *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award (24 December 2007) (**Exhibit CL-45**), para. 428; *Metalclad*, Award (30 August 2000) (**Exhibit CL-15**), para. 115; *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits (24 May 2007) (**Exhibit RL-73**), para. 38. See also S. Ripinsky & K. Williams, *Damages in International Investment Law* (2008) (**Exhibit RL-120**); and *Hoffland Honey Co. v. National Iranian Oil*, Case No. 495, Award (1983 – Vol. 2), Iran-U.S. CTR 41 (**Exhibit RL-47**), p. 2.

⁸⁵⁰ Respondent’s Rejoinder, para. 487.

843. Thirdly, Eco Oro has failed to show that it could have secured an environmental license to allow it to undertake mining exploitation activities. Pursuant to the General Environmental Law, Colombia's licensing authorities were legally prohibited from issuing environmental licenses for mining exploitation activities where those activities could cause harm to the páramo. Given the relevant authorities' strict application of the precautionary principle, it was "*highly improbable*" that Eco Oro would have been able to satisfy the ANLA and other relevant authorities that either an underground or open pit large scale mining project could cause no harm to the páramo such that but for Colombia's actions it would have secured an environmental licence.
844. Eco Oro is basing its claim for damages on a "*remote hypothetical possibility that it may have, somehow, been able to prepare a viable plan, obtain all necessary licenses and permissions, and proceeded to extract minerals profitably.*"⁸⁵¹ There can be no liability for damages.

(b) Claimant's Position

845. Eco Oro refers back to its detailed arguments with respect to the merits. Firstly, there was no mining ban in force at the time the FTA entered into force. Secondly, it had an acquired right to exploit notwithstanding that its exercise required fulfilling certain legal requirements such as obtaining an environmental license. Thirdly, it is for Colombia to prove that Eco Oro would not have successfully applied for an environmental licence and given Colombia has issued environmental licenses in páramo areas since the General Environmental Law, Colombia's argument as to the manner in which the General Environmental Law and the precautionary principle will be applied cannot be correct. In any event, the Angostura Project is not located in páramo as is demonstrated by the ECODES report and it is the wrongful manner in which Colombia delimited the Santander Páramo that has deprived Eco Oro of the right to attempt to meet the applicable environmental licensing requirements.
846. Finally, the Angostura project was not speculative. Eco Oro was a going concern at the time of the Challenged Measures and Mr. Rossi confirmed in his testimony that "[...] *there* [are]

⁸⁵¹ Respondent's Counter-Memorial, para. 451.

reasonable prospects for eventual economic extraction".⁸⁵² The valuation methodology applied by Compass Lexecon factors in the risk factors associated with the stage of development of the Angostura Project by using comparable companies in a similar or earlier stage of development. The cases referred to by Colombia all relate to damages claimed using a DCF income-based approach which is not the approach adopted by Eco Oro.

(2) The Tribunal's Analysis

847. By a majority, the Tribunal finds that Colombia's breach of Article 805 entitles it to make a claim for damages in respect to any loss that it can show to have been caused as a result of that breach.
848. The Tribunal has found that there was no mining ban in existence at the time the FTA came into force. The Tribunal has further found, by a majority, that Eco Oro had an acquired right to exploit, albeit such right could only be exercised upon its PTO being approved and upon obtaining an environmental licence to allow it to engage in exploitation. It is common ground that in absence of such a license Eco Oro could not engage in any exploitation. The Tribunal further does not find, by a majority, that Eco Oro's claim is necessarily speculative; Colombia has not shown that no environmental licences were issued for mining activities in páramo areas since the General Environmental Law came into force such that the precautionary principle cannot be said to apply, or that Eco Oro had no prospect whatsoever of obtaining an environmental licence.
849. Finally, the Tribunal does not accept, to the extent it is pleaded by Colombia, that it was Eco Oro's intervening acts and omissions that caused its loss, that the casual link has been broken by Eco Oro's renunciation. To the extent that Eco Oro is able to establish that it has suffered losses as a result of the breach of Article 805, such losses will have been incurred before the renunciation of the Concession and the renunciation was effected by Eco Oro in order to mitigate its continuing losses as detailed in its letters to MinMinas and MinAmbiente.⁸⁵³

⁸⁵² Tr. Day 5 (Mr. Rossi), 1302:14-1303:4.

⁸⁵³ Letter from Eco Oro (Mr. Orduz) to the Ministry of Mining and Energy (Ms. Suárez) (29 March 2019) (**Exhibit C-423**); Letter from Eco Oro (Mr. Orduz) to Ministry of Environment (Mr. Lozano) (29 March 2019) (**Exhibit C-424**).

B. WHETHER ECO ORO IS ENTITLED TO FULL REPARATION BASED ON FAIR MARKET VALUE

(1) The Parties' Positions

(a) Claimant's Position

(i) Appropriate Methodology

850. The only provision in the FTA relating to the standard of compensation is Article 811(2) with respect to lawful expropriation. Eco Oro therefore turns to customary international law principles as contained in Articles 31, 35 and 36(1) of the ILC Draft Articles.⁸⁵⁴ These provide for “*full reparation*” which, where restitution is not possible, entails “[...] *an obligation to compensate for the damage caused* [...]”.
851. Full compensation should be assessed on the basis of the resultant diminution of the fair market value of the affected asset. This is the appropriate methodology for valuing the loss caused by both a breach of Article 811 and Article 805 of the FTA.
852. An income-based valuation methodology is not appropriate; although a preliminary economic assessment has been prepared, on the basis of which Behre Dolbear concludes the Angostura Project would be economically viable, no final plans had been made as to the development of the project and there is insufficient certainty for a feasibility study. Where a project is at an early development stage, such as this, the necessary inputs cannot be established with sufficient precision and an income-based valuation is not the preferred valuation approach.⁸⁵⁵
853. In the precious metal mining industry a company's primary value driver is the volume of extractable minerals it has the right to exploit and, consistent with the industry-specific guidance given by the Canadian Institute of Mining, Metallurgy and Petroleum (“**CIM**”) special committee on Valuation of Mineral Properties in its Standards and Guidelines for

⁸⁵⁴ International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (2001) (**Exhibits CL-17 / CL-202 / RL-115**).

⁸⁵⁵ Claimant's Memorial, para. 385, citing to *Waguïh Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (1 June 2009) (**Exhibit CL-58**), para. 570; and *Bear Creek*, Award (30 November 2017) (**Exhibit CL-91**), para. 600.

Valuation of Mineral Properties (“**CIMVAL**”),⁸⁵⁶ the fair market value methodology is the preferred approach for a property at the stage of development that the Angostura Project was at.

854. Calculating the fair market value on the basis of Eco Oro’s market capitalisation is unreliable. Firstly, at the Valuation Date, the market had already priced in the negative effect of key aspects of the Challenged Measures such that the market capitalisation cannot be used to derive a fair market value. Secondly, Eco Oro’s stock is thinly traded and highly illiquid.
855. Colombia’s arguments as to other tribunal’s concerns as to the validity of a market-based assessment are not applicable here: it is unnecessary to consider a hypothetical buyer as data is available relating to three genuinely comparable market transactions (the “**Comparable Transactions**”).

(ii) The comparable transactions valuation

856. The Comparable Transactions used are three purchases by AUX Canada of the outstanding shares *(i)* in March 2011 of Ventana Gold Corporation (“**Ventana**”) which held the rights to develop mining titles located in the California-Vetas Mining District including the La Bodega and La Mascota deposits (the “**Bodega Project**”); *(ii)* in December 2012 of Galway Resources Ltd. (“**Galway**”) which held 14 mining titles in the California-Vetas Mining District; and *(iii)* also in December 2012, of Calvista Gold Corporation (“**Calvista**”) which held the rights to 12 mining titles again in the California-Vetas Mining District (the “**Comparable Companies**”). Whilst all three are comparable, the Bodega Project is the most similar to the Angostura Project in terms of size and mineralisation.
857. The comparability can be seen as they each concern mining properties *(i)* located directly adjacent to and landlocked by Concession 3452 on an eleven kilometre continuous mineralized stretch of land starting in California and ending at the far end of the Angostura deposit; *(ii)* at similar or earlier stages of development than the Angostura Project; *(iii)* in the case of the largest Comparable Transaction, involves an underground project similar to the

⁸⁵⁶ CIMVAL, Standards and Guidelines for Valuation of Mineral Properties (February 2003) (**Exhibit C-85**). See also Victor Rudenno, *The Mining Valuation Handbook*, 4th ed. Milton, Australia: John Wiley & Sons (2012) (**CLEX-74**), pp. 284-288.

one projected for Angostura; and (iv) owned by publicly traded Canadian companies subject to the same regulatory reporting requirements as Eco Oro. Indeed, the extreme level of comparability can be demonstrated in respect of each of the ten “*modifying factors*” identified by the Committee for Mineral Reserves International Reporting Standards (“**CRIRSCO**”) in its International reporting Template.⁸⁵⁷ They are all independently identified as “*adjacent properties*” to each other in their respective NI 43-101 reports meaning they have “*geological characteristics similar to those of the property being reported on*”.⁸⁵⁸ The comparability of these properties answers the concerns raised by the tribunal in *Khan Resources v. Mongolia*⁸⁵⁹ and is consistent with the approaches in a number of recent cases, such as *Windstream v. Canada*.⁸⁶⁰ This addresses Mr. Rossi’s concerns as to the mineralization differences between the three projects.

858. The Comparable Transactions build in equivalent social and political risk market perception and variations in broader economic conditions affecting gold mining companies that can be accounted for by adjusting prices using the Junior Gold Mining Index. Indeed, CRA advances a methodology that is practically identical, but uses additional comparable transactions in addition to the three chosen by Compass Lexecon.
859. It is of note that whilst Colombia’s expert, CRA, says that the Comparable Transactions are not appropriate to be used for valuation purposes, it uses them when calculating its Valuation Multiple. The other nine transactions and companies used by CRA have underlying properties that are not as comparable to the Angostura Project or are not appropriate to be used for valuation purposes with four subject to different economic, political and social

⁸⁵⁷ Committee for Mineral Reserves International Reporting Standards (CRIRSCO), International Reporting Template for the Public Reporting of Exploration Results, Mineral Resources and Mineral Reserves (November 2013) (**Exhibit C-190**), pp. 9-10.

⁸⁵⁸ Canadian Securities Administrators, National Instrument 43-101, Standards of Disclosure for Mineral Projects (2011 version), with Form 43-101F1 (January 2011) (**Exhibit BD-18**), section 1.1. See also Samuel Engineering, “Preliminary Assessment: La Bodega Project Prepared for Ventana Gold Corp” (8 November 2010) (**Exhibit C-134**); SRK Consulting (US), Inc., NI 43-101 Technical Report on Resources: California Gold-Silver Project Report Prepared for Galway Resources (25 October 2012) (**Exhibit C-168**); and Scott Wilson Mining, Technical Report on the California Project for Calvista Gold Corporation (17 January 2011) (**Exhibit C-143**).

⁸⁵⁹ *Khan Resources Inc., Khan Resources B.V. and CAUC Holding Company Ltd. v. Government of Mongolia*, PCA Case No. 2011-09, Award on the Merits (2 March 2015) (**Exhibit RL-97**), para. 399.

⁸⁶⁰ *Windstream Energy LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2013-22, Award (27 September 2016) (**Exhibit CL-88**).

contributions and risk factors, for example a distressed asset in Ecuador, an operation in China with dissimilar reporting requirements, and four significantly smaller North American transactions with vastly different mineralization than that at the Angostura Project.

860. In calculating the value of the Angostura Project, Compass Lexecon first computes a per-ounce value for the volume of extractable minerals Eco Oro had the right to exploit (“**Extractable Minerals**”) based on values ascribed by the market to other comparable projects. Eco Oro and the Comparable Companies, being publicly traded Canadian mining companies, report in a standardized manner pursuant to the guidelines established in NI 43-101.⁸⁶¹ Such NI 43-101-compliant reports are authored by a recognised Qualified Person and the authors of the reports relied upon by Eco Oro are independent of Eco Oro. NI 43-101-compliant reports are considered in the industry to be “*rigorous and inherently reliable*”.⁸⁶² Eco Oro and the Comparable Companies report their Extractable Minerals in such NI 43-101-compliant reports such that there is a common basis for comparing them and the Comparable Companies each published NI 43-101-compliant Extractable Minerals estimates just prior to their sales.
861. Behre Dolbear have reviewed the estimates prepared by Golder in 2012, Micon International Limited in 2015 and Eco Oro itself in 2017 and concludes that Eco Oro’s resource base of the Weighted Gold Ounce Equivalent is 2.97 million ounces of gold. Colombia’s expert Mr. Rossi’s criticism of Behre Dolbear’s inclusion of a value for Extractable Minerals below the selected cut-off grade is not valid. There are circumstances where an operator will extract resources below the cut-off grade and further Ventana’s Board of Directors persuaded its shareholders to reject AUX’s initial offer on the basis, *inter alia*, that it did not take into account the fact that “[h]igher commodity prices effectively result in a greater proportion of the deposit being economically mineable, resulting in a lower cut-off grade and a meaningful

⁸⁶¹ Canadian National Instrument 43-101 on Standards of Disclosure for Mineral Projects (*NI 43-101*) (June 2011) (**Exhibit C-152**); Ontario Securities Commission, Under the Securities Act National Instrument 43-101, Standards of Disclosure for Mineral Projects, Form 43-101F1, Technical Report, and Companion Policy 43-101CP (17 November 2000) (**Exhibit C-78**).

⁸⁶² Claimant’s Memorial, para. 394; First Behre Dolbear Report, para. 55.

increase in the resource.”⁸⁶³ Some value should be ascribed to such lower grade materials, albeit significantly discounted vis-à-vis the materials at or above grade.

862. Further, Colombia’s argument that a deduction should be made for those resources that fall outside the Preservation Zone of the 2090 Delimitation must fail given that the totality of Concession 3452 was rendered valueless as a result of the prevailing uncertainty.
863. Having computed an adjusted transaction enterprise value for each of the Comparable Companies to capture all market changes between the dates each transaction took place as against the Valuation Date, Compass Lexecon then derives a common denominator (the Weighted Gold Ounce Equivalent) to apply across the three transactions given each of the Comparable Companies and Eco Oro have differing amounts of mineral material divided amongst different mineral resource categories (measured, indicated and inferred). Proven and probable reserves are valued at 100%, measured and indicated resources have a weighting of 50% and inferred resources have a weighting of 25%. Such weightings are used practically uniformly in the mining industry. Compass Lexecon also converts other extractable minerals (such as silver and copper) to a Weighted Gold Ounce Equivalent by dividing the volume of declared minerals by the ratio of the gold price to the applicable silver or copper price prevailing on the date of the transaction.
864. The effective price paid per ounce of Extractable Minerals is ascertained by dividing the Adjusted Transaction Enterprise Value by the Weighted Gold Ounce Equivalent (the Valuation Multiple) and this figure is multiplied by the Weighted Gold Ounce Equivalent of Eco Oro’s Extractable Minerals.
865. This method has been approved by the Tribunal in Crystallex as being a method which is “[...] *widely used as a valuation method of businesses, and can thus be safely resorted to, provided it is correctly applied, and, especially, if appropriate comparables are used.*”⁸⁶⁴

⁸⁶³ Ventana Gold Corp., Director’s Circular Recommending Rejection of the Offer by AUX Canada Acquisition Inc. of Ventana Gold Corp. (22 December 2010) (**Exhibit C-141**), p. 2.

⁸⁶⁴ *Crystallex*, Award (4 April 2016) (**Exhibit CL-85**), para. 901.

866. Compass Lexecon has calculated the price paid by AUX per Weighted Gold Ounce Equivalent, the Valuation Multiple, for each of the three transactions as follows: for the Ventana transaction, USD 366 (and it should be noted that the Bodega Project is now operating under the ownership of Minesa (a Mubadala subsidiary) with declared resources in 2017 of 10.2 million ounces of gold and 58.6 million ounces of silver); for the Galway transaction, USD 196; and for the Calvista transaction, USD 45.
867. Compass Lexecon then computes a weighted average of the three Valuation Multiples based on the relative Weighted Gold Ounce Equivalent at each property (Ventana 1.57 million ounces, Calvista 0.80 million ounces and Galway 0.83 million ounces) to reach a Valuation Multiple of USD 242 per ounce of Weighted Gold Ounce Equivalent. Compass Lexecon then sense-check this figure by benchmarking it against the multiples implied by the market capitalisation of publicly traded companies similarly placed to Eco Oro and show that it is a reasonable metric, falling between the median and the 7th percentile of the observed market multiples.
868. Compass Lexecon then multiplies Eco Oro's resource base of the Weighted Gold Ounce Equivalent (2.97 million ounces of gold as determined by Behre Dolbear) by the Valuation Multiple to reach a valuation of USD 696 million (having adjusted to account for certain private royalty agreements).

(iii) Colombia's proposed market capitalisation methodology

869. Colombia's market capitalisation methodology was only submitted in Colombia's Rejoinder. Whilst Compass Lexecon does not accept that Colombia's proposed methodology is correct given the early development stage Eco Oro was at, it does agree that the three steps proposed by CRA are the correct steps to undertake a market capitalisation valuation, namely: *(i)* selection of the base date or last clean date and ascertain the market capitalisation at that date; *(ii)* adjustment by reference to how the mining industry would have evolved up to the valuation date using the Junior Gold Mining Index; and *(iii)* make any necessary additional adjustments to reflect such specific factors relating to Eco Oro as may not have been captured by the Junior Gold Mining Index.

870. CRA has not, however, correctly followed these steps in its valuation; it has used data that is not market based. For example, instead of ascertaining Eco Oro's market capitalisation on the base date, (23 April 2010), it takes Eco Oro's enterprise value instead, a sum that is USD 80 million lower as a result of cash held by Eco Oro for further investment. Further, it has made adjustments on the basis of the differential production size between Eco Oro's 2009 technical report which included a PEA prepared in anticipation of an open-pit mine and the 2012 Golder Report which was prepared on the basis of an underground mine; this has no relevance to an inference in the stock price value. CRA have also made no adjustment for the difference between a minority stake in a stock market transaction with a very small flotation percentage and the controlling stake.
871. CRA should have reviewed all market news and press releases between the base date and the date on which the Golder underground resources were announced to give the market impact of that assessment compared to the evolution generally in the junior gold mining industry. Any adjustment to Eco Oro's market capitalisation should have been effected on the basis of that public news, calculated by Compass Lexecon to give rise to a reduction in value of Eco Oro's stock of 14.7%, which means a market capitalisation of USD 251 million. This then needs further adjustment as it is the value of a minority stock. A 40% acquisition premium should be applied to give a market capitalisation of USD 351 million for a controlling stake and a USD 350 million enterprise value.

(iv) *Valuation date*

872. Eco Oro's loss is its total loss of value in its investment pursuant to NMA Resolution VSC 829 on 8 August 2016 being the date when "*the interference has ripened into a more or less irreversible deprivation of the property rather than on the beginning date of the events.*"⁸⁶⁵
873. Colombia's argument that the valuation date should be either 19 December 2014 (the date of the 2090 Resolution) or 8 February 2016 (the issuing of Judgement C-35) should be ignored: neither of these measures had the effect of irreversibly depriving Eco Oro of its rights and having instead been chosen on the basis of the prevailing (adverse) market

⁸⁶⁵ Claimant's Reply, para. 552.

conditions (the Junior Gold Miners Total Return Index being 46.1 and 44.9% of the value on Eco Oro's identified valuation date).

874. The only possible alternative valuation date is 1 April 2019 when the NMA rejected Eco Oro's requests for a suspension of obligations and a request for the filing of its PTO.

(b) Respondent's Position

875. The burden is on the Claimant to prove the certainty of its damages⁸⁶⁶ and Eco Oro's claim is inherently speculative. The Angostura Project never progressed beyond the conceptual level, despite approximately twenty years of exploration activities and was non-operative at the time of the alleged wrongful conduct with limited, if any, economic value. This is evidenced by the fact even before the Challenged Measures, Eco Oro's enterprise value had fallen below USD 20 million. There can be no liability to compensate for speculative or uncertain damage.⁸⁶⁷

(i) Appropriate methodology

876. CRA refers to the valuation standards and methodologies developed by CIMVAL which provide for three main approaches: market, income and cost-based.⁸⁶⁸ Other tribunals have held that for single-asset, publicly traded companies, the most reliable valuation approach is to value the asset on the basis of the actual share price of the company as of the relevant valuation date⁸⁶⁹ and CRA adopts the market approach applying actual market data. It is incontrovertible that the price actually paid for an asset in the market is inherently more reliable as an indicator of value than the price paid for other assets. Eco Oro's concerns as

⁸⁶⁶ *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/3 ("**Gemplus**"), Award (16 June 2010) (**Exhibit CL-64**), paras. 12-56. See also S. Ripinsky, K. Williams, *Damages in International Law* (2015) (**Exhibit RL-130**), p. 162.

⁸⁶⁷ *Rudloff Case* (US v. Venezuela) 1903-1905, IX RIAA 255 (**Exhibit RL-44**), p. 258; *Amoco International Finance v. The Islamic Republic of Iran* (1987 – Vol. 15), Iran-US CTR 189 (**Exhibit RL-49**), para. 238; *LG&E Energy Corp. et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award (25 June 2007) (**Exhibit RL-74**), para. 51; *Gemplus*, Award (16 June 2010) (**Exhibit CL-64**), paras. 12-56.

⁸⁶⁸ First CRA Report, para. 39.

⁸⁶⁹ Respondent's Rejoinder, fn. 799; S. Ripinsky & K. Williams, *Damages in International Investment Law* (2008) (**Exhibit RL-164**), p. 189, citing *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award (27 June 1990) (**Exhibit CL-9**), para. 96; *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award (12 May 2005) (**Exhibit CL-31**), para. 403.

to the illiquidity of its stock issue are not valid; Eco Oro's stock was traded with sufficient frequency and volume to be reliable for valuation purposes.

877. The definition of fair market value is “*the price that a willing buyer would normally pay to a willing seller of the investment, after taking into account all relevant circumstances such as the nature and duration of the investment.*”⁸⁷⁰ Given the consequences of the existence of the páramo, no willing buyer would have valued the Angostura Project using the methodology applied by Eco Oro. Compass Lexecon relies instead upon an “*approach of valuation by inference from the known values of ‘comparable’ assets.*”⁸⁷¹ Such a comparables analysis should only be used as a reasonableness check against other valuation methods and not as the primary methodology.
878. As the economic viability of the Angostura Project has not been established, the market multiples methodology is “*highly conjectural*”. Any reasonable (hypothetical) buyer would assess the technical and economic viability of the Angostura Project, an exercise Compass Lexecon has not undertaken. The only available analysis is Eco Oro's PEA which is insufficient and does not show the project's viability. Indeed, the document notes it is only a “[...] *preliminary assessment based on conceptual mine plans and process flowsheets.*” Mr. Johnson confirms that reasonable potential purchasers would not rely on a PEA when considering an acquisition or investment into a junior mining company, being considered no more than a “*scoping study*”.⁸⁷² A serious buyer would develop its own technical due

⁸⁷⁰ World Bank, “Legal Framework for the Treatment of Foreign Investment” (1992) (**Exhibit CRA-42**), p. 26. Reference is also made to Eco Oro's reliance upon the definition of fair market value adopted by the Iran-US Claims Tribunal in *Starrett*, which provides: “*the price that a willing buyer would pay to a willing seller in circumstances in which each had good information, each desired to maximize his financial gain, and neither was under duress or threat. [The expert] appropriately assumed that the willing buyer was a reasonable businessman.*” See *Starrett Housing Corporation, Starrett Systems, Inc, and Others v. The Government of the Islamic Republic of Iran, Bank Markazi Iran, and Others*, Iran-US Claims Tribunal Case No. 24 (“*Starrett*”), Final Award (14 August 1987) (**Exhibit CL-7**), para. 277.

⁸⁷¹ First CRA Report, paras. 45-46.

⁸⁷² Johnson Report, paras. 26-27 (“*As per the Toronto Stock Exchange and the Ontario Securities Commission, only a Prefeasibility Study (‘PFS’) could give a ‘reasonable expectation’ of the technical and economic viability of a mining project. A PFS can give an understanding, in relation to a mining project of: a) ‘What it should be’ – (i.e. ‘a strong belief’). b) Realistic economic and engineering studies sufficient to demonstrate economic viability and establish mineral reserves. c) To have a cost accuracy of +/- 25%. d) To have engineering detail of 1 to 5%.*”) and 187 (“*No reasonable buyer or valuer would rely on the results of a PEA to place value on a Mineral Project, especially that of a Junior Mining Company. Buyers are aware that the seller is motivated to view their project through ‘rose-colored glasses’, to maximise the perceived value of the*

diligence to estimate the resources and viability of the project. In the absence of any such due diligence from Behre Dolbear or Compass Lexecon, Eco Oro cannot be said to have proved its loss.

879. Even were a PEA reliable for the purposes of a potential acquisition, Behre Dolbear's resource estimation cannot be relied upon. It merely endorses reports prepared by third-party consultants (and as argued with respect to causation, the Golder PEA is not reliable), and a non-NI 43-101-compliant report prepared by Eco Oro itself, without carrying out any actual analysis themselves. NI 43-101 reports are just "*marketing tools*" with a "*significant bias towards optimism*" and are "*not accepted at face value, not even by securities regulators*".⁸⁷³ Behre Dolbear also inflates Eco Oro's alleged loss by: (i) including "*low grade resources*" and ascribing a value to them; (ii) the use of weighting factors for the different categories of reserves which are not used in the mining industry; and (iii) wrongfully ascribing value to Exploration Potential.

880. Thus, Eco Oro cannot show that any reasonable purchaser would have had a reasonable expectation that the Angostura Project would have been viable.

(ii) *Market capitalisation*

881. Whilst CRA adopts the market approach, it does so on the basis of the actual market data; CRA follows a three-step process. Firstly, CRA selects a date that predates the market's awareness, then it projects the market capitalisation forward to the valuation date by reference to the movement in price of the market index for listed junior mining companies between the chosen date and the valuation date. This resolves any concern that the market had already priced in the effect of the Challenged Measures.

882. Colombia has calculated Eco Oro's market capitalisation on the basis of the following base dates or last clean dates: (i) 23 April 2010 being the last trading day prior to the date on which Eco Oro publicly disclosed that its EIA licence application had been rejected due to

Mineral Project, in the case it is a motivated seller or is seeking to attract capital investment." See also Mining Disclosure: NI 43-101 fundamentals, best practices, and useful guidance for TSX and TSX Venture issuers (4 March 2015) (**Exhibit CJ-3**).

⁸⁷³ First Rossi Report, paras. 129-141.

concerns with regard to the presence of páramo and is the last day on which the market had not anticipated and priced the possibility of any of Colombia's measures; (ii) 18 December 2014 being the day before Resolution 2090 was adopted; (iii) 6 September 2013 being the closest trading day to the cut-off date, 8 September 2013; and (iv) 1 August 2011, the closest trading day to the day the FTA entered into force on 15 August 2011. These calculations show market capitalisation ranging between USD 13.79 million and USD 77.53 million depending on which base date and valuation date are applied. Colombia contends that if damages are to be awarded, the correct base date is 6 September 2013.

883. The second step is to adjust the calculated market capitalisation by reference to the Junior Gold Mining Index to take account of how the industry would have evolved from the base date to the valuation date.
884. The third step is a further adjustment of the market capitalisation to take account of any company specific factors that may not be captured by the evolution of junior gold mining index. This gives rise to a market capitalisation of USD 78 million on Colombia's preferred base and valuation dates.
885. However, this valuation is for the entire area of the Concession and the residual value of that part of the deposit not impacted by Resolution 2090 should be deducted, namely 47.7% of the total Concession area under which is estimated to be approximately 40% of the total resource.⁸⁷⁴ Eco Oro has not adduced any technical or expert evidence to show that no project was viable in that part of the Concession which did not overlap the páramo and there was no uncertainty with respect to the ability to mine in the non-overlapping part of the concession.

(iii) Eco Oro's Comparable Transactions approach

886. The methodology adopted by Compass Lexecon is speculative and unreliable.
887. The three Comparable Companies identified by Compass Lexecon are not sufficiently comparable to the Angostura Project. It is rare in the mining industry to find assets that are

⁸⁷⁴ First Rossi Report, paras. 233, 236.

closely comparable. The fact that the deposits are on the same mineralised trend does not of itself make them comparable as deposits and trends are “*complex*” and “*generally exhibit significant differences in short distances*”.⁸⁷⁵ The area where the Angostura Project is located is the subject of extreme variation over a short distance and has a “*complex array of veins, unique to the Angostura deposit*”⁸⁷⁶ as a result of events before, during and after mineralisation. There are significant differences between Angostura and La Bodega and even considerable geotechnical variation within the La Bodega Project. There are also differences with Galway and Calvista has a different deposit type, containing “*breccias*” as opposed to “*veins*”.⁸⁷⁷ The fact there are differences between the Comparable Transactions is evident from the fact the per-ounce price paid for each is significantly different, ranging from USD 78 to 546 per ounce.⁸⁷⁸

888. The Comparable Companies are also not genuinely comparable because the relevant transaction dates were in 2010 and 2011, significantly before Eco Oro’s asserted valuation date, potentially giving rise to significant additional errors. Finally, three comparables is insufficient, a broader spread is required, particularly where, as here, each transaction involves the same buyer.
889. Compass Lexecon’s analysis is also flawed as not only is the comparable data unreliable, the underlying data from the Behre Dolbear estimate of resources (based on Eco Oro’s 2017 Resource Estimation) has been demonstrated by Mr. Rossi to be unreliable. The significant variation in capital costs between the assets requires adjustment which has not been undertaken and the weighted average approach to the performance values of the Comparable Transactions distorts the multiple in favour of Eco Oro, increasing the Weighted Gold Equivalent Ounce from USD 347 per ounce to USD 407 per ounce giving rise to a 15% inflation in the final valuation.

⁸⁷⁵ First Rossi Report, para. 251.

⁸⁷⁶ First Rossi Report, para. 54.

⁸⁷⁷ First Rossi Report, paras. 275-276.

⁸⁷⁸ Respondent’s Counter-Memorial, para. 483; CRA: Compass Lexecon Transaction Multiples (Undated) (Exhibit CRA-14).

890. Finally, Compass Lexecon's bench-check cannot be relied upon as it is performed against a skewed selection of publicly traded companies that are not comparable to Eco Oro such as companies at a significantly advanced stage with established economic viabilities or in countries with lower country risk, but that notwithstanding, the median (USD 124 per weighted ounce) is still well below Compass Lexecon's valuation of USD 177 per weighted ounce. This is why Compass Lexecon adds a 40% acquisition premium to equal the calculations. There is no place in a fair market valuation for the inclusion of an acquisition premium.
891. Whilst Colombia does not accept the validity of a comparables-based valuation in this factual matrix, it has prepared an alternative valuation based on comparables. Using Eco Oro's resource estimations, CRA examines valuation data from twelve properties globally being the most comparable to the Angostura Project by reason of their inherent characteristics. From this it can be seen that the Galway and Ventana transactions are clear outliers and CRA concludes that the enterprise value of Angostura Project would have been USD 180 million. However, this is not an accurate valuation of Angostura as (i) the data set includes Ventana (which had lower capital and operating costs); (ii) it includes two companies whose development was far more advanced than the Angostura Project; and (iii) most of the companies included were based in countries with lower country risk. It is further of note that a reasonable buyer would have factored in the risks associated with environmental licensing and permitting.

(iv) Valuation Date

892. The correct valuation date should be 19 December 2014, when Resolution 2090 was issued and Eco Oro lost any right to conduct mining exploitation activities in the area of Concession 345 falling within the Resolution 2090 delimitation. Alternatively, 8 February 2016 when Judgement C-35 struck down the transitional regime which Eco Oro says it is entitled to benefit from. Resolution VSC 829 merely confirmed the fact that Eco Oro could not conduct any mining activities in the area delimited by Resolution 2090, it did not impact on the extent of Eco Oro's rights to conduct mining activities. Neither date proposed by Eco Oro has merit; its loss crystallised earlier, at the time of the Challenged Measures.

(2) The Tribunal's Analysis

893. The Tribunal does not have sufficient information at this stage to determine the quantum of damages, if any, that flow from Colombia's breach of Article 805.
894. Given the Tribunal's majority finding that there was a breach of Article 805 of the FTA, it is necessary to ascertain the quantum of loss suffered by Eco Oro as a result of that breach. The Tribunal accepts Eco Oro's submissions that the appropriate standard is full reparation for the loss suffered as a result of the breach, as provided for in the ILC Draft Articles, whilst recognising that the burden is on Eco Oro to establish that loss. Eco Oro does not seek restitution (nor could it given the terms of Article 2201(3) of the FTA). Where restitution is not possible, pursuant to Article 36(1) the ILC Draft Articles, a State's obligation is to pay compensation for the damage caused.
895. What is less clear is the nature and extent of the loss suffered by Eco Oro as a result of Colombia's breach of Article 805. Eco Oro was not able to engage in exploitation without an environmental license, and the breach of Article 805 found by the majority precluded Eco Oro from applying for such a license. The question therefore arises as to whether Eco Oro's loss is limited to the value of the loss of opportunity to apply for an environmental licence, or whether it may also claim for further losses that may be proven to be a direct consequence of the breach? Relatedly, a question arises as to how such losses, if they occurred, are to be valued?
896. The Parties made submissions as to the appropriate methodology for calculating damages. It is common ground that, given the stage at which the Angustura Project had reached, an income-based approach would not be appropriate and that the correct methodology is a market-based methodology. The principles of fair market value are also not in dispute, although the Parties provide slightly different definitions:⁸⁷⁹ in summary a fair market

⁸⁷⁹ See Claimant's Memorial, para. 374, making reference to the definition in *Starrett*, Final Award (14 August 1987) (**Exhibit CL-7**), para. 277: "*the price that a willing buyer would pay to a willing seller in circumstances in which each had good information, each desired to maximize his financial gain, and neither was under duress or threat. [The expert] appropriately assumed that the willing buyer was a reasonable businessman.*"; and Respondent's Counter-Memorial, para. 457, making reference to World Bank, "Legal Framework for the Treatment of Foreign Investment" (1992) (**Exhibit CRA-42**), p. 26: "*the price that a willing buyer would normally pay to a willing seller of the investment, after taking into account all relevant circumstances such as the nature and duration of the investment.*"

valuation determines the price that a willing buyer would pay to a willing seller, after taking into account all relevant circumstances such as the nature and duration of the investment and where neither party is under any duress or threat.

897. The Parties disagree as to how the fair market value should be determined; on the basis of Comparable Transactions (as contended for by Eco Oro) or calculating Eco Oro's market capitalisation (as contended for by Colombia).
898. It is also common ground that there is relatively little actual data in the record before the Tribunal upon which to assess Eco Oro's loss. No Feasibility or pre-Feasibility study was undertaken for Eco Oro's underground mining project for the Angostura Deposit, the PEA it submitted to the Colombian authorities related to the open-pit mine (which it abandoned of its own volition) and there is no equivalent document in relation to the underground tunnel or underground mining. There is also a paucity of independent documentation detailing the nature and quantum of the Angostura Deposit's Extractable Minerals. Colombia itself accepts that, in the absence of the block model, drilling logs, and the information on process metallurgy and process economics, an independent resource estimation cannot be carried out⁸⁸⁰ leaving Eco Oro's NI 43-101 reports as the only source of available data. Equally, the Tribunal is not persuaded by Colombia's market capitalisation methodology in the circumstances of this dispute, particularly given the fact that there was not a significant volume of trade in Eco Oro's stock over the course of the Challenged Measures and the use by CRA of the Junior Gold Mining Index to adjust Eco Oro's market capitalisation as opposed to calculating the impact of the actual market news and press releases publicly available.
899. The Tribunal therefore finds that, of the alternative market basis methodologies put forward by the Parties for determining Eco Oro's loss, as a matter of principle the Comparable Transactions methodology may be preferable. However, the Tribunal is uncertain as to whether – and if so, how – this methodology might be used to value the loss of Eco Oro's

⁸⁸⁰ Respondent's Counter-Memorial, para. 503; First Rossi Report, para. 334.

right to apply for an approved PTO and environmental licence permitting it to engage in exploitation.

900. In preparing its Comparable Transactions analysis, Eco Oro relies on three Comparable Transactions, whereas Colombia relies on twelve. Whilst the Tribunal appreciates the concerns raised by Colombia as to whether Eco Oro's three Comparable Transactions are as similar as contended for by Eco Oro, it seems to the Tribunal that they have more similarity to the Angostura Deposit than those proposed by Colombia. The properties identified by Eco Oro are neighbouring properties on the same mineralised trend, at equally early stages of development (none having obtained environmental licenses), the sellers were each publicly traded Canadian companies and the properties are subject to the same country risk. The Tribunal understands that merely by virtue of the deposits being on the same mineralised trend does not of itself make them comparable and that there is no certainty that there are no geotechnical variations between the deposits under the mining titles held by Galway, Ventana and Calvista and the Angostura Deposit. However, the Tribunal further notes that they were described as "*adjacent properties*" in the NI 43-101 reports, which means the consultant who prepared such reports appears to have taken the view they had similar geological characteristics.
901. The Tribunal accepts that the Comparable Transactions took place several years before the Challenged Measures, but notes that whilst the transactions identified by Colombia are similar from an economic perspective, there are considerable other differences (excluding with respect to Ventana, Galway and Calvista which Colombia includes in its identified comparable properties). In particular, none are in Colombia, which means that the regulatory and other country risks are different (the Tribunal accepts that for some the country risk may be smaller). Moreover, one of the properties (Shandong Ruiyin) is not compliant with the CRIRSCO's reporting requirements and four of the properties have much smaller sizes than the Angostura Deposit. Further, just as there is no certainty that the Ventana, Galway and Calvista deposits had similar geological characteristics to the Angostura Deposit, there is equally no certainty that the deposits for the properties proposed by Colombia had similar geological characteristics.

902. Having weighed up the similarities between the transactions identified by Eco Oro and Colombia – and subject to the point made above in relation to the absence of a license to engage in exploitation – the Tribunal considers that, in the absence of any track record of established trading, and given the presence of the three similar projects in the vicinity of Concession 3452, the evidence relating to the three Comparable Transactions identified by Eco Oro appears to offer the best evidence before the Tribunal as to the methodology that might be followed. The Tribunal therefore finds it reasonable to consider this approach in considering what loss has been suffered by Eco Oro. However, there is no evidence before the Tribunal as to the application of that methodology – or indeed any other – to the valuation of a loss that could be established as a direct consequence of the loss of the right to apply for an environmental license. In this context, before the Tribunal determines the quantum of loss suffered by Eco Oro, the Tribunal raises a number of questions to be addressed by the Parties, to be supplemented with such expert evidence as the Parties each considers to be necessary to adduce in support of their further submissions. In this regard, given, as Eco Oro accepts,⁸⁸¹ it has the burden of proof to make its case on damages, Eco Oro is ordered to file its submissions responsive to the following questions and Colombia is then to file its submissions in response, if any. To the extent either the Parties agree or the Tribunal so orders, a second round of sequential reply submissions will be permitted. The questions are as follows:

- a. Are the losses suffered by Eco Oro for a breach of Article 805 and Article 811 the same, and to be measured in the same way? If not, given the majority Tribunal's reasoning, what is the nature of the loss that Eco Oro has actually suffered, if any?
- b. Should the expert evidence adduced by the Parties be revised, given the majority Tribunal's findings that Colombia is not in breach of Article 811 but is in breach of Article 805? If so, how?
- c. Given the Tribunal's findings on the merits and given its analysis above with respect to the inapplicability both of an income-based valuation methodology and Colombia's chosen comparable transactions, is Eco Oro's proposed Comparable

⁸⁸¹ Claimant's Reply, para. 651.

Transactions methodology the one to be applied, or is there an alternative methodology which should be considered given the nature of Eco Oro's losses?

- d. How can Eco Oro's loss of opportunity to apply for an environmental licence to allow exploitation be valued? On what basis is the quantum of that loss, if any, to be assessed?
- e. What is the probability that the Santurbán Páramo overlaps with the Angostura Deposit and to what extent?
- f. What is the probability that Eco Oro would have been awarded an environmental licence to allow exploitation in the following scenarios:
 - i. The Angostura Deposit is not within the boundaries of the páramo as determined by the final delimitation;
 - ii. The Angostura Deposit is partially within the boundaries of the páramo as determined by the final delimitation; or
 - iii. The Angostura Deposit is wholly within the boundaries of the páramo as determined by the final delimitation.
- g. What is the effect on the identification of the loss suffered, and its valuation, if any, if Eco Oro failed to establish that an exercise in due diligence had been carried out prior to the decision to move to the development of an underground mine?
- h. What is the correct valuation date for a breach of Article 805 of the FTA?
- i. If there is a significant gap between the identified valuation date and the dates on which the Comparable Transactions took place, what adjustment, if any, should be made to the Comparable Transactions valuation?
- j. What evidence, if any, is there on the record, in addition to Mr. Moseley-William's testimony that the area of Concession 3452 that does not lie within the current

delimitation cannot be ascribed a value,⁸⁸² such that no deduction should be made in the event that a fair market valuation is adopted to value Eco Oro's loss?

- k. What evidence is there to support Eco Oro's assertion of the costs it has incurred to date?

C. WHETHER ECO ORO IS ENTITLED TO INTEREST

(1) The Parties' Positions

(a) Claimant's Position

903. Eco Oro is entitled to full reparation and that includes the payment of interest. The ILC Draft Articles provide that “[i]nterest on any principal sum payable under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.”⁸⁸³
904. Article 811(3) of the FTA provides that compensation should accrue at a “[...] *commercially reasonable rate* [...] *from the date of expropriation until the date of payment*”. A commercially reasonable interest rate is the London Inter-bank Offered Rate (“**LIBOR**”) plus 4 %⁸⁸⁴ and this should be the floor of what is to be considered reasonable. Eco Oro therefore claims interest at 6.6% being the rate that best represents a “[...] *reasonable commercial rate*” by reference to the cost of borrowing “[...] *for prime corporations in Colombia which, on average, is equivalent to 6.6% per year during the relevant period since the Valuation Date.*”⁸⁸⁵
905. This rate should be compounded semi-annually to ensure full reparation. A State's duty is to make full reparation immediately after its unlawful act has caused harm and to the extent

⁸⁸² Second Moseley-Williams Witness Statement, para. 31; Tr. Day 2 (Moseley-Williams), 504:4-14.

⁸⁸³ International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (2001) (**Exhibits CL-17 / CL-202 / RL-115**), Art. 38(1).

⁸⁸⁴ *Murphy Exploration & Production Company - International v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2012-16, Partial Final Award (6 May 2016) (**Exhibit CL-86**), para. 517; *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (22 August 2016) (**Exhibit CL-87**), para. 838; *Mobil Investments Canada Inc & Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Award (20 February 2015) (**Exhibit CL-83**), para. 170.

⁸⁸⁵ Second Compass Lexecon Report, para. 97.

such payment is delayed (as is the case here) compound interest compensates Eco Oro for its lost opportunity to use the funds for productive ends. Compound interest is thus an element of full reparation as has been held by numerous tribunals.⁸⁸⁶ As held by the tribunal in *Gemplus*, “there is now a form of ‘*jurisprudence constante*’ where the presumption has shifted from the position a decade or so ago with the result it would now be more appropriate to order compound interest, unless shown to be inappropriate in favour of simple interest, rather than vice-versa.”⁸⁸⁷

906. Eco Oro also claims post-award interest.⁸⁸⁸

907. Colombia’s submission with respect to the low risk of enforcement against Colombia does not address the question of full reparation. The rate at which a private corporation can obtain financing does not take account of the situation of the borrower and the cases cited by Colombia do not arise under treaties with the same wording as Article 811(3), which expressly provides for a “*commercially reasonable rate*”. A short-term risk-free interest rate

⁸⁸⁶ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (5 October 2012) (**Exhibit CL-78**), paras. 834, 840, making reference, *inter alia*, to the principle set out in the *Case Concerning the Factory at Chorzów (Germany/Poland)* (PCIJ), Merits (1928) (**Exhibit CL-1**), p. 47: “reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law”; *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, ICSID Cases Nos. ARB/08/1 and ARB/09/20, Award (16 May 2012) (**Exhibit CL-76**), paras. 324-325; *Quasar de Valores SICAV S.A. and others v. Russian Federation*, SCC Case No. 24/2007, Award (20 July 2012) (**Exhibit CL-77**), paras. 226, 228; *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award (5 September 2008) (**Exhibit CL-53**), paras. 307-316; *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award (21 June 2011) (**Exhibit CL-70**), paras. 382-384; and *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011) (**Exhibit CL-73**), para. 746. See also *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (20 August 2007) (**Exhibit CL-43**), paras. 9.2.1-9.2.8.

⁸⁸⁷ *Gemplus*, Award (16 June 2010) (**Exhibit CL-64**), para. 16-26; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (5 October 2012) (**Exhibit CL-78**), paras. 843-845.

⁸⁸⁸ Claimant’s Memorial, para. 460: “The threat of post-award interest removes any incentive on the part of the Respondent to further delay the compensation to which Eco Oro is entitled”. Eco Oro cites to *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award (12 May 2005) (**Exhibit CL-31**), paras. 470-471; *Metalclad*, Award (30 August 2000) (**Exhibit CL-15**), para. 131; *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, Final Award (1 July 2004) (**Exhibit CL-27**), pp. 73-74; and *S. Ripinsky and K. Williams, Damages in International Investment Law* (2008) (**Exhibit CL-49**), p. 389.

does not take account of the economic realities for Eco Oro, namely that it was subject to commercial risk after the valuation date and therefore before it renounced the Concession it still had to, in that period, raise and maintain capital at a commercial rate. Further, given the relevant period is three years, this makes the use of a short-term rate inappropriate. Finally, the rate proposed by Colombia is considerably lower than the cost of financing faced by most corporations and nearly four times lower than Colombia's own cost of borrowing giving rise to a substantial windfall to Colombia in its own costs.

908. Finally, Colombia is unable to cite any case law to support its submissions with respect to the inappropriateness of compound interest in this case. Compound interest “[...] *reflects the economic reality that a dollar foregone could otherwise have been invested, and that the income on that investment could have also been reinvested, so that funds grow at a compound rate.*”⁸⁸⁹

(b) Respondent's Position

909. Whilst Colombia accepts tribunals have a right to award interest in principle, Article 811(3) of the FTA is not applicable as it applies only to compensation for a lawful expropriation and the applicable rate should reflect a “*low risk*” investment⁸⁹⁰ compensating for the time value of money, the loss of purchasing power and certain macroeconomic risks. Eco Oro faces no commercial or market risk during the pendency of these proceedings and therefore the applicable rate does not need to compensate for such risks. Finance charges or lost investment should be claimed as separate heads of damages and Eco Oro has not made any such claims. The rate should reflect a lower country risk given the fact Colombia has a strong track record of paying arbitral awards rendered against it.
910. LIBOR is inappropriate as it includes commercial risks and no justification has been given for the additional 4%. The applicable interest rate should be a ‘risk free’ rate such as the

⁸⁸⁹ Second Compass Lexecon Report, para. 94(c). See also M. S. Knoll, “A Primer on Prejudgment Interest”, Texas Law Review Association. Vol 75. No. 2 (1996) (**Exhibit CLEX-95**), pp. 306-308.

⁸⁹⁰ *Sistem Mühendislik İnşaat Sanayi ve Ticaret A. Ş. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award (9 September 2009) (**Exhibit RL-80**), paras. 194-196; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas Inc. v. United States of Mexico*, ICSID Case No. ARB(AF)/04/5, Award (21 November 2007) (**Exhibit RL-76**), para. 300; *Siemens AG v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award (6 February 2007) (**Exhibit CL-41**), para. 396.

US Treasury Bill Rate. This should be payable on any monetary sum awarded to Colombia in respect of costs, including arbitration costs and professional fees and disbursements made to Colombia.

911. Pursuant to the Commentary to the ILC Draft Articles,⁸⁹¹ compound interest is only appropriate when justified by “*special circumstances*” and no such special circumstances exist in the present case.

(2) The Tribunal’s Analysis

912. The Tribunal accepts that, to the extent that Eco Oro has suffered loss as a result of Colombia’s breach of Article 805 of the FTA, Eco Oro should receive full reparation and such reparation should include interest. The Tribunal further accepts that the appropriate interest rate should be a commercially reasonable rate.

913. The Tribunal accepts Eco Oro’s submissions that the US Treasury Bill rate is not a commercially reasonable rate. The Parties are invited to make any final submissions on what is a commercially reasonable rate.

D. WHETHER THE AWARD SHOULD BE NET OF ALL APPLICABLE COLOMBIAN TAXES

(1) The Parties’ Positions

(a) Claimant’s Position

914. Eco Oro submits that, as the valuation prepared by Compass Lexecon is net of Colombian taxes, any Award should be ordered to be net of all applicable Colombian taxes and Colombia should be ordered not to tax or attempt to tax the Award. Eco Oro also seeks an indemnity from Colombia in respect of any adverse consequences that may result from the imposition of a double taxation liability by the Colombian tax authorities if the declaration

⁸⁹¹ International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001) (**Exhibit CL-17**), Article 38, commentary 9.

in the Award recognising that the Award is net of Colombian taxes is not accepted as the equivalent of evidence of payment.⁸⁹²

(b) Respondent's Position

915. Colombia has not made any submissions on this issue.

(2) The Tribunal's Analysis

916. In the absence of any submissions from Colombia, the Tribunal in principle accepts Eco Oro's submissions and holds that any award of damages will be expressly ordered to be net of all applicable Colombian taxes.

E. WHETHER ECO ORO IS ENTITLED TO AN INDEMNITY IN RESPECT OF REMEDIATION COSTS

(1) The Parties' Positions

(a) Claimant's Position

917. Eco Oro claims an indemnity in respect of remediation costs. Whilst Eco Oro renounced Concession 3452, this was not done voluntarily; it was compelled to do so because the ANM arbitrarily refused to suspend its obligations under the Concession or extend the deadline for submitting a PTO. The renunciation triggered a requirement under Colombian law to undertake the remediation of the site of the Angostura Project. Whilst the costs are not yet known, these costs form part of Eco Oro's losses arising from Colombia's breach of the FTA pursuant to the principle of full reparation.⁸⁹³

⁸⁹² Claimant's Memorial, paras. 461-462. See also *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Partial Award on the Merits (30 March 2010) (**Exhibit CL-63**), paras. 552-553; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award (7 February 2017) (**Exhibit CL-90**), paras. 544-547; *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (22 August 2016) (**Exhibit CL-87**), paras. 850-855.

⁸⁹³ Claimant's Reply, paras. 648-650. See also *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award (28 March 2011) (**Exhibit CL-177**), para. 246; *Crystallex*, Award (4 April 2016) (**Exhibits CLEX- 32 / CL- 85**), paras. 868-869; *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award (20 May 1992) (**Exhibit CL-11**), para. 215.

(b) Respondent's Position

918. Colombia is not required to indemnify Eco Oro for the remediation costs. Colombia did not compel Eco Oro to renounce Concession 3452, it renounced it voluntarily and it was this intervening act (and its omission in failing to submit a PTO within the contractual time limit) which caused the loss for which it seeks to hold Colombia liable. These costs would have been payable in any event once the Concession was terminated, including if it had been terminated upon successful completion of a mining exploitation project, pursuant to Articles 110 and 114 of the 2001 Mining Code and Clause 19 of the Concession Agreement.⁸⁹⁴

(2) The Tribunal's Analysis

919. The Tribunal requests the Parties to address the following additional questions to assist it in determining this issue:

- a. What is the anticipated timetable for Eco Oro to undertake remediation work?
- b. What is the likely nature of that remediation work?

IX. DECISION

920. For the reasons set forth above, the Tribunal decides as follows:

- (1) The Tribunal has jurisdiction over the claims raised.
- (2) By a majority, the Tribunal decides that Colombia is not in breach of Article 811 of the FTA.
- (3) By a majority, the Tribunal decides that Colombia is in breach of Article 805 of the FTA.
- (4) In this regard, given, as Eco Oro accepts, it has the burden of proof to make its case on damages, Eco Oro is ordered to file its submissions responsive to the following questions and Colombia is then to file its submissions in response, if any. To the extent

⁸⁹⁴ Respondent's Rejoinder, paras. 496-498.

either the Parties agree or the Tribunal so orders, a second round of sequential reply submissions will be permitted. The questions are as follows:

- a. Are the losses suffered by Eco Oro for a breach of Article 805 and Article 811 the same, and to be measured in the same way? If not, given the majority Tribunal's reasoning, what is the nature of the loss that Eco Oro has actually suffered, if any?
- b. Should the expert evidence adduced by the Parties be revised, given the majority Tribunal's findings that Colombia is not in breach of Article 811 but is in breach of Article 805? If so, how?
- c. Given the Tribunal's findings on the merits and given its analysis above with respect to the inapplicability both of an income-based valuation methodology and Colombia's chosen comparable transactions, is Eco Oro's proposed Comparable Transactions methodology the one to be applied, or is there an alternative methodology which should be considered given the nature of Eco Oro's losses?
- d. How can Eco Oro's loss of opportunity to apply for an environmental licence to allow exploitation be valued? On what basis is the quantum of that loss, if any, to be assessed?
- e. What is the probability that the Santurbán Páramo overlaps with the Angostura Deposit and to what extent?
- f. What is the probability that Eco Oro would have been awarded an environmental licence to allow exploitation in the following scenarios:
 - i. The Angostura Deposit is not within the boundaries of the páramo as determined by the final delimitation;
 - ii. The Angostura Deposit is partially within the boundaries of the páramo as determined by the final delimitation; or
 - iii. The Angostura Deposit is wholly within the boundaries of the páramo as determined by the final delimitation.

- g. What is the effect on the identification of the loss suffered, and its valuation, if any, if Eco Oro failed to establish that an exercise in due diligence had been carried out prior to the decision to move to the development of an underground mine?
 - h. What is the correct valuation date for a breach of Article 805 of the FTA?
 - i. If there is a significant gap between the identified valuation date and the dates on which the Comparable Transactions took place, what adjustment, if any, should be made to the Comparable Transactions valuation?
 - j. What evidence, if any, is there on the record, in addition to Mr. Moseley-William's testimony that the area of Concession 3452 that does not lie within the current delimitation cannot be ascribed a value, such that no deduction should be made in the event that a fair market valuation is adopted to value Eco Oro's loss?
 - k. What evidence is there to support Eco Oro's assertion of the costs it has incurred to date?
 - l. What is a commercially reasonable interest rate?
 - m. What is the anticipated timetable for Eco Oro to undertake remediation work?


and
 - n. What is the likely nature of that remediation work?
- (5) The Parties are invited to confer and reach an agreement on the format and timetable for the additional submissions requested by the Tribunal in this Decision and to appraise the Tribunal of the terms of such an agreement by no later than 7 October 2021.
- (6) Upon receiving the Parties' additional submissions, the Tribunal will render its award on damages. Any award of damages will be expressly ordered to be net of all applicable Colombian taxes. Colombia will be ordered not to tax or attempt to tax the award and to indemnify Eco Oro in respect of any adverse consequences that may result from the

imposition of a double taxation liability by the Colombian tax authorities if the declaration in the award recognising that the award is net of Colombian taxes is not accepted as the equivalent of evidence of payment.

(7) The Tribunal's decision on costs is reserved.

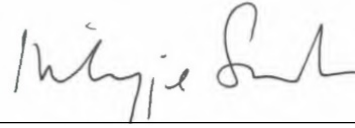
and

(8) All other claims are dismissed.



Professor Horacio A. Grigera Naón
Arbitrator
(Subject to the attached dissenting opinion)

Date: 9 September 2021



Professor Philippe Sands QC
Arbitrator
(Subject to the attached dissenting opinion)

Date: 9 September 2021



Ms. Juliet Blanch
President of the Tribunal

Date: 9 September 2021

ANNEX A: CHRONOLOGY OF RELEVANT FACTS

Date	Milestones, events and documents	Exhibit No.
1969		
22 December	The Congress of Colombia enacts a law containing provisions on mines and hydrocarbons (Law 20 of 1969)	PMR-2
1970		
20 July	The President of the Republic of Colombia enacts Decree No. 1275 of 1970, whereby Law 60 of 1967 and Law 20 of 1969 are regulated and other provisions on mines are enacted	PMR-3
1974		
18 December	National Code on Renewable Natural Resource and the Protection of the Environment (Decree No. 2811) <i>“Article 4: The rights acquired by private parties in accordance with the law on environmental elements and renewable natural resources are acknowledged. Insofar as its exercise, such rights will be subject to the provisions of this Code.”</i>	R-52
1986		
8 August	The President of the Republic of Colombia enacts Decree No. 2477 of 1986, whereby Law No. 60 of 1967, Law No. 20 of 1969 and Law No. 61 of 1879 are regulated	C-62
1987		
29 April	Greystar Resources Ltd Certificate of Incorporation	C-63
1988		
29 March	Resolution 707 granting Permit No. 3452	C-1bis
23 December	The President of the Republic of Colombia enacts Decree No. 2655 of 1988, whereby the Mining Code is issued	C-64
1990		
16 October	The MinMinas issues a communication regarding Permit 3452, <i>inter alia</i> , approving the activity report for 1989 (which reported a production of 4,000 tons) and classifying the mining operation as small-scale mining	C-303
1991		
---	Political Constitution of Colombia	C-65
1992		
27 February	MinMinas issues Environmental Protection Unit Report No. 172 upon technical visit to Permits No. 3451 and 3452	C-304
3-14 June	United Nations Conference on Environment & Development, Rio de Janeiro, UN Agenda 21, Chapter 18, Protection Of The Quality And Supply Of Freshwater Resources: Application Of Integrated Approaches To The Development, Management And Use Of Water Resources	R-142
17 June	Constitutional Court of Colombia issues Judgment T-411/92, the summary of which is formulated as follows: <i>“Ecology contains an essential core, it being understood by this that part that is absolutely necessary so that legally protected interests and what gives rise to it turn out to be real and effectively act as a guardian. The essential content is overtaken or not recognized when the right is submitted to the limitations that make it unfeasible, making it more difficult beyond what is reasonable or divesting it of the necessary protection. The rights to work, private property, and freedom of business enjoy special protection, provided that there exists a strict respect of the ecological function, this is the duty to safeguard the environment due to a fundamental constitutional right.”</i>	R-134
20 October	MinMinas communication regarding Permit 3452, whereby supplementary information is requested.	C-305

Date	Milestones, events and documents	Exhibit No.
1993		
22 December	Law No. 99 of 1993 (General Environmental Law)	C-66
1994		
8 March	The President of the Republic of Colombia enacts Decree No. 1753 of 1994, <i>inter alia</i> , governing the power to grant environmental licenses and the regime of environmental impact assessment.	C-307
28 October	Contract of Assignment between Minas Los Diamantes Ltda and Greystar Resources Ltd – Permit No. 3452	C-2 / C-67
31 October	The MinMinas issues Resolution No. 196198, granting a “five(5) year extension to the holders of Permit No. 3452 for the exploration and exploitation of Precious Metals and other metals that may be subject to mining permits in the municipality of California, Santander Department, which was granted by means of Resolution No. 000707 of 29 March 1988.”	C-308
29 December	MinMinas Resolution No. 106214, authorising assignment of Permit 3452	C-281
1995		
---	Greystar started carrying out a program of surface mapping, sampling and diamond drilling	C-75, p. 6
24 March	The Minister of Mines and Energy and the Minister of Environment issue Decree No. 501 of 1995, whereby the registration of titles for the exploration and exploitation of nationally owned minerals in the mining registry is regulated	PFDV-4
25 May	Greystar forms a subsidiary under the laws of Colombia under the name “Greystar Resources de Colombia S.A.”	R-156 / CLEX-16, p. 4
24 July	Letter from the MinMinas (Mr. Zuñiga Vera) to Sociedad Minera Los Diamantes Ltda, stating, <i>inter alia</i> , that: “3. According to the information submitted, at the moment the exploitation activities have been suspended since there are negotiations underway with Canadian company Grey Star Resources Ltda., with the purpose of defining new exploitation projects.”	R-178 / C-309
7 December	Greystar registers a branch in Colombia	R-156 / CLEX-16, p. 4
1996		
29 January	Decree No. 205 of 1996, whereby the Covenant on Biological Diversity made in Rio de Janeiro on 5 June 1992 was enacted	R-54
7 February	Assignment of Permit 3452 declared by the Regional Division of Bucaramanga	C-3
18 December	CDMB issued an Order to Greystar, accompanied by Terms of Reference, for the submission of an Environmental Management Plan for the exploration of precious metals – gold and silver – in the Angosturas village within the jurisdiction of the California municipality.	R-191 / R-61
1997		
31 March	Greystar submits its Environmental Management Plan (PMA; prepared by Geocol, Ltda.) to CDMB	C-4
4 June	CDMB issues Resolution No. 568: approving Greystar’s PMA: “[...] This Resolution only covers the exploratory stage of the mining project. Therefore, the relevant environmental license shall be obtained in order to undertake exploitation activities.”	C-5 / R-64
6 June	Law No. 373 of 1997: “Section 16. Protection of special management zones. In preparing and presenting the program it shall be specified that the páramo areas, cloud forests and areas of influence of water springs and mountain headwater clusters shall be acquired as a priority by environmental entities of the relevant jurisdiction, which will carry out the studies necessary to determine their actual capacity to supply	C-68

Date	Milestones, events and documents	Exhibit No.
	<i>environmental goods and services to initiate a recovery, protection and conservation process.”</i>	
13 June	Amalgamation Agreement between Greystar Resources Ltd and Churchill Resources Ltd.	C-69
15 August	Certificate of Amalgamation	C-70
1 September	MinMinas issues Resolution No. 992194, modifying the surface area of Permit 3452 to “230,032 hectares comprised within the following boundaries: Landmark Point determined by the confluence of the San Andrés and Angosturas Ravines, taken from Plate No. 101-I-C of the IGAC, with approximate coordinates of $X = 1.308.050$ and $Y = 1.130.110$ ”	R-163
30 September	Greystar News Release “Multi-Million Oz. Gold Resource Projections Announced”	CLEX-22
1998		
---	Colombian Ecosystems General Map issued by IAvH (1:9,000,000 scale)	C-6
18 October	Ramsar Convention enters into force in Colombia	Day 1, 254:14-16 (R’s Timeline 3) See also: RL-31, R-153 and R-188
3 November	Greystar News Release “Greystar Doubles Angostura Resource Estimate”	CLEX-23
10 November	CDMB issues Resolution No. 1116 approving “ <i>the Environmental Management Plan submitted by the firm Sociedad Minera Santa Isabel Limitada for the development, preparation, exploitation, and processing of a gold and silver mine in the Municipality of Vetás, on the banks of the Vetás River and the San Antonio Stream, approximately two kilometers to the northwest of the municipal town center.</i> ”	R-164
1999		
---	Greystar suspends exploration activities due to security threats by FARC and ELN	See MR-10 (Annex 2)
12 April	Greystar Renewal Annual Information Form	R-156 / CLEX-16
2001		
15 August	Law 685 of 2001 (2001 Mining Code)	
15 August	Speech of President Andrés Pastrana on signing into force the Mining Code	C-274
8 September	Amended Law 685 of 2001 (2001 Mining Code)	C-8
2002		
January	Greystar abandons completely all activities in the region for a year due to continued security by the FARC and ELN	See MR-10 (Annex 2)
February	Program for the Restoration and Sustainable Management of High Mountain Ecosystems: Páramos	R-113
7 May	The Constitutional Court renders Decision C-339/02, establishing the obligation to adopt effective measures for protection of the páramos. It is noted that protected ecosystems are not limited to those expressly included in legislation. (which addresses a constitutional challenge against articles 3 (partially), 4, 18 (partially), 34, 35 (a) and (c) (partially), and 36 (partially) of the 2001 Mining Code): “ <i>For the matter that concerns us, this means that in case of lack of absolute scientific certainty regarding the exploration or mining exploitation of a certain area, the decision must necessarily be inclined towards the protection of the environment. If the mining activity is advanced and then it is shown that it caused serious environmental damage, it would be impossible to reverse its consequences.</i> ”	C-82
August	Constitutional Court T-666 decision, stating that areas of ecological importance (including the páramos) have a higher level of protection than	See MR-10 (Annex 2)

Date	Milestones, events and documents	Exhibit No.
	the rest of the environment, and that the use of these areas should be compatible with conservation and should prevent exploitation of resources	
5 August	MinAmbiente Resolution No. 769: definition of páramo [requiring regional and municipal authorities to evaluate the status of and develop protection measures, conservation, and sustainable management plans for the páramos.	C-9 See MR-10 (Annex 2)
6 August	Decree No. 1728: it is prohibited to grant an environmental license for projects, works and activities to be carried out in páramo areas or water springs	C-84
10 December	Greystar requests consolidation of mining titles	C-314 / R-83
2003		
---	Greystar returns to the site, but encounters challenges by local miners over its property rights. Exploration activities eventually resume in July, once property rights issues are settled.	See MR-10 (Annex 2)
---	Map of the Colombian Andes Ecosystems of 2000 issued by IAvH (1:1'000.000 scale)	C-74
10 May	Decree No. 1180: repeals Decree No. 1728	C-86
Third quarter	Banco de la República and Coinvertir, Colombia Talking Points: acknowledges the importance of Greystar's investments and Colombia's intent to maintain legal stability.	C-283
1 August	Resolution No. 839: terms of reference for a Study on the Current Situation of Páramos and an Environmental Management Plan for the Páramos [terms of reference for regional and municipal authorities to evaluate the status of the páramos and develop protection measures, conservation, and sustainable management plans for the páramos.:	C-88 See MR-10 (Annex 2)
14 October	Read: Miner gives Colombia another chance	C-90
2004		
13 July	CORPONOR creates the Regional System of Protected Natural Areas, SIRAP, for the Department of Norte de Santander	R-143
2005		
---	MinMinas Planning Unit, Mining, an excellent choice for investing in Colombia: The Investor's Guide: Páramo areas were not mentioned in the annex listing prohibited areas.	C-94
February	MinMinas, Mining and Energy Planning Unit, Monthly Mining and Energy Bulletin: acknowledging the importance of Greystar's project.	C-284
21 April	Decree No. 1220: "when the projects referred to in articles 8 and 9 [hydrocarbon and mining projects] of this decree are intended to be developed in páramo ecosystems, wetlands and/or mangrove swamps, the environmental authorities shall take into consideration the decisions taken on the matter regarding their conservation and sustainable use through the different administrative instruments of environmental management."	C-97
May	MinMinas, Mining and Energy Planning Unit, Monthly Mining and Energy Bulletin: "For 2008, if the results of the exploration that it is carrying out turn out well, the entry into operation of a project in Vetás California, Santander, is expected, based on the participation of the Canadian multinational Greystar Resources. Ninety-seven thousand meters of drilling have been carried out which, accounting to preliminary information, result in 143 tonnes of reserves, which would make Greystar Resources the largest goldmining company in Colombia."	C-285
18 November	President Uribe gives a speech at the International Mining Show held in Medellín: stability and investor protection.	C-11 / C-101
2006		
---	IAvH publishes a report on the Ecosystems of the Colombian Andes	C-275
April	Prospectors and Developers Association of Canada (m), "PDAC in Brief": Greystar recognition	C-12

Date	Milestones, events and documents	Exhibit No.
May	CDMB notes that the company is not in compliance with its PMA and imposes preventative measures that include the suspension of certain activities related to exploration (Resolution 488). CDMB initiates an administrative investigation to regularly monitor Greystar's compliance with the PMA.	See MR-10 (Annex 2)
October	Greystar's institutional magazine "Visión Minera" highlights the "award from those responsible for the organization of the [2006 Mining] Fair, and in the presence of the President of the Republic, in recognition of [Greystar's] outstanding performance during its exploration stage."	C-13
2007		
---	Atlas of Colombia páramos	C-14bis / MR-29
---	Beatriz Duque Montoya, Director of Mines, publishes a Policy for Promoting Colombia as a Mining Country: including junior mining companies as targets.	C-15
2 February	Resolution DSM No. 75: INGEOMINAS authorizes integration of the areas of ten of Greystar's mining titles.	C-109 / R-68
8 February	Eco Oro and INGEOMINAS enter into Concession Contract 3542.	C-16 / MR-34
20 July	2007 Ministry of Foreign Affairs Report to Congress re Canadian investment: acknowledging the importance of Greystar	C-287
9 August	Registration of Concession Contract 3542	Apud R-72 / C-19
23 November	CDMB Agreement No. 1103 and and CORPONOR Agreement No. 17: Berlín Páramo declared a Renewable Natural Resources Integral Management District	R-115
2008		
16 April	Greystar files amended PMA with CDMB further to the consolidation of mining titles	C-111 / C-17
June	CORPONOR creates the Sisavita Regional National Park	Apud R-88
September	Greystar conducts a stakeholder engagement process for the Environmental Impact Assessment with communities in the municipalities of Suratá, Vetás, California and Tona.	See MR-10 (Annex 2)
October	CDMB determines that Greystar's activities are generally compliant with environmental requirements	See MR-10 (Annex 2)
21 November	Canada and Colombia sign FTA and Environment Agreement	C-22 / R-137 / R-138
1 December	MinMinas Presentation	C-115
10 December	Letter from CDMB approving Greystar's environmental audit carried out during the performance of its exploration activities for July, August and September 2008.	C-320
2009		
---	IAvH issues a document named "Planificación ecorregional para la conservación de la biodiversidad en los Andes y el Piedemonte Amazónico colombianos"	R-185
26 January	MinAmbiente provides Terms of Reference for the preparation of Environmental Impact Study (EIA) and requests that Greystar submits its EIA together with a Works Program (PTO)	C-117
20 March	Greystar announces investment by IFC	C-118
8 July	The Constitutional Court renders Judgment C-443, reiterating its 2002 ruling that environmental authorities may declare certain ecosystems excluded from mining areas, even if those areas are not listed expressly in legislation or included in national regional parks or forest reserves.	PMR-20

Date	Milestones, events and documents	Exhibit No.
	<p><i>“Naturally, exclusion areas need to be geographically delimited in a clear manner, and this duty falls upon the environmental authority, in line with the provisions of Article 5 of Law 99 of 1993. Moreover, it includes the mining authority’s collaboration in mining interest areas, which gives effect to the principle of prioritizing the protection of our country’s biodiversity along with sustainable utilization, in accordance with the universal and sustainable development principles enshrined in the Rio de Janeiro Declaration of June 1992, which has been ratified by Colombia. The Court finds it necessary to point out that the mining authority has a duty to collaborate with the environmental authority, but this collaboration duty does not, however, operate as a limitation or condition on the exercise of the powers of the environmental authority, which is the agency in charge of establishing exclusion zones; it is for this reason that in the operative portion of this decision we will restrict the constitutionality of Article 34(2) of Law 685 of 2001.” (p. 40)</i></p>	
23 September	<p>Greystar submits a PTO to INGEOMINAS: <i>“1.9.2 Main environmental and social problems: The studies have identified the following: • The proximity of project Angostura to the Santurbán Páramo is something to be taken into account, because the lakes are situated in the area. [...]”</i></p>	R-44 / R-84
December	<p>Greystar’s EIA prepared by Unión Temporal Vector and Ingetec: identifying significant presence of páramo and subpáramo in the concession area</p>	C-321 (Chapter 3) / R-158 (Chapter 1)
18 December	<p>CORPONOR Directing Council Agreement No. 37: approving the Study regarding the Páramos’ Current Status – EEAP- in Santurbán and the Environmental Management Plan –PMA- for the Santurbán Páramos.</p>	R-144
22 December	<p>Greystar applies for an Environmental License (enclosing the EIA and other materials)</p>	C-121
2010		
13 January	<p>MinAmbiente orders the commencement of the administrative procedure for the granting of a global environmental license to Greystar</p>	C-322
27 January	<p>MinAmbiente and the IAvH, Inter-administrative Agreement No. 006 of 2010: Phase II Páramo delimitation</p>	R-145
1 February	<p>Greystar announces further investment by IFC</p>	C-123
9 February	<p>Law No. 1382: amends Article 34 of the 2001 Mining Code, including an express reference to páramo ecosystems amongst the areas in which mining operations could be prohibited</p>	C-18
20 April	<p>MinAmbiente Order No. 1241: EIA is returned to Greystar, invoking the location of the project in páramo zone; <i>“in order to define the [mining] exclusion area established in article 3 of Law 1382 dated 9 February 2010, by which article 34 of Law 685 of the Mining Code is amended, reference must be made to the definition of the Instituto Alexander Von Humboldt, as established by said law.” (p. 9); “the new study presented by GREYSTAR RESOURCES LTD for the development of the open-pit mining project of gold-silver minerals, corresponding to the mining concession contract No. 3452, shall consider the so-called ‘Páramo of Santurbán’ ecosystem as an area excluded from mining activities.”</i></p>	R-14 / R-78 (Technical Opinion)
24 April	<p>Greystar internal exchanges: <i>“Almost all our activities are above 3200m including half the open pit. This effectively stops the project and puts us virtually back to the starting gate. We do not know whether there is suitable land within reasonable distance and would be back to the beginning with land acquisition, base lines studies and total engineering redesign. The project, with this condition, may not be feasible or economic.”</i></p>	R-180
26 April	<p>Greystar New Release</p>	CRA-138 (see market reactions:

Date	Milestones, events and documents	Exhibit No.
		CRA-144; CRA-145; CRA-146; CRA-147; CRA-148)
26 April	Eco Oro's market value collapses	CRA-98; CRA ER2, Figure 4 R-160; MR-10.
29 April	Greystar files request for reconsideration of Order No. 1241	R-85
3 May	Greystar Internal Memo	R-159
3 May	Greystar CEO report to the Board of Directors: " <i>comprehensive communication plan has to be developed to inform and shape Government and public opinion that mining can be conducted responsibly alongside preservation of páramo and water resources.</i> "	R-160
19 May	Greystar internal e-mail: support by Minister of Mines	C-323
27 May	Order No. 1859: MinMinas overturns Order No. 1241, directing that the assessment of Greystar's EIA on its merits be resumed.	R-15
5 August	Decree No. 2820: " <i>Article 10. Special Ecosystems. In those cases where the projects mentioned in Article 9 hereof entail the intervention of wetland areas included in the list of internationally significant wetlands, páramo or mangrove areas, the relevant competent environmental authority shall request the prior opinion issued by the [MinAmbiente].</i> <i>Similarly, the environmental authorities shall duly take into account the relevant considerations established in connection with this subject matter as adopted by virtue of the respective administrative resolutions and orders in relation to the preservation and sustainable use of such ecosystems.</i> "	C-129
7 August	Juan Manuel Santos becomes President	C-130
27 August	Chart depicting evolution of mining titles in páramo areas between 1990 and 2009 (slide 8)	C-132
October	As the result of a technical visit, CDMB finds Greystar again out of compliance with the PMA. CDMB lifts the preventive measures established through Resolution 488 of 2006 and fines Greystar (Resolution 1248)	See MR-10 (Annex 2)
21 November	MinAmbiente holds a public hearing as required under its process for mining applications. First public hearing: California, northeastern Colombia; public support; citizens from Bucamaranga do not attend	C-137 / C-138 / C-276 See MR-10 (Annex 2)
December	Indicators of Mining in Colombia, Monitoring the National Mining Development Plan 2007-2010: " <i>The National Government's policies, such as Decree 4743 of 2005, have boosted this result and have given continuity to the Vallejo Plan, which, since 1967, has granted a series of tariff exemptions to imports of machinery and equipment used in the mining cycle, as well as to activities related to the exploration and exploitation of hydrocarbons. [...] Similarly, in the mining sector, investments increased from US\$466 million in 2002 to approximately US \$3.054 billion in 2009, an increase of 555%.</i> "	C-277
15 December	INGEOMINAS Resolution No. GTRB 267: First 2-year extension of the exploration stage under Concession Contract 3452.	R-69 / PMR-23
29 December	Adaptation Fund created as a response to the "La Niña" phenomenon	Apud R-147
2011		
---	IAvH Informational Criteria Guide for Demarcating Páramos in Colombia	R-117
---	MinAmbiente is restructured. Frank Pearl is the first Minister of Environment after the restructuring.	See R-188; C-213

Date	Milestones, events and documents	Exhibit No.
20 January	INGEOMINAS Technical Opinion on the hydrogeological chapter of Greystar's PTO	R-79
February	Estimated 20,000 people gather in Bucaramanga to demonstrate against Greystar's project	See MR-10 (Annex 2)
22 February	INGEOMINAS Resolution No. DSM-28: designating Concession 3425 and the Angostura Project a Project of National Interest; <i>"The purpose of the abovementioned project is the technical exploration and the economic exploitation of a mineral deposit of GOLD, SILVER, CHROME, ZINC, COPPER, TIN, LEAD, MANGANESE, PRECIOUS METALS, RELATED MINERALS AND OTHER MINERALS UNDER CONCESSION, in a total area of 5,244 hectares and 8,584 square meters; [...] As the project involves polymetallic sulphides, the techniques required for the exploration, exploitation and extractive metallurgy involve the use of chemical methods to treat the mineral ore that have an environmental impact, which is a very sensitive subject for the communities that are directly affected and, therefore, stricter verification and compliance with the technical, legal and economic obligations is required in order to maximize the use of the reserves with the least possible environmental impact.</i> <i>In accordance with the bioclimatic characterization, the project's geographical location requires special attention from the Colombian Government, as public opinion has shown great interest in the effects it might have on the ecosystems and the communities that would be affected by the exploration works."</i>	C-19 See R-73; C-26
March	Cutfield Freeman & Co presentation to Greystar Board of Directors on "Open pit v Underground"	C-326
4 March	The MinAmbiente organizes a Second Public Hearing: Bucaramanga; violent confrontations by groups opposing the development of Angostura; hearing suspended.	C-146 See MR-10 (Annex 2)
14 March	Greystar internal document 'Path Forward': <i>inter alia</i> , "16. The Greystar name has negative associations with Government in Colombia and in Bucaramanga. Rebranding is necessary. This can be achieved through renaming the Colombian company or through a corporate transaction. Clearly Government and public do not trust a junior with no CV to develop a large and sensitive project."	C-327
18 March	IAvH celebrates Greystar's decision to withdraw its application	C-328
18 March	Greystar News Release: <i>"Comments made yesterday could be incorrectly interpreted to mean that Greystar is fully withdrawing from the Project, but the intent is simply to desist from on-going environmental licensing to allow for a future re-filing in the terms that reflect concerns."</i> Underground alternative is mentioned for the first time.	CLEX-24 / R-21
23 March	Greystar requests to withdraw its Environmental license application	R-18 / R-86
7 April	IAvH Technical Report relevant to the Delimitation and Characterization of the Páramo System in the Area of Serranía de Santurbán	R-80 / R-81
14 April	Greystar announces a change of officers and directors, in accordance with an agreement with a shareholder, stating that the company will focus on reformulating the Angostura project in a manner that is environmentally sustainable and socially responsible.	See MR-10 (Annex 2)
1 May	IAvH Press release	C-329
11 May	Constitutional Court Judgment C-366/11: strikes down Law 1382 (omission of the duty to carry out prior consultation); <i>"[I]t is necessary to defer the effects of the declaration of unconstitutionality for a period of two years, in order to simultaneously protect the right of ethnic communities to be consulted in relation to such legislative measures and safeguard natural resources and special environmental protection zones which are indispensable for the survival of humanity and its environment."</i>	C-150
24 May	INGEOMINAS decided not to continue the assessment of Greystar's PTO following Greystar's withdrawal request	R-63

Date	Milestones, events and documents	Exhibit No.
25 May	MinAmbiente Resolution No. 937: <i>“To adopt the cartography mapped at 1:25,000 scale provided by the Alexander von Humboldt Research Institute of Biological Resources set forth in the so-called Atlas of Colombian Páramos for the identification and delimitation of Páramo Ecosystems.”</i>	R-70
31 May	MinAmbiente Resolution No. 1015: MinAmbiente does not accept Greystar’s withdrawal request and decides to continue <i>sua sponte</i> with the administrative procedure. It further denies the global environmental licence requested by Greystar	R-16 / R-71
16 June	Law 1450: 2010-2014 National Development Plan; Article 202 Delimitation of Páramo and Wetland Ecosystems <i>“Paragraph 1. No agricultural activities, exploration or exploitation of hydrocarbons and minerals, nor construction of hydrocarbon refineries shall be undertaken in the páramos ecosystems. For these purposes, the cartography contained in the Atlas of Colombian Páramos by the Alexander von Humboldt Investigations Institute will be considered as a minimum reference, until a more detailed scale cartography has been obtained.”</i>	C-20
20 June	Greystar requests Terms of Reference for EIA for underground mine	C-153
7 July	Greystar requests INGEOMINAS to reduce the contract area re a portion where no indicators of presence of precious metals exist	R-88
12 July	Greystar requests meeting with the Director of Licenses of the MinAmbiente to <i>“review and discuss errors and omissions committed by the company in preparing and presenting the environmental impact for the open-pit Angostura mining project”</i>	R-89
15 August	Circular No. 024 of the Directorate of Foreign Commerce of the Ministry of Commerce: FTA enters into force	C-21
16 August	Certificate of Change of Name of Eco Oro issued by the Registrar of Companies of British Columbia: <i>“I Hereby Certify that GREYSTAR RESOURCES LTD. changed its name to ECO ORO MINERALS CORP. on August 16, 2011 at 03:42 PM Pacific Time.”</i>	C-23
September	Further executive appointments are made in Eco Oro	See MR-10 (Annex 2)
27 September	Letter from MinMinas (Ms. Díaz Lopez) to INGEOMINAS (Mr. Montes): <i>“Currently, the requirements for declaring páramo ecosystems throughout the country, as reflected in the law in force have not been satisfied. Although the transitional regime [sic] in [Law 1450] requires that the cartography set out in the von Humboldt Institute’s Atlas to be used as a minimum reference, at no point does it determine that such cartography established the areas excluded from mining. Finally, the position of the control organs in relation to the protection of natural resources is clear to this Office. Thus, the precautionary principle constitutes one of the fundamental tenets of Colombian environmental policy. However, such principle cannot disregard acquired rights, in accordance with Article 58 of the Political Constitution.”</i>	C-330 (USB drive provided at the Hearing)
31 October	ANLA Resolution No. 35: confirms Resolution No. 1015.	C-290
2012		
---	IAvH New Cartography of the Páramos of Colombia – Scale 1:100,000	R-140 See R-155
---	IAvH Páramo Complex Santurbán-Berlín Jurisdictions – Scale 1:100,000	R-186
14 February	Email from Omar Ossma (Eco Oro) to David Heugh (Eco Oro) and others: <i>“even though this company filed for an amendment of its PMA in 2008, this was never formally approved, nevertheless every follow up report presented to CDMB was approved based on this PMA. This situation has become support for us that we DO have a PMA based on tacit approval.”</i>	C-332
27 February	ANLA provides Terms of Reference for the Angostura underground mine project: <i>“considering the project’s location, it should be mentioned that the Ministry of Environment and Sustainable Development is currently conducting, jointly with the Alexander von Humboldt Institute (AVHI) and with the assistance of the CDMB, the</i>	C-24

Date	Milestones, events and documents	Exhibit No.
	<i>delimitation of the Santurbán páramo at a scale of 1:25.000, pursuant to the provisions of Law No. 1450 of 2011. The Company shall take this situation into consideration in the Environmental Impact Assessment, in addition to the boundaries set forth in the cartography of the Atlas de Páramos (Páramo Atlas) adopted by means of Resolution No. 937 dated May 25, 2011.”</i>	
March	Eco Oro estimates 4,000 people in Bucaramanga demonstrate against the project and 4,000 people demonstrate in Berlín, Colombia, in favor of agricultural and mining activities in Santurbán.	See MR-10 (Annex 2)
4 May	Eco Oro requests second extension of the exploration phase	R-90
14 May	MinMinas Opinion 2012026198 in response to question raised by the Attorney General’s Office regarding Mining Concession Contracts: <i>“According to Article 46 of Law 685 of 2001, in order to determine the applicable law for a Mining Concession Contract, the date of its execution should be taken into account. Therefore, it will not be either of the two dates indicated in your question, but the date of the registration in the National Mining Registry. Footnote 2: Law 685 of 2001. The concession contract must be contained in a document written in the Spanish language and be signed by the parties. In order for to perfect and to prove its existence, it will merely need to be registered in the National Mining Registry. [...]”</i> <i>“Before the State, the applicant only has an expectation of obtaining the respective title, given that due to the ongoing process of the concession proposal, while these are not fully finished, the interested parties will only have a mere expectation to obtain the title. However, this is not the case with the concession contracts that have been duly granted, which at the time of execution give rise to acquired rights which become part of the concessionaire’s patrimony subject to protection by the law.”</i>	PMR-26 (USB drive provided at the Hearing)
3 June	Article Dinero <i>“Colombia tranquiliza a inversionistas sobre futuro de la minería”</i>	C-162
8 August / 27 August (see C-33, Annex 1)	Second two-year extension ANM Resolution VSC No. 2: <i>“ARTICLE ONE.- For the reasons set out in this resolution, to extend the exploration phase of concession contract No. 3452, which is held by ECO ORO MINERALS CORP. SUCURSAL COLOMBIA, for an additional period of two (2) years until 8 August 2014, exclusively for the area that does not overlap with the PZ Jurisdicción-Santurbán Páramo zone in accordance with the following coordinates; [...] ARTICLE 2.- To request that the holder of concession contract No. 3452 provide within two (2) months of the notice of this administrative act the modification of the document “Technical Report on the Extension of the Exploration Phase” limiting the activities and investments to be made to the area cited in the first Article of this resolution, specifying the subsectors in which the exploratory activities will be carried out and the itemized sum of proposed investments”</i>	R-72
29 August	Eco Oro requests that Resolution VSC No. 2 be revoked in its entirety.	R-91
12 September	Second two-year extension (amended) ANM Resolution VSC-4: <i>“ARTICLE ONE. To amend Article 1 of Resolution No. VSC-002, dated August 8, 2012, which shall read as follows: ARTICLE ONE. To extend by two (2) years the exploration stage of concession agreement No. 3452, held by ECO ORO MINERALS CORP. SUCURSAL COLOMBIA, for the reasons established in the rationale of this resolution, which will be extended until August 8, 2014. The Holder may not carry out exploratory activities in the páramo area pursuant to Article 202 of Law No. 1450 of 2011, until the Ministry of the Environment and Sustainable Development or the entity acting in its capacity issues the final delimitation to a scale of 1:25,000. ARTICLE TWO. To delete Article 32 of Resolution No. VSC-002 of 2012. All other provisions of said resolution shall remain in force and apply as appropriate.”</i> These decisions were taken, <i>inter alia</i> , on the following bases: <i>“Based on the evidence of the validity of the applicability of Laws No. 1382 of 2010 and No. 1450 of 2011 to concession agreement No. 3452, how the legal exclusion</i>	C-25

Date	Milestones, events and documents	Exhibit No.
	<p>indicated therein is to be put into practice should be considered, with the elements available to the mining authority and based on the criteria of reasonableness, proportionality and responsibility.</p> <p>[...]</p> <p>Hence, and in response to the arguments put forward by the mining title holder in its petition for reversal, it is necessary to examine the rationality and proportionality of the decision contained in Resolution No. VSC-002, dated August 8, 2012, based on the undeniable fact that, at present, Article 202 of Law No. 1450 of 2011 has not been developed, so there is no map at a more detailed scale to provide the mining authority with solid arguments to delimit with absolute certainty the páramo that the resolution is intended to protect.</p> <p>As a result, the decision in Resolution No. VSC-002, dated August 8, 2012, must be intended to protect both the collective right to the environment represented by the preservation of the páramo and the right of the holder of the mining title to preserve an area whose legal status is uncertain, because it cannot be said with complete certainty, due to the absence of technical parameters, that it is located within the páramo.</p> <p>However, the precautionary and prudent action that must be taken by the government agency concerning collective rights cannot go so far as to threaten subjective rights. Hence, the instruments provided for by the legal system have to be used to create conditions to suspend rights so that, when an uncertain condition is satisfied, the right is either granted or forfeited.</p> <p>Accordingly, and in response to the arguments put forward by the holder of the mining title in its petition for reversal filed under No. 2012-261-026565-2, it is clear that the delimitation of the páramo ecosystem based on the map of the Alexander von Humboldt Research Institute is temporary until the competent environmental authority creates the final delimitation at a scale of 1:25,000 after carrying out the technical, economic, social and environmental studies referred to in Article 202 of Law No. 1450 of 2011. For this reason, the mining authority determination must be in line with said condition. Therefore, the mining authority considers it appropriate to adjust Article 1 of Resolution No. VSC-002 of 2012 and, therefore, will modify it to extend the exploration stage of mining concession agreement No. 3452 of 2007, suspending exploration activities in the area overlapping with the páramo, in accordance with the delimitation based on the map in the Páramo Atlas of Colombia by the Alexander von Humboldt Institute, until the Ministry of the Environment and Sustainable Development or the entity acting in its capacity issues the final delimitation of the páramo area in accordance with Article 202 of Law No. 1450 of 2011. This will serve to ensure the effective enforcement of the prohibition on mining activities in páramo areas contained in Article 202 of Law No. 1450 of 2011.”</p>	
14 September	<p>Brigitte LG Baptiste interview, Youtube: “Right, the question is what is the problem that those potential solutions are trying to address. And who said we needed mines? Who said we needed that gold? Who said we needed all that? For whom and under what conditions? If there is a real problem justifying that, let’s look for other imaginary solutions that will serve as substitutes. Because, potentially, there is... there have to be many roads we can take to live without the need to bleed Amazonas dry, without the need to destroy a mountain, right? So, there is a very good exhibition that opened today in Bogotá about gold in the páramos, with a humorous approach to that apparent wealth. Now, if all Colombians swear time and again that we need mining to improve our quality of life, to purchase... to import more items, which is what we’re starting to do with the money that’s coming, and foreign investment arrives and we immediately go out and buy more TVs, import more consumer goods. If that’s the goal, then why ask if we really need to tear down páramos, deplete water reserves, and make the situation worse, right? So we have to create imaginary solutions following the principles... yada yada yada!”</p>	C-164
20 September	Eco Oro suspends further exploration activities	R-22

Date	Milestones, events and documents	Exhibit No.
24 November	Article La Parrilla “Viceministra despistada”	C-170
21 December	Letter from Eco Oro (Mr. Gómez Flórez) to the ANM: Supplement to the Report on the second extension of the exploration phase; <i>“Eco oro recognises the existence of a restriction, which is presently indicative and temporary, for the carrying out of exploration activities in the páramo areas. However, given the uncertainty as to where said ecosystem starts and up to where it extends, and given that the delimitation, it seems, is merely an initial process, we are of the opinion that, for the time being, we should not rule out the scheduling of activities in any zone of the contract, given the lack of definition of protected areas and the general impact on the current mining project.”</i>	R-92
2013		
---	Fundación Alejandro Ángel Escobar, Press release regarding the 2013 Award for Environment and Sustainable Development granted to IAvH for the updating of Colombia’s páramos at a scale of 1:100,000.	R-155
---	MinMinas, National Mining Agency, Colombian Geological Service, UPME and Antioquia Government, Colombian Mining Statistics Yearbook: list of 24 “Large Mining Companies in Colombia” under the heading “3.7 Mining Country Promotion” in which Greystar is featured	C-286
16 January	CDMB Directing Council Agreement 1236: Santurbán Páramo Regional Park is declared	C-175 See C-174
17 January	Eco Oro News Release “Development of Eco Oro’s Angostura Project Not Restricted by Official Park Boundaries” Eco Oro’s initial assessment was that the officially declared boundaries should not impede development of the Angostura project, although significant portions of the Company’s property (both mineral holdings and surface rights) fell within the boundaries of the Santurbán Páramo Park, in relation to which Eco Oro reserves its rights (see C-33)	C-176
February	Adaptation Fund, Prior Studies for the Signing of an Inter-administrative Agreement between the IAvH and the Adaptation Fund for the Combining of Efforts for the Delimitation of the Prioritized Strategic Ecosystems (Páramos and Wetlands)	R-147
14 February	Inter-administrative Agreement No. 5 of 2013 executed between the Adaptation Fund and the IAvH: <i>“combine the economic, technical, and administrative efforts of THE FUND and THE INSTITUTE in order to produce technical supplies and a recommendation for the delimitation, by THE MINISTRY, of prioritized strategic ecosystems (Páramos and Wetlands) within the framework of Agreement No. 008 of 2012 (hydrographic basins affected by the 2010-2011 La Niña phenomenon).”</i>	R-148
18 February	Article La República “Ojo con los ambientalistas de escritorio”	C-178
May	ECODES Ingeniería Ltda. Report “State of Preservation of Biodiversity in the Ecosystems of the Angosturas Sector, Municipality of California, Department of Santander”	C-180 See C-336 (letters to several government recipients); C-182 (News Release)
19 June	ANM Resolution No. 592: declaring Eco Oro’s project a project of national interest	C-27
27 June	Speech by Brigitte Baptiste “Por qué y para qué delimitar los páramos?”	C-184
26 July	Speech by Brigitte Baptiste before the Congress	C-340
30 July	Eco Oro requests suspension of exploration works in all the area of the Concession	R-93

Date	Milestones, events and documents	Exhibit No.
20 August	Policy Guidelines for the Development of Projects of National and Strategic Interest (PINES)	R-149
8 September	FTA's mandatory cut-off date	Both Parties agree (C: Tr. Day 1 (Mr. Blackaby), 46:18-19; R: Tr. Day 1 (Mr. Mantilla-Serrano), 320:4
9 September	<p>Letter from Attorney General (Mr. Ordóñez Maldonado) to MinAmbiente, MinMinas and ANM:</p> <p><i>"The above partly explains why as of this date the Colombian Mining Registry is not up to date and organized: it is because of the delay in complying with the zoning and regulation obligations required to clearly identify excluded areas. All this created an uncertain legal environment that resulted in the discussion becoming ideological, which made it seem in some respects that the development of an environmentally responsible mining industry is incompatible with the conservation of the environment, which criminalizes the activity, exaggerating its effects and creating suspicions about any decision taken by the mining or environmental authorities.</i></p> <p><i>In short, the Ministries and the ANM are hereby compelled to take appropriate action in order to:</i></p> <ol style="list-style-type: none"> <i>1. Coordinate efforts to comply with their obligations as established by law and the Constitution;</i> <i>2. Whenever possible and as mandated by the Political Constitution, settle existing queries given that there are mining areas that had been granted to black and native communities in some of the areas intended to be regulated;</i> <i>3. Avoid ideologization of the debate and make decisions based on comprehensive supporting studies;</i> <i>4. Regularly share any progress made in the zoning and delimitation process for the sake of transparency;</i> <i>5. Recognize any consolidated situations and vested rights to prevent the filing of legal claims against the Colombian state;</i> <i>6. The National Mining Agency is required to proceed with caution to refrain from rejecting proposals or terminating agreements if there are conditions – such as the decisions made by the Ministry of the Environment and Sustainable Development – that may threaten citizens and companies that, relying on the principle of confianza legítima, have approached the State to propose or develop mining concessions."</i> 	C-28
12 September	New Minister of Environment (Luz Helena Sarmiento)	See C-186
16 September	Article El Espectador "¿Quién quiere achicar a Santurbán?"	C-187
25 September	Article Vanguardia "Noviembre, fecha definitiva para la delimitación de Páramo de Santurbán"	C-188
November	Eco Oro estimates 1,000 people demonstrate to support the protection of water in Bucaramanga	See MR-10 (Annex 2)
11 October	Letter from Santander Mine Workers' Union (SINTRAMISAN) to Ministry of Environment (Minister Sarmiento): <i>"We only request that you DO NOT LIMIT OUR LIVES, JUST DELIMIT THE SANTURBÁN PÁRAMO."</i>	C-278
30 October	Letter from IAvH (Ms. Baptiste) to Mayor of Vetás and others: <i>"neither I nor the Institute have the power to decide on those borders because, as already stated, the Ministry of the Environment and Territorial Development, who has the authority, takes these decisions"</i>	C-189

Date	Milestones, events and documents	Exhibit No.
7 November	Creation of the Intersectoral Commission for Infrastructure and Strategic Projects (CIIPE); responsible to support the management and overview of Projects of National and Strategic Interest (PINES)	R-162
12 November	Intersectoral Commission for Infrastructure and Strategic Projects (CIIPE) Presentation "Intersectoral Commission for Infrastructure and Strategic Projects": <i>"Angostura (3452) ECO ORO MINERALS CORP SUCURSAL COLOMBIA, Santander and Norte de Santander</i> <i>Project designated as being of National Interest by the National Mining Agency. It is located in the municipalities of Vetas and California in the Santander Department. We have information that the Angostura deposit contains indicated mineral resources of 30.6 million tonnes at a cut-off grade of 3g/tonne of gold and 14.8g/tonne of silver, with an estimated initial capital costs of US\$529 million."</i>	C-342
12 November	Intersectoral Commission for Infrastructure and Strategic Projects (CIIPE) Minutes of Meeting No. 1 [CONFIDENTIAL DOCUMENT]: validated Eco Oro's project as PINES	R-150
25 November	Letter from Eco Oro (Mr. Linares Pedraza) to the Minister of Mines (Mr. Acosta Medina): <i>"The changes that have taken place around the Angostura Project are translated, among others, in that it is being led under a new philosophy and a new strategic direction, nurtures itself from learning and knowledge of the experiences and mistakes of the past. Equally behind this project are new investors with a more human and environmental outlook; there is a new Board of Directors with the participation of Colombians interested in marking the development of this country and a new team mostly made up of Santandereans.</i> <i>You, Minister, must be aware of the abysmal differences between the old Greystar open-cast project from a technical and environmental point of view, and today's Eco [Oro] underground project. But perhaps, we have not made a big enough effort you pick up the feeling, the mood, the soul of those who day by day fight. Our company takes it from there and shapes, with realities, the dreams of thousands of families of the needy province of Soto Norte.</i> <i>Our identity is authentic and genuinely Colombian, and like you Dr. Amilkar, we are proud of it: for no reason - not even for gold - would we be at the forefront of a project that could undermine or jeopardise our land and our people."</i>	R-94
30 November	Article El País "Delimitación del Páramo de Santurbán ya está definida: Minambiente"	C-191
5 December	ANM Resolution No. VSC 1024: "To accept the request for the suspension of activities made by Eco Oro Minerals Corp. Sucursal Colombia, holder of concession agreement No. 3452, for the term of six (6) months commencing on July 1, 2013."	C-192
12 December	Article Vanguardia "El 20 de diciembre se realizará la primera mesa de trabajo sobre Santurbán"	C-193
2014		
---	IAvH "Contributions to the delimitation of the páramo"	C-194; C-195; C-196; C-197; R-187; R-187.1
---	IAvH "Biodiversity and ecosystem services"	R-120
---	"Technical Specifications for the Territory's Comprehensive Management for the Conservation of the Páramo Jurisdicciones – Santurbán – Berlin. Incorporation of Social and Economic Aspects"	R-133
17 January	ANM Resolution No. VSC 16: "To extend the suspension of activities under Concession Agreement No. 3452, approved by Resolution VSC-01024 of December 5, 2013, for the term of six (6) months commencing on January 1, 2014"	C-199

Date	Milestones, events and documents	Exhibit No.
6 February	IAvH “Contributions to the strategic conservation of the Colombian páramos: Updating the mapping of the páramo complexes to a scale of 1:100,000”	C-200
24 February	Letter from Mayors of Soto Norte et al to MinAmbiente (Minister Sarmiento) and CDMB (Mr. Anaya Méndez): <i>“Since the declaration of the Santurbán Páramo Regional Natural Park (PNR), more than 1,300 direct jobs and approximately 2,500 indirect jobs have been lost in the areas of Vetas, California, Surata Matanza, Charta and Tona. This reduction in employment in the area has resulted in a complicated situation for civil unrest and illegality that will likely be aggravated if the delimitation of the Páramo ecosystem covers an area larger than the Park. This is because the communities of the Soto Norte region are not prepared to allow their rights to be further affected; [...]. It is our duty to show that the Ministry of Environment’s decision on the delimitation of the Santurbán páramo ecosystem should not ignore the acquired rights of mining titleholders of the Soto-Norte Region. This results in a sensitive situation from a juridical and political perspective because in the municipalities that make up the region, there are innumerable deposits of gold and silver, over which there are many mining titles that were acquired from the Constitution and the Law (some of which were granted under the terms of Law 2655 of 1988 and others under Law 685 of 2001), and registered in the National Mining Registry; [...] If the real objective is to preserve the area adequately, to prevent the proliferation of illegal mining and to avoid environmental disasters, displacement and misery, as well as a rise in unemployment and legal uncertainty, the area of the páramo should not be larger than the area of the park.”</i>	C-201 (USB drive provided at the Hearing)
25 February	Eco Oro News Release regarding “Galafardeo” (unauthorized mining activities) in California	C-202
1 April	Eco Oro states in a press release that MinAmbiente announced that the boundaries of the páramo have been delineated but no coordinates or cartography have been received by Eco Oro. Once it has received the cartography, it will assess the impact on its assets of the delineation of the páramo.	C-29
April	Several news articles on Santurbán.	See C-203; C-204; C-205; C-206; C-344
3 April	Eco Oro News Release: <i>“MinAmbiente conveyed to the Company that the map posted on the MADS website on April 2, 2014 should not be used to assess the impact of the Santurbán Páramo on the Company's Angostura Project and that only the official coordinates should be used for this purpose. The Ministry of Mines and Energy also expressed that view to Eco Oro. MADS indicated that the coordinates of the Santurbán Páramo would be made available in the coming days”</i>	C-30
May	IAvH “Ecological Characterization of the Santurbán páramo”	R-121
7 May	Letter from Eco Oro (Mr. Gómez Flórez) to the ANM (Ms. García Botero): requesting third extension of the exploration phase of the project	R-95
16 May	Article La Razón “Política, detrás de las decisiones sobre medio ambiente en el páramo de Santurbán”	C-208
27 May	Article La Crónica “Brigitte Baptiste”: <i>“She claims that little was learned after the recalled winter emergency. She says that money has been invested to do the same things and that we are on the verge of paying exactly the same price. Brigitte asserts that the high-impact mining carried out at La Colosa is not justifiable. ‘I do not think that we should have gold mining. After the metal is transformed it does not become something important for everyday life. We take the gold out of the mountain to store in a bank.”</i>	C-209
15 July	Article Vanguardia “En un mes entregaremos coordenadas de Santubán’: MinAmbiente”	C-210

Date	Milestones, events and documents	Exhibit No.
21 July	ANM Resolution No. VSC No. 714: <i>“Extend the suspension of activities under concession contract No. 3452, approved through Resolutions VSC-01024 of 2013 and VSC-016 of 2014, for a term of six (6) months counted from the first (1) of July of 2014. PARAGRAPH.- In the event that the Ministry of Environment and Sustainable Development issues the Administrative Act through which the Santurbán páramo ecosystem is delimited pursuant to Article 202 of Law 1450 of 2011 before the expiry of the suspension of activities term, the facts upon which the suspension was based shall be deemed to have been overcome and, as a consequence, the titleholder will be obliged to recommence activities.”</i>	R-74
1 August	Article Portafolio <i>“Al menos mil mineros operan ilegalmente en Santurbán”</i>	C-211
6 August	Third two-year extension ANM Resolution VSC No. 727: <i>“To extend for an additional term of two (2) years the exploration stage under concession contract No. 3452, the holder of which is ECO ORO MINERALS CORP. COLOMBIA BRANCH, for the reasons mentioned in the reasoning section of this resolution, which shall be until August 8, 2016, warning the Concession Holder that it may not perform exploration activities within the páramo area, pursuant to Article 202 of Law No. 1450 of 2011, until the Ministry of the Environment and Sustainable Development, or any other entity that may replace it, issues the final delimitation at a 1:25,000 scale.”</i>	C-212
12 August	Article Contexto ganadero <i>“Estos son los 3 retos principales del nuevo MinAmbiente”</i> (Gabriel Vallejo López)	C-213
15 August	Letter from the CDMB (Mr. Villamil Vasquez) to Eco Oro (Mr. Galeano Bejarano): acknowledging receipt of environmental compliance reports; <i>“It should be highlighted that the company's drilling activities have been preventively and voluntarily suspended since 2013 until the Ministry of the Environment and Sustainable Development officially clarifies the areas to be preserved as Santurbán Páramo.”</i>	C-214 / C-215
22 August	Article El Espectador <i>“Límites de Santurbán, promesa incumplida”</i>	C-31
27 August	Email from Wilmer González Aldana (Eco Oro) to Hernán Linares (Eco Oro) with Minutes of Visit of the Minister of Environment to Santander: <i>“In this regard, the Minister invited stakeholders to work on finding a consensus and reaching solutions which are beneficial to both the páramo inhabitants and those in the Bucaramanga metropolitan area. ‘The solution to this problem lies in where the boundary will be located, but the most important, complementary aspect is how to clearly guarantee that these people can continue to live in decent manner and, likewise, how to guarantee adequate supply and quality of water to the entire Bucaramanga metropolitan area... The solution is neither black nor white; extreme positions in this regard are not helpful or useful; this is not about divisions, but about how we can join forces so that we can all achieve the best possible benefit’, the Minister added. [...] ENVIRONMENTALISTS. Erwin Rodríguez took the floor and expressed his disapproval of the development of large scale mining projects; the Minister asked about the solution this sector would propose to the problem of acquired rights, and Mr. Rodríguez said that the solution was to revoke these. The Minister objected to extreme positions and called for mediation. [...] 1. No delimitation of the boundaries of the Santurbán páramo will be published until the law on páramos is instituted, which process will be dealt with by the Colombian Congress. 2. A manager shall be appointed to lead the process aimed at coordinating the various stakeholders and become acquainted first hand with the reality of the municipalities. 3. The Colombian Government has made it a priority to solve the problems related to the Santurbán páramo delimitation in the short term. 4. Ways to make sustainability compatible with territorial development, without giving rise to displacements or generating greater impacts in the region, will be looked at.”</i>	C-345
8 September	Article La Silla Vacía <i>“El tal páramo de Santurbán sí existe”</i>	R-110
23 September	Eco Oro contacts the manager of Santurbán, Luis Alberto Giraldo	C-346

Date	Milestones, events and documents	Exhibit No.
26 September	<p>Transcript of Luis Alberto Giraldo's video:</p> <p><i>"Running through the middle of what we see in this video, we would have the famous 1:25,000 line. In front of me is a landscape that, to me, seems identical all the way from the upper to the lower part of the ecosystem. We're in the trail section [dialogue] called Tosca Borrero, through which the line would pass. Even so, everything we can see in this video is supposed to be part of the páramo ecosystem. And right in front of me, where there are authorized exploitation titles, the line could divide, if you will, the area that is being exploited within the páramo from the area that is being exploited below the páramo. However, if you look at the entire landscape, it's all the same, in spite of the altitude, which is the only difference that could be made here, the elevation point [inaudible]."</i></p>	C-347
7 October	<p>Letter from the MinAmbiente (Mr. Vallejo) to the Consejo de Estado (Mr. Hernandez): asking 7 questions:</p> <p><i>"1. Does the prohibition under Article 202(1) of Law No. 1450 apply prospectively, i.e. would it affect only legal or factual situations that had not already materialized prior to the entry into force of the prohibitions contained in Law No. 1382 of 2010 and Law No. 1450 of 2011?</i></p> <p><i>2. If the answer to the previous question is no, is the enforcing authority of such law required to immediately order the closure of all prohibited activities? Would such order result in potential liability for the State in relation to persons with an interest in legal situations which have already materialized in the area delimited as a páramo ecosystem?</i></p> <p><i>3. If the answer to the first question is no, is the government allowed to request compliance with such law in a gradual or progressive manner, in furtherance of the principle of legitimate expectations?</i></p> <p><i>4. Can the environmental authority, through zoning and the regime governing the uses of the delimited páramo ecosystem, adopt environmental actions to progressively and gradually allow the reconversion of prohibited activities in páramo ecosystems, even when such activities had materialized before the entry into force of Law No. 1450 of 2011?</i></p> <p><i>5. Is it possible to file an application for an environmental license with the environmental authority in relation to mining titles that had been granted before the entry into force of such prohibition and that did not apply for or obtain the relevant environmental license authorizing the commencement of mining exploitation activities? Is the environmental authority, while Law No. 1450 of 2011 is in force, allowed to authorize mining exploitation activities by granting an environmental license for mining titles that were effective prior to the entry into force of the legal prohibition under Law No. 1382 of 2010?</i></p> <p><i>6. Pursuant to Article 202 of Law No. 1450, is the Ministry required to delimit the ecosystem in line with the technical elements provided by natural sciences, taking into account the social and economic information required to characterize the area?</i></p> <p><i>7. Or is it required to define the ecosystem by combining the elements resulting from natural sciences and the social and economic aspects of the area, which would involve excluding ecosystems already transformed by human activities from the delimitation of the páramo?"</i></p>	C-348
15 October	<p>Decree No. 2041: <i>"Article 5. Environmental licenses in relation to other licenses. The granting of an environmental license is the pre-condition for the exercise of rights arising from permits, authorizations, concessions, contracts and licenses issued by authorities other than the environmental authorities. [...] Article 10. Ecosystems of special ecological importance. If the projects referred to in Articles 8 and 9 of this decree are aimed at conducting activities in wetlands included in the list of wetlands of international importance (RAMSAR), páramos or mangrove areas, the competent environmental authority shall request a prior opinion of the Ministry of the Environment and Sustainable Development on the preservation and sustainable use of such ecosystems."</i></p>	C-216

Date	Milestones, events and documents	Exhibit No.
16 October	Email from Wilmer González (Eco Oro) to Luis Alberto Giraldo (Santurbán manager), together with a document named “Eco Oro – Angostura Project: Responsible mining for Soto Norte and the country”	C-350
17 October	<p>Email from Hernán Linares (Eco Oro) to Management Committee of Eco Oro, forwarding Article Vanguardia “<i>Se mueven piezas en el ‘ajedrez’ de Santurbán</i>”: <i>AUX acquired by a Qatari investment group (USD400 million); “And so, the long-awaited decision by the Ministry of Environment is still in limbo while everyone from the mining and environmental sectors and the area’s communities wonders if mining projects in páramo zones will be prohibited or not. This decree on licensing and its ambiguity as concerns special areas would affect over 30 páramos across the country. After failing to meet several deadlines, the Ministry of Environment is yet to publish the delimitation’s coordinates, which, according to former minister Luz Helena Sarmiento, have been ready since late 2013. The Ministry of the Environment remains firm in its intention to focus on the social aspect of the issue and refrain from disclosing any specifics until a comprehensive solution is found for the Soto Norte community, with Luis Alberto Giraldo, the Ministry’s delegate for the Santurbán páramo, at the helm.”</i></p>	C-351
28 November	Letter from Eco Oro (Ms. Stylianides) to Minister of Environment (Mr. Vallejo López)	C-33
December	MinAmbiente Presentation “Delimitation of the Páramo of Santurbán”: makes reference to ECODES	C-217
9 December	Letter from Eco Oro (Ms. Galeano Bejarano) to the ANM: requesting further extension of the suspension of activities	R-96
11 December	<p><i>Consejo de Estado</i> Advisory opinion No. 2233 re “Protection of páramo ecosystems. Implementation of the prohibition contained in Act 1450 of 2011. Prevalence of the general interest and implementation of the necessary measures for its effectiveness”: “<i>c. Those contracts executed prior to Act 1382 of 2010 that pose a risk to the páramo ecosystems which cannot be neutralized through existing environmental instruments cannot continue, and the general interest of environmental protection must take precedence over the private interests of the mining concession-holder. In these events, the need to reach agreements for economic compensation so as to avoid legal claims must be reviewed on a case-by-case basis.</i>”</p> <p>This Advisory Opinion contains several noteworthy passages, <i>inter alia</i>: “<i>the conflict between private property and the general interest is resolved under the Constitution in the latter’s favor, but on condition of the prior payment of compensation, which acts as compensation or subrogation for the right of which its holder has been deprived. In this way, property is not disregarded but, it is precisely its recognition that determines its transformation into a credit claim against the expropriating public entity, for the value of the compensation.</i></p> <p><i>Thus, since the sacrifice of individual and established situations does not constitute the general rule of State action and entails a clear afflictive effect on citizens, their legal position is surrounded by a series of minimum guarantees such as (i) strict adherence to the principle of legality (compliance with constitutional requirements); (ii) observance of due process and (iii) payment of compensation to prevent the Administration’s decision from becoming ‘a confiscatory act, expressly prohibited by Article 34 of the Constitution.’</i></p> <p>“<i>Thus, in cases such as the one analyzed, the protection of páramo ecosystems for the benefit of the entire community, and even for global environmental sustainability, must also take into account the situation of the people who legally inhabit or exploit these territories, in order to avoid, as far as possible the unnecessary creation of situations of state liability through the implementation of the prohibition analyzed.</i></p> <p>[...]</p>	R-135

Date	Milestones, events and documents	Exhibit No.
	<i>“it is constitutionally problematic for citizens to be exposed to sudden changes in regulations, which affect validly formed economic and life expectations based on existing regulations (even more so when they have been promoted, authorized or tolerated by the State itself), without there being any legal periods or mechanisms of transition or compensation, as the case may be. Consequently, the solutions to the questions raised must consider how to render these constitutional requirements compatible with the purposes of the legal prohibition analyzed.”</i>	
In the days that followed	Eco Oro meets with Vice-Minister of Mines, Maria Isabel Ulloa to review information about its project in the context of the delimitation process	Day 1, 110:2-5
16 December	Email from Hernán Linares to Juan Esteban Ordúz: internal update	C-353
17 December	Letter from ANM (Mr. Martínez) to MinAmbiente (Mr. Vallejo): Technical Studies (Delimitation not provided by Colombia)	C-354
18 December	Mining Registry Report RT-0821-14 “Analysis of Mining Title Overlap in the Defined Criteria – Santurbán Páramo Area According to Resol 2090 of 2014”	C-448
18 December	ANM Technical Concept VSC No. 215	C-355
19 December	MinAmbiente Resolution No. 2090 of 2014: delimits the Santurbán páramo	C-34 / MR-35
29 December	Article Vanguardia “Mineros de Santurbán programan marcha en Bucaramanga”	C-219
2015		
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January	ANM Presentation “Santurbán Berlín Páramo Complex – Mining Title Ownership”	C-449
6 January	ANM Resolution VSC No. 3: <i>“the Ministry of the Environment and Sustainable development issued, on December 19, 2014, Resolution No. 2090, whereby ‘the Páramo, Jurisdictions Santurbán – Berlin was delimited and other determinations were adopted’; thus, the technical circumstances giving rise to the stay of the activities are deemed overcome and thus the grant of the new request is not awarded [...] The stay of activities under concession No. 3452 pursuant to Resolutions No. VSC-01024 of 2013, No. VSC-016 of 2014 and No. VSC-0714 f 2014 shall not be extended, for the reasons described above in this Administrative Decision.”</i>	C-35
6 January	Letter from the Mayor of Vetás (Mr. González) to the Minister of Environment (Mr. Vallejo): requesting that the delimitation of the páramo be reconsidered: <i>“7. Mining title 14833 represents a large portion of the history of Vetás municipality. It was originally granted in the 1950s and more than two generations of locals have legally worked under that title. The title is held by 14 residents of Vetás and it generates over 60 direct jobs. There is an environmental control instrument (PMA) and a current concession agreement. 100% of this title has been affected: 78.1% is covered by the preservation area (green) and 21.9% by the restoration or potential páramo area (yellow). In light of everything that this title represents for the past, present, and future of Vetás and considering that its holders are local residents of our municipality, we request a review and analysis of the extent of its overlap with the páramo and that it be excluded from the green area.”</i>	C-357
26 January	Eco Oro News Release “Eco Oro Announces Private Placement Of Up To \$3 Million”	R-23
29 January	Yulieth Natalí Avila Pinto, Thesis “Characterization of the Main Vegetation Cover in the Santurbán Páramo”: <i>“Consequently, in accordance with contract No. 13-10-308-043PS entered into with the Alexander von Humboldt Biological Resources Research Institute, I prepared a characterization of the species in the main vegetation coverages found in this area, taking into account the population-páramo interaction, the main land uses and the anthropogenic interventions that put at risk the biodiversity and the resources obtained from this complex. (p.12)”</i>	C-358

Date	Milestones, events and documents	Exhibit No.
February	IFC acquires additional shares in Eco Oro	See MR-10 (Annex 2)
12 February	Eco Oro Environmental Compliance Report Q3 and Q4 2014 for the Angostura underground project	C-359
13 February	Email from Hernán Linares to Anna Stylianides: re meeting with Minister of Mines in Toronto on 3 March during the PDAC.	C-360 See C-365
20 February	Letter from the Municipality of Vetas to Attorney General (Mr. Ordóñez): “desperate plea”	C-363
20 February	Letter from the Ministry of Environment to Pedro Daniel Sánchez Guette (Vetas Mayor’s Office)	C-361 / C-362
25 March	Article The Northern Miner “PDAC 2015: Mines Minister says Colombia is picking up the pace”	C-222
April	Approximately 30,000 people protest against the Angostura project in Bucaramanga, while another march occurs on the same day in Bogotá in defense of the Santurbán Páramo	See MR-10 (Annex 2)
21 April	Article Vanguardia “Mineros piden al Polo no politizar problemática de Santurbán”	C-223
25 April	Article La Silla Vacía “Los coqueteos de Santos II a los mineros”	C-366
25 April	Letter from the ANM (Aura Isabel González) to the Constitutional Court (Alberto Rojas): “a list of the persons or legal entities who have mining titles granted for exploring and/or exploiting the areas located in the Jurisdicciones — Santurbán — Berlín Páramo Area established by Resolution 2090 of 2014, issued by the Ministry of the Environment and Territorial Development.” Reference to Eco Oro	C-450
7 May	PINES Group visit to the Angostura project site	See C-368
7 May	Eco Oro “Internal Technical Review – Angostura Gold-Silver Project Santander, Colombia”	R-161
8 May	Eco Oro Mineral Corp., Minutes of the Annual General Meeting of Shareholders: Election of directors	C-293
9 June	Law No. 1753: National Development Plan 2014-2018	C-36
July	Eco Oro issues a report stating that it is assessing how the Angostura project will be developed taking into account the Santurbán Páramo	See MR-10 (Annex 2)
13 August	Email from Wilmer González (Eco Oro) to Hernán Linares (Eco Oro): re meeting with Ministry of Mines; Claudia Pava’s (an official appointed by the Ministry of Mines to remain in Bucaramanga) “main goal is to look after our Project, as they consider us as the ‘VIP’ Project in the region.”	C-370
October	Eco Oro Presentation “Angostura Project Envisioning”	C-373
1 October	CDMB Resolution 995 granting the Award for Environmental Excellence to Eco Oro	C-38
21 October	Article Portfolio “Eco Oro se acomoda a los nuevos límites de Santurbán”	R-111
21 October	WhatsApp Communication between Mark Moseley-Williams and Vice- Minister of Mines María Isabel Ulloa: “You are Pines and there are many ways in which we can help.”	C-226
26 November	Email from Martha Arenas (Eco Oro) to ANLA together with letter “Request for visit to the Angostura Project”	C-375 / C-376
December	ANM Brochure “Exploring Opportunities”; mentions Eco Oro; “Legal Disclaimer: The information outlined in this publication has been prepared based on the existing rules; however, these rules can be amended at any time. Therefore, we recommend to check the validity of the regulatory provisions previously.” (p. 2) “Additionally, Colombia occupies the 9th place worldwide in proper climate for mining investments, improving two places since 2014 according to the report ‘Where to Invest in Mining 2015’ presented by the American consulting firm Behre Dolbear.” (p. 4) Some companies with projects in Colombia: “Eco Oro, Canada” (p. 24)	C-294

Date	Milestones, events and documents	Exhibit No.
	Main institutions: pp. 26/27 Duration of the Concession Contract: p. 28 <i>“Due to its private nature, no government institution is responsible for the transfer of mining rights. Therefore, we recommend investors to examine these key issues before purchasing an existing title:</i> <ul style="list-style-type: none"> • <i>Verify the mining title is registered in the National Mining Register.</i> • <i>Verify the title is up to date with its contractual obligations.</i> • <i>Verify the investor is not disqualified from contracting with the State.</i> • <i>Verify the title is not within the prohibited areas for mining, whether it is in an area with communities of ethnic minorities and / or in an environmental exclusion zone.”</i> (p. 30) Type of duties to be paid: surface canons / Royalties (p. 33) IIAs and FTAs entered into by Colombia (p. 37) No reference to Páramos	
2 December	Email from Wilmer González to Mark Moseley-Williams re EIA procedure (including reference to contacts with public authorities and environmental consultants)	C-381
5 December	Letters from Eco Oro to various environmental consultants extending invitation to field visit in the framework of the procedure to grant an Environmental License for the Angostura Project.	C-382; C-383; C-384
2016		
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5 January	Letter from Eco Oro (Mr. Moseley-Williams) to ANLA (Mr. Iregui): requesting Terms of Reference to obtain Environmental License – Underground gold and silver project	C-39
25 January	Letter from ANLA (Ms. González) to Eco Oro (Mr. Moseley-Williams): requesting executive summary of the project	C-387 / C-388
6 February	Article Portafolio “Minería ilegal se toma una zona de Santurbán”	C-40
8 February	Press release Colombian Constitutional Court Judgment C-35 of 2016: <i>“To declare subsections 1, 2, and 3 of the first paragraph of section 173 Law No. 1753 of 2015 [UNENFORCEABLE].”</i>	C-42 See C-41
10 February	Exchanges between Eco Oro and IFC: IFC mentions: <i>“The meeting with the President’s Minister and her advisors, Carolina Soto and Catalina Sandoval, was really amiable; they seemed very willing to work hand in hand with Eco Oro to get the project ahead. The advisors said they tried to reach the company in the past but failed to receive an answer. They mentioned the meeting with Joseph and Juan Esteban with the ANLA. They said that ANLA was willing to evaluate the underground project under the páramo ecosystem, but such a decision will be dependent upon studies showing that the hydrology of the protected area will not be affected.”</i>	C-389 / C-392
11 February	Letter from the Ministry of Environment to the Constitutional Court requesting clarification of certain parts of the Press Release	C-43
12 February	Minutes of a meeting of the Board of Directors of Eco Oro: <i>“the Company has an Environmental Management Plan (Planes de Manejo Ambiental or ‘PMA’), the Company could have argued (prior to the Ruling) that its PMA would have led to environmental license. Mr. Moseley-Williams advised that the Ruling does no appear to have any immediate effect on the Company but the benefit of the Company having PMA is now in question and the Company will likely be required to go to the Regional Autonomous Corporation for the Defense of the Bucaramanga Plateau (Corporación Autónoma Regional para la Defensa de la Meseta de Bucaramanga or ‘CDMB’) for environmental licensing, with the associated political and social risks of such decision residing with a local authority.”</i>	C-393

Date	Milestones, events and documents	Exhibit No.
	<p><i>“Mr. Orduz also noted that he had spoken with representatives of Mubadala and will do so again and that a dialogue has been opened although he cautioned that he does not see anything happening very quickly. He expressed that, with respect to that Ruling, we should look at our alternatives, including bringing an international arbitration under the Colombia-Canada Free Trade Agreement (‘CCFTA’).”</i></p> <p><i>“After extensive discussion, there was consensus amongst the Directors that Freshfields be instructed to assess at the merits of the Company’s case under the CCFTA and to prepare the Trigger Letter, which assessment and letter would be presented at another meeting of the Board of Directors. It was further agreed that Mr. Moseley-Williams should proceed with meeting with the relevant Colombian authorities in an attempt to get clarity on environmental licencing and Páramo among other things.”</i></p>	
24 February	Letter from ANM to the Constitutional Court seeking clarification on the consequences of Constitutional Judgment C-35	C-44
2 March	Decision 097/16 of the Colombian Constitutional Court: denying the request for clarification filed by the Minister of the Environment on procedural grounds	C-47
7 March	Eco Oro files Notice of Intent to submit the claim to arbitration	C-48
26 March	Article El Espectador “Minería: seguridad jurídica o soberanía?”	C-227
6 April	Constitutional Court Ruling 138/16: denying request for clarification filed by the ANM on the basis that the “jurisdiction of the Constitutional Court is expressly set forth in Article 241, and does not include a role as an advisory or consulting body to deal with the effects of its own decisions or the effectiveness of legal or regulatory provisions.”	C-49
19 April	Article Vanguardia “El problema de Santurbán es que lo delimitaron desde un escritorio”	C-228
25 April	Article RCN Radio “Aumentó el desempleo en Vetas, ante la prohibición de explotar el páramo de Santurbán”	C-229
4 May	Letters from Eco Oro (Mr. González) to various environmental consultants: <i>“the screening process in which your company became involved last December has been suspended until we have assurances that the project will be executed”</i>	C-394
6 May	Eco Oro requests fourth extension of exploration phase	C-230
19 May	<p>Letter from ANM to Eco Oro: <i>“The Ministry of the Environment and Sustainable Development has recently sent the National Mining Agency the submitted zones corresponding to the reference areas for the páramo ecosystems declared and delineated in the country, which have been incorporated into the Colombian Mining Registry (CMC).</i></p> <p><i>In furtherance of the Mining Cadaster and Registry’s duty to manage and update the information contained in the national mining cadaster, the National Mining Agency, under Decree No. 4134 of 2011, has found that the mining concession contract under Law No. 685 of 2001, identified with number EJI-163, of which you are the holder, overlaps 49.45% of a Preservation Zone, as per the delimitation of the Ministry of the Environment and Sustainable Development of PZ- JURISDICTIONS-SANTURBÁN-BERLÍN.</i></p> <p><i>In addition, it should be borne in mind that, under Article 173 of Law No. 1753 of 2015, establishing the 2014-2018 National Development Plan, ‘All for a New Country’, ‘No person may engage in agricultural activities, exploration or exploitation of non-renewable natural resources or construction of hydrocarbon refineries in the areas delimited as páramos.’ As a consequence, no mining activities may be conducted in these areas.</i></p> <p><i>Likewise, it should also be taken into account that the Constitutional Court, when discussing such article, in judgment C-035 of 2016, ruled as follows:</i></p> <p><i>However, the question to be resolved by the Court is whether it is reasonable to permit mining and hydrocarbon activities temporarily in areas of special constitutional</i></p>	C-232

Date	Milestones, events and documents	Exhibit No.
	<p>protection when there is a deficit of legal protection, and the provision whereby such activities are allowed does not provide for any real protection guarantee.</p> <p>In the Court's view, the answer to the question asked above should be 'no'. Sacrificing legally protected interests, such as water quality, continuity and accessibility, and the other environmental services provided by páramos is disproportionate to the potential benefits that may derive from the extraction of non-renewable resources. With páramos being such a vulnerable and fragile ecosystem, endowed with little adaptation capacity, the impacts thereon are long term, if not permanent.</p> <p>In addition, it is noteworthy for your mining project that Article 36 of Law No. 685 of 2001 provides as follows:</p> <p>In concession contracts, the areas, plots of land and courses where, pursuant to the above articles, mining activities are prohibited shall be deemed excluded or restricted by operation of law or conditioned by the granting of special permits or authorizations. This exclusion or restriction need not be declared by any authority whatsoever, or be expressly stated in acts and agreements, nor may be subject to any waiver by the bidder or concessionaire of such areas or plots of land (...).</p> <p>The above is set out for your information and relevant purposes."</p>	
25 May	Article RCN Radio "Sector minero critica fallo de Corte Constitucional sobre explotación de minerales en el país"	C-233
2 June	Letter from Eco Oro (Ms. Arenas Uribe) to the ANM (Mr. García Granados): illegal exploitation by unspecified parties	C-236
30 June	Office of the Compliance Advisor Ombudsman (CAO), "Compliance Investigation, IFC Investment in Eco Oro (Project # 27961), Colombia"	MR-10
21 July	Investment Agreement between Eco Oro and Trexs	R-12; C-452
22 July	Eco Oro News Release "Eco Oro Minerals Announces Investment by Tenor Capital"	R-1 / R-30
26 July	<p>Letter from ANM (Mr. García Granados) to Eco Oro (Ms Arenas Uribe):</p> <p>"As you already know, the Ministry of the Environment and Sustainable Development issued resolution 2090 on December 19, 2014, whereby 'the Jurisdicciones – Santurbán – Berlin Páramo have been delimited and other decisions have been made.'</p> <p>As a result, it follows from the maps provided by the abovenamed Ministry that concession contract No. 3452 has a 50.73% overlap with the Preservation Zone, in which mining activities of any kind are prohibited, in conformity with official communication No. 20162200182461 submitted on May 19, 2016, by the Head of the Mining Cadastre and Registry under the purview of the National Mining Agency.</p> <p>In view of the fact that the next contractual year begins on August 8, 2016, and that pursuant to Section 36 of Law 685 of 2001, the area overlapping with the JURISDICCIONES – SANTURBÁN – BERLIN páramo is excluded by operation of law, it should be noted that the surface canon to be paid by the concession holder will need to be assessed and paid solely on the non-overlapping area, provided that no mining activity is permitted to be carried out on the remaining piece of land."</p>	C-50
26 July	Eco Oro News Release "Eco Oro Announces Board Appointment"	R-2
1 August	<p>ANM Technical Report No. VSC 169: "4.1 Considering that this mining project is currently in the ninth year of the exploration phase, it is concluded that the 'Mining and Environmental Policy' submitted has been executed in accordance with the criteria set forth in Section 12 of Concession Agreement No. 3452. The term of duration of this policy is from August 8, 2015 to August 8, 2016, thus, the project is currently in the ninth (9) year of exploration insured by the policy.</p> <p>As regards the 'Surface Canon' paid by 'Eco Oro Minerals Corp. Colombia Branch', amounting to \$337,952,451 for the ninth year of exploration, it is considered correct and in accordance with the criteria set forth in Concession Agreement No. 3452 and Article 27 of Law No. 1753 of 2005.</p> <p>Due to the foregoing, the concession holder under agreement No. 3452, ECO ORO MINERALS CORP. COLOMBIA BRANCH, is in good standing with respect to the</p>	C-51

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	<p>provision of the mining environmental policy effective until August 8, 2016 and payment of the surface canon effective until August 8, 2016.</p> <p>4.2 It is recommended that the request for extension of the exploration phase submitted by the concession-holder under agreement No. 3452, Eco Oro Minerals Corp. Colombia Branch be approved, as it is considered technically feasible and in compliance with the provisions of the current regulations: Law No. 1450/2011, Implementing Executive Order No. 943/2013, Executive Order No. 1073/2015, Law No. 1753/2015. However, Constitutional Court Judgment No. C-035 of February 8, 2016 on páramos should also be considered. Such judgment is aimed at protecting areas of special ecological significance, such as páramos, since these have a major role in the regulation of drinking water in our country, are places of groundwater recharge and of great vulnerability to any intervention.</p> <p>In view of the foregoing and, the holdings of Constitutional Court Judgment No. C-035 of February 8, 2016 and of case law on páramos, the exploration phase should be continued within the área of mining title 3452 that is outside the area delimited as the Santurbán páramo zone, páramo restoration zone and outside the Santurbán Regional Natural Park.</p> <p>Finally, a detailed schedule of the exploration activities to be conducted on a monthly basis for the two years of extension, stating specific dates, is required in order to allow for the future supervision and control of such activities and verification of performance thereof.</p> <p>4.3. This opinion should be referred up to the legal division of the PIN Group, for the purpose of making any relevant determination.”</p>	
2 August	Article El Espectador “En Colombia, el 88% de la producción de oro es ilegal”	C-52
2 August	<p>Fourth Two-Year Extension of the Exploration Phase</p> <p>ANM Resolution No. VSC 829 (notified to Eco Oro on 8 August 2016):</p> <p>“ARTICLE ONE – To extend for two (2) additional years the exploration phase under concession contract No. 3452, held by ECO ORO MINERALS CORP. SUCURSAL COLOMBIA, for the reasons stated in the rationale of this resolution, which shall extend until August 8, 2018, exclusively with respect to the area that does not overlap with the ZP – JURISDICTIONS – SANTURBÁN – BERLIN páramo preservation zone.; ARTICLE TWO – To request that the concession holder under concession contract No. 3452 submit, within a term of thirty (30) days following notification of this administrative act, a schedule detailing the exploration activities and investments to be carried out, evidencing that they are limited to the area set forth in section one hereof.”</p>	C-53
5 August	<p>Eco Oro (Mr. Moseley-Williams) to ANM (Mr. García Granados): “We have received the abovementioned communication. We do not understand the reasons that justify ANM’s stance in arguing that there is an area excluded ‘by the operation of the law’. To this date, Concession Contract 3452 is valid, has not been modified and its extension is pending. On the understanding that our rights will be respected, we will pay the amount specified in your communication and are willing to pay the entirety of the canon.</p> <p>In this regard, please find enclosed Corporate Agreements Form No. (92) 02500099338119 of August 5, 2016, of Davivienda Bank, in the amount of one hundred and eighteen million, seven hundred and seventy-six thousand, four hundred and fifty-seven Pesos (\$118,776,457) through which, pursuant to the instructions of the ANM, the surface canon for the tenth year of the exploration activities in the aforementioned mining title has been paid.</p> <p>Lastly, we note that Eco Oro reserves all rights pursuant to the Free Trade Agreement signed by the Republic of Colombia and Canada on November 21, 2008 and international law in connection with this matter.”</p>	C-54
16 August	Intersectoral Commission for Infrastructure and Strategic Projects (CIPE) Minutes of Meeting No. 5 [CONFIDENTIAL DOCUMENT]: “Angostura:	C-397

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	<p><i>After analyzing the impact of the unconstitutionality declaration rendered with regard to Article 173(1)(1) of Law No. 1753 of 2015 on the performance of mining concession contracts awarded prior to 9 February 2010, it was concluded that this project cannot be carried out with respect to over 60% of the mineralized area.</i></p> <p><i>Moreover, it was noted that the Project is being affected by illegal mining activities. Inter- institutional coordination between the National Government and territorial entities is required to address this.”</i></p>	
13 September	<p>Eco Oro Management Information Circular: Investment Agreement with Trexs (Second Tranche Shares approved: Investor owns an aggregate of 49.99% of the Company’s issued and outstanding Common Shares and the Participating Shareholders (certain existing shareholders of the Company) owning an aggregate of 18.16% of the Company’s issued and outstanding Common Shares and the Notes; if shareholder approval not obtained: the Second Tranche will consist of the Notes and secured contingent value rights, entitling the Investor to 51% and the Participating Shareholders to an aggregate of 19.93% of the gross proceeds of the Arbitration.</p>	R-5
19 September	<p>Letter from Eco Oro (Ms. Arenas Uribe) to the ANM (Mr. García Granados): together with document titled “Update of Exploration Activities Schedule Period 2016-2018 Mining Concession Contract 3452”:</p> <p><i>“This measure strongly affects the Angostura Project, since deprives Eco Oro’s mining rights, specifically 50.73% of the area of Mining Concession 3452, and makes it seriously question its viability.</i></p> <p><i>In this sense, this document is intended to describe the activities to be carried out during the extension, which are aimed at establishing whether or not it is viable to continue developing the Angostura Project, considering the new measure adopted.</i></p> <p><i>We clarify that submission of this present proposal of works does not suppose nor can be interpreted, in any way, as project viability. [...]</i></p> <p><i>Finally, we note that Eco Oro reserves all its rights under the Free Trade Agreement signed between the Republic of Colombia and Canada on 21 November 2008 and international law in relation to this matter.”</i></p>	R-97
27 September	<p>Email from Jan Wehebrink (IFC) to Anna Stylianides (Eco Oro): “Further to our phone conversation, I am writing to inform you that IFC is considering divesting its interests in Eco Oro and the Angostura project. As you know, the IFC’s policy is to invest in emerging market projects that will drive development and job creation within our country partners.</p> <p><i>Given recent developments in Colombia, and in particular, the ANM’s recent withdrawal of a significant portion of the mining title upon which the Project depends, we take the view that the Project is unlikely to be developed further. As you will appreciate, IFC continues to seek opportunities to reinvest our funds into other projects that fulfill our investment policy goals.</i></p> <p><i>The team and I will be happy to discuss process in further detail. And if you are aware of any parties that would potentially be interested in acquiring a block/ blocks of shares, please do let us know.”</i></p>	C-238
4 October	<p>Letter from Eco Oro (Ms. Arenas Uribe) to ANM (Mr. Rojas Salazar): re Concession EJ1-159</p>	C-239
13 October	<p>CDMB Resolution No. 824: granting the Award for Environmental Performance of Cleanest Production to Eco Oro</p>	C-55
November	<p>Office of the Comptroller General, 2015 Audit Report ANM (Extract):</p> <p><i>“Based on the auditing group’s analysis of the information reported in ANM documents 20151100214921 of 06/10/2016 and 20163300225751 of 06/22/2016, it was observed that between the 2007 and 2015 terms, the mining authority received requests for reduction in area from mining permit-holders, and these requests were not resolved in a timely manner. This omission resulted in the concession-holders, based on their requests and given the lack of timely response by the entity, choosing to pay the surface tax in a reduced amount, i.e., pursuant to the area resulting from said</i></p>	R-189

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	<p>reduction without prior issuance of the administrative act approving the reduction in area and without signing the Addendum and registering it with the Mining Registry, thereby formalizing the modification of the area (clause two of mining concession contracts). However, it is a legal duty of the mining authority, as was cautioned before, to settle and collect the economic considerations deriving from the mining permits granted in a timely and complete manner, thus also demonstrating failure to apply the provisions from paragraph d) of Article 112 of Act 685 of 2001.</p> <p>[...]</p> <p>p. 5</p> <p>It was observed that during the course of the present fiscal year, for the contracts listed below, payment of the surface tax was made based on the reduced area, without authorization for this from the competent authority with the formalities required by law:</p> <p>Table 3. Differences in surface tax collected due to requests for reduction in area</p> <p>[...]</p> <p>EJI-163 (reduction request made 5/5/2011)</p> <p>ECO ORO MINERALES CORP COLOMBIA BRANCH"</p>	
3 November	ANM Resolution No. VSC 144: "To approve the payment of surface canon fees in the amount of COP 118,769,899 for the tenth year of the exploration period under Concession Contract No. 3452, which shall extend from 9 August 2016 through 8 August 2017."	C-398
17 November	<p>Eco Oro Form 51-102F3 - Material Change Report re closing of second tranche of its private placement: "The CVRs entitle Trexs and the Participating Shareholders to an aggregate of 70.93% of the gross proceeds of the Company's arbitration with the Government of Colombia under the Free Trade Agreement between Canada and Colombia (the 'Arbitration') if the Company proceeds with the Arbitration and is successful in the Arbitration. The CVRs are secured and are subject to events of default, covenants and restrictions on the business of the Company.</p> <p>On November 9, 2016, the Company announced the issuance of the CVRs and the Convertible Notes and the closing of the Second Tranche. The Second Tranche included Trexs and the Participating Shareholders and resulted in gross proceeds to the Company of approximately US \$15 million."</p>	R-6 / R-38
21 November	<p>Intersectoral Commission for Infrastructure and Strategic Projects (CIIPE) Minutes of Meeting No. 9 [CONFIDENTIAL DOCUMENT]:</p> <p>"Soto Norte (Minesa) and Angostura (Eco Oro)</p> <p>As regards illegal mining, different strategies are being implemented, given that in the case of Angostura illegal miners are operating inside the páramo area Illegal miners are permanently intruding in the mines left by Eco Oro in order to exploit them. Inter-institutional roundtables have been established with formal companies in order to adjust their PTO. In any event, illegal mining activities in the páramo area require more decisive planning based on the CONPES (Colombian Council of Economic and Social Policy). Coordination with the National Planning Department (DNP) and the Ministries of Environment, of Mines and Energy and of Defense shall be progressed in order to define a schedule and action plans regarding any páramos to be delimited in the future.</p> <p>[REDACTED TEXT]</p> <p>As regards security issues, the Ministry of Defense has requested that the companies strengthen their private security. Furthermore, it was noted that the Ministry of Mines and Energy and the Governor's Office are working on a productive change program which will include 5,000 people in Vetás and 2,000 people in California.</p> <p>As regards the delimitation process in the Santurbán páramo, the current legal status was described: the Constitutional Court is currently reviewing the tutela action filed against Resolution No. 2090 of 2014, through which the Santurbán-Berlin páramo was delimited.</p>	C-399

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	<i>In the context of the claim, the Von Humboldt Institute submitted information at the request of the Court; as a result, the Ministry of Environment and Development is requested to review and coordinate its intervention with this entity.”</i>	
5 December	<p>Letter from Eco Oro (Mr. Moseley-Williams) to CDMB (Mr. Carvajal):</p> <p><i>“Firstly, I would like to express my deepest gratitude for making time in your schedule and meeting me and some of the members of the board of directors on November 21. The opportunity to exchange opinions and to understand the CDMB’s stance with regard to certain key matters for the Company is highly important, as it represents an important input for the development of our business affairs.</i></p> <p><i>As you are aware, Eco Oro has worked hard for several years to make Project Angostura a reality, envisioning it as an example of sustainable development, good environmental practices, regional development and job creation.</i></p> <p><i>In this regard, we share your concern with respect to the lack of a decision by the Constitutional Court regarding the action for the protection of constitutional rights requested from the Court against Resolution 2090 of 2014, to finally clarify the regulations applicable to the project. Without this decision, the CDMB will be unable to process and grant an environmental license for the development of the Angostura Project, as you stated during the meeting.</i></p> <p><i>Finally, we would like to reiterate that the Company, in the context of its commitment to the protection and conservation of the environment, wishes to make a contribution to the CDMB by donating four (4) weather stations, hoping to contribute to a deeper knowledge of the environmental and weather conditions of the conservation areas within the jurisdiction of the Authority. Eco Oro’s team looks forward to coordinating with your delegates to complete the donation.”</i></p>	C-57
8 December	Eco Oro’s Request for Arbitration	
2017		
---	Decision of the Supreme Court of British Columbia, Harrington Global Opportunities Fund Ltd and Courtenay Wolfe v. Eco Oro Minerals Corp, 2017 BCSC 664	R-136
13 January	Eco Oro News Release “Eco Oro Announces Management Incentive Plan”	R-31
17 January	ANM Technical Report No. VSC 3: <i>“Following its review, the submitted technical document was found to be a complement to the original document requesting the extension, adjusted to the area outside the páramo zone, with the schedule of operations to be carried out until August 2018, which was requested in Article 2 of Resolution No. VSC 0829 of August 2, 2016, whereby the exploration stage of Agreement 3452 was extended for two more years and whereby it was considered to be technically viable. However, following Resolution 2090 of December 19, 2014, whereby the Santurbán Páramo is delimited, it is necessary to clarify whether mining operations in the ‘Zones for the restoration of the páramo ecosystem’ can be executed or not. Furthermore, it needs to be defined if this area is part of the ‘Santurbán-Berlín Páramo Area.’”</i>	C-240
8 February	<p>ANM Order PARB No. 84: <i>“On 10 July 2006, the COLOMBIAN GEOLOGY AND MINING INSTITUTE — INGEOMINAS—awarded Concession Contract No. EJ1-159 to the corporation KEDAHDA S.A. for the exploration and exploitation of a deposit containing GOLD ORE AND CONCENTRATES AND OTHER ITEMS WHICH MAY BE SUBJECT TO CONCESSION, within the jurisdiction of the Municipality of SURATA, SANTANDER department, in an area of 814 hectares and 9478 square meters, for a total term of thirty (30) years starting from 9 March 2007, when the registration was made with the National Mining Registry (pages 41-51).</i></p> <p><i>The assignment of one hundred percent of Concession Contract No EJ1-159, in favor of GREYSTAR RESOURCES LTD, was completed and approved by means of Resolution GTRB No 0010 of 5 February 2008, which was recorded in the National Mining Registry on 18 March 2008 (pages 123-124).”</i></p>	C-402

Date	Milestones, events and documents	Exhibit No.
8 February	ANM Resolution VSC No. 10: <i>“1. Notify the corporation Eco Oro Minerals Corp. Colombia Branch, holder of concession contract No. 3452 of Technical Concept VSC-003 of 17 January 2017, so that within thirty (30) days from the notification of this order, they present the clarifications listed therein, as well as the observations that they consider relevant.”</i>	R-75
10 February	Press Release by Requisitioning Shareholders regarding Meeting to Reconstitute Eco Oro Board	R-32
7 March	<p>Letter from Eco Oro (Ms. Arenas Uribe) to ANM (Mr. García Granados): seeking suspension of its obligations under Concession Contract 3452:</p> <p><i>“In December 2014, the Ministry of the Environment and Sustainable Development, through Resolution No. 2090, set the limits of the Santurbán Páramo. The Resolution divided the páramo into three zones: i) the preservation zone; (ii) the restoration zone and, iii) the sustainable use zone. The same resolution made some exceptions to the general prohibition to carry out mining operations in the area. Among other exceptions, the Resolution stipulated that mining operations could be authorized and executed in the restoration zones of the páramo located in the municipalities of Vetás, California and Suratá (where Concession 3452 is located). Additionally, and generally, the Resolution provided that those projects with a mining concession contract and with an environmental control and management instrument could continue with the operations despite being located in a páramo. These exceptions would be consistent with the rules of legal certainty set out in the Mining Code. Afterwards, through Resolution VSC No. 00003, the National Mining Agency (ANM, on January 6, 2015, lifted the suspension of operations under title 3452. Some months after, on June 2015, Law 1753 was enacted, which included exceptions similar to the ones of Resolution No. 2090. Even if the scope of certain exceptions was still to be determined, these regulations would allow Eco Oro to continue with the development of its Angostura Project.</i></p> <p><i>However, on February 8, 2016, the Constitutional Court issued judgment C-035/16, whereby the provisions of Law 1753 of 2015 that established exceptions to the general prohibition to perform mining operations in the páramo, including the exceptions that represented the ones included in Resolution No. 2090 (mentioned in the above paragraph) and which applied to Eco Oro, were declared unconstitutional. In addition, judgment C-035/16 limited the powers of the Ministry of the Environment and Sustainable Development to demarcate the páramos. Even though Judgment C-035/16 has no direct impact on Resolution No. 2090, due to its importance, and because there is a pending tutela action before the Constitutional Court against said resolution, the demarcation of the Santurbán Páramo became uncertain. This had a direct impact on the possibility of developing activities under Concession 3452.</i></p> <p><i>Next, and based on Judgment C-035/16, the ANM issued Resolution No. VSC 829 on August 2, 2016, whereby the exploration stage of Concession Contract 3452 was extended for two years, but ‘exclusively concerning the area that does not overlap with the páramo preservation zone.’ Likewise, the ANM decided that, given that Agreement 3452 has ‘50.73% of its area partially overlapping with the páramo preservation zone’ Eco Oro should only pay surface canons ‘for the area that does not overlap, on the understanding that the rest is excluded by operation of the law.</i></p> <p><i>This means that, as a result of Judgment C-035/16 and ANM Resolution No. VSC 829, Eco Oro lost the right to perform mining operations on most of the land under Concession 3452 and to access the existing mineral resources, which deprives Eco Oro of its rights.</i></p> <p><i>The ANM subsequently limited to an even greater extent the possibility of developing the Angostura Project, by creating a situation of uncertainty with respect to the Eco Oro’s rights under Contract 3452.</i></p> <p><i>In this sense, on 7 April 2016, the ANM issued Resolution GSC-ZN 000048, of which Eco Oro was notified on 20 September 2016, and in which it accepted the extension request for the exploration phase that Eco Oro had filed in relation to</i></p>	C-241

Date	Milestones, events and documents	Exhibit No.
	<p>another of Eco Oro's concession contracts, title EJ1-159. According to this resolution, within title EJ1-159, as well as being prohibited in the 'preservation' area of the Santurbán Páramo, mining was prohibited in the 'restoration' area of the Santurbán Páramo, as well as in the Santurbán Regional Natural Park. If this same criterion is applied to title 3452, it would reduce the area of Concession 3452 in which Eco Oro can carry out mining activities by a further 10%. This would even further reduce the resources available in Concession 3452. In light of this, on 4 October 2016, Eco Oro filed before the ANM an appeal against Resolution GSC-ZN 000048, requesting clarification of the scope of these contradictory decisions. To date, no response has been received from the ANM.</p> <p>Moreover, to date, no guidelines have been established, or any zoning carried out, nor has there been any determination of the activities permitted within the Santurbán-Berlin Páramo, and it is not known what type of actions or measures will be taken in order to do so. The lack of clarity and legal certainty regarding the activities that Eco Oro can carry out within the boundaries of Concession 3452 makes it difficult, if not impossible, to advance the development of a mining project.</p> <p>Moreover, as mentioned above, a pending tutela action is currently underway against Resolution 2090 before the Constitutional Court, which, in light of the precedent set by Judgment C-35, could modify the application of Resolution 2090 or even deprive the Resolution of effect and order the cessation of mining exploration and exploitation activities being carried out in the Santurbán Páramo while it is re-delimited.</p> <p>As a consequence of the legal uncertainty affecting Contract 3452, the CDMB (the environmental authority responsible for licensing the Angostura Project) has recently informed Eco Oro that, given the lack of clarity regarding the regulatory framework applicable to the Angostura Project, it is not in a position to process or grant an environmental license requested by Eco Oro so that the Angostura project can progress to the construction and mounting and, subsequently, exploitation phases, until the litigation currently on foot is resolved. Additionally, if Resolution 2090 is left without legal effect, it will not be possible for the Angostura Project to obtain an environmental license since it will first be necessary for the entire process of delimiting and zoning the Páramo to take place before mining activities can be authorized in the area where the Angostura Project is located.</p> <p>Mining Concession Contract 3452 is currently in the tenth year of exploration work. The last extension of this phase granted by the ANM will expire on 8 August 2018. Eco Oro will not be able to continue developing the Angostura Project if it is not possible to obtain an environmental license prior to the expiry of the exploration phase. For this reason, faced with the current unviability of the Angostura Project for the reasons previously described, including the lack of legal clarity and security, it is not sustainable for Eco Oro to continue carrying out activities and making investments in the title. These circumstances constitute a force majeure or unforeseeable circumstances [caso fortuito] event."</p>	
23 March	Article Mongabay "World Bank exits controversial Angostura goldmine project in Colombian moorland"	MR-9
23 March	Letter from Eco Oro (Ms. Arenas Uribe) to ANM (Mr. García Granados): re restoration zone issue	C-242
27 March	Eco Oro Shareholder Circular "Let's fix Eco Oro"	R-39
29 March	Eco Oro Management Information Circular	R-40
11 May	Article El Mundo "Sector minero crece pese a la amenaza de la inseguridad jurídica"	C-243
9 August	ANM Resolution 683: suspension of obligations under Concession Contract No. 22346 <i>Force majeure</i>	C-248
22 August	ANM No. 906 (received by Eco Oro on 15 September 2017): not to grant the suspension of obligations under Concession 3452, events not unforeseeable	C-249

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11 September	IAvH “Colombian Biodiversity: Numbers to Keep in Mind”	R-128
13 October	ANM Resolution VSC No. 195: ANM approved the PTO filed by Minesa – the holder of a mining concession that was completely surrounded by Concession 3452 – for the furtherance of its Soto Norte mining project <i>“provided that its execution does not interfere with the rights of the holders of concession contract No. 3452 and Exploitation License 0105-68 and other holders that could be affected.”</i>	C-255
24 October	Joint Commission of the Free Trade Agreement Between the Republic of Colombia and Canada, Decision No. 6: <i>“the Joint Commission decided that Articles 803, 804 and 805 be authoritatively interpreted as follows in order to clarify and reaffirm their meaning”</i>	R-139
8 November	Eco Oro appealed ANM’s decision re Minesa	C-258
10 November	Colombian Constitutional Court publishes Judgment T-361/17 dated 30 May 2017: Resolution 2090 was struck down and a re-delimitation of the Páramo was required due to lack of public consultation (by November 2018) <i>“All the Parties involved, however, considered that the delimitation featured technical flaws to the point of having excluded areas that are part of the páramo and included others that are not.”</i> <i>New páramo to be issued in accordance with the law within one year</i> <i>“the new delimitation of the Páramo may not provide less environmental protection than the delimitation adopted through Resolution 2090.”</i>	C-244
15 November	Blu Radio, transcript of Brigitte Baptiste’s radio interview: <i>“01:16 – 01:58 Néstor Morales (interviewer): What are the boundaries defined by the von Humboldt [Institute] for the Santurbán Páramo? Brigitte Baptiste: There is a map that was produced by us and by the Autonomous Corporation that was adopted by the Ministry of Environment by means of a legislative act, it is in the most recent Páramo Atlas Néstor Morales: But do you recall the altitude? Brigitte Baptiste: The delimitation does not follow an altitudinal line. It is... It is a boundary that is defined using a biological and climatic model, because the páramo looks different according to the particular slope, according geological conditions. There are differences.”</i>	C-406
17 November	Attorney General requests UNESCO to include Colombian Páramo Ecosystems as a World Heritage Site	C-260
21 November	Article RCN Radio “Gobierno frena decisión sobre licencia ambiental a Minesa”: Minister of Environment stated that the decision over the environmental license to be granted to Minesa would be put on hold until the delimitation of the Santurbán Páramo is revised. The Minister of Environment further stated that <i>“[e]ach potential effect must be examined in detail because it is a lie that we are trying to swap water for gold.”</i>	C-262
26 November	Article El Espectador “Sin una nueva delimitación de Santurbán, no se podrá explotar”: <i>“[T]here can be no decision on licensing before this delimitation is carried out”</i>	C-265
2018		
12 February	Government of Colombia, Official Twitter Account of the Office of the Attorney General, Video Tweet: The Attorney General stated as follows: <i>“Answer: “Good afternoon. The truth is that páramos are strategic ecosystems because they are the main matting that protects and allows the distribution of water in our country. We are lucky to have around 50% of all the páramos in the world here in Colombia. This is why the Administrative Prosecutor’s Office, through the head of environmental matters, adopted several measures to protect these ecosystems. [...] Also, recently, we requested from the National Mining Agency the exclusion of all protected areas, particularly páramos, and that all works and activities conducted</i>	C-268

Date	Milestones, events and documents	Exhibit No.
	<p>by concessionaires be immediately suspended and <u>abandoned</u> without compensation, as mandated by Article 36 of the current Mining Code.</p> <p>And regarding the Santurbán páramo, in light of the Constitutional Court's decision, we are following up on the discussions held with the Ministry of the Environment and, of course, we are working towards the páramo's delimitation before the end of the current administration." Question: "What do you mean by 'abandoned'?"</p> <p>Answer: "I mean that, sometimes, mining areas overlap with protected areas because titles were granted on protected areas where mining cannot be conducted. So, pursuant to the applicable regulations, the Administrative Prosecutor's Office has insisted on this because there are several titles currently in force that overlap with areas where mining is prohibited."</p>	
15 March	ANM Resolution No. VSC 204: ANM again declared the Project as a PINE	R-76
16 April	ANM Resolution VSC No. 343: confirming decision to reject Eco Oro's suspension request	R-77
21 June	Letter from Eco Oro (Ms. Arenas Uribe) to the ANM (Ms. Habib): "For the reasons indicated herein, ECO ORO finds itself prevented from fulfilling its obligation to submit a PTO before the end of the time period established by Articles 84 and 281 of the Mining Code." (i.e., 21 June 2018)	R-104
27 July	Law No. 1930: management of páramos: "ARTICLE 5. Prohibitions. The development of projects, works or activities in páramos will be subject to the corresponding Environmental Management Plans. In any case, the following prohibitions will be taken into account: 1. Development of mining exploration and exploitation activities."	R-51
30 August	Letter from the ANM (Mr. García Granados) to Eco Oro (Ms. Arenas Uribe): "Eco Oro should be granted a time extension until 30 November 2018 to comply with its duty to submit the PTO"	C-410 / R-107
30 August	MinAmbiente files an 8-month extension request before the Santander Administrative Tribunal	C-411
9 October	Santander Administrative Tribunal Order: "1. To clarify the meaning of paragraph 1 of article 3 of Order of 25 October 2018, which is deemed to mean that the new delimitation of the Santurbán-Berlín páramo which should be adopted by the Ministry of Environment may not be issued on a date later than eight months after the end of the term of one year set out in article 5 of the resolving part of Judgment T-361/2017."	C-414
23 November	Letter from Eco Oro (Ms. Arenas Uribe) to ANM (Mr. García Granados): "I would like to reiterate our request filed by means of an Official Document filed under No. 2018904317822, in the sense of requesting from the ANM an additional period of three (3) months for submission of the PTO that must be filed by ECO ORO by virtue of Concession Contract No. 3452, starting from the date when the MADS publishes the administrative act finally defining the boundaries of the Santurbán-Berlín Jurisdictions Páramo, in compliance with Judgment T-361 of 2017. That is to say, it is requested that the current time period, which expires on 30 November 2018, be extended until 15 October 2019 (3 months after the expiration of th the new boundaries of the Santurbán Páramo."	R-108
24 December	Letter from ANM (Mr. García Granados) to Eco Oro (Ms. Arenas Uribe): "Consequently, given that to date there is no valid basis for extending the deadline for submission of the Jobs and Works Plan of Contract No. 3452, it is not appropriate to accede to the request submitted in the above-mentioned official letter."	R-109
2019		
14 February	ANM Resolution No. VSC 41: "1. To require, at risk of being fined, that Eco Oro Minerals Corp. Sucursal Colombia, holder of Concession Contract No. 3452, submit the PTO under such Contract within thirty (30) days of notification of this administrative decision, as provided in Article 84 of Law No. 685 of 2001."	C-418

Date	Milestones, events and documents	Exhibit No.
15 March	<p>The Attorney General's Office filed its Fourth report in compliance with Constitutional Court Decision T-361 of 2017, where it made, <i>inter alia</i>, the following remarks:</p> <p>"[...]</p> <p><i>On 9 November 2018, the third compliance report was issued, which contained a summary of the measures adopted by the Attorney General's Office, a compliance review of Orders issued by the Santander Oral Administrative Tribunal (Order of 30 July 2018 and Order of 25 September 2018), a review of the reports on communication activities carried out by the MADS, and a quantitative analysis of the Action Plan, which notes that, during such period, the Ministry made no substantial progress in terms of compliance with the orders of the Honorable Constitutional Court."</i></p>	C-419
21 March	<p>ANM's Resolution No. VSC 48: ANM decided not to reverse its decision re Minesa</p>	C-421
29 March	<p>Letter from Eco Oro (Mr. Orduz) to the ANM (Ms. Daza): "<i>I, the undersigned, DIEGO FERNANDO ORDUZ, of age, domiciled and residing in Bucaramanga, in my capacity as Acting Legal Representative of ECO ORO MINERALS CORP. SUCURSAL COLOMBIA ('ECO ORO' or the 'Company'), Tax Identification No. [NIT] 830012565-2, as evidenced in the enclosed certificate of good standing and legal representation, pursuant to Article 108 of Law No. 685 of 2001, hereby file the Company's renunciation of Mining Concession Contract No. 3452.</i></p> <p><i>In accordance with Article 108 of Law No. 685 of 2001, ECO ORO may renounce Concession 3452 because it has complied with all of its obligations to date. ECO ORO's compliance is evidenced by the attached copies of the proof of payment of surface canons for the 2018-2019 period.</i></p> <p><i>ECO ORO reserves all of its rights under International Law in connection with this renunciation."</i></p>	C-425bis
29 March	<p>Letter from Eco Oro (Mr. Orduz) to the MinMinas (Ms. Suárez): "<i>ECO ORO filed its renunciation of Concession Contract No. 3452 ("Concession 3452") with the National Mining Agency ("ANM"); "certain measures adopted by the Colombian government, particularly the ANM, have rendered ECO ORO's Angostura Project in Concession 3452 unviable and left ECO ORO with no choice but to renounce Concession 3452 in order to mitigate its losses:</i></p> <p><i>1. In December 2014, Resolution No. 2090 of the Ministry of Environment and Sustainable Development ("Resolution 2090") delimited the Santurbán Páramo, which partially overlapped with the area of Concession 3452. Resolution 2090 contained certain exceptions to the general prohibition on conducting mining activities in the páramo areas, including that mining projects which had a concession contract and an environmental control and management instrument granted before February 2010—as was the case with Concession 3452—could continue to operate until the termination of the Concession, notwithstanding the fact of overlapping with the demarcated páramo area. In June 2015, Law No. 1753 was enacted, which ratified the exception to the general prohibition on mining activities contained in Resolution 2090 for mining concessions with environmental control and management instruments granted before February 2010. Based on those rules, ECO ORO could continue to develop the Angostura Project.</i></p> <p><i>2. However, on 2 August 2016, the ANM issued Resolution VSC 829 ("Resolution VSC 829"), which extended the exploration phase of Concession Contract 3452 for a final term of two years, but restricted that extension to "the area [of Concession 3452] that does not overlap with the páramo preservation area [set out in Resolution 2090]."</i></p> <p><i>The ANM based this decision on Constitutional Court Ruling No. C-035/16 of 8 February 2016, which struck down the exception to the ban on mining in páramo areas for concessions with environmental instruments granted before 2010, as stipulated in Law No. 1753. The ANM stated that, inasmuch as Concession 3452</i></p>	C-423

Date	Milestones, events and documents	Exhibit No.
	<p><i>“presents a partial overlap of 50.73% with the páramo preservation area,” the extension of the exploration phase of Concession 3452 would only apply to the remaining areas of the Concession.</i></p> <p><i>3. Upon the issuance of Resolution VSC 829, ECO ORO was deprived of its rights to conduct mining activities in most of the area of Concession 3452 and to access the mineral resources in that area, despite having invested more than two hundred and fifty million dollars in the Concession area on the basis of those rights. The Company’s inability to access these resources rendered the Angostura Project economically unviable. Moreover, it was still not clear whether ECO ORO would be able to develop the remaining Concession areas located outside the páramo preservation area, as defined in Resolution 2090, in light of: (i) the inconsistent stance adopted by the ANM regarding the possibility of accessing the areas inside the páramo restoration zone set out in Resolution 2090; and (ii) the likelihood that the Constitutional Court would declare Resolution 2090 unenforceable within the context of a pending action for the protection of constitutional rights (tutela) (which was strong at the time, based on the Constitutional Court’s criticism of the delimitation in Ruling No. C-035/16).</i></p> <p><i>4. In fact, in November 2016, the CDMB, which was the regional environmental authority competent to issue licenses for ECO ORO’s Angostura Project, informed the Company that, as a result of the legal uncertainty surrounding ECO ORO’s right to conduct mining activities in the remaining areas of Concession 3452, and particularly in light of the tutela action against Resolution 2090 which was pending at the time, no environmental license request could be processed for any project located within Concession 3452.</i></p> <p><i>5. Against this backdrop, ECO ORO commenced an arbitration against the Republic of Colombia under the Free Trade Agreement between Canada and the Republic of Colombia in order to seek compensation for the destruction of the value of its investments in Concession 3452 and the Angostura Project. Consistent with its obligations under international law, ECO ORO adopted measures to preserve the status quo with respect to Concession 3452 so as to protect all available options to mitigate its losses.</i></p> <p><i>6. Consequently, on 7 March 2017, ECO ORO requested the suspension of the obligations deriving from Concession Contract No. 3452 through letter No. 123346, filed with the ANM under No. 2017904005542. Such suspension would have suspended the deadline for completing the exploration phase of Concession No. 3452 until the legal uncertainties regarding the ultimate location of the páramo were clarified. In that letter, ECO ORO pointed out that:</i></p> <p><i>‘[G]iven the current unviability of the Angostura Project for the reasons outlined above, including the lack of clarity and legal certainty, it is not sustainable for Eco Oro to continue carrying out activities and making investments in the title. These circumstances constitute a force majeure event or an act of God.’</i></p> <p><i>7. In the following months, other Colombian Government acts exacerbated the uncertainty surrounding Concession 3452 and affected ECO ORO’s rights under its concession.</i></p> <p><i>7.1. First, on 22 August 2017, the ANM rejected ECO ORO’s suspension request through Resolution VSC No. 000906, stating that there were no impediments to completing mine planning on Concession 3452. It was irrational to demand that ECO ORO continue investing in mine development in an area where there was no certainty that mining activities would be permitted in the future. Thus, on 29 September 2017, by means of Letter No. 123478, ECO ORO filed an administrative challenge [recurso de reposición] to the ANM’s decision and requested that a suspension of its obligations be granted.</i></p> <p><i>7.2. Second, on 13 October 2017, the ANM issued Order No. 00195 approving the Construction and Works Plan (Plan de Trabajo y Obras, PTO) of Sociedad Minera de Santander S.A.S. (“Minesa”), the owner of Concession 0095-68 which is an enclave within Concession 3452. Minesa’s PTO contemplated the construction of key</i></p>	

Date	Milestones, events and documents	Exhibit No.
	<p>infrastructure, specifically twin tunnels, through areas of Concession 3452 called “Agua Limpia” and “La Ollada” (two areas of Concession 3452 located outside the páramo preservation area delimited by Resolution 2090, for which no mineral resources have been declared). Minesa had not asked for ECO ORO’s consent to use these areas of Concession 3452, granted exclusively to ECO ORO by acquiring and paying for the rights to those areas, as it was required to do as a matter of Colombian law.. ECO ORO therefore challenged the ANM’s approval of Minesa’s PTO on the basis that it provided for the construction of infrastructure inside Concession 3452 without ECO ORO’s consent, which constituted an additional infringement of ECO ORO’s rights under Concession 3452.</p> <p>7.3. Third, in November 2017, the Constitutional Court rendered Decision No. T-361/17, leaving Resolution 2090 without effect inasmuch as the delimitation of the Santurbán Páramo had been conducted in breach of the applicable public consultation requirements. The Court postponed for a year—until November 2018—the annulment of Resolution 2090 in order to allow the Colombian Government to carry out the required consultation process and issue a new delimitation. The Constitutional Court stated that the new delimitation could only provide greater, not lesser, protection to the Santurbán Páramo. This cast doubt as to whether any areas of Concession 3452 would remain available for mining activities if the páramo delimitation was expanded. Following the issuance of the Constitutional Court’s decision, the Ministry of the Environment announced a moratorium on permitting for projects in the area for this very reason</p> <p>The November 2018 deadline set by the Constitutional Court to issue the new (and broader) delimitation of the Santurbán páramo was five months after the 21 June 2018 deadline for ECO ORO to submit a PTO and complete the permitting process for Concession 3452 (a term that the ANM refused to suspend). In other words, ECO ORO would not know whether any areas of Concession 3452 would remain available for mining activities until five months after its deadline to complete mine planning and permitting pursuant to its obligations under the concession.</p> <p>7.4. Fourth, on 21 March 2018, the ANM issued ORDER VSC 048 dismissing ECO ORO’s administrative challenge [recurso de reposición] against the approval of Minesa’s PTO. The ANM’s decision allows Minesa to build its mining project’s essential infrastructure inside Concession 3452, even though those areas were granted to ECO ORO and Minesa has not paid for use of these rights.</p> <p>However, Minesa agreed to acquire other mining titles belonging to ECO ORO that were not affected by the uncertainty linked to the delimitation of the Santurbán páramo—mining titles that it needed to carry out its own mining project.</p> <p>7.5. Fifth, on 3 May 2018, ECO ORO was notified of ANM Resolution VSC 000343 of 16 April 2018, dismissing ECO ORO’s appeal against the ANM’s refusal to suspend the Company’s obligations under Concession 3452. As a result, the expiry date for the Concession’s exploration phase was upheld and, thus, ECO ORO still had to comply with its obligation to submit a PTO and complete the permitting procedures for Concession 3452 before 21 June 2018.</p> <p>8. Consequently, on 21 June 2018, ECO ORO informed the ANM through letter No. 123872 that, in view of the uncertainty regarding the location in which mining activities would be allowed (if anywhere at all)[¹] following the new delimitation of the Santurbán páramo, ECO ORO would be unable to comply with its obligation to submit a PTO and complete the permitting procedure before the deadline of 21 June 2018, or even before 8 August 2018, the date on which the exploration phase of Concession 3452 would expire.</p> <p>[1] ¹ As explained by ECO ORO to the ANM in its letter of June 21, 2018, “[u]nder Article 84 of the Mining Code, the PTO must identify, among other things, the ‘definitive delimitation of the mining area,’ the ‘location [...] of the reserves to be exploited,’ and the ‘location of the infrastructure and works, mineral deposits, treatment plant and transport, and, if required, processing facilities.’ Thus, for ECO</p>	

Date	Milestones, events and documents	Exhibit No.
	<p>ORO to be able to submit a PTO, it needs to clearly understand in which areas of Concession 3452 it will be able to conduct mining activities.”</p> <p>9. The ANM replied to ECO ORO’s letter on 5 July 2018, pointing out the following: “given that [...] Eco Oro indicates that it is not possible for it to fulfil its obligation of presenting a PTO [...] we understand that ultimately you would require an additional term for fulfilling your obligation, and this being the case, it is appropriate for the title-holder to file a formal request for an extension [...].”</p> <p>10. Although it noted that it was not aware of any legal grounds for requesting an extension of the Concession’s exploration phase (besides the suspension of its obligations), ECO ORO accepted the ANM’s proposal and on 30 July 2018, by means of letter No. 122912, ECO ORO requested that the ANM extend the Concession’s exploration phase until after the Ministry of Environment issued the new delimitation of the Santurbán Páramo (the deadline for this being 30 November 2018).</p> <p>11. Shortly afterwards, ECO ORO filed a request for pre-judicial conciliation with the ANM (and Minesa) regarding the ANM’s decision to approve Minesa’s PTO, in a final effort to have the decision revoked.</p> <p>12. On 30 August 2018, through letter No. 20183500273331, the ANM decided to grant ECO ORO an extension until 30 November 2018, the same deadline as that established by the Constitutional Court for the new delimitation of the Santurbán Páramo. However, in October 2018, a Colombian court granted the Ministry of Environment an extension until 15 July 2019 to complete the public consultations required under Constitutional Court ruling No. T-361/17 and publish the new delimitation of the Santurbán Páramo.</p> <p>13. When ECO ORO requested, through letter No. 124065 of 23 November 2018, that the ANM grant an equivalent extension for the expiry of its Concession, the ANM rejected that request by means of letter No. 20193000267141 of 21 December 2018. In its decision, the ANM averred that ECO ORO faced no “technical or legal impediments” in preparing a PTO, which it knew to be false. The ANM’s decision contradicts its previous decision to grant an extension until after the original deadline set by the Constitutional Court for the new delimitation of the Santurbán Páramo.</p> <p>14. By December 2018, the conciliation relating to the approval of Minesa’s PTO had failed.</p> <p>15. Although the Ministry of Environment has yet to publish the new coordinates for the Santurbán Páramo, on 14 February 2019, the ANM issued Order VSC 041 instructing ECO ORO to submit a PTO for Concession 3452 within the following 30 days.</p> <p>As a result, at present, the exploration phase of Concession 3452 has formally ended and thus ECO ORO has no choice but to formally renounce the Concession in order to mitigate its losses and thus, among other things, (a) avoid the continuing costs related to the mine’s maintenance and safety; and (b) avoid a declaration of caducity that could impede the conclusion of the sale and transfer of certain mining titles by ECO ORO to Minesa.”</p>	
29 March	Letter from Eco Oro (Mr. Orduz) to MinAmbiente (Mr. Lozano): [same content as letter to Minister of Mines]	C-424
23 April	<p>Article Semana Sostenible “¿En qué va la nueva delimitación del Páramo de Santurbán?”:</p> <p>“A few days before, on 20 March, the Santander Administrative Tribunal formally opened contempt proceedings against the Minister of Environment, Ricardo Lozano, on the ground that the delimitation process was not being progressed, in violation of the constitutional mandate ordered in Judgment T – 361.”</p>	C-426
29 July	ANM “Informe Visita de Verificación de Estado y Condiciones de Seguridad de los Túneles Exploratorios La Perezosa y Veta de Barro en el Área del Contrato 3452 de Eco Oro”	MR-55
November	MinAmbiente, Proposal for the new delimitation of the Santurbán Páramo	C-455

Date	Milestones, events and documents	Exhibit No.
---	Map comparing 2090 Delimitation with the 2019 MinAmbiente's delimitation proposal	C-454
---	CORPONOR, Map showing the overlap of the Santurbán-Sisavita Park with Concession 3452	R-190
2020		
---	The Santurbán Páramo has not definitively been delimited to this date	Tr. Day 1 (Mr. Blackaby), 17:1-2; Tr. Day 1 (Ms. Richard), 147:20-22 – 148:1-2; Tr. Day 1 (Mr. Adam), 354:1-2; and Day 2 (Cross-Examination of Mr. Javier García by Ms. Richard), 596:8-11. See also Claimant's Post-Hearing Brief, ¶34, 118; and Respondent's Post-Hearing Brief, ¶22.

Partial Dissenting Opinion

1. For the reasons that follow, based on the specific facts and applicable law in the present case, and despite certain coincidences in the legal analysis and facts considered in the decision and in this dissenting opinion in respect of or in connection with the indirect expropriation claim, I find myself unable to share the conclusions in the decision in regard to this claim.
2. Also, although I am in agreement with the decision's final adjudication of the Claimant's fair and equitable claim, I do not agree – as it should become apparent from a comparison of this dissenting opinion with the decision – with each and every finding, understanding of the evidence or analysis leading to such decision.
3. Annex 811 (2)(b) of the Canada-Colombia Free Trade Agreement (the “Treaty”) is to be read against the backdrop of general international law for its understanding and interpretation. As set forth in the *Phoenix* award, the parties to a treaty cannot contract out of the system of international law. As soon as States contract with one another, they do so automatically and necessarily within the system of international law,¹ which brings into the picture general principles of law and international law doctrines.² Therefore, when construed or interpreted, this Treaty provisions cannot be isolated from general international law.
4. Annex 811 (2)(b) refers to “*rare circumstances*” and includes as illustration of situations in which “*rare circumstances*” would be present, “*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 [or of a] non-discriminatory [character]*”.³ If rare circumstances are present under international law, a finding of indirect expropriation may follow.
5. “*Rare circumstances*” afford large leeway for interpretation. In the corresponding interpretative exercise, the legal factors to be considered from an international law perspective include legitimate expectations created when the concession was executed on 8 February 2007 (the “Concession”)⁴ in respect of legal title/Concession rights of the

¹ *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009), at para. 77.

² Vienna Convention on the Law of Treaties, Article 31(3)(c) (Exhibit CL-3).

³ Free Trade Agreement between Canada and the Republic of Colombia (signed on 21 November 2008 and entered into force on 15 August 2011) (Exhibit C-22; see also Exhibit R-137).

⁴ Concession Contract 3452, 8 February 2007 (Exhibit C-16).

Claimant, general public international law principles of *pacta sunt servanda*, good faith (including legitimate expectations and the condemnation of abuse of rights) and the proportionality principle. Indeed, although good faith – a general principle of customary international law – encompasses all the latter which, in turn, contribute to shaping the notion of good faith and its substance, *pacta sunt servanda* is a general, stand-alone principle of customary international law.

6. The above is apposite in connection with contractual agreements like the Concession. Contractual rights thereunder are protected investments under the definition of investment in Article 838(g)(i), Section “C” of the Treaty, which expressly includes concessions. Contractual rights covered by this provision (unlike other situations which might also fall within its purview) are particularly apt to generate legitimate expectations frustrated by the retroactive or retrospective application of laws, including, without limitation, environmental laws, insofar as not accompanied by full compensation or a credible offer to fully compensate. Indeed, under Treaty Article 811(1)(c), lack of compensation as defined in the Treaty constitutes a Treaty breach rendering the taking illicit under international law.
7. The validity of the Concession under Colombian law has not been challenged, so that the necessary conclusion is that the Concession was made with the concessionaire having the legitimate expectation that its rights thereunder would be respected including, without limitation, its right to make a profit or draw economic benefit. The frustration of such rights resulting from retroactive or retrospective legislation or regulations must necessarily be taken into account to determine if Treaty guarantees have been violated, including in the analysis whether “*rare circumstances*” are present. As it will be further discussed below, a valid concession under Colombian law vests the concessionaire with acquired rights to explore and exploit the mining resource within the boundaries of the Concession as granted.
8. Further, the protection of legitimate expectations is intimately intertwined with customary international law rules, of substantial relevance when there is uncertainty in the applicable legal regime introduced through State conduct after the granting of contractual rights under a transaction to which the State is a party.
9. As the European Court of Human Rights⁵ has decided, not only the protection of legitimate expectations is a component of the general good faith rule of customary international law but, indeed, such rule is a corollary of the protection of legitimate expectations as a general principle of law⁶ indissolubly linked to the good faith rule under customary international law.

⁵ *Opel Austria GmbH v. Council of the European Union*, Case T-115/94 (Judgment of the Court of First Instance (Fourth Chamber) (22 January 1997) ECR II-00039.

⁶ See, for example, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/01, Award (22 September 2014) (Exhibit RL-96) at para. 576 showing that the protection of legitimate expectations is a general principle of law. The International Court of Justice has not endorsed the existence of an international law principle protecting legitimate expectations (*Obligation to Negotiate Access to the Pacific Ocean (Bolivia vs Chile)* October 2018 Judgment ICJ Report 2018 page 507, at page 559 (para. 162). However, the facts giving rise to this decision

*“The principle of good faith, codified by Article 18 of the First Vienna Convention, is a rule of customary international law whose existence is recognized by the International Court of Justice and is therefore binding on the Community. The principle is the corollary in public international law of the principle of protection of legitimate expectations, which forms part of the Community legal order and on which an economic operator to whom an institution has given justified hopes may rely”.*⁷

10. Although this case concerned the application in time of a provision of the EC Agreement, it stands for a general principle of customary international law which is clearly relevant when acquired rights are exposed to the retroactive application of legal rules, therefore adversely affecting legal certainty and predictability and concomitant expectations associated with them. In this connection, the following excerpt of this decision is pertinent:

*“The principle of legal certainty requires Community legislation to be certain and its application foreseeable by individuals and that every Community measure having legal effects must be clear and precise and must be brought to the notice of the person concerned in such a way that he can ascertain exactly the time at which the measure comes into being and starts to have legal effects. That requirement must be observed all the more strictly in the case of a measure liable to have financial consequences in order that those concerned may know precisely the extent of the obligations which it imposes on them”*⁸.

11. To consider, in light of the above, whether “*rare circumstances*” in face of which, for example, not respecting a concessionaire’s rights under a concession would lead to the violation of Treaty Article 811(1) and its Annex 811(2)(b), it is necessary to bear in mind that *normal circumstances* require not applying retroactively laws or regulations interfering with contractual rights and defeating acquired rights or expectations associated with such rights. It cannot be “normal” to take for granted the retroactive application of the law or legal regulations to defeat concession rights, which are prospective in nature, particularly when such application is pursued by the State party to the contract to the detriment of the private counterpart in a situation like the one at stake, in which the State played an active role in attracting investments through, *inter alia*, the enticement of a concession based on the agreement between the State and a private party the legal regime of which is unilaterally controlled by the State. In such scenario, if such interference happens, a “*rare circumstance*” is engendered, and compensation may be appropriate.

concerned the existence or not of the obligation to negotiate maritime boundaries in an inter-State dispute, and not the enforcement of concession rights protected by a bilateral investment protection treaty. Further, the Court explicitly recognized that the legitimate expectations principle was applied in treaty investment disputes.

⁷ *Ibidem*, at II-40.

⁸ *Ibidem*, at II-41.

12. Colombian law leads to similar conclusions. Under Colombian law, including Colombian constitutional law, the retroactive (affecting acquired rights, Colombian Constitution Article 58) or retrospective (affecting ongoing relationships) application of national law requires compensation. Although this provision privileges the public interest over merely private ones, it does provide for compensation in case of deprivation of property rights. In this respect, not only does Article 58 preclude the retroactive application of the law as a basic constitutional guarantee, but it also provides that acquired rights are part of the property rights protected by this provision, which in the present case come into life simultaneously with the coming into life of the contract or concession constituting their source⁹. In turn, the notion of acquired rights unequivocally carries with it the principle that acquired rights may not be eroded or suppressed by a retroactive application of the law without compensating for the deprivation of such rights protected by the Colombian Constitution.
13. Also, the Colombian law principle of “*confianza legítima*” (“legitimate expectation or reliance”) comes into the picture. The retroactive application of the law to the detriment of acquired rights under Colombian law would be a still more blatant violation both of the legitimate expectations principle under international law and the *confianza legítima* and acquired rights principles under Colombian law. It should be noted that under Colombian constitutional law, all of acquired rights, *confianza legítima* and legal predictability (*seguridad jurídica*) fall within the protected ambit of the good faith principle and are thus united by a common thread¹⁰. It would then be the “*rarest of circumstances*” not to find a violation of Annex 811(2)(b) on the basis of the facts and the law applying in the present case, considered from the perspective of both applicable domestic and international law, including the reference in this provision to the principle of good faith. Such proximity between municipal and international law evokes the kind of convergence of legal principles underlined in the European Court of Human Rights decision referred to at para. 9 above.
14. Under Colombian law, there is no limitation on the operation of these principles in respect of environmental regulations. Specifically, Council of State Advisory Opinion 2233 of

⁹ (All citations to Colombian legal texts or cases in this opinion refer to their original text in Spanish). Article 58 of the Colombian Constitution (Exhibit C-65) recites as follows: “*Se garantizan la propiedad privada y los demás derechos adquiridos con arreglo a las leyes civiles, los cuales no pueden ser desconocidos ni vulnerados por leyes posteriores. Cuando de la aplicación de una ley expedida por motivos de utilidad pública o interés social, resultare en conflicto los derechos de los particulares con la necesidad por ella reconocida, el interés privado deberá ceder al interés público o social. La propiedad es una función social que implica obligaciones. Como tal, le es inherente una función ecológica. El Estado protegerá y promoverá las formas asociativas y solidarias de propiedad. Por motivos de utilidad pública o interés social definidos por el legislador, podrá haber expropiación mediante sentencia judicial e indemnización previa. Este se fijará consultando los intereses de la comunidad y del afectado. En los casos que determine el legislador, dicha expropiación podrá adelantarse por vía administrativa, sujeta a posterior acción contenciosa-administrativa, incluso respecto del precio*”. The irretroactivity principle is further confirmed by Article 46 of Law 685 of 2001 (Colombian Mining Code, Exhibit C-8): “*Normatividad del contrato. Al contrato de concesión le serán aplicables durante el término de su ejecución y durante sus prórrogas, las leyes mineras vigentes al tiempo de su perfeccionamiento, sin excepción o salvedad alguna. Si dichas leyes fueren modificadas o adicionadas con posterioridad, al concesionario le serán aplicables estas últimas en cuanto amplien, confirmen o mejoren sus prerrogativas exceptuando aquellas que prevean modificaciones de las contraprestaciones económicas previstas en favor del Estado o de las de Entidades Territoriales*”.

¹⁰ Consejo de Estado, Decision No. 2233 (11 December 2014), at pp. 38-39 (Exhibit R-135).

11 December 2014 provides that: a) the doctrines of acquired rights and *confianza legítima* apply (are not carved out or excluded) in connection with environmental regulations¹¹; and b) both cases of retroactive application of the law in regard to acquired rights or of retrospective application of the law in connection with ongoing relationships give rise to compensation¹². In fact, Constitutional Court Decision C-35 is an explicit acknowledgment of the retroactive effects of its determinations because it expressly states that it is purposely aimed at curing what is described as the then existing “deficient legal protection of páramo ecosystems”¹³, in other words, at modifying the then existing law.

15. In the present case, notions of acquired rights and *confianza legítima* under Colombian administrative law and converging notions of international law referred to above play a central role in the evaluation of the factual and legal context of the situations that give rise to these Treaty claims, including expropriation claims.
16. Focusing now on the text of Annex 811 (2)(b), this provision requires an analysis of *pacta sunt servanda*, good faith, proportionality, legitimate expectations and abuse of rights. Such principles must be brought to bear when interpreting references to the “severity” or the “purpose” of measures concerned by the application of Annex 811(2)(b).
17. As argued by the Claimant and shown in the witness testimony of Mark Mosely Williams (unrebutted in this part), the Angostura deposit 150 hectares is the Concession’s most attractive in terms of silver and gold reserves. This sector of the Concession overlaps 0.09 % of the Santurbán Páramo (assuming (*quod non*) the Páramo delimitation pursuant to Resolutions 2090 of 2014 of the *Ministerio de Ambiente y Desarrollo Sostenible*¹⁴ and Resolution VSC 829 of 2 August 2016 of the *Agencia Nacional de Minería*¹⁵), but deprives the concessionaire of over 50 % of its Concession mining rights and renders mining under the Concession economically inviable¹⁶. However, neither the Constitutional Court Decision C-035 of 2016 nor Resolution 2090 of 2014¹⁷, which preceded Resolution VSC 829, can be taken as the final criterion of delimitation since later Constitutional Court Decision T-361 of 2017 struck down Resolution 2090 and ordered a new delimitation of the Páramo, albeit by taking into account the criteria set forth in Resolution 2090.
18. Nevertheless, the meaning or real effects of this latter Constitutional Court Decision are less than clear, since: a) it did not delineate the Santurbán Páramo; b) in vague terms, it

¹¹ *Ibidem*, at pp. 36-37, no. 1.1.

¹² *Ibidem*, at 36-40. This is also the situation in international law: *infra*, fn. 36.

¹³ Constitutional Court, Judgment No. C-35 (8 February 2016), paras. 166-169 at pp. 140-141 (Exhibit C-42).

¹⁴ Ministry of Environment, Resolution No. 2090 of 2014 (19 December 2014) (Exhibit C-34).

¹⁵ National Mining Agency, Resolution No. VSC 829 (2 August 2016) (Exhibit C-53).

¹⁶ Witness statement of Mark Moseley-Williams (19 March 2018) at para. 59. More specifically, as a result of Resolution 2090, the Santurbán Páramo overlaps with a) 50.7 % of the Concession and 32.4 % of the Angostura deposit; and b) 3.9 % of the restoration area under the Concession and 27.6 % of such area corresponding to the Angostura deposit (*ibidem*, at paras. 25-26).

¹⁷ Ministry of Environment, Resolution No. 2090 of 2014 (19 December 2014) (Exhibit C-34).

says that as a result of any delineation the levels of protection of the Páramo cannot be lower “as to the protection of the environment” than the one afforded under Resolution 2090; c) still, it goes on to say, the demarcation of the Páramo in such Resolution can be modified in view of errors committed in the demarcation; d) in any case, it also says, that any ensuing modification cannot adversely affect measures to protect or safeguard the Páramo “in global terms”; and e) it states that in the delimitation the classification of Páramo zones under the Alexander Humboldt Institute (IAvH) report must be taken into account¹⁸. At any event, the order in this Decision to the Ministry of the Environment to delimit the Páramo within one year, in the form of an administrative act, was never carried out.

19. On 24 December 2016, the Constitutional Court refused to clarify its Decision C-035 despite various indications from different sectors that its meaning and effects were unclear¹⁹. It should also be noted that different laws, resolutions or court decisions (e.g. Law 1930 of 2018²⁰ at Article 14; Resolution 769 of 2002 at Article 8²¹, Constitutional Court decision T-361 of 2012 at para. 15.3.4²²; Council of State Advisory Opinion 2233 of 2014, at 7-8)²³ impose on the State, in compliance with its constitutional duties, the unilateral obligation to acquire, on its own initiative, páramo areas, which, if complied with, would likely have avoided Colombian law and international law violations leading to the Claimant’s claims in this case; however, despite the vital ecological importance of this natural resource and Colombia’s constitutional duties which, since 1997 (Law 373), required Colombia to acquire páramo areas (and accordingly to delimit such areas to determine what was to be acquired) it granted instead, in 2007, a Concession to the Claimant without first establishing whether it overlapped or not with páramo area subject to Colombia páramo acquisition obligations. Colombia did not attempt either to acquire the concession rights it had granted the Claimant limited to the Concession sector comprising the Santurban Páramo, which would have been in line with the mandate set forth in Law 373 to protect the páramos.
20. No due diligence in 2007 – when the Concession was executed – could have anticipated the uncertainties and accompanying contradictions created by State conduct postdating the Concession summarized in paras. 16-19 above²⁴. Further, no due diligence on the side of the Claimant could have enabled it to predict the radical impairment of its Concession rights through host State conduct or justify the State’s breach of its own, constitutionally

¹⁸ Constitutional Court, Judgment No. T-361 (30 May 2017) at pp. 261-262 (Exhibit C-244).

¹⁹ Constitutional Court, Ruling 138/16 (6 April 2016) (Exhibit C-49).

²⁰ Law No. 1930 (27 July 2018) (Exhibit R-51).

²¹ Ministry of Environment, Resolution No. 769 (5 August 2002) (Exhibit C-9).

²² Constitutional Court, Judgment No. T-361 (30 May 2017) (Exhibit C-244).

²³ *Consejo de Estado*, Decision No. 2233 (11 December 2014) (Exhibit R-135).

²⁴ Post-Concession State conduct like conduct described, *inter alia*, at paras. 772-805 of the decision, as well as the facts and circumstances alluded to in its conclusion at para. 820, could not have been anticipated by the concessionaire when entering into the Concession.

mandated obligations to protect the páramos, reminded by the Colombian Council of State²⁵, which were ignored when granting the Concession. In the specific context of the transactions at stake, this situation of inequality gives rise to both legal and moral obligations on the State not to unreasonably or disproportionately exercise its unilateral regulatory or police powers²⁶, since the Respondent is solely responsible for failing to carry out any due diligence or conduct itself and for its lack of foresight when determining the legal entitlement vested in the private party under the Concession having in mind the social or State interests compromised by granting it.

21. Further, blanket or general statements as to environmental protection prior to the Concession could not have alerted the Claimant about specific issues regarding its concession rights and their scope or delimitation, but certainly should have alerted the State not to grant concession rights actually or potentially interfering in its laws or obligations regarding Páramo protection, including preliminary due diligence to avoid such interference, which should have included the delimitation of the Páramo through State action prior to granting the Concession. It was exclusively in the hands of the State to delimit the Páramo: the private party could not substitute itself for the State to carry out such delimitation. If the State did not have this foresight, nor could the Claimant have had it.
22. The IAvH was created pursuant to the 1993 General Environmental Law²⁷. It took it 17 years to issue its 2007 Report on the páramos²⁸, including Santurbán, evaluating their fragility and establishing their general geographic dimension (but not the Santurbán delimitation) after the execution of the Concession. The Claimant could not have anticipated this through a due diligence, that was clearly not undertaken by the State itself in protecting a Páramo already identified in the Colombian maps since 1851²⁹ and – as it was of public knowledge – which had been subject to continuing – apparently destructive – mining operations since then without effective counter-action by the Colombian State despite this Páramo’s seemingly obvious delicate ecosystem characteristics.
23. The radical impairment of the concessionaire’s acquired rights arising out of state conduct consisting, *inter alia*, of the uncertain Angostura deposit delimitation, rooted in turn in the uncertainty of the Concession delimitation itself, cannot be dissociated from the parallel neutralization of the exercise of such rights to, for example, obtain the mining licenses, necessarily requiring the previous delimitation of the licensed area in which the exploration and exploitation activities would be carried out. In such respect (and for all legal purposes, including for assessing the existence of an indirect expropriation under the Treaty), it is not possible – unless adopting a formalistic approach – to dissociate an acquired right under applicable law from its exercise: there is no distinction between denying the existence of an acquired right and neutralizing its exercise through private or State action or conduct,

²⁵ *Consejo de Estado*, Decision No. 2233 of 11 December 2014, at pp. 16-99 (Exhibit R-135).

²⁶ J.D.B Mitchell, *The Contracts of Public Authorities, a Comparative Study* (University of London (London School of Economics), 1954), at 91.

²⁷ Law No. 99 of 1993 (22 December 1993), Articles 16(c) and 19, (Exhibit C-66).

²⁸ IAvH, Atlas of Colombia Páramos (2007) (Exhibit C-14).

²⁹ Article La Silla Vacía “El tal páramo de Santurbán sí existe” (8 September 2014) (Exhibit R-110).

as it has happened in this case. Acquired rights are as much ignored when their existence is rejected as when their exercise is impaired. Therefore, a holistic evaluation of the situation at stake shows that the Claimant's acquired rights have been denied in their entirety and, accordingly, that an illicit taking under the Treaty has ensued.

24. The uncertainties in the Concession delimitation were in part prompted by social strife between water users in the city of Bucaramanga and miners in the Vetás Municipality. However, the Claimant did not originate nor could predict the impact of this social strife on the delineation of the Páramo as a result of the measures. Rather, the State (in compliance with its basic political and social obligations) should have been aware of the clash of interests between different sectors of its population (as testified by Minister Luz Helena Sarmiento³⁰ and acknowledged by the Colombian Constitutional Court³¹) which – as accepted in the decision – in substantial part account for the State's meandering conduct regarding the Páramo before and after the adoption of the measures and the uncertainty regarding its delimitation, existing even today.
25. Therefore, a comparative evaluation of the severity of: (i) the detriment to the Páramo sought to be prevented by Resolution 2090, the Constitutional Court Decision C-35 and Resolution VSC 829 (collectively, the "Measures") in light of their purpose (as set forth in Annex 811 2 (b)), and (ii) the deprivation of the Claimant's rights caused by the Measures, must necessarily take into account that the Páramo delimitation relied upon by the Measures when adopted was, without any fault attributable to the Claimant, not accurate, was still subject to modification or review, and in any case was not final, and that the Measures, which could not have been anticipated by the Claimant when contracting, were harmful to the Claimant by substantially depriving it from its acquired rights under the Concession, particularly in connection with the Angostura deposit. The Respondent was fully responsible for such uncertainty, the very existence of which also constituted a violation of the Respondent's constitutional duties. Such evaluation must also take into account the relatively minimum effects on the Santurbán Páramo on mining the Angostura deposit, which – even if hypothetically considering the correctness of the Páramo delimitation pursuant to the Measures – only affects less than 1% of the entire Páramo.
26. In view of the foregoing, the proportionality and abuse of rights principles – which are closely linked and operate in tandem – and the good faith principle, including the notion of legitimate expectations inherent to it, referred to in Annex 811(2)(b), require a weighing and balancing exercise³². Such balancing and weighing exercise, also warranted under

³⁰ Hearing transcript, Day 2 (21 January 2020), at pp. 674-685.

³¹ Constitutional Court, Judgment No. T-361 (30 May 2017) (Exhibit C-244), paras. 19-20 and dispositive part, at pp. 254-284.

³² Not only this weighing and balancing exercise along lines of proportionality and reasonableness should be applied when construing and applying Annex 811(2) in accordance with international law, but it is also mandated under Colombian law in expropriation cases (when the constitutionality of the applicable norm is challenged, but which, *mutatis mutandis*, is set forth as a general principle (Constitutional Court, Judgment No. C-35 (8 February 2016) (Exhibit C-42), at paras. 52-53, 56-57, para. 61 at p. 64)). According to this Decision, the most stringent constitutional controls are brought to bear when applying such principle in situations in which a rule of law is applied retroactively, since in those cases, principles of legal certainty, good faith and *confianza legítima* turn the weighing exercise table in favor of the private party (*Ibidem*, paras. 74-75 at p. 71).

Colombian constitutional law, is part and parcel of a determination of the scope and limits of such principles, in light of the State public and regulatory powers³³.

27. The adverse and severe impact of the Measures on the Claimant's Concession rights is undisputed, since it is not questioned that as a result of the Measures the Concession is, for all practical effects, deprived of economic value or, in other terms, that the Claimant's investment was destroyed. In view of the uncertain nature of the delimitation exercise on which the Measures are based, it is not possible to conclude that such Measures' objectives – protecting the Páramo – were pursued or adopted in good faith or are proportionate to attaining such objective. The omission by Colombia to delimit the Páramo before granting the Concession and Colombia however later resorting to its unilateral law making power to impose on the concessionaire a Páramo delimitation the deficiencies of which have been already highlighted, thereby retroactively damaging the concessionaire's rights without compensation, is not compatible either with the principle of good faith, referred to in Treaty Annex 811(2)³⁴. Absent a reliable delimitation of the Páramo, it is not possible to grasp which is the real harm (if any) posed by the rights under the Concession to the purposes of protecting the Páramo ecosystem purportedly sought by the Measures. Therefore, the severity of the harm inflicted on the Claimant is not proportionate to the protective objectives of the Measures since: a) obviously, the Measures were neither reasonable nor appropriate to such effect because the Santurbán Páramo delimitation ensuing from the Measures could not be assumed to be final or correct in view of the Constitutional Court Decision T-361 of 2017³⁵, and b) the Measures were anyway enforceable irrespective of any action or opposition of the Claimant to such enforcement.
28. Because of their purpose – protecting the Santurbán Páramo – the Measures qualify as measures “*designed and applied to protect legitimate public welfare objectives*” alluded to in Annex 811(2)(b), which include the protection of the environment. However, the unilateral pursuit of such objectives by the State without the payment of compensation cannot be privileged without ignoring the reference to *rare circumstances* because an interpretation of this provision ignoring such express qualification of the State's rights to protect the public welfare would be incorrect: the reference to *rare circumstances* clearly signifies that such State rights are not absolute or unbound, and that their exercise, even if hypothetically assuming its validity under the applicable national law, may require – depending on the circumstances – compensation in order not to infringe international law³⁶.

³³ Constitutional Court, Judgment No. C-35 (8 February 2016) (Exhibit C-42), para. 124 at p. 117.

³⁴ The good faith standard under international law is an objective one. There is no need to prove bad faith intention or motivation in order to show absence of good faith. As stated at para. 161 of *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (13 November 2000) (Exhibit RL-55): “*The intent of government is a complex and multifaceted matter [and] [e]ach of the many persons involved in framing government policy may approach a problem from a variety of different policy objectives and may sometimes take into account partisan political factors or career concerns. The Tribunal can only characterize CANADA's motivation or intent fairly by examining the record of the evidence as a whole*”.

³⁵ Constitutional Court, Judgment No. T-361 (30 May 2017) (Exhibit C-244).

³⁶ “*Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's*

29. On the other hand, the pursuit of such objectives by the State or, specifically, the purpose of the Measures, is not adversely affected, impeded, prevented or interfered with through the assertion or enforcement of the Claimant's rights under Annex 811(2)(b) seeking the payment of compensation under Treaty Article 811(1), since such payment does not preclude any action undertaken or to be undertaken by Colombia to protect the Santurbán Páramo in pursuit of the public welfare protection objectives referred to in such Annex. In *rare circumstances* – like the ones described above – the severity of imposing the payment of compensation as a result of the Measures (the enforcement of which, or the advancement of the policies underlying them, was and remains unhindered) does not outweigh the severity of the deprivation of the Claimant's acquired rights under the Concession and of the ensuing destruction of the Claimant's investment.
30. As set forth in connection with State contracts against the backdrop of the exercise of State police powers:

“The result of the general principle here advanced is therefore that the public authority may be exempt from performing its contract according to its strict expression, but that where this exemption results in a loss to the individual contractor compensation should be payable save where that payment would offend the principle. Such cases should arise only where the burden of payment would be such that it could not be borne by the public authority”³⁷.

There is nothing in the record of this arbitration indicating or even suggesting that Colombia would not be able to bear the payment of the compensation due and payable to the investor in the present case.

31. Consequently:
- (i) The Measures retroactively impose a delimitation on the Santurbán Páramo, with direct and adverse impact on the Angostura deposit, and with the effect of substantially depriving the Claimant of the economic value of its acquired rights under the Concession without compensation, and thus constitute a violation of Treaty Article 811(1) and its Annex 811(2)(b).
 - (ii) By retroactively imposing the Santurbán Páramo delimitation but at the same time undermining the accuracy and reliability of such delimitation, and thus creating uncertainty as to the very scope of the Measures and their effects, the Respondent has violated the concessionaire's acquired rights under the Concession, deprived

obligation to pay compensation remains”. *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award (17 February 2000) (Exhibit CL-14), at para. 72.

³⁷ Mitchell, cited *supra*, at 20. The exercise of overriding police power implies excluding the remedies of specific performance or injunctions or their equivalent but “*Compensation is not thereby necessarily also eliminated, since it is the performance of, or abstention from, a particular act which is obnoxious to the general rule, and not the payment of money*” (also at 20).

the concessionaire's rights of their economic value, and thus are part and parcel of the violation by the Respondent of Treaty Article 811(1) and Annex 811(2)(b).

- (iii) The Measures infringe Colombian constitutional law rules precluding the retroactive application of the law without compensation, the constitutional duties of the Colombian State regarding the delimitation of the Páramo and the acquisition of Páramo covered areas, and Colombian and international law principles precluding the violation both of legitimate expectations and contractual acquired rights under the Concession covered by the investment definition of the Treaty and protected under its provisions and international law.
 - (iv) Even if the Measures' purposes were considered in isolation, the fulfilment of such purposes is not jeopardized since the enforcement of the Measures is not prevented nor is it rendered impossible or impracticable. For that reason, also in light of the considerations set out in paras. 5-30 above, not paying compensation as required by Treaty Article 811(1) would inflict severe and unwarranted damages to the investor, precisely in a *rare circumstance* situation pursuant to Treaty Annex 811(2)(b) in which compensation is warranted.
 - (v) The above is confirmed by a weighing and balancing exercise carried out by taking into account the Measure's purposes and the harm suffered by the Claimant occasioned by the Measures. As a result of this exercise, the comparative severity of the harm and deprivation suffered by the Claimant and its investment resulting from the Measures outweighs the severity of the Respondent's obligation to compensate under the Treaty.
32. Under such circumstances, the Measures are: a) neither reasonable nor proportionate to the harm to the Claimant resulting from the Measures; i.e, the destruction of its investment; b) objectively incompatible with State conduct pursued in accordance with both international customary law principles of good faith, referred to in Treaty Annex 811(2)(b) (including the principles of proportionality and protection of legitimate expectations) and *pacta sunt servanda*; c) constitute an arbitrary deprivation of the Claimant's contractual rights under the Concession the exercise of which did not and does not preclude or prevent Respondent's actions seeking the protection of the Santurbán Páramo; and (d) thus constitute an illicit indirect expropriation in violation of Treaty Article 811(1) and its Annex 811(2)(b), which finally culminated on 8 August 2016 (date of notification to the Claimant of ANM Resolution VSC 829).

9 September 2021

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

ECO ORO MINERALS CORP.

the Claimant

and

THE REPUBLIC OF COLOMBIA

the Respondent

ICSID Case No. ARB/16/41

PARTIAL DISSENT OF PROFESSOR PHILIPPE SANDS QC

1. This case turns on a struggle between competing societal objectives which pull in opposite directions: on the one hand, the protection of the treaty rights of an international investor; on the other hand, the ability of a community to take legitimate measures to conserve its environment. In the present matter, the issues which are presented to the Tribunal concern the lawfulness of the approach taken by the government of Colombia, on behalf of the Respondent, to reconcile the protection of the Santurbán Páramo with the rights granted to Eco Oro, the Claimant, under the 2008 Free Trade Agreement between Canada and the Republic of Colombia, which entered into force on 15 August 2011 (the FTA).

2. The dispute is centred on measures adopted by Colombia to protect the Santurbán Páramo, a high mountain ecosystem. The páramo is known to provide a significant role in maintaining biodiversity, with a unique capacity to retain, restore and distribute water across extended areas. This function is of great importance for the broader ecosystems, and for human populations. There is no dispute as to the significance of the páramos of Colombia, or that they represent a majority of such ecosystems around the world, and that they are subject to established and far-reaching protections under the laws of Colombia and international law.

3. The FTA between Canada and Colombia has evidently been drafted with care, to ensure that measures properly taken to protect the respective environments of the two countries are not undermined by rights granted to foreign investors. This shared concern for the environment is reflected in the FTA's specific provisions on (i) applicable law,¹ (ii) police powers,² and (iii) exceptions.³

¹ Free Trade Agreement between Canada and the Republic of Colombia (signed on 21 November 2008 and entered into force on 15 August 2011) (**Exhibit C-22**; see also **Exhibit R-137**), Article 832 (the Tribunal “shall decide the issues in dispute in accordance with [the FTA] and applicable rules of international law”).

² *Id.*, 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 ... the protection of the environment, do not constitute indirect expropriation”).

³ See *id.*, Article 2201(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: ... (c) For the conservation of living or non-living exhaustible natural resources”).

4. The Tribunal has concluded that it has jurisdiction over the claims brought by Eco Oro, and (by a majority) that the indirect expropriation claim submitted under Article 811 of the FTA should be dismissed, having regard to the provisions of Annex 811(2)(b) on police powers. I support these conclusions. A majority of the Tribunal has further concluded that the claim brought by Eco Oro in respect of Article 805 of the FTA should succeed. I respectfully disagree with this conclusion. The approach taken by the majority fails to respect the text agreed by the drafters of the FTA, and is likely to undermine the protection of the environment.

Article 805

5. Article 805(1) of the FTA provides:

“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.”

This language makes clear – as the Majority recognises – that the standard of protection which has been granted to the investor is the Minimum Standard of Treatment (‘MST’), the one that exists in customary international law. The standard to be applied by the Tribunal is not the Fair and Equitable Treatment (‘FET’) standard, one that is to be found and applied in other investment protection agreements. The parties to the FTA have reinforced the distinction between the two different standards by the authoritative interpretation of Article 805 and MST adopted in 2017 by the Joint Commission established under the FTA; this confirms that the investor has “the burden to prove a rule of customary international law invoked under Article 805”.⁴

⁴ Joint Commission of the Free Trade Agreement Between the Republic of Colombia and Canada, Decision No. 6 (24 October 2017) (**Exhibit R-139**).

6. As acknowledged by both the ICJ and the ILC, the fact that the FET provision can be found in a number of treaties is not enough to affect the content of customary international law.⁵ Indeed, the widespread inclusion of FET provisions supports the opposite conclusion, as states which include such provisions in their treaties may be understood as expressing a desire to depart from the standard in customary international law. As with all rules of customary international law, the crucial issue is whether there is sufficient evidence of state practice and *opinio juris* to support the conclusion of the existence of a rule of customary law. As noted below, the majority has made no effort to address that evidentiary requirement, ignoring the explicit requirement of the FTA drafters that the Claimant must prove the content of the rule of customary international law invoked under Article 805.
7. In the past, certain tribunals have – accidentally or deliberately – sought to equate or meld the MST and FET standards. The two standards may share a common aim of imposing restrictions on the manner and extent to which a state is required to treat a foreign investor in its territory, but they do so in different ways. A breach of the customary MST standard would invariably give rise to a breach of the FET standards, but the reverse is generally not the case. This is because the MST standard sets a much higher bar.
8. The position was stated with care and clarity in 1981, by F.A. Mann, who wrote:

“The terms ‘fair and equitable treatment’ envisage conduct which goes far beyond the minimum standard and afford protection to a greater extent and according to a much more objective standard than any previously employed form of words. A tribunal would not be concerned with a minimum, maximum or average standard. It will have to decide whether in all circumstances the conduct in issue is fair and equitable or unfair and inequitable. No standard defined by other words is likely

⁵ *Ahmadou Sadio Diallo (Guinea v Democratic Republic of the Congo)*, Preliminary Objections, (2007) ICJ Rep 582, at para 90 (discussing rules of diplomatic protection); ILC, ‘Report of the International Law Commission on the Work of its 70th Session (30 April – 1 June and 2 July - 10 August 2018) UN Doc A/73/10, 143-146.

to be material. The terms are to be understood and applied independently and autonomously.”⁶

Dr Mann’s conclusion, which is as pertinent today as when it was written, does not mean that the law on MST is set in stone, or is static. It does mean, however, that there is a cardinal distinction between the two standards, and in carrying out its task the duty of a tribunal is bound to take that distinction and apply it to the facts of the case. A failure to do so amounts to a departure from the intentions of the drafters of the FTA. As the Joint Commission has made clear, the burden is on the Claimant to prove the content of the customary rule, and that the standard it sets forth has not been met. A tribunal that melds the two terms, or which misapplies one standard (MST) by applying the conditions of the other (FET), or which fails to satisfy itself that the Claimant has met its requisite burdens of proof, or which fails to give effect to the intentions of the drafters, risks adopting an approach which might be said to manifestly exceed its powers.

9. In the present case, the Claimant has not met the burden of showing sufficient state practice, independent of the mere existence of FET provisions in modern investment treaties, to establish that the customary standard has evolved so as to be identical (or similar) to the FET standard. Nor has the Claimant offered any plausible evidence on the requisite *opinio juris*. In so proceeding, the Claimant has not engaged with the deliberate and explicit drafting choice made by the parties to the FTA, one that is premised on the customary standard (MST) continuing to have its own identity, autonomy and component elements.
10. The tribunal in *Glamis Gold v United States of America* noted that although the exact formulation of the MST in the old case of *Neer* is no longer directly applicable as such, the customary standard it articulated has not radically changed.⁷ That conclusion is surely right. As outlined by the Majority in this case, the starting point in determining whether a state’s conduct has breached the MST is whether it has acted in a way which is “arbitrary or grossly unfair or discriminatory, or otherwise inconsistent with the

⁶ F. A. Mann, ‘British Treaties for the Promotion and Protection of Investments’ (1981) 52 *British Yearbook of International Law* 241, 244.

⁷ *Glamis Gold, Ltd v United States of America*, UNCITRAL, Award (8 June 2009) (**Exhibit CL-59**), para 21.

customary international law standard”.⁸ The state’s conduct must be “egregious and shocking”,⁹ and lead to an outcome which “offends judicial propriety”.¹⁰ In applying the standard it is important that a tribunal’s analysis is made “in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders”.¹¹ The Claimant has offered no plausible evidence to support a different standard, and the Majority Decision has cited no authority or evidence to support its conclusion. Whilst a finding of bad faith or malicious intention on the part of the state is not required, the threshold for finding a breach of the MST nevertheless remains very high, such that a finding that it has been breached must be based on facts which are truly exceptional. Although the ordinary decision-making processes of states may result in a breach of the FET standard, a breach of the MST is not an everyday occurrence and should be found only in truly egregious circumstances.¹²

11. The Majority has sought to construct its finding of a breach of the MST on three intertwined strands of reasoning: first, that the Respondent breached the Claimant’s legitimate expectations; second, that the Respondent failed to provide a stable and predictable legal environment; and third, that the Respondent acted arbitrarily in its dealing with the Claimant. The approach is novel. I disagree with the Majority’s reasoning in relation to all three strands, as there is no evidence to support the approach to the MST standard, or the finding that there has been a breach of it.

Legitimate Expectations

12. The notion of legitimate expectations has become a frequent and controversial issue in investment treaty disputes. It has become a recognised element of the FET standard, but its role in the context of an MST inquiry is not yet established.

⁸ *Mobil Investments Canada Inc and Murphy Oil Corporation v Government of Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (22 May 2012) (**Exhibit CL-179**), para 153.

⁹ *Glamis Gold Ltd v United States of America*, UNCITRAL, Award (8 June 2009) (**Exhibit CL-59**), paras 616 and 627.

¹⁰ *Waste Management Inc v United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004) (**Exhibit RL-64**), para 98.

¹¹ *S.D. Myers v Government of Canada*, UNCITRAL, Partial Award (13 November 2000) (**Exhibit RL-55**), para 263.

¹² *Mobil Investments Canada Inc and Murphy Oil Corporation v Government of Canada (I)*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (22 May 2012) (**Exhibit CL-179**), para 153.

13. First, as acknowledged by the Majority, in the context of the MST the failure to observe a claimant's legitimate expectations is just one factor a tribunal may take into account in determining whether there has been a breach of the MST.¹³ The claimant must still show that the failure to observe its legitimate expectations was, in the circumstances, serious enough to amount to egregious and shocking behaviour.
14. Second, and more pertinently, if legitimate expectations are to have any place in the context of MST, the concept will have a more limited role than in relation to FET. Unlike in a FET inquiry, there is no authority for the proposition that it will be sufficient for a claimant to point to reliance on legislative provisions or broad statements. Rather, the limited jurisprudence that exists (in the NAFTA context) indicates *inter alia* that a claimant must be able to establish a "quasi-contractual" relationship or expectation,¹⁴ in the sense that the state must have made "explicit" or "specific" encouragements or representations on which the investor has placed reliance.¹⁵ The Majority's analysis fails to acknowledge or address this requirement, and in so doing has in effect conflated the FET and MST.
15. The Majority concludes that the Claimant had three legitimate expectations: (i) it would be entitled to undertake mining exploitation activities in the entirety of the area covered by Concession 3452; (ii) in the event that the State were to expropriate Eco Oro's acquired rights, compensation would be payable; and (iii) that Colombia would ensure a predictable commercial framework for business planning and investment.
16. With regard to (i), there is no evidence before the Tribunal to establish that the Respondent gave a "quasi-contractual" commitment that the Claimant would have the right to exploit the entirety of the Concession area. Indeed, the right to exploit was premised on the relevant environmental authorisations being obtained, in circumstances in which the Claimant was aware at the time of its investment that the grant of such

¹³ *Glamis Gold Ltd v United States of America*, UNCITRAL, Award (8 June 2009) (**Exhibit CL-59**), para 627.

¹⁴ *Glamis Gold Ltd v United States of America*, UNCITRAL, Award (8 June 2009) (**Exhibit CL-59**), paras 766 and 799; *Cargill Incorporated v United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009) (**Exhibit RL-81**), para 290.

¹⁵ *Glamis Gold Ltd v United States of America*, UNCITRAL, Award (8 June 2009) (**Exhibit CL-59**), para 767; *Mobil Investments Canada Inc and Murphy Oil Corporation v Government of Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (22 May 2012) (**Exhibit CL-179**), para 152.

authorisations was uncertain. To get around this fact, the Majority relies mainly on general statements of encouragement from certain of the Respondent's ministers and officials, as well as the mere fact of the granting of the Concession, but neither gives rise to a "quasi-contractual" relationship. As the Tribunal acknowledges in relation to the expropriation claim, the Claimant was aware, or should have been aware, of the existence and effect of the páramo in the Concession area; that the Respondent was committed to the protection of the environment, and that its right or ability to go beyond exploration to exploit the Concession area was subject to the overriding need to protect the environment. Considering that, in its analysis of the Art 811 claim, these same facts led the Tribunal to conclude that the Claimant had not received a specific assurance or representation such as to give rise to a legitimate expectation,¹⁶ it is wholly inconsistent for the Majority to reach a different conclusion in its analysis of the Art 805 claim.

17. Likewise, I do not believe that there was any quasi-contractual commitment with regard to expectations (ii) and (iii). The Claimant has not pointed to any specific assurances that it would receive compensation in the event of an expropriation, or that the Respondent would ensure a predictable framework for planning and investing. Any investor could claim to have such 'expectations' on the basis of the Respondent's domestic law and general statements from ministers and officials, but these would not be protected under the MST. I find the reference to expectation (ii) particularly odd given that the Tribunal has concluded that no expropriation has taken place. The concepts of stability and predictability, which underpin expectation (iii), are addressed below.

18. There is a further difficulty with the majority's conclusion that the Respondent has violated the Claimant's legitimate expectations under MST (and 805). The Tribunal has recognised that: (1) in order to rely on a claim of legitimate expectation (under FET) an investor must show that its expectation would have been shared by a "prudent" or "reasonable investor", and to that end it must have engaged in some sort of due diligence;¹⁷ (2) there is nothing in the record before it to show that any due diligence

¹⁶ Tribunal's Decision, para 694.

¹⁷ See Tribunal's Decision, paras. 681, 762; see *Antaris & Göde v Czech Republic*, PCA Case No. 2014-01, Award of 2 May 2018, para. 360(6): "in order to rely on legitimate expectations the investor should inquire in advance regarding the prospects of a change in the regulatory framework in light of the then prevailing or reasonably to be expected changes in the economic and social conditions of the host State."

was undertaken by Eco Oro in respect of any of the representations upon which it was said to have relied;¹⁸ (3) “the most cursory due diligence even before Concession 3452 was granted would have revealed (i) the potential existence of a páramo ecosystem within the boundaries of Concession 3452; (ii) the Government’s commitment and obligation to protect these ecosystems; and (iii) that such protection could be achieved by the imposition of a mining ban”;¹⁹ (4) Eco Oro had no “distinct reasonable investment backed expectations that exploitation would be permitted in the entirety of the concession area”;²⁰ and (5) an appropriate due diligence exercise would have advised Eco Oro “that Colombia could retrospectively impose a mining ban on all or part of Concession 3452 to protect a páramo ecosystem”.²¹ Yet notwithstanding these rather clear conclusions, largely in relation to the failed Article 811 claim, the majority nevertheless concludes that Eco Oro had a legitimate expectation in relation to MST, on which it could rely notwithstanding the total absence of any exercise of due diligence. In reaching its conclusion (at paras. 804 and 805 of the Decision), the majority passes in silence on due diligence.²²

Stability and Predictability

19. The Majority’s reliance on the concepts of stability and predictability are no less problematic. Despite the Majority’s tendency to refer to the concepts separately, they are closely interconnected and cannot really be said to be distinct in any meaningful sense; indeed, it is not clear from the Decision what the Majority understands to be the difference between stability and predictability. In any case, the obligation to provide stability or predictability has no foundation in the FTA or in the case law on the MST. In its initial explanation of the MST, the Majority makes no mention of matters of legal or regulatory stability; indeed, at various parts of the Decision, including at paragraph 749, the Majority explicitly states that the Respondent is not under an obligation to provide a stable legal framework. Yet when it comes to the application of

¹⁸ Tribunal’s Decision, paras. 682, 694, 768.

¹⁹ Tribunal’s Decision, para. 682.

²⁰ Tribunal’s Decision, para. 694.

²¹ Tribunal’s Decision, para. 765.

²² In relation to the Article 811 claim, the majority concludes 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” on the delimitation of the páramo (Tribunal’s Decision, para. 696). In reaching this conclusion, the majority offers no evidence: it is mere assertion, unsupported by the record of the proceedings. The point is not made in relation to the Article 805 claim.

the MST standard to the facts of the case, out of nowhere the obligation of stability suddenly emerges, as though magically concocted out of thin air, with no reference to be found either to the Claimant's evidentiary burdens (on state practise or *opinio juris* in relation to the customary law standard) or any legal authority. Legal or regulatory stability is then mentioned repeatedly in the Majority's reasoning, most brightly at paragraphs 754, 762, 781, 803 and 805; this is despite that fact that legal and regulatory stability has never before been treated as part of MST, and no authority or evidence is cited for the conclusion.

20. The reliance on predictability, to the extent that it is distinct from stability, is also unsupported by any evidence or authority. The sole source which the Majority invokes in relation to the relevance of predictability is a single line in the preamble to the FTA. It is, however, widely recognised that a preambular aspiration cannot as such give rise to a hard edged or actionable obligation.²³

21. This reliance on stability and predictability is therefore manifestly incorrect. To be sure, there is ongoing debate as to whether the FET standard encapsulates any sort of an obligation to ensure legal and regulatory stability, with the weight of jurisprudence indicating that such an obligation only exists where the FET provision in question explicitly mentions stability. Without such clear language, most tribunals have recognised that international investment law does not – and cannot, and should not – freeze the regulatory environment of a host state, and must not act in effect as a mechanism of insurance system for investors.²⁴ The decision of treaty parties – as in this FTA – not to include a stability clause in an international agreement is one that a Tribunal must take seriously, as it represents a deliberate choice of the drafters to preserve a greater degree of regulatory discretion. The same goes for domestic

²³ *Cargill Incorporated v United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009) (**Exhibit RL-81**), paras 289-290.

²⁴ *MTD Equity Sdn. Bhd and MTD Chile S.A. v Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment (21 March 2007), para 67; *Mobil Investments Canada Inc and Murphy Oil Corporation v Government of Canada (I)*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (22 May 2012) (**Exhibit CL-179**), para 153; *Hydro Energy I S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum (9 March 2020), para 584.

legislation. Invoking the concept of legitimate expectations, as the Majority does by way of magical thinking, cannot change this.²⁵

22. These considerations apply with particular force under the customary MST, which is the standard applicable in this case. Where is the authority for the proposition that a failure to provide stability or predictability can give rise to a violation of the MST standard? The Majority has cited none. I am aware of none. The Majority has effectively engaged in judicial law-making; it has invented a new element for the identification of the customary standard which no state has appeared to have articulated, in the total absence of any evidence of state practise or *opinio juris*. Despite the fact that the drafters of the FTA have made it clear that in relation to Article 805 and MST a claimant must prove the customary rule, with all that implies for evidence of state practise and *opinio juris*, the Majority makes no mention of these elements in relation to the facts of stability or predictability. Without evidence of *opinion juris* or state practise, the claim to a customary standard does not get off the ground.
23. The Majority has not explained why what has happened in Colombia is contrary to the rule of law – indeed, it has done the very opposite, invoking a series of legislative and regulatory acts and ensuing litigation, including before the Constitutional Court, in its narrative. The Claimant’s own witnesses and experts testified as to the existence of remedies still available to the Claimant, and the failure to pursue them, and the plausibility of decisions of the Constitutional Court, even if they do not necessarily agree with them. The comportment of Colombia may not be perfect, but in failing to provide stability or predictability it cannot be said to violate the rule of law, or customary law, or to even come close to shocking or offending a sense of judicial propriety. By concluding as it has, the Majority ignores the obvious diligence with which the Constitutional Court of Colombia addressed matters of considerable complexity, offering reasons for all of its conclusions which are drafted with evident care and balance. There is here a manifest inconsistency in the conclusions of the Majority. In the absence of an aggravating factor, such as one of Professor Schreuer’s

²⁵ *Cargill Incorporated v United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009) (Exhibit RL-81), paras 289-290.

indicia, mere instability can never of itself be serious enough to give rise to a breach of the MST.

24. Consequently, I do not believe that, in itself, the stability or predictability of the domestic legal framework has any relevance in determining whether the Respondent has breached the MST.

Arbitrariness

25. I agree with the Majority that a state which acts arbitrarily may be in breach of the MST. The starting point in assessing whether a state has acted arbitrarily is the decision of the International Court of Justice in *ELSI*. In that case the Court indicated that a finding of arbitrariness was only appropriate when a state has acted contrary to the rule of law, or its conduct shocks or offends a sense of juridical propriety.²⁶ Similar language has also been used by investment tribunals,²⁷ and it continues to reflect the state of the law today. The Claimant has offered no plausible evidence to support a contrary view, and the Majority Decision has cited no authority to the contrary.
26. In assessing arbitrariness, tribunals must recognise that they should not simply substitute their own views on a particular issue for those of the host state. As stated by the tribunal in *Cargill v Mexico*, and cited by the Majority, “an actionable finding of arbitrariness must not be based simply on a tribunal’s determination that a domestic agency or legislature incorrectly weighed various factors, made legitimate compromises between disputing constituencies, or applied social or economic reasoning in a manner that the tribunal criticises”.²⁸ I fully agree with the Majority that the indicia of arbitrariness given by Professor Christoph Schreuer in *EDF (Services) Limited v Romania* are relevant to the customary MST and helpful in the present case.²⁹

²⁶ *Elettronica Sicula S.P.A. (ELSI)*, Judgment, I.C.J. Reports 1989 (**Exhibit CL-153 / RL-50**), p. 15, para 128.

²⁷ *Waste Management Inc v United Mexican States*, ICSID Case No. ARB(AF)/00/3 Award (30 April 2004) (**Exhibit RL-64**), para 98; *Glamis Gold v United States of America*, UNCITRAL, Award (8 June 2009) (**Exhibit CL-59**), para 21; *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009) (**Exhibit RL-81**), paras 285-296; *Mobil Investments Canada Inc and Murphy Oil Corporation v Government of Canada (I)*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (22 May 2012) (**Exhibit CL-179**), para 152.

²⁸ *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009) (**Exhibit RL-81**), para 292.

²⁹ *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award (8 October 2009) (**Exhibit CL-174**), para 303.

27. For the reasons outlined above, mere instability cannot amount to a breach of the MST. Beyond ‘instability’, the Majority’s conclusion appears to turn on its view that the Respondent acted for a reason other than environmental protection, and/or that the Respondent did not act for a legitimate purpose.³⁰ This view seems to be based on three factors: that the Respondent referred to factors other than environmental protection in some of its decision-making processes; that there were competing approaches to the delimitation of the Santurbán Parámo in different parts of the Respondent’s government; and that the Respondent has not eliminated illegal mining in its territory. In my view, these factors, whether taken individually or cumulatively, are manifestly not sufficiently grave to amount to arbitrariness, or a breach of the MST.
28. In determining whether measures taken by a state is arbitrary to the point of being shocking, tribunals must be sensitive to the difficulties of government decision-making in the face of legitimate objectives that pull in different directions. In the search for balance, and in the face of competing pressures, different arms of the same government may inevitably give expression to different and potentially conflicting priorities. As noted above, this is particularly the case when the protection of the environment or human health is at stake (one need only think of the current challenges faced by so many governments around the world as they confront the emerging reality of global warming/climate change and biodiversity losses and their consequences, or the reality of Covid-19, as governments struggle to find a way through the difficulties of protecting human health whilst also securing economic wellbeing).
29. Although states increasingly sign treaties committing themselves to the protection of the environment, they are still often under pressure to prioritise other social objectives. These competing objectives will often be economic in nature. As concern about the protection of the environment increases, states are increasingly likely to be confronted with decisions that involve complex trade-offs, making internal government debate – and changes of direction – more likely. When a government does choose to prioritise a certain interest, such as environmental protection, there are a variety of ways a policy can be designed and implemented depending on the weight a government wishes to

³⁰ Tribunal’s Decision, paras 810 and 821.

give to other interests. Such policy decisions imply delicate balancing acts and may leave particular stakeholders disappointed or even financially worse-off. None of this, in my view, is sufficient of itself to cast doubt on the sincerity of the government's stated objectives. These decisions and their consequences are not extraordinary in any sense, but have become routine and the business of government.

30. In this context, arbitrators and judges, as well as other adjudicators, must take care to remain within the arbitral or judicial function: they must not legislate, and they must take care not to trespass into a forbidden domain by imposing their own policy preferences where the legislative branch – and perhaps also a divided executive arm – oscillates over time between competing social objectives and policy goals. I fear that the Majority has fallen into error: it has failed to take into account the realities of governmental decision-making in legitimate domains, and the clear limits imposed by the drafters of the FTA in relation to the protection of the environment, not least by imposing the application of MST with all that implies for proving the content of the customary rule.

31. On the factual record before the Tribunal, I do not consider that the behaviour of the Respondent can be characterised as having shocked or offended a sense of juridical propriety, or may be said to be contrary to the rule of law. Indeed, the Decision makes crystal clear that Colombia has acted throughout in good faith, seeking to find compromises in balancing the competing objectives of environmental protection and economic development (in this case by means of mining activity). The Decision passes in relative silence on the compelling testimony offered by witnesses, in particular Ms Brigitte Baptiste, on behalf of the Respondent. As she explained, in her capacity as Director General of the Alexander von Humboldt Institute (from 2010 to 2019), she described how the Institute contributed to the delimitation of the páramo, confirming the complexity of the task, the manner in which non-ecological factors were taken into account, and the significance and challenge of delimiting the transition zone (strip) between the páramo and other areas (“The transitional strip from any ecosystem to another one is the area where you have the most ecological exchanges, where you have the most flows because it is a border [...] So, the strip is key for the operation of the ecosystem, and the strip is considered a key protection area for the páramo because this is the ecosystem that is above, and also the flow of ecosystem and, in particular,

water.”³¹) Ms Baptiste’s evidence on the delimitation was honest, balanced, compelling and persuasive, reflective of her integrity; it strongly supported the conclusion that the Respondent’s effort to delimit the páramo may not have been perfect, but it was carried out in good faith, was motivated by genuine environmental considerations, and cannot be said to have been arbitrary. Her evidence was undamaged by cross-examination or other evidence.

32. Like many governments around the world, Colombia has found the challenge of taking reasonable measures to protect its environment to be daunting, one that takes time and is often composed of a multitude of decisions that apparently take contrary directions. At a time when the need to protect the environment is, in legal terms, a relatively recent development, it is understandable that different parts of a government may on occasion pull in different directions, or that over time contradictory legislation may be adopted, or that different judicial decisions may be handed down.
33. In the age of climate change and significant loss of biological diversity, it is clear that society finds itself in a state of transition. The law – including international law – must take account of that state of transition, which gives rise to numerous uncertainties. Adjudicators – judges and arbitrators – recognise the need to proceed with caution at a time of transition and uncertainty. Indeed, the precautionary principle has been developed to assist in the taking of decisions in times of uncertainty, and the Tribunal has correctly determined that the application of the precautionary principle – treated as being applicable as a rule of law in accordance with Article 832 of the FTA – to this case has contributed to the conclusion that there has been no actionable violation of Article 811 of the FTA. Yet in respect of Article 805, it seems that precaution has no place for the Majority.
34. To be clear, the Respondent has not acted perfectly in its management of the páramo, but the MST standard does not require it to have done so. Neither the MST nor the FTA offer a right against confusion. The Majority is correct to point out that there were problems with the manner in which the government handled the process of delimiting the Santurbán Parámo. It was slow, it was inconsistent, it was uncertain. The key

³¹ Transcript, day 3, page 741, lines 7-22, and surrounding exchanges (Wednesday 22 January 2020).

question, however, is: did the process of delimitation cross the line of departing from the rule of law, or proceed on a basis that shocks our sense of juridical propriety? In my view it did not, and the heart of the Decision makes that clear, premised as it is on the view that the Respondent acted in good faith. Yet when it comes to the final and permanent delimitation of the *parámo*, and all the difficulties that gave rise to, including delays, the Majority has taken the evidence before the Tribunal and concluded that the Respondent was somehow not truly motivated by the aim of environmental protection. This conclusion is difficult to comprehend, given the evidence and the finding in the context of the expropriation claim that the Respondent's actions *were* motivated by a desire to protect the environment.³²

Conclusion on Article 805

35. The Majority's finding of a breach of Article 805 appears to be based on little more than the evidence that the Respondent struggled with the compromises to be made as between different interests, with reasoning and decision-making that was not as efficient, timely or consistent as it could have been. Whilst there are legitimate criticisms to be made as to how the Respondent acted, the same criticisms may be made of any government faced with such decisions, and subject to judicial challenges at every stage. This is why the standard to be applied is paramount, as reflected in the clearly expressed intentions of the drafters of the FTA. In my view, the Majority has manifestly failed to apply the correct standard.

36. The Majority's analysis undercuts the plain meaning of the FTA and well-established principles of customary law. The effect of its approach is to significantly lower the bar, and in effect rewrite the FTA and the content and effect of MST. As the language of the ICJ in *ELSI* and other investment tribunals shows, a finding that a state has breached the MST will be rare and extraordinary.

37. It is not in dispute the protection of the *parámo* was a legitimate objective. The designation of the general area of the *parámo* in 2007 has not been impugned, and the Tribunal has recognised that the area in which mining has been prohibited has not

³² Tribunal's Decision, paras 678 and 699.

crossed a line of impropriety or illegality under the FTA. The Claimant went into this project with its eyes open, knowing that it was investing in a parámo which was already subject to certain protections, and it knew – or should have known – that over time those protections were likely to become even more restrictive. By the time of its renewed and revised project in 2011, when it abandoned an open cast mine for an underground mine, the Claimant was well aware of the difficulties it faced. What the Tribunal impugns is merely the fact that the Respondent has failed to give precise and detailed effect in a timely manner to the permanent and final delimitation of the parámo in accordance with a particular scale, timetable and factors. By any reasonable standard, the situation faced by the Respondent, in seeking to give effect to a legitimate objective of environmental protection, was challenging. Its approach in meeting that challenge was not perfect, but it was not contrary to the rule of law, and it was not conduct that shocked or offended a sense of juridical propriety.

The 2201(3) exception

38. Having concluded that there has been no breach of either Article 805 or Article 811, I do not address the interpretation and applicability of Article 2201(3).

Retroactivity

39. Retroactivity, which has been addressed by Mr Grigera Naón as a matter of concern. As a general proposition, outside of the criminal law context it cannot be said that there is a strict rule against retroactivity. The point was addressed the tribunal in *Cairn Energy v India*,³³ a case concerned with whether retroactive tax measures violated the FET standard, independently of the doctrine of legitimate expectations. This appears to be the first decision to consider the point in any detail.³⁴ The tribunal rejected the proposition that a principle of legal certainty entailed an absolute prohibition against retroactive measures.³⁵ Instead, it stated that retroactive measures may not lead to a

³³ *Cairn Energy PLC and Cairn UK Holdings Limited v The Republic of India*, PCA Case No. 2016-7, Award (21 December 2020) (Arbs. Laurent Lévy (Pres.), Stanimir A. Alexandrov and J. Christopher Thomas QC).

³⁴ *Cairn Energy PLC and Cairn UK Holdings Limited v The Republic of India*, PCA Case No. 2016-7, Award (21 December 2020), para 1734.

³⁵ *Cairn Energy PLC and Cairn UK Holdings Limited v The Republic of India*, PCA Case No. 2016-7, Award (21 December 2020), paras 1757 and 1760.

breach of the FET when taken for the public interest and in conformity with the principle of proportionality.³⁶ A two stage test was suggested:

“(i) [T]he retroactive application of a new regulation is only justified when the prospective application of that regulation would not achieve the specific public purpose sought, and (ii) the importance of that specific public purpose must manifestly outweigh the prejudice suffered by the individuals affected by the retroactive application of the regulation.”³⁷

Although in the context of an FET claim, the analysis in *Cairn Energy* is premised on the proposition that it is not correct to assume that retroactive measures are strictly prohibited. This is consistent with international case law and the practise of many domestic legal systems, which do not support the idea of a general principle of law (understood in the sense of Article 38 of the ICJ Statute) prohibiting retroactive measures. The better view is that of the tribunal in *Cairn Energy* – that retroactive measures are permissible if taken for the public interest and in accordance with the principle of proportionality. The fact that a measure may have retroactive effects cannot be sufficient for a tribunal to conclude that the facts of a case bring it within the “rare circumstances” so that Annex 811 does not apply. Tribunals must instead consider whether contested retroactive measures were taken in the public interest, and whether they are proportionate. This ties in with the analysis in the Decision, as stated in paras 623-699, to the effect that the measures were taken in the public interest and were proportionate.

Damages

40. Having concluded that there has been no breach of Article 805 or Article 811, in my view the question of damages does not arise. The majority having concluded otherwise, in relation to Article 805, it will be necessary to have an additional phase to identify the loss suffered by Eco Oro if any, and the methodology by which it is to be valued. In this

³⁶ *Cairn Energy PLC and Cairn UK Holdings Limited v The Republic of India*, PCA Case No. 2016-7, Award (21 December 2020), paras 1760 and 1788.

³⁷ *Cairn Energy PLC and Cairn UK Holdings Limited v The Republic of India*, PCA Case No. 2016-7, Award (21 December 2020), para 1760.

regard, as the questions put by the Tribunal make clear, the finding that Eco Oro had no right to engage in any exploitation without the grant of necessary environmental licenses, coupled with the absence of any exercise in due diligence as to what the likelihood of receiving such licences was in relation to an underground mine, makes this a not entirely straightforward task.

41. In this regard, as to the question of acquired rights,³⁸ it may be that as a matter of Colombian law Eco Oro may be said to have rights that could be characterised, as the majority does, as ‘acquired rights’. That characterisation, however, is of limited, if any, consequence, for the case before us, which is concerned with what right Eco Oro actually had under the FTA in relation to the concession. It had a right to explore, and it had a right to apply for an environmental license which would allow it to engage in future exploitation. It had no right, however, as such, to exploit, or to apply to extend the concession for the purpose of future exploitation, without the grant of an environmental license. Nor did Eco Oro have any right to an environmental license. To conclude, as the majority does, that Eco Oro had an ‘acquired right’ to exploit subject to the grant of a future (and speculative) environmental license does not, in my view, materially assist in the identification and valuation of any loss as the majority may determine to have occurred.

Professor Philippe Sands QC

09 September 2021

³⁸ See e.g. Tribunal’s Decision, paras. 449 and 499.