INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

RED EAGLE EXPLORATION LIMITED

Claimant

and

REPUBLIC OF COLOMBIA

Respondent

ICSID Case No. ARB/18/12

AWARD

Members of the Tribunal
Dr. Andrés Rigo Sureda, President
Mr. José Martínez de Hoz, Arbitrator
Prof. Philippe Sands KC, Arbitrator

Secretary of the Tribunal
Ms. Catherine Kettlewell

Date of dispatch to the Parties: February 28, 2024

REPRESENTATION OF THE PARTIES

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TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
ANM	*Agencia Nacional de Minería*
BCSC	British Columbia Securities Commission
C-[#]	Claimant's Exhibit
Cl. Mem.	Claimant's Memorial on the Merits dated May 16, 2020
Cl. NDP Comments	Claimant's Comments to Canada's Non-Disputing Party Submission dated November 16, 2022
Cl. PHB	Claimant's Post-Hearing Brief dated May 17, 2023
Cl. Rej.	Claimant's Rejoinder on Jurisdiction dated September 9, 2021
Cl. Reply	Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction dated March 18, 2021
CL-[#]	Claimant's Legal Authority
CDMB	*Corporación Autónoma Regional para la Defensa de la Meseta de Bucaramanga*
Eco Oro	*Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41
GATT	General Agreement on Tariffs and Trade
Hearing	Hearing on jurisdiction, merits and *quantum* held from February 27 to March 3, 2023
IAVH	*Instituto de Investigación Alexander von Humboldt*
ICJ	International Court of Justice

ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
ILC Articles	International Law Commission's Articles on State Responsibility
Mining Titles	Real Minera, La Tríada de Oro, San Bartolo, Arias, La Peter, Santa Isabel, El Dorado, Los Delirios, San Antonio, San Alfonso, La Vereda
PMA	*Plan de manejo ambiental* (Environmental Management Plan)
PTO	*Plan de trabajos y obras* (Mining Works Program)
Project, Vetas Project, Vetas Gold Project	Large-scale mining project in las Vetas
R-[#]	Respondent's Exhibit
Request for Arbitration	Request for Arbitration dated March 21, 2018
Resp. C-Mem.	Respondent's Counter-Memorial on the Merits dated November 2, 2020
Resp. Mem.	Memorial on Jurisdiction dated November 2, 2020
Resp. NDP Comments	Respondent's Comments to Canada's Non-Disputing Party Submission dated November 16, 2022
Resp. PHB	Respondent's Post-Hearing Brief dated May 17, 2023
Resp. Rej.	Respondent's Rejoinder on the Merits dated July 23, 2021
Resp. Reply	Respondent's Reply on Jurisdiction dated July 23, 2021
RL-[#]	Respondent's Legal Authority

Treaty or FTA	Free Trade Agreement between Canada and the Republic of Colombia, signed November 21, 2008, entered into force on August 15, 2011
Tr. Day [#] [Speaker(s)] [page:line]	Transcript of the Hearing
Tribunal	Arbitral Tribunal constituted on April 19, 2019
UNCTAD	United Nations Conference on Trade and Development
VCLT	Vienna Convention on the Law of Treaties

I. INTRODUCTION AND PARTIES

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

2. The claimant is Red Eagle Exploration Limited ("**Red Eagle**" or the "**Claimant**"), a company incorporated under the laws of Canada.

3. The respondent is the Republic of Colombia ("**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).

5. This dispute relates to certain measures taken by the Colombian government that allegedly modified the terms of the Mining Titles acquired by Minera Vetas, Red Eagle's wholly owned branch in Colombia.

II. PROCEDURAL HISTORY

6. On March 21, 2018, ICSID received a request for arbitration from Red Eagle Exploration Limited against the Republic of Colombia (the "**Request for Arbitration**").

7. On April 18, 2018, the Secretary-General of ICSID registered the Request for Arbitration in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

8. 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.

9. The Tribunal is composed of Andrés Rigo Sureda, a national of Spain, President, appointed by agreement of the Parties; José A. Martínez de Hoz, a national of Argentina, appointed by the Claimant; and Philippe Sands, a national of the United Kingdom, France and Mauritius, appointed by the Respondent.

10. On April 19, 2019, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**Arbitration Rules**"), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Catherine Kettlewell, ICSID Senior Legal Counsel, was designated to serve as Secretary of the Tribunal.

11. On May 19, 2019, the Respondent filed a preliminary objection under Rule 41(5) of the Arbitration Rules.

12. On May 20, 2019, the Tribunal invited the Claimant to respond to the Respondent's preliminary objection.

13. On May 30, 2019, the Claimant filed its Answer on the Respondent's Preliminary Objections.

14. In accordance with Arbitration Rule 13(1), the Tribunal held a first session on June 12, 2019, by teleconference.

15. On December 4, 2019, the Tribunal held a preliminary procedural consultation with the Parties by telephone conference.

16. On December 12, 2019, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters. Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from April 10, 2006, that the procedural languages would be English and Spanish, and that the place of proceeding

would be Washington, DC. Procedural Order No. 1 also set out the agreed schedule for the proceeding.

17. On December 16, 2019, the Tribunal issued a Decision on the Respondent's Preliminary Objection.

18. On January 27, 2020, the Acting Secretary-General moved that the Tribunal stay the proceeding for non-payment of the required advances pursuant to ICSID Administrative and Financial Regulation 14(3)(d). On January 28, 2020, the Tribunal suspended the proceeding for lack of payment.

19. On February 6, 2020, the proceeding is resumed following payment of the required advances.

20. On May 16, 2020, the Claimant filed its Memorial on the Merits together with the First Witness Statement of Ms. Ana Milena Vásquez (Spanish); the First Expert Report of Versant Partners; the First Legal Opinion of Ms. Adriana Martínez Villegas (Spanish); Appendix A – Index of Fact Exhibits C-1 to C-814; Appendix B – Index of Legal Authorities CL- 1 to CL-187; Appendix C – Compendium of Claimant Mining Titles ("**Cl. Mem.**").

21. On June 16, 2020, the Respondent filed a Request for Bifurcation.

22. At the invitation of the Tribunal, the Claimant submitted its Observations on the Respondent's Request for Bifurcation on July 16, 2020.

23. On August 3, 2020, the Tribunal issued its Decision on Bifurcation, rejecting the Respondent's Request for Bifurcation.

24. On November 2, 2020, the Respondent filed its Counter-Memorial on the Merits and separately its Memorial on Jurisdiction; a Consolidated List of Exhibits; Factual Exhibits R-0015 to R-0125; Legal Authorities RL-0040 to RL-0151; the First Witness Statement of Mr. Juan Manuel Pinzón (Spanish); the Legal Opinion of Professor De Vivero (Spanish), along with an Index of Annexes and Annexes PFDV-01 to PFDV-10; and the Expert

Report of The Brattle Group (ENG), along with Appendix A to Appendix C, and Exhibits BR-001 to BR-188 ("**Resp. C-Mem.**" and "**Resp. Mem.**").

25. On January 4, 2021, both Parties submitted to the Tribunal their requests for production of documents in the form of a Redfern Schedule.

26. On January 18, 2021, the Tribunal issued Procedural Order No. 2 concerning production of documents.

27. On March 18, 2021, the Claimant filed its Reply on the Merits and Counter-Memorial on Jurisdiction, together with the Witness Statement of Mr. Juan A. Franco Quintero (Spanish); the Second Witness Statement of Ms. Ana Milena Vásquez (Spanish); the Expert Report of SRK Consulting; the Second Expert Report of Versant Partners; the Second Legal Opinion of Ms. Adriana Martínez Villegas (Spanish); Appendix A – Index of Fact Exhibits C-815 to C-1142; and Appendix B – Index of Legal Authorities CL-188 to CL-267 ("**Cl. Reply**").

28. On April 14, 2021, the Respondent submitted a letter to the Tribunal indicating that the Claimant had submitted "a massive volume of exhibits onto the record on which it [did] not specifically rely in its Reply, witness statements or expert reports, including the entirety of the Parties' production of documents presented by the Claimant as two 'exhibits.'" As such, the Respondent requested that the Tribunal order that (i) the Claimant's Exhibits C-815, C-816, C-819, C-820, C-933, C-1007, C-1008, C-1009, and C-1010 be stricken from the record; and (ii) the Claimant replace the references made to Exhibit C-815 at paragraphs 56, 170 and 250 of its Reply by new exhibits, which may only contain references to a single, specific document.

29. Following the invitation from the Tribunal, on April 25, 2021, the Claimant filed its observations on the Respondent's letter arguing that there was no basis to strike the exhibits from the record because the Respondent "attempt[ed] to unilaterally impose new procedural limitations on Claimant." Accordingly, the Claimant requested that the Tribunal reject the Respondent's request.

30. On April 28, 2021, the Tribunal issued Procedural Order No. 3 denying the Respondent's request, finding that it was not convinced that "fairness would be served by the removal of a large number of documents from the record, as requested by the Respondent."

31. On July 23, 2021, the Respondent filed its Rejoinder on the Merits and separately its Reply on Jurisdictional Objections, along with the Second Witness Statement of Mr. Juan Manuel Pinzón; the Witness Statement of Ms. Brigitte Baptiste; the Second Expert Report of The Brattle Group; the Second Expert Report of Professor Felipe De Vivero; the Expert Report of Mr. Mario Rossi, along with Factual Exhibits R-126 to R-176 and Legal Authorities RL-152 to RL-194 ("**Resp. Rej.**" and "**Resp. Reply**").

32. On September 10, 2021, the Claimant filed its Rejoinder on Jurisdiction, together with Appendix A – Index of Fact Exhibits C-1249 to C-1288; and Appendix B – Index of Legal Authorities CL-268 to CL-284.

33. Pursuant to ICSID Administrative and Financial Regulation 14(3), the Centre requested an advance payment of USD 200,000 on October 14, 2021.

34. By letter dated October 27, 2021, the Claimant requested leave from the Tribunal to introduce into the record the Decision on Jurisdiction, Liability and Directions on Quantum dated September 9, 2021 in the case of *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41 (hereinafter "***Eco Oro***").

35. Following the invitation from the Tribunal, the Respondent confirmed it had no objections to the introduction of the *Eco Oro* decision as it is a public document.

36. In view of Colombia's no objection, the Tribunal granted the Claimant's request to introduce the *Eco Oro* decision into the record by letter dated November 4, 2021.

37. On November 8, 2021, the Claimant introduced the *Eco Oro* decision as granted by the Tribunal and clarified that it had proposed the introduction of the document pursuant to Article 16.3 of Procedural Order No. 1 and that the document was ultimately being incorporated into the record "by consent (not because it is in the public domain, which does not make a document or legal authority part of the record)."

38. On the same date, the Centre acknowledged receipt of the Claimant's portion of the advance payment requested on October 14, 2021.

39. On November 9, 2021, the Government of Canada filed a Non-Disputing Party Submission pursuant to Article 827(2) of the Treaty, which was transmitted to the Tribunal and the Parties by the Secretary of the Tribunal on the same date.

40. On January 3, 2022, after exchanges with the Parties, the Tribunal confirmed that the hearing would be held on the week of February 27 – March 3, 2023 (holding March 4, 2023 in reserve).

41. Having not received the Respondent's portion of the advance payment requested on October 14, 2021, on July 14, 2022, the Secretary-General notified the Parties of the Respondent's default and invited either party to pay the outstanding amount of USD 200,000 by July 29, 2022, pursuant to ICSID Administrative and Financial Regulation 14(3)(d).

42. On July 29, 2022, the Claimant informed the Centre that it required additional time to "assess and make relevant arrangements."

43. By letter dated August 1, 2022, the deadline extension for the parties to make default advance payment until August 12, 2022 was notified.

44. On August 9, 2022, the Claimant requested that, considering (i) Colombia's duty to pay; (ii) Colombia's failure to pay; and (iii) the date of the hearing being set for the week of February 27, 2023, with no procedural steps envisioned until November 16, 2022; the date for the advance payment be fixed on or around November 13, 2022, and encouraged the Respondent to comply with its payment obligations.

45. On August 31, 2022, the Tribunal informed the Parties that it considered "reasonable" the November 13, 2022 proposed by the Claimant to make the default payment.

46. Having not received a payment by the Respondent, by letter dated November 11, 2022, the Claimant informed the Centre that it would be submitting the payment imminently.

47. On November 16, 2022, the Respondent submitted its Comments on Canada's Non-Disputing Party Submission of November 9, 2021, together with Legal Authorities RL-195 to RL-200. On the same date, the Claimant also submitted its Comments to Canada's Non-Disputing Party Submission, together with Factual Exhibits C-1289 to C-1302; and Legal Authorities CL-286 to CL-291.

48. By letter dated November 30, 2022, the Centre acknowledged receipt of a wire transfer in the amount of USD 200,000 from the Claimant, corresponding to the Respondent's portion of the advance requested on October 14, 2021.

49. By correspondence dated December 9, 2022, the Respondent objected to the Claimant's introduction of Factual Exhibits C-1289 to C-1302 submitted with their Comments to Canada's Non-Disputing Party Submission, and requested they be stricken from the record.

50. Following the Tribunal's invitation, on December 19, 2022, the Claimant submitted its observations on the Respondent's objection of December 9, 2022.

51. On December 13, 2022, the Centre circulated a draft Procedural Order No. 4 on the organization of the hearing, and invited the Parties to submit a joint proposal advising the Tribunal of any agreements they are able to reach on the draft, or of their respective positions where they are unable to reach an agreement.

52. By letter dated December 23, 2022, the Tribunal rejected the Respondent's request to exclude Factual Exhibits C-1289 to C-1302 from the record and invited the Respondent to address this matter, including with any additional evidence, during the hearing.

53. On January 27, 2023, a pre-hearing organizational meeting between the Parties and the Tribunal was held by videoconference to discuss any outstanding procedural, administrative, and logistical matters in preparation for the hearing, including the draft Procedural Order No. 4 and the Parties' respective positions where no prior agreement had been reached.

54. On January 30, 2023, the Tribunal issued Procedural Order No. 4 on the Organization of the Hearing.

55. On February 14, 2023, the Respondent filed a request for the Tribunal to decide on the admissibility of new documents "for the purpose of responding to the new factual allegations raised in the Claimant's Comments to Canada's [Non-Disputing Party] Submission."

56. Following the Tribunal's invitation, the Claimant filed its observations on February 17, 2023, requesting the introduction of the new documents be denied.

57. The Tribunal decided on the admissibility of the new documents on February 22, 2023, rejecting the Respondent's request "on the basis of the immediacy of the upcoming Hearing."

58. A hearing on jurisdiction, merits and *quantum* was held in Washington, DC from February 27 to March 3, 2023 (the "**Hearing**"). The following persons were present at the Hearing:

Tribunal:	
Dr. Andrés Rigo Sureda	President
Mr. José Martínez de Hoz	Arbitrator
Prof. Philippe Sands KC	Arbitrator
ICSID Secretariat:	
Ms. Catherine Kettlewell	Secretary of the Tribunal
For the Claimant:	
Mr. Jonathan C. Hamilton	White & Case
Mr. Francisco X. Jijón	White & Case
Mr. Damien Nyer	White & Case
Mr. John Dalebroux	White & Case
Mr. Paulo Maza	White & Case
Ms. Vivi Méndez	White & Case
Ms. Natalia Jaramillo	White & Case
Ms. Helin Akcam	White & Case
Mr. Javid Dharas	White & Case
Mr. Emilio González Balbontín	White & Case
Ms. Camila Hernández–Corena	White & Case
Mr. Antonio Nittoli	White & Case
Mr. Brandon Murray	White & Case
Ms. Lizette Contreras	White & Case
Mr. Ian Slater	Claimant
For the Respondent:	
Mr. Fernando Mantilla-Serrano	Latham & Watkins

Mr. Samuel Pape	Latham & Watkins
Mr. Diego Romero	Latham & Watkins
Mr. Hugo Varenne	Latham & Watkins
Mr. Ignacio Stratta	Latham & Watkins
Mr. Lorenzo Cappelli	Latham & Watkins
Ms. Alexia Benchimol	Latham & Watkins
Ms. Martha Lucía Zamora	ANDJE
Ms. Ana María Ordóñez Puentes	ANDJE
Mr. Giovanny Vega Barbosa	ANDJE
Ms. Marcela Silva Zambrano	ANDJE
Ms. María Camila Valencia	ANDJE
Ms. Elizabeth Prado López	ANDJE
Mr. Camilo Valdivieso León	ANDJE
Mr. Leiver Dario Palacios Ramos	ANDJE
Ms. Gabriela Cruz Hoyos	ANDJE

Court Reporters:

Ms. Dawn Larson	English Court Reporter
Mr. Leandro Iezzi	Spanish Court Reporter

Interpreters:

Ms. Silvia Colla
Mr. Charlie Roberts
Mr. Luis Arango

59. During the Hearing, the following witnesses were examined:

On behalf of the Claimant:

Ms. Adriana Martínez	Martínez, Córdoba & Abogados Asociados
Mr. Wayne Barnett	SRK Consulting
Mr. Guy Dishaw	SRK Consulting
Mr. Kiran Sequeira	Versant Partners/ Secretariat
Mr. Stuart Dekker	Versant Partners/ Secretariat
Ms. Ana Milena	
Mr. Juan Franco	

On behalf of the Respondent:

Mr. Felipe De Vivero	De Vivero & Asociados
Mr. Mario Rossi	GeoSystems International, Inc.
Mr. Graham Davis	The Brattle Group
Ms. Andrea Ahrens	The Brattle Group
Mr. Florin Dorobantu	The Brattle Group

Ms. Paula Jaramillo	The Brattle Group
Mr. Juan Manuel Pinzón Ms. Brigitte Baptiste	

60. The Parties filed simultaneous post-hearing briefs on May 17, 2023.

61. The Parties filed their submissions on costs on June 15, 2023.

62. The proceeding was closed on February 20, 2024.

III. FACTUAL BACKGROUND

63. The dispute concerns the prohibition for gold mining in the Respondent's *páramos*. The Claimant is a gold mining company which acquired eleven gold mining titles in the Santurbán area over the period June 2010 and October 2013 ("**Mining Titles**").[1] The

[1] Mining Titles acquired by the Claimant:

Figure 1
Claimant's Mining Titles

Title	*Option*	*Acquisition*	*Assignment*	*Approval*	*Registration*	*Environmental Permit*
Real Minera	Oct. 23. 2009	Apr. 19. 2010	Apr. 26. 2010	May 21. 2010	Jun. 9. 2010	Environmental-Mining Guidelines submitted to the CDMB on 5 April 2010
San Alfonso	Apr. 14. 2009 (signed Apr. 15, 2009)	Oct. 27. 2011	Dec. 6. 2011	Apr. 18. 2012	Sept. 17. 2013	Environmental-Mining Guidelines submitted to the CDMB on 6 November 2013
La Vereda	Aug. 4. 2009	Jun. 12. 2012	8 Mar. 2012	12 Apr. 2012	12 Feb. 2013	Environmental-Mining Guidelines submitted to the CDMB on 13 November 2012
Los Delirios	Dec. 11. 2009	25 Aug. 2010	Sept. 30. 2010	28 Oct. 2010	9 Feb. 2011	Environmental management plan approved in 2002; transfer to Minera Vetas on 12 August 2011
La Peter	Dec. 11. 2009	21 May 2010	24 Jun. 2010	13 Jul. 2010	10 Aug. 2010	Environmental management plan approved in 1998; transfer to Minera Vetas on 19 August 2011
El Dorado	Dec. 13. 2009	22 Jul. 2010	27 Jul. 2010	31 Aug. 2010	2 Dec. 2010	Environmental-Mining Guidelines submitted on 16 February 2011
Arias	Jan. 21. 2010	15 Oct. 2010	22. Jul. 2010 (authenticated 25 Oct. 2010)	10 Dec. 2010	17 Feb. 2011	Environmental management plan approved in 2001; transfer to Minera Vetas on 9 April 2013
Santa Isabel	Jan. 13. 2010	21 May 2010	24 Jun. 2010	13 Jul. 2010	10 Aug. 2010	Environmental management plan approved in 2003; transfer to Minera Vetas on 12 August 2011
La Triada	Oct. 7. 2010	28 Mar. 2012	Mar. 30. 2012	18 Apr. 2012	18 Oct. 2013	Environmental management plan approved in 2002; transfer to Minera Vetas is pending
San Bartolo	Oct. 24. 2009	Oct. 20. 2010.	Nov. 30. 2010	26 Mar. 2012	7 Nov. 2012	Environmental management plan approved in 2001; transfer to Minera Vetas on 23 April 2011
San Antonio	Oct. 24. 2009	Oct. 20. 2010.	Dec. 6. 2011	18 Apr. 2012	2 Feb. 2013	Environmental-Mining Guidelines submitted to the CDMB on 1 October 2012

Cl. Mem., ¶ 44.

Claimant argues that, following the acquisition of the Mining Titles, it pursued a gold exploration program to develop a large-scale project in Vetas ("**Vetas Project**", "**Vetas Gold Project**" or "**Project**").[2]

64. Law 1382 of February 9, 2010,[3] had forbidden mining in the *páramos*[4], except for activities carried out pursuant to an existing environmental license. The Parties debate as to whether this exception applied to new activities within titles where existing activities were carried out. Law 1382 was effective as from the date it was adopted. The Constitutional Court found Law 1382 to be unconstitutional because it was enacted without consulting indigenous and afro-descendant people (Judgment C-367 of May 11, 2011).[5]

65. The Respondent has explained that the *páramos* are diverse, extremely fragile and rare ecosystems,[6] and that under the existing legal framework, to acquire vested rights is necessary to obtain an environmental license and an approved mining works program (*plan de trabajos y obras* or "**PTO**"). A requisite for the license is the preparation and approval of an EIA (Environmental Impact Assessment).[7]

66. It is notable for purposes of this case that in 2011 the Colombian authorities rejected an application by Eco Oro for an environmental license for a large-scale mining project adjacent to Red Eagle's Mining Titles.[8]

67. The Resolution No. 937 of May 25, 2011,[9] adopted the cartographic information of the 2007 Instituto de Investigación Alexander von Humboldt ("**IAVH**") Páramo Atlas to identify and delimit Colombian *páramos*, further to the mandate of Law 1382.

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[2] Cl. Mem., ¶ 4.

[3] Law 1382, February 9, 2010, **Exhibit C-655**.

[4] *Páramos* are described in Resolution 769 of the Ministry of the Environment as a "High mountain ecosystem, located between the upper limit of the Andean forest and, if applicable, with the lower limit of glaciers or perpetual snow, in which a herbaceous and grassland vegetation dominates, frequently *frailejones* and may have low and shrubby forest formations and present wetlands such as rivers, ravines, streams, peat bogs, swamps, lakes and lagoons." Ministry of Environment, Resolution No. 769, August 5, 2002, Article 2, **Exhibit C-15**.

[5] Constitutional Court, Judgment C-367, May 11, 2011, **Exhibit C-575**.

[6] Resp. C-Mem., ¶¶ 17-21.

[7] Resp. C-Mem., ¶ 139.

[8] CDMB, Resolution No. 125 (La Triada de Oro Title PMA), February 18, 2002, **Exhibit R-48**.

[9] Ministry of Environment, Resolution No. 937, May 25, 2011, **Exhibit R-11**.

68. Law 1450 of June 16, 2011, reinstated the ban on mining in *páramos* ecosystems with immediate effect.[10]

69. The delimitation of the Santurbán *Páramo* by Resolution 2090 of December 19, 2014 was nearly identical to the 2007 Páramo Atlas delimitation.[11]

70. Law 1753 of June 9, 2015 ratified the mining ban in the *páramos*.[12] This law was challenged at the Constitutional Court in February 2016. In Judgment C-035,[13] the Court declared portions of Article 173 of Law 1753 as unconstitutional because they authorized mining activities in projects with pre-acquired environmental licenses. Judgment C-035 eliminated the grandfathering provision for mining titles issued prior to February 9, 2010.[14]

71. The Respondent disputes the correctness of Red Eagle's assertion that there were no restrictions or prohibitions on mining in the *páramos* prior to 2010. The Respondent recalls that the Constitutional Court in Judgment C-339 of May 7, 2002 ruled that environmental authorities could designate mining exclusion zones within Claimant's titles by creating a natural park or delimitation of a *páramo* ecosystem as a mining exclusion zone.[15]

72. On May 17, 2016,

> the ANM informed Claimant that mining was banned in 76.95% of the Real Minera concession area and requested that Claimant return areas falling within the concession contract. That same day, the ANM informed Claimant that mining activity was banned in 33.40% of La Tríada de Oro. Subsequently, on December 2016, the ANM sent another letter to Claimant, advising it that portions of the Real

[10] Law 1450, June 16, 2011, **Exhibit C-576**.

[11] Ministry of Environment and Sustainable Development, Resolution No. 2090, December 19, 2014, **Exhibit C-580**. *See also* Investigation IAVH, *Páramo* Atlas, January 1, 2007, **Exhibit C-508**.

[12] Law 1753, June 9, 2015, **Exhibit C-17**.

[13] Constitutional Court, Judgment C-035, February 8, 2016, **Exhibit C-18**.

[14] Constitutional Court, Judgment C-035, February 8, 2016, **Exhibit C-18**.

[15] Constitutional Court, Judgment C-339, May 7, 2002, **Exhibit R-109**. *See also* Resp. C-Mem., ¶¶ 154-158.

> Minera concession overlapped with the Santurbán Páramo and therefore, mining activities would be restricted.[16]

73. In April 2017, "the ANM reiterated that 76.95% of the Real Minera concession overlapped with the Santurbán Páramo and ordered Claimant to return this area to the State."[17] In August 2017, the ANM ratified the ban on mining within delimited *páramos*. At this point Minera Vetas had to determine whether developing the remainder of the Vetas Project was economically viable.[18]

74. Judgment T-361 of May 30, 2017 made it clear that the new delimitation would be more expansive than the previous delimitation. Six years later no new delimitation has been done. This together with the reduction of the titles' areas lead the Claimant to conclude that the Vetas Project as originally conceived was not viable.[19]

75. This factual background will be expanded to the extent necessary to provide context to the Parties' arguments.

IV. THE PARTIES' CLAIMS AND REQUESTS FOR RELIEF

76. The Claimant requests the Tribunal to render an award:

- Declaring that the dispute is within the jurisdiction and competence of the Tribunal;
- Ruling that Colombia has breached its obligations under the Treaty, on the grounds referenced [in its Memorial and Reply], and is liable to Claimant as a result;
- Ordering Respondent to pay damages and pre-award interest as specified [in its Memorial and Reply] and in Claimant's supporting materials, and post-award interest at a rate to be determined;

[16] Cl. Mem., ¶ 82, *citing* Concepto Técnico Oficina Asesora Jurídica ANM 20171200263041, December 29, 2017, **Exhibit C-749**; Concepto Técnico Oficina Asesora Jurídica ANM 20181200265101, April 12, 2017, **Exhibit C-750**; and ANM Letter to Minera Vetas, December 22, 2016, **Exhibit C-751**.

[17] Cl. Mem., ¶ 83, *citing* ANM Letter to Minera Vetas, April 26, 2017, **Exhibit C-19**.

[18] Cl. Mem., ¶ 84, *citing* ANM Letter to Minera Vetas, August 31, 2017, **Exhibit C-20**.

[19] Constitutional Court, Judgment No. T-361, May 30, 2017, **Exhibit C-22**. *See also* Cl. Mem., ¶¶ 86-87.

- Ordering Respondent to pay all costs incurred by Claimant associated with these proceedings, including legal fees and disbursements;

- Ordering such further relief as the Tribunal may deem appropriate.[20]

77. In its Rejoinder on Jurisdiction, the Claimant added to its request for relief for the Tribunal to render an award, "[d]eclaring that the dispute is within the jurisdiction and competence of the Tribunal, rejecting all of Respondent's jurisdictional objections."[21]

78. The Respondent, on the other hand, requests the Tribunal dismiss Red Eagle's claims for lack of jurisdiction and/or admissibility.[22] In the alternative, the Respondent requests the Tribunal to:

- Dismiss Red Eagle'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:

    - Any claim or violation by the Republic of Colombia of Article 804 of the FTA;
    - Any claim or violation by the Republic of Colombia of Article 805 of the FTA;
    - Any claim or violation by the Republic of Colombia of Article 811 of the FTA;
    - Any claim that Red Eagle suffered losses for which the Republic of Colombia could be liable;

- Order that Red Eagle 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

- Grant such relief that the Tribunal may deem just and appropriate.[23]

[20] Cl. Mem., ¶ 218; Cl. Reply, ¶ 667.

[21] Cl. Rej., ¶ 129.

[22] Resp. Mem., ¶ 89; Resp. Reply, ¶ 129.

[23] Resp. C-Mem., ¶ 578.

V. JURISDICTION

79. The Respondent alleges that the Claimant has failed to prove that it meets the jurisdictional requirements under the Treaty (**A**). According to the Respondent, Red Eagle's claims fall outside of the jurisdiction *ratione temporis* of the Tribunal (**B**); Red Eagle failed to submit its claims within the mandatory limitation period and failed to submit a valid notice of intent prior to submitting its claims to arbitration (**C**); Colombia has denied the benefits of Chapter Eight of the Treaty to Red Eagle in accordance with Article 814(2) of the FTA (**D**); and Red Eagle's claims fall outside of the Tribunal's jurisdiction *ratione materiae* (**E**).[24]

A. WHETHER RED EAGLE HAS DISCHARGED ITS BURDEN OF PROOF ON JURISDICTION REQUIREMENTS

(1) The Parties' Positions

a. The Respondent's Position

80. The Respondent affirms that it is a fundamental principle of international law that a claimant must establish the elements of its case, including the jurisdictional requirements of the treaty on which it bases its claims.[25] Colombia alleges that the brief reference in Claimant's Memorial to the jurisdiction of the Tribunal did not elaborate on the numerous jurisdictional elements that are required to meet its burden of proof.[26] The Respondent states that this principle applies to all jurisdictional requirements under the Treaty and the Claimant's attempt to shift that burden onto Colombia is without merit.[27]

b. The Claimant's Position

81. The Claimant alleges that the Respondent mischaracterizes the burden of proof.[28] The Claimant first addresses that it is the Respondent that has the burden of proving with

[24] Resp. Mem., ¶ 7.

[25] Resp. Mem., ¶ 9, *citing SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, February 12, 2010, **Exhibit RL-96**, ¶ 57; *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, April 15, 2009, **Exhibit RL-93**, ¶¶ 60-61.

[26] Resp. Mem., ¶ 11.

[27] Resp. Reply, ¶¶ 15-16.

[28] Cl. Mem., ¶¶ 259-263.

sufficient evidence the basis of its objections to jurisdiction. The Claimant argues that it has submitted "documentary evidence sufficient to show that it is an investor with a covered investment under the Treaty and the ICSID Convention and has complied with all requirements for jurisdiction, including under Article 25 of the ICSID Convention and the Treaty."[29]

82. The Claimant asserts that the burden of proof lies with the party that asserts the fact and confirms that it is "well-established in international law that 'if said Party adduces evidence that *prima facie* supports its allegation, the burden of proof may be shifted to the other Party."[30] In this case, the Claimant adds, "[a]s Respondent has raised the objections on jurisdiction, the Respondent bears the burden of proving them."[31]

83. According to the Claimant, once a claimant has established that the tribunal has jurisdiction and that its claims are admissible, the burden shifts to respondent "to establish the facts that it claims contradict the allegations of the opposing party."[32] This approach, the Claimant says, has been established by jurisprudence in cases such as *Ambiente v. Argentina*, *Pezold v. Zimbabwe, Pac Rim v. El Salvador* and others.[33]

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[29] Cl. Reply, ¶ 260, *citing* Cl. Mem., ¶¶ 88-93. *See also* Cl. Rej., ¶¶ 11-18.

[30] Cl. Reply, ¶ 261; Cl. Rej., ¶¶ 8-18.

[31] Cl. Rej., ¶ 11.

[32] Cl. Reply, ¶ 261, *citing Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon,* ICSID Case No. ARB/15/18, Award, June 22, 2017, **Exhibit CL-217,** ¶ 138. The Claimant also supports its allegation on the following cases: *Ambiente Ufficio SpA and others v. Argentine Republic*, ICSID Case No ARB/08/9, Decision on Jurisdiction and Admissibility, February 8, 2013, **Exhibit CL-212**, ¶ 312 ("the tribunal considered which party bore the burden of proving the nationality requirement under the ICSID Convention and concluded that, while 'the burden of proof that the Claimants are Italian nationals falls on the Claimant themselves,' 'the burden to disprove the negative elements – i.e. . . . not having been domiciled in Argentina for more than two years – would fall on the Respondent's side.'"); *Pezold et al. v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, July 28, 2015, **Exhibit CL-214**, ¶ 176 (the tribunal "summarized the legal standard as follows: 'the general principle applies to require the Respondent to produce sufficient evidence to establish its objections to jurisdiction.'"); *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Preliminary Objections, August 2, 2010, **Exhibit RL-106,** ¶ 111 ("the tribunal stated that 'the burden of persuading the tribunal to grant the preliminary objection must rest on the party making that objection, namely the respondent.'").

[33] Cl. Rej., ¶ 14. *See also Canfor Corp. et al. v. United States of America,* UNCITRAL, Decision on Preliminary Question, June 6, 2006, **Exhibit CL-216,** ¶ 176 ("[W]here a respondent State invokes a provision in the NAFTA which, according to the respondent, bars the tribunal from deciding on the merits of the claims, the respondent has the burden of proof that the provision has the effect which it alleges."); *Vito G. Gallo v. Government of Canada*, PCA Case No. 55798, Award, September 15, 2011, **Exhibit CL-238**, ¶ 277 ("[T]he principle *actori incumbit probatio* is a coin with two sides: the Claimant has to prove its case, and without evidence it will fail; but if the Respondent raises

84. The Claimant argues that it has established that the Tribunal has jurisdiction and that the claims are admissible and that the burden has now shifted to the Respondent to disprove this.[34]

(2) The Tribunal's Analysis

85. Each party is responsible for proving the facts on which it relies. Whether the burden of proof has been satisfied, the Tribunal will further decide as it considers the evidence submitted by the Parties for each of the objections and claims.

B. WHETHER RED EAGLE'S CLAIMS ARE OUTSIDE OF THE *RATIONE TEMPORIS* JURISDICTION OF THE TRIBUNAL

(1) The Parties' Positions

a. The Respondent's Position

86. The Respondent alleges that the facts related to Claimant's claims occurred before the Treaty entered into force on August 15, 2011 and, therefore, these are outside the Tribunal's jurisdiction under Article 801(2) of the Treaty.[35] For purposes of this objection, Colombia points out to two relevant dates: (i) the FTA's entry into force of August 15, 2011, and (ii) the FTA's mandatory cut-off date of December 21, 2014.[36]

87. Colombia argues that the acts and facts on which the Claimant's claims are based are the "mere continuation of measures adopted prior" to the date of entry into force of the Treaty.[37] On the basis of Article 13 of the International Law Commission's Articles on State Responsibility ("**ILC Articles**"), the Respondent argues that "an act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time that the act occurs."[38] According to Colombia, the dispute

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defences, of fraud or otherwise, the burden shifts, and the defences can only succeed if supported by evidence marshalled by the Respondent.").

[34] Cl. Reply, ¶ 263.

[35] Resp. Mem., ¶¶ 12-14.

[36] Resp. Reply, ¶ 18.

[37] Resp. Mem., ¶ 14; Resp. Reply, ¶ 19.

[38] Resp. Reply, ¶ 23, *citing* International Law Commission, "Articles on State Responsibility for Internationally Wrongful Acts, with commentaries", [2001-II] Yearbook of the International Law Commission, **Exhibit RL-137**, Article 13.

between Red Eagle and Colombia arose on February 9, 2010, when Colombia adopted Law 1382 that protects the *páramo* by prohibiting mining. This mining prohibition, Colombia states, had its roots in Law 99 of 1993 and it was adopted and immediately became effective on February 9, 2010 together with the IAVH Páramo Atlas.[39] This fact, the Respondent argues, was known to the Claimant at that time. Colombia recalls that Mr. Franco, Claimant's witness, had prepared an environmental due diligence report concerning three of the mining titles (Real Minera, San Bartolo and San Antonio). When Claimant considered the acquisition of these mining titles, it analyzed the draft bill of Law 1382 which was later enacted in September 2010.[40] According to Colombia, Mr. Franco confirmed that "in accordance with the Atlas of Colombian Páramos […] the evaluated mining projects […] are located in areas of the páramo ecosystem that are part of the Santurbán Complex."[41]

88. Colombia argues that the determination that these titles overlapped with the *páramo* has never changed, nor did Colombia give any indication that it did. The Respondent explains that the Ministry of Environment confirmed in Resolution 937 dated May 25, 2011, that IAVH's 'cartographic information' referred to in Law 1382 was the 2007 IAVH Páramo Atlas. That Resolution, says Colombia, also confirmed that it immediately applied to the areas identified in the 2007 IAVH Páramo Atlas.[42]

89. The Respondent argues that according to the 2007 IAVH Páramo Atlas, 95.1% of the Claimant's titles overlapped with the Santurbán *Páramo*, 56.43% of La Vereda title and 33.23% of the San Antonio title fell within the bounds of the Santurbán Regional Park. According to the Respondent, there were no additional restrictions introduced by Resolution 2090.[43] Colombia argues that there was a clear overlap of 95.5% [95.1] of the Claimant's titles with the Santurbán *Páramo* as shown in the map below:[44]

[39] Resp. Reply, ¶¶ 26, 31.
[40] Resp. Reply, ¶ 32.
[41] Resp. Reply, ¶ 32, *citing* Due Diligence Report, December 1, 2009, **Exhibit C-603**, p. 25.
[42] Resp. Reply, ¶ 33.
[43] Resp. Reply, ¶ 34.
[44] Resp. Reply, ¶ 34.

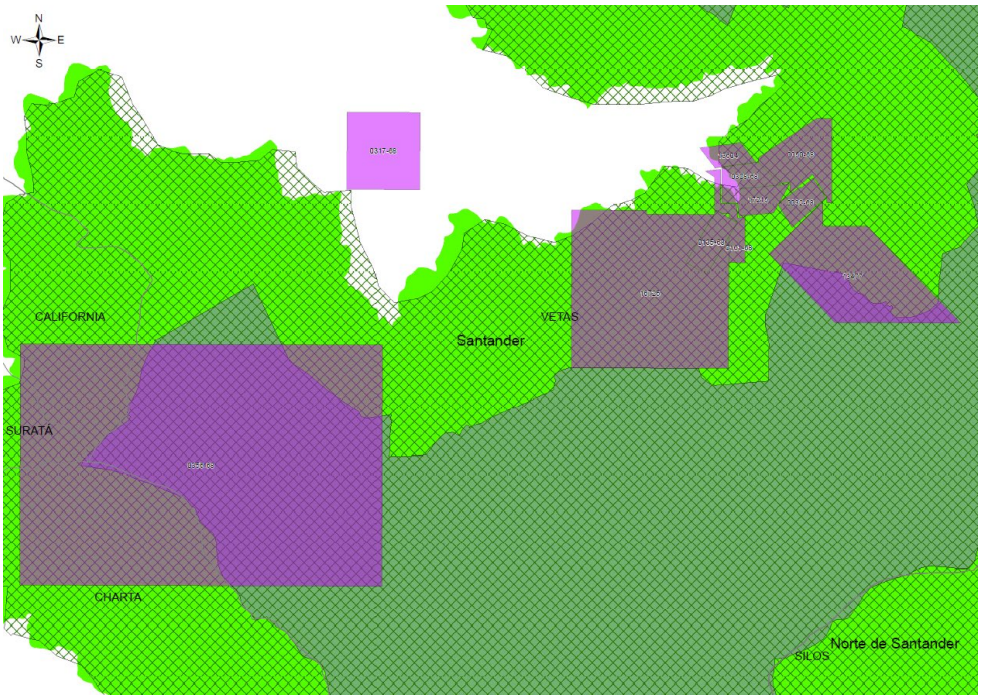

Fig. 1: Map showing the overlap of Red Eagle's titles with the 2007 IAVH Páramo Atlas (in purple squares), Resolution 2090 (in light green) and the Santurbán Regional Park (in dark green) (Resp. C-Mem., ¶ 285, Figure 11).

90. The Respondent adds that the Claimant's Mining Titles and exploration areas were also covered by the 2007 IAVH Páramo Atlas as shown in the map below:[45]

[45] Resp. Reply, ¶ 35.

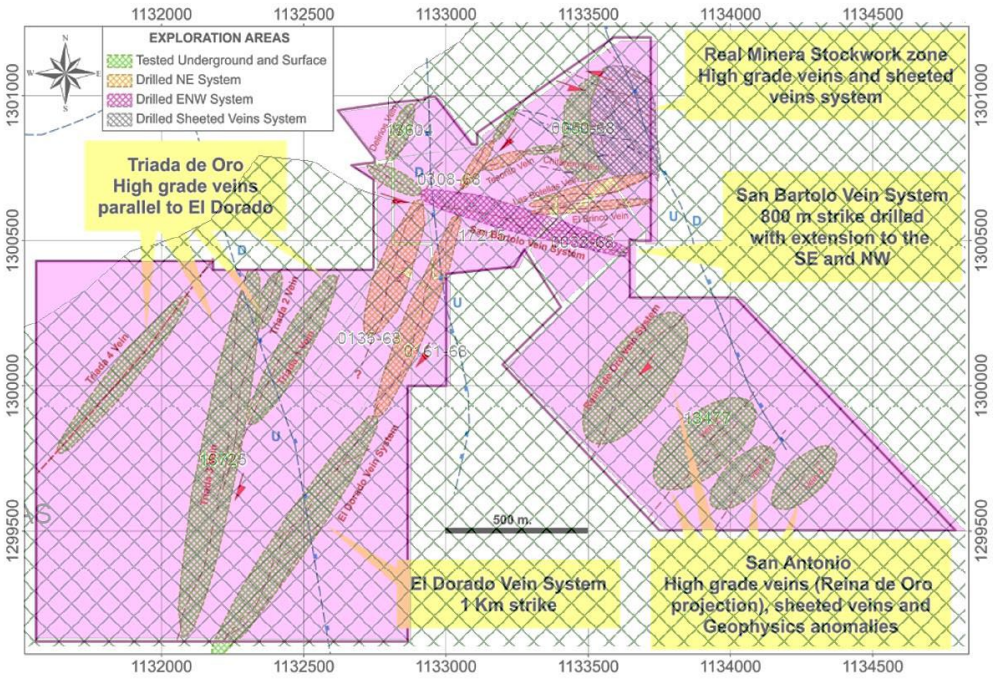

Fig. 2: Map showing the overlap of Red Eagle's exploration areas with the 2007 IAVH Páramo Atlas (in green squares), including Red Eagle's Mining Titles outlined in purple (Resp. Reply, ¶ 35, Figure 2).

91. The Respondent alleges that the Claimant's development of the Project was precluded since February 9, 2010. Consequently, Colombia argues, the 'damage' would have occurred immediately after the prohibition became effective. The Respondent also argues that this mining prohibition has remained in force uninterruptedly since that date.[46]

92. Separately, Colombia adds that Red Eagle had not obtained environmental licenses or an environmental management instrument for the Vetas Gold Project to avail itself of the protection of the transitional regime under Article 3 of Law 1382. According to the Respondent, the existing licenses were limited to small-scale artisanal mining activities and the Claimant would not have qualified for the transitional regime by applying to modify these licenses for a different set of activities at a different scale.[47] Consequently, Colombia alleges that "because the same prohibition on mining in the páramo areas has

[46] Resp. Reply, ¶ 29.

[47] Resp. Reply, ¶ 37. *See also* Cl. PHB, ¶ 69.

remained in force ever since 9 February 2010, the same dispute has continued, and no new dispute has arisen since the FTA entered into force."[48]

93. Colombia also argues that the measures taken after August 15, 2011 identified by Red Eagle do not constitute a new prohibition but rather those are measures that concern "the same policy and legal prohibition, and derive from the same facts and considerations, surrounding the dispute arising out of Law 1382."[49] The Respondent supports its argument indicating that tribunals "have held that a tribunal lacks jurisdiction *ratione temporis* if the claim before it concerned 'same subject-matter' as a claim predating the entry into force of a treaty."[50]

94. Colombia argues that Red Eagle's Mining Titles were already located in the *páramo* area as of February 9, 2010. The Respondent further states that "the designation of part of said Mining Titles as mining exclusion zones is a mere consequence and constitutes the natural application of Law 1382 of 2010." Consequently, Colombia alleges that the Tribunal lacks jurisdiction *ratione temporis* as the claims arose from measures adopted prior to the Treaty's entry into force on August 15, 2011.[51]

b. The Claimant's Position

95. The Claimant alleges that the Respondent's objection *ratione temporis* has no basis in the law or any fact.[52] According to the Claimant, Colombia offers an incomplete reading of the text of the Treaty. The Claimant argues that a reading of Chapter Eight of the Treaty should be consistent with its object and purpose. The Claimant adds that the Respondent is trying to unilaterally limit the scope of said Chapter by excluding from its protection any disagreement on a point of law that continues to exist after the Treaty came into force. According to the Claimant, "Article 801 serves to define the temporal scope of certain substantive protections afforded to the investors of a party for covered investments in the

[48] Resp. Mem., ¶ 18. *See also* Resp. Reply, ¶¶ 36, 38, 39.

[49] Resp. Mem., ¶ 19.

[50] Resp. Mem., ¶ 20, *citing Industria Nacional de Alimentos S.A. and Indalsa Perú S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4, Award, February 7, 2005, **Exhibit RL-83**, ¶¶ 48, 53, 59.

[51] Resp. Mem., ¶ 23.

[52] Cl. Reply, ¶¶ 264-292.

territory of the other party, including in situations where the act or fact continues to occur or exist after the treaty has come into force."[53]

96. The Claimant alleges that the Respondent has erred in setting out the legal standard for the existence of the dispute. The Claimant argues that "various tribunals have confirmed that a claimant may only be precluded from asserting its claims if the dispute was 'crystallised' before the Treaty's entry into force."[54] The Claimant states that several tribunals have rejected similar objections. They have held that "the critical date [for assessing jurisdiction] is the date when the dispute arose rather than the date when events and actions that may have given rise to the dispute took place."[55] The Claimant argues that, even if the facts and acts occurred prior to the entry into force of the Treaty, that does not preclude the Tribunal from assessing jurisdiction over such breaches because tribunals should take into account the factual background that pre-dates the Claimant's complained measures.[56] The Claimant also alleges that in order to preclude jurisdiction, the facts must concern the same subject matter as the claims.[57]

97. In its Rejoinder on Jurisdiction, the Claimant points out that Colombia has mischaracterized the legal standard. Red Eagle argues that the Respondent changed its initial argument from whether the dispute existed before the Treaty's entry into force to whether the concerned acts or facts occurred before the entry into force.[58] According to the Claimant, the Respondent is relying on an incomplete reading of the Treaty which

[53] Cl. Reply, ¶ 269. The Claimant supports its argument with the following legal authorities: *Gas Natural Fenosa Electricidad Colombia S.L. and Gas Natural SDG S.A. v. Republic of Colombia*, ICSID Case No. UNCT/18/1, Award, March 12, 2021, **Exhibit CL-188**, ¶¶ 209-210; International Law Commission, Draft Articles on the Law of the Treaties with Commentaries, 1966, **Exhibit CL-224**, p. 27 [p. 212].

[54] Cl. Reply, ¶ 273. In support of this argument, the Claimant recalls the following legal authorities: *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, June 16, 2006, **Exhibit CL-210**, ¶ 116; *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award, January 9, 2015, **Exhibit RL-112**, ¶ 149; C. Schreuer et al., The ICSID Convention: A Commentary, Second Edition, Cambridge University Press, 2009, **Exhibit RL-38**, p. 96; *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, January 25, 2000, **Exhibit CL-207**, ¶¶ 95-96, 106.

[55] Cl. Reply, ¶ 276, *citing Ioan Micula and others v. Romania I,* ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, September 24, 2008, **Exhibit CL-225**, ¶ 156.

[56] Cl. Reply, ¶ 276.

[57] Cl. Reply, ¶ 277.

[58] Cl. Rej., ¶ 25, *citing* Resp. Mem., ¶¶ 13, 14, 18; Resp. Reply, ¶¶ 20, 24.

expressly limits the temporal restriction to acts or facts that ceased to exist prior to the entry into force of the Treaty.[59]

98. The Claimant argues that the claims arose after the Treaty's entry into force.[60] The Claimant asserts that Colombia is wrong to contend that prior acts to Resolution 2090 are the basis of the Claimant's claims. In fact, the Claimant argues, the reference to prior legislation confirms that the restrictions to the Claimant's mining activities did not exist prior to Resolution 2090. The Claimant recounts that Law 1382 did not prevent the Claimant's mining activities because the Mining Titles were not covered by the delimited protected areas and even the Respondent acknowledges that the first attempt of formal delimitation is through Resolution 2090.[61]

99. According to the Claimant, the measures claimed to be in breach of the Treaty included (i) Law 1753/2015 of June 9, 2015, (ii) Constitutional Decision No. C-35/2016 of June 8, 2016, (iii) *Agencia Nacional de Minería* ("**ANM**") correspondence of May 17, 2016, (iv) Constitutional Court Judgment T-361 of May 30, 2017, and (v) the continued enforcement of these measures. All these measures were taken after August 2015, and 39 months prior to the Claimant's submission of its Request.[62]

100. The Claimant states that the "earliest a breach and the knowledge required by the Treaty can be dated is December 22, 2014, the date on which Respondent published Resolution 2090/2014, which purported to delimit the Santurbán Páramo."[63] The Claimant adds that Resolution 2090 was announced on December 19, 2014 but it was not published until December 22.[64] From this point on, the Claimant argues, Colombia undertook further measures impacting Claimant's investment. According to the Claimant, "all of these are

[59] Cl. Rej., ¶ 26.

[60] Cl. Reply, ¶¶ 280-292.

[61] Cl. Reply, ¶ 283, *citing* Resp. Mem., ¶ 33.

[62] Cl. Rej., ¶ 22.

[63] Cl. Rej., ¶ 21. *See also* Cl. NDP Comments, ¶ 13.

[64] Cl. Rej., ¶ 21, *citing* Pastor Virviescas Gómez, *Por fin fue delimitado Santurbán*, December 19, 2014, **Exhibit C-892**; Ministry of Environment, Resolution 2090/2014 Sharefile, December 22, 2014, **Exhibit C-1271**.

actionable as separate and distinct breaches of the Treaty; and, accordingly, there can be no doubt that Claimant's claims are timely."[65]

101. The Claimant alleges that contemporaneous actions and documents show the inexistence of a dispute prior to the entry into force of the Treaty. These actions or documents include: (i) approving the assignment of six of the Mining Titles to Minera Vetas,[66] (ii) issuing a favorable opinion recognizing Minera Vetas' right to convert the Real Minera exploitation license into a concession contract, and approving the execution,[67] (iii) issuing a technical report recognizing Minera Vetas' right to convert La Peter exploitation license into a concession contract,[68] (iv) confirming through the *Corporación Autónoma Regional para la Defensa de la Meseta de Bucaramanga* ("**CDMB**") that the Mining Titles were not affected.[69]

102. In support of the Claimant's argument that, even assuming that the dispute arose over Law 1382, it would not have been over the 'same subject matter', because, according to the Claimant: (i) the environmental authority had not delimited the *páramos* within the areas covered by the Mining Titles or anywhere near the Project; (ii) the Mining Titles were not subject to restrictions on mining insofar they were issued prior to February 9, 2010, and (iii) Law 1382 was declared unconstitutional by the Colombian Constitutional Court.[70] The Claimant asserts that Law 1382 provided for requirements for future restrictions which none of them occurred prior to the entry into force of the Treaty. It was not until September

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[65] Cl. NDP Comments, ¶ 13.

[66] INGEOMINAS, Resolution GTRB No. 087, Title No. 0050-68 Real Minera, May 21, 2010, **Exhibit C-244**; INGEOMINAS, Resolution GTRB No. 0138, Title No. 17214, La Peter, July 13, 2010, **Exhibit C-268**; INGEOMINAS Resolution No. 0136, Title No. 0308-68, Santa Isabel, July 13, 2010, **Exhibit C-286**, INGEOMINAS Resolution No. 01359, Title No. 0135-68, El Dorado, August 31, 2010, **Exhibit C-347**; INGEOMINAS Resolution GTRB No. 0214, Title No. 13604, Los Delirios, October 28, 2010, **Exhibit C-360**; INGEOMINAS, Resolution GTRB No. 0236, Title No. 161-68, Arias, December 10, 2010, **Exhibit C-737**.

[67] INGEOMINAS, Technical Report No. 373, October 27, 2010, **Exhibit C-539**.

[68] INGEOMINAS, Favorable Opinion (*Concepto Favorable*) to Proffer a Concession Contract for Title No. 17217, La Peter, March 30, 2011, **Exhibit C-741**.

[69] CDMB Letter to Leyhat, No Parque Real Minera, December 15, 2010, **Exhibit C-509**, p. 1; CDMB Letter to Leyhat, No Parque Santa Isabel, December 15, 2010, **Exhibit C-512**; CDMB Letter to Leyhat, No Parque La Peter, December 15, 2010, **Exhibit C-510**; CDMB Letter to Leyhat, No Parque Los Delirios, December 15, 2010, **Exhibit C-511**; CDMB Letter to Leyhat, No Parque San Bartolo, December 15, 2010, **Exhibit C-513**; CDMB Letter to Leyhat, No Parque El Dorado, December 15, 2010, **Exhibit C-726**.

[70] Cl. Reply, ¶ 287.

2011, after the Treaty entered into force, that the Head of the Legal Department of the Ministry of Mines issued a letter indicating that "at no moment the zones excluded for mining have been determined."[71]

103. The Claimant argues that Law 1382 did not impact the Claimant's ability to develop the Project but the subsequent measures did. These measures were issued by Congress, Colombia's Constitutional Court, the Ministry of Environment, CDMB and ANM, among others.[72] The Claimant adds that it has not engaged in any actions before the Colombian authorities with respect to Law 1382 because it understood that Law 1382 did not apply to Claimant's Project.[73]

(2) The Tribunal's Analysis

104. The dispute concerns the prohibition of mining in the *páramos* and the delimitation of the Santurbán *Páramo*. The basis of this objection concerns the date on which the dispute arose with respect to the date on which the Treaty came into effect. The Claimant has argued that the first formal delimitation of the Santurbán *Páramo* was through Resolution 2090 of December 21, 2014, while for the Respondent the dispute arose when Law 1382 was enacted on February 9, 2010, prior to the FTA entered into force on August 15, 2011.

105. The Tribunal considers that all the measures on which the Claimant bases its claims are dated later than August 15, 2011, starting with Resolution 2090. In fact, the documents of the Respondent indicate the inexistence of a dispute before August 2011.[74] The Tribunal considers that the formal delimitation made by Resolution 2090 should be used for purposes of determining when the dispute crystalized, namely, on December 22, 2014, the date of publication of Resolution 2090.

[71] Cl. Reply, ¶ 288, *citing* Ministry of Mines and Energy Concept 2011-05791, September 27, 2011, **Exhibit C-669**, p. 11. *See also* Ministry of Mines and Energy Concept 2011-05791, September 27, 2011, **Exhibit C-669**, p. 11.

[72] Cl. Reply, ¶ 290.

[73] Cl. Reply, ¶¶ 291-292.

[74] Cl. Reply, ¶¶ 284-285.

C. WHETHER RED EAGLE HAS COMPLIED WITH THE MANDATORY CONDITIONS PRECEDENT OF THE TREATY

(1) The Parties' Positions

a. The Respondent's Position

106. Colombia alleges that the Claimant did not comply with the mandatory conditions precedent of the Treaty. Specifically, the requirement of submitting the claim within the limitations period and the complete notice of intent.[75] The Respondent argues that, being consent a cornerstone of arbitration, the non-compliance of the mandatory requirements under Article 821 of the Treaty is fatal to any claim. Colombia reiterates that it is the Claimant's burden to demonstrate that it has met these requirements.

107. Article 821 of the Treaty reads as follows:

> 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;
>
> […]
>
> (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:

[75] Resp. Mem., ¶¶ 25-57. *See also* Resp. Reply, ¶¶ 40-63.

> (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;
>
> […]
>
> (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[...]

108. First, the Respondent addresses the limitations period objection.[76] According to the Respondent, the Tribunal lacks jurisdiction over Red Eagle's claims because Article 821(2)(e)(i) provides for "a mandatory cut-off date of 21 December 2014 in this case […], and Red Eagle had knowledge of such prohibition on mining in the páramo ecosystems, and any damage associated with such prohibitions, before that date."[77] In its Reply, Colombia further argues, based on the analysis of other tribunals, that Article 821(2)(e)(i) is a 'clear and rigid' requirement which cannot be extended or circumvented because a course of conduct is continuing.[78]

109. In its comments on Canada's Non-Disputing Party Submission, the Respondent pointed out that Canada confirmed Colombia's position that, "in the case a measure with a 'continued effect on an investor', the limitation period 'begins to run once a claimant has

[76] Resp. Mem., ¶¶ 33-46.

[77] Resp. Mem., ¶ 33.

[78] Resp. Reply, ¶ 43, *citing Grand River Enterprise Six Nations Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Decision on Objections to Jurisdiction, July 20, 2006, **Exhibit RL-164**, ¶ 29; *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 1999, **Exhibit CL-256**, ¶ 63.

first acquired either actual knowledge or constructive knowledge of the alleged breach and loss.'"[79] The Respondent also referred to Canada's interpretation of Article 821(2)(e)(i) that noted that when a dispute arises out of a series of related measures, some of them occurring prior to the limitation period and some after, a tribunal only has jurisdiction over the measures that fall within the time period if it constitutes a distinct or separate actionable breach.[80]

110. The Respondent argues that the Claimant knew, or ought to have known of the alleged breach and knowledge of loss or damage from the date of Law 1382, the law that introduced a ban on mining activities in *páramo* ecosystems issued on February 9, 2010. According to Colombia, the Claimant "failed to adduce any evidence of its contemporaneous understanding of the mining ban and existing framework of the protection of the páramo" when it acquired the Mining Titles.[81] Colombia refers to the environmental report prepared by Mr. Franco in 2009. In this report, he recommended to Red Eagle to take into account "the uncertainty relating to the creation of mining exclusion zones when negotiating the purchase prices of the Mining Titles."[82]

111. The Respondent refuted with examples Red Eagle's allegation that Colombia never enforced the ban on mining in the *páramo* ecosystem before Resolution 2090. First, the Respondent argues, as Mr. Franco indicated in his witness statement, "between 2010 and 2011, the CDMB expressly rejected a number of Red Eagle's PMA requests on the basis of the ban on mining in páramo ecosystems."[83] Another example, was the approval of the assignment of four *Planes de Manejo Ambiental* ("**PMA**") by the CDMB in August 2011 and April 2013 on condition that Minera Vetas "would only be able to conduct mining exploitation activities in those titles provided Minera Vetas applied to amend its PMAs to allow the large-scale exploitation activities associated with the Vetas Gold Project."[84] The

[79] Resp. NDP Comments, ¶ 11, *citing* Canada's Non-Disputing Party Submission, ¶ 3. *See also* Canada's Non-Disputing Party Submission in *Galway Gold Inc. v. Republic of Colombia*, ICSID Case No. ARB/18/13, January 31, 2022, **Exhibit RL-197**, ¶ 8.

[80] Resp. NDP Comments, ¶ 12, *citing* Canada's Non-Disputing Party Submission, ¶ 4.

[81] Resp. Reply, ¶ 48.

[82] Resp. Reply, ¶ 48, *citing* Due Diligence Report, December 1, 2009, **Exhibit C-603**, pp. 25-26.

[83] Resp. Reply, ¶ 50, *citing* Witness Statement of Mr. Franco, ¶ 24.

[84] Resp. Reply, ¶ 51.

Respondent alleges that the Claimant did not submit any application to amend the PMAs.[85] The Respondent's third example is that "the mining authorities deferred any decision on Red Eagle's conversion requests until the Resolution 2090 delimitation was issued in order to ensure that the mining exclusion zones as finally delimited were properly recorded."[86]

112. Colombia further elaborates that even if Red Eagle's claims were on the basis of Resolution 2090 of December 19, 2014, the 39-month period would also have expired since the Request for Arbitration was submitted on March 21, 2018, *i.e.* 39 months and two days after December 19, 2014.[87] In support of this last argument, Colombia argues that, pursuant to Article 822(4)(a), "a claim is submitted to arbitration when 'a request for arbitration under paragraph 1 of Article 36 of the ICSID Convention is received by the Secretary-General.'"[88]

113. In response to Red Eagle's argument that Resolution 2090 was not published until December 22, 2014, the Respondent argues that on December 19, 2014, the Ministry of Environment "announced the issuance of Resolution 2090 on its website, publishing the presentation to which Red Eagle refers […], as well as a map of Resolution 2090 Delimitation, at a scale of 1:100,000."[89] The Respondent argues that with the scale of this map, it was sufficient for the Claimant to determine the level of overlap of the delimitation with the Mining Titles and to note that the limits were similar to those described in the 2013 IAVH Atlas.[90] Thus, the Respondent concludes, the Claimant had knowledge of the delimitation at the very latest on December 19, 2014.[91]

[85] Resp. Reply, ¶ 51, *citing* Second Witness Statement of Mr. Pinzón, ¶ 8.

[86] Resp. Reply, ¶ 52, *citing* Resp. C-Mem., ¶ 264; Memorandum from the Director of the Colombian Geological Service to the Coordinator of the Bucaramanga Regional Working Group, December 28, 2011, **Exhibit R-103**.

[87] Resp. Mem., ¶ 4; Resp. Reply, ¶¶ 53-60.

[88] Resp. Mem., ¶ 36. *See also* Resp. NDP Comments, ¶ 13.

[89] Resp. Reply, ¶ 55, *citing* Ministry of Environment, Map of the Delimited Santurbán Páramo, December 19, 2014, **Exhibit C-562**.

[90] Resp. Reply, ¶¶ 56-58. *See* Ministry of Environment Presentation, Delimitation of Páramo de Santurbán (Delimitación del Páramo de Santurbán), December 19, 2014, **Exhibit C-515**, p. 43.

[91] Resp. Reply, ¶ 59.

114. Accordingly, Colombia concludes that the Claimant's claims relating to facts or damages that Red Eagle knew or should have known prior to December 19, 2014 would be time-barred.[92] Colombia recounts the following:

- On February 9, 2010, Law 1382 introduced the mining ban in *páramo* ecosystems;[93]
- On May 11, 2011, the Constitutional Court declared Law 1382 unconstitutional (*inexequible*), but acknowledged the importance of the *páramo* ecosystems deferring the effects of its decision for a period of two years (*i.e.* until May 11, 2013);[94]
- On May 25, 2011, the *Ministerio de Ambiente y Desarrollo Sostenible* issued Resolution No. 937 adopting the IAVH Biological Resources Research's Páramo Atlas as the "benchmark for enforcement of the ban in practice until a definitive delimitation was completed;"[95] and
- On June 16, 2011, Law 1450 confirmed that, pending a definitive delimitation, the mining ban would be enforced immediately on the basis of the IAVH Páramo Atlas.[96]

115. In its Reply on Jurisdiction, the Respondent provides a timeline showing each of the acts which were completed prior to the FTA's entry into force and the mandatory cut-off date.[97] In this timeline, the Respondent shows that Law 1753 of June 9, 2014 reiterated and continued the mining ban that was already provided for and in force since Law 1382 of 2010. As for Judgment C-035, the Respondent recalls that this judgment overturned the transitional regime of Resolution 2090, which was not applicable to the Claimant and, therefore, did not impact the Vetas Gold Project. As to Judgment T-361, the Respondent

[92] Resp. Mem., ¶ 36.
[93] Resp. Mem., ¶ 38, *citing* Law 1382, February 9, 2010, **Exhibit C-571**, Article 3.
[94] Resp. Mem., ¶ 38, *citing* Constitutional Court, Judgment C-366, May 11, 2011, **Exhibit R-10**, pp. 99-100.
[95] Resp. Mem., ¶ 38, *citing* Ministry of Environment Resolution No. 937, May 25, 2011, **Exhibit R-11**, Article 1.
[96] Resp. Mem., ¶ 38, *citing* Law 1450, June 16, 2011, **Exhibit C-576**, Article 202.
[97] Resp. Reply, Fig. 3.

notes that this judgment required the Ministry of Environment to cure certain deficiencies with respect to the public consultations for the *páramo* delimitation but that too had no impact on the Claimant's Mining Titles because Resolution 2090 already prevented Red Eagle from carrying out the Vetas Gold Project.[98]

116. Colombia adds that since the Claimant acquired the Mining Titles, it enforced its prohibition on mining in the *páramo* areas through several actions by the environmental and mining authorities.[99]

117. The Respondent affirms that, as posed in the International Court of Justice ("**ICJ**") *Fisheries Jurisdiction (Spain v. Canada)* case,[100] there is a proper approach to assess the Tribunal's jurisdiction over claims submitted prior to the mandatory cut-off date.[101] According to the Respondent, the measures adopted by Colombia after December 21, 2014 do not give rise to new disputes. The measures that Red Eagle challenges are a continuation of the prohibition on the mining in the *páramo* ecosystem first adopted on February 9, 2010 by Law 1382 and confirmed on December 19, 2014 through Resolution 2090 delineating the *páramo*. The Respondent alleges that the measures derive from the same facts and issues as those arising outside the limitation period.[102]

118. Second, the Respondent addresses the Claimant's failure to state the legal basis for its claims in the Notice of Intent.[103] The Notice of Intent is the means by which a State is apprised of the existence of a dispute and triggers the running of a "cooling-off" period. The Respondent alleges that, while Red Eagle identified Resolution 2090 and Judgment C-

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[98] Resp. Reply, ¶¶ 61-62.

[99] Resp. Mem., ¶ 39; Resp. C-Mem., Section V.B.

[100] Resp. Mem., ¶ 44, *citing Fisheries Jurisdiction Case (Spain v. Canada)*, Jurisdiction, ICJ Reports 1998, December 4, 1998, **Exhibit RL-74**, ¶¶ 30-31. *See also Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Case No. 2011-03, Award, March 18, 2015, **Exhibit RL-113**, ¶¶ 211, 220; *Industria Nacional de Alimentos S.A. and Indalsa Perú S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4, Award, February 7, 2005, **Exhibit RL-83**, ¶ 50; *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, September 5, 2007, **Exhibit RL-86**, ¶¶ 118-119; *Kingdom of Lesotho v. Swissbourgh Diamond Mines et al.*, Judgment of the High Court of the Republic of Singapore, August 14, 2017, **Exhibit RL-123**, ¶ 176.

[101] Resp. Mem., ¶¶ 43-46.

[102] Resp. Mem., ¶ 45.

[103] Resp. Mem., ¶¶ 47-57.

035 in its Notice of Intent, the actual dispute submitted by Red Eagle concerns a much broader array of measures.[104]

119. The Respondent points out that in the Request, the Claimant submitted to arbitration a dispute arising out of Law 1753, the ANM's measures adopted with respect to Red Eagle's titles between May 2016 and April 2017, and Judgment T-361. Colombia recalls that these measures had already happened at the time that the Notice of Intent was submitted and could readily have been included in the Notice.[105]

120. The Respondent adds that the Notice of Intent only referred to the Real Minera, La Tríada de Oro, San Bartolo and Arias mining titles, only four of the 11 titles included in the Request.[106] With this, the Respondent adds, Colombia did not have the required information to be able to assess the scope of the Claimant's claims as they are now sought.[107] In light of these discrepancies, the Respondent concludes, "the Notice of Intent submitted by Red Eagle is not valid or sufficient to allow Red Eagle now to pursue claims arising from different investments."[108]

121. In its Reply on Jurisdiction, the Respondent reiterates that the Notice of Intent is a strict and mandatory requirement of the FTA and that the Claimant's Notice of Intent is not compliant with the FTA's requirement.[109]

122. The Respondent argues that the cases relied upon by the Claimant were under treaties that did not have an equivalent language to the FTA.[110] The Treaty, the Respondent argues, requires a claimant to state the 'measures at issue' in the Notice of Intent. This, the Respondent adds, is a requirement that is not included in the treaties of the cases invoked by the Claimant in support of its argument.[111]

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[104] Resp. Mem., ¶ 52.
[105] Resp. Mem., ¶¶ 54-55; Resp. Reply, ¶¶ 80-81.
[106] Resp. Mem., ¶ 56; Resp. Reply, ¶ 85.
[107] Resp. Reply, ¶ 85.
[108] Resp. Mem., ¶ 56.
[109] Resp. Reply, ¶¶ 66-87.
[110] Resp. Reply, ¶ 71.
[111] Resp. Reply, ¶ 77.

123. Regarding the contents of the Notice of Intent, the Respondent argues that the FTA does not allow an investor to reserve its rights to provide a detailed description in the future as a way to overcome the specific requirement of 'measures at issue' contained in the FTA.[112]

124. The Respondent concludes that the Parties have not perfected their consent to submit the claim to arbitration, therefore, the Tribunal lacks jurisdiction.[113]

b. The Claimant's Position

125. First, the Claimant addresses the Respondent's time bar argument.[114] The Claimant alleges that, from the plain text of Article 821(2)(e)(i), it is clear that the relevant date for purposes of determining whether a claim is time-barred under the Treaty is not by the occurrence of the breach but rather the Claimant's knowledge of (i) the alleged breach, and (ii) the fact that it 'has incurred' in loss or damage as a consequence of said breach.[115] The Claimant finds support for its argument in *Resolute Forest v. Canada*[116] and *Mobil v. Canada*.[117]

126. The Claimant argues that the Respondent has mischaracterized Red Eagle's position regarding the date of the measures and the Tribunal's jurisdiction. The Claimant clarifies that it affirmed that all its claims "are premised on events that post-date the Treaty's entry into force."[118]

127. The Claimant contends that its claims are timely. They arise from various measures that impaired Red Eagle from developing the Project following Colombia's delimitation of the Santurbán *Páramo* in Resolution 2090. None of the prior dates is relevant. According to the Claimant, Law 1382 did not restrict the mining activities in the Mining Titles. Even if the delimitation covered them, the Claimant argues, they were protected by the

[112] Resp. Reply, ¶ 78.

[113] Resp. Mem., ¶¶ 46-57.

[114] Cl. Reply, ¶¶ 295-318; Cl. PHB, ¶ 69.

[115] Cl. Reply. ¶ 297; Cl. Rej., ¶ 31.

[116] Cl. Reply, ¶ 299, *citing Resolute Forest Products v. Canada*, PCA Case No. 2016-13, Decision on Jurisdiction, January 30, 2018, **Exhibit CL-176**, ¶¶ 4, 118, 178.

[117] Cl. Reply, ¶¶ 300-301, *citing Mobil Investments Canada Inc. v. Canada,* ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, July 13, 2018, **Exhibit CL-177**, ¶¶ 149, 152. *See also* Cl. Rej., ¶ 33; Cl. NDP Comments, ¶ 12.

[118] Cl. Reply, ¶ 302, *citing* Claimant's Observations on Respondent's Request for Bifurcation, ¶ 43.

'grandfathering clause' because they were issued prior to the enactment of Law 1382, they had appropriate environmental permits, and exploitation activities had been covered by them prior to the Claimant's acquisition. The Claimant concludes that because Law 1382 did not impact Red Eagle's Mining Titles, the Constitutional Court judgment declaring Law 1382 unconstitutional had no impact either, neither did Resolution 937 and Law 1450.

128. According to the Claimant, the Respondent's retroactive assertion of a prohibition on mining is inconsistent with the Respondent's efforts to promote mining in Colombia.[119] Red Eagle alleges that Colombia has failed to identify any contemporaneous record of having advised about the mining prohibitions that it asserts existed at the time. The Claimant argues that there was no prohibition on mining upon the publication of Law 1382. First, the Claimant supports this allegation by saying that the Respondent had not delimited either the Santurbán *Páramo* or any *páramo* area in 2010 and that Law 1382 only established the requirements for eventual restrictions on mining. Furthermore, regarding the mining restrictions, Red Eagle maintains that the Mining Titles were not subject to restrictions because of the 'grandfathering clause' in Article 3 of Law 1382, and that Law 1382 was subsequently declared unconstitutional.[120] Second, the Claimant argues that the 2007 Páramo Atlas did not precisely identify the boundaries of the future Santurbán *Páramo*.[121] Third, the Claimant affirms that the Mining Titles met the relevant statutory requirements to be grandfathered under Law 1382 because such titles had a PMA. Specifically, the Real Minera title was a vested right because Colombia (i) confirmed on December 22, 2010 that exploration activities could continue, (ii) approved in 2011 the conversion of the exploitation license into a concession contract, and (iii) confirmed in 2011 that Real Minera was not located within the park proposal and that the *páramo* area did not exist.[122] Fourth, the Claimant notes that Red Eagle's Due Diligence report addressed the possibility of the prohibition on mining activities and "concluded that there were 'important criteria that favor[ed] the development of mining activity and counter[ed]

[119] Cl. Rej., ¶ 39.
[120] Cl. Rej., ¶ 40.
[121] Cl. Rej., ¶¶ 43-45.
[122] Cl. Rej., ¶ 47, *citing* First Witness Statement of Mr. Franco, ¶ 24.

the possibility of any declaration of [mining] exclusion areas.'"[123] Fifth, the Claimant alleges that it has demonstrated that Resolution 937 of May 2011 recognized that the 2007 *Páramo* Atlas map was "inadequately precise to determine the impact of future mining restrictions, if any."[124] Lastly, the Claimant argues that it has demonstrated that Law 1450 identified future steps for the delimitation of the Santurbán *Páramo* that did not occur.[125]

129. The Claimant adds that, leaving aside that there was no prohibition on mining, there was also no enforcement from Colombia's part. The Claimant notes that the Respondent approved the transfer of all 11 Mining Titles between May 2010 and April 2012,[126] their registration between June 2010 and October 2013,[127] confirmed that the Mining Titles were not in the Santurbán Páramo Park in December 2010,[128] issued a favorable opinion recognizing Minera Veta's right to convert the Real Minera exploitation license to a concession contract in January 2012,[129] issued a favorable opinion recognizing Minera Veta's right to convert La Peter exploitation license to a concession contract in March 2012,[130] and issued a technical concept paper confirming that Red Eagle could proceed with the conversion of the El Dorado license into a concession contract in April 2012.[131]

130. The Claimant also recalls that Colombia approved the four PMAs following Law 1450. In response to the Respondent's argument that the PMAs were issued with a warning that the Claimant would have to amend the PMAs to ensure compliance with the mining prohibition and that the amendment application was never submitted, the Claimant points out that it

[123] Cl. Rej., ¶ 48, *citing* Due Diligence Report, p. 25, **Exhibit C-603**.

[124] Cl. Rej., ¶ 49.

[125] Cl. Rej., ¶ 50.

[126] Cl. Rej., ¶ 52, *citing* Cl. Mem., ¶ 502.

[127] Cl. Rej., ¶ 52, *citing* Cl. Mem., ¶ 502.

[128] Cl. Rej., ¶ 52, *citing* CDMB Letter to Leyhat, No Parque Real Minera, December 15, 2010, p.1, **Exhibit C-509**; CDMB Letter to Leyhat, No Parque Santa Isabel, December 15, 2010, **Exhibit C-512**; CDMB Letter to Leyhat, No Parque La Peter, December 15, 2010, **Exhibit C-510**; CDMB Letter to Leyhat, No Parque Los Delirios, December 15, 2010, **Exhibit C-511**; CDMB Letter to Leyhat, No Parque San Bartolo, December 15, 2010, **Exhibit C-513**; CDMB Letter to Leyhat, No Parque El Dorado, December 15, 2010, **Exhibit C-726**.

[129] Cl. Rej., ¶ 52, *citing* INGEOMINAS, Technical Report No. 373, October 27, 2010, **Exhibit C-359**.

[130] Cl. Rej., ¶ 52, *citing* INGEOMINAS, Favorable Opinion (*Concepto Favorable*) to Proffer a Concession Contract for Title No. 17215, La Peter, March 30, 2011, **Exhibit C-741**.

[131] Cl. Rej., ¶ 52, *citing* Colombian Geologic Service, Technical Report GTRB No. 134, April 2, 2012, **Exhibit C-673**.

has engaged in responsible and sustainable mining, and that the Claimant's efforts to continue developing its project were impeded by the Respondent's breach which did not allow for additional exploration to determine a necessary modification to the PMA. The Claimant notes that the Respondent had approved the conversion of six mining titles into concession agreements and continued encouraging the Claimant to invest following the issuance of Law 1450. Lastly, the Claimant notes that Resolution 2090 did not prohibit mining with respect to the Claimant's Mining Titles because they were excepted under the 'grandfathering clause.' The Claimant concludes that before the publication of the maps necessary to determine the boundaries of the delimitation, the Claimant could not have had knowledge of the breach or the damage.[132]

131. According to the Claimant, the measures that impacted its ability to develop the Project were (i) Law 1753, declaring the general ban on mining activity and limiting the scope of the 'grandfathering' provisions; (ii) Constitutional Court Judgment C-035, declaring Law 1753 unconstitutional and eliminating all together the 'grandfathering' provisions; (iii) ANM's correspondence of May 2016, informing the Claimant that mining was banned in 76.95% of the Real Minera concession and 33.40% of La Tríada de Oro; (iv) Constitutional Court Judgment T-361, which held Resolution 2090 unconstitutional and ordering the Ministry of Environment to conduct a new and expansive delimitation of the Santurbán *Páramo*.[133]

132. Second, the Claimant addresses the Respondent's objection to the Notice of Intent.[134] The Claimant alleges that the Treaty does not require that the Claimant include all the factual and legal arguments in its Notice of Intent and that it is sufficient as submitted.

133. The Claimant argues that the Treaty establishes that the Notice of Intent "'shall' specify 'the legal and factual basis for the claim, including the measure at issue'" but does not require to include all legal and factual arguments. The Notice, the Claimant says, serves to

[132] Cl. Reply, ¶ 314, *citing* Pastor Virviescas Gómez, *Por fin fue delimitado Santurbán*, December 19, 2014, **Exhibit C-892**. The Claimant notes that the relevant maps were not shared on Friday, December 19, 2014 and would be shared with mining companies the following Monday, December 22, 2014.

[133] Cl. Reply, ¶ 318.

[134] Cl. Reply, ¶¶ 319-332; Cl. Rej., ¶¶ 63-78.

inform the State of the existence of a dispute and to trigger the cooling-off period; this has been accepted by investment arbitration tribunals repeatedly.[135] In this case, the Claimant adds, Colombia cannot argue that it was not informed of the existence of this dispute.[136] The Claimant further supported the difference between the present case and *Supervisión y Control v. Costa Rica*[137] and *Guarachi v. Bolivia*;[138] in the case of the former because the treaty required a much stricter standard and the claims were different and not directly related, and in the case of the latter because they were new claims that were distinct from the main claim.

134. The Claimant states that it is undisputed that the Notice of Intent (i) was submitted on September 14, 2017, (ii) expressly referred to Resolution 2090 and Colombian Constitutional Court Judgment C-035, (iii) mentioned that the Project consisted of 11 mining titles, (iv) reserved the Claimant's rights to provide a further detailed description of the facts and circumstances of the claims, and (v) complied with the cooling-off period established in the Treaty.[139]

135. The Claimant alleges that the Respondent inaccurately asserts that the Claimant excluded other measures, such as Law 1753, the ANM communications of May 17, 2016 and April 26, 2017, and the Constitutional Court Judgment T-361, as they were directly related to Resolution 2090 and Judgment C-035.[140] The Claimant adds that the Respondent also

[135] Cl. Reply, ¶ 322, *citing B-Mex, LLC and others v. United Mexican States,* ICSID Case No. ARB(AF)/16/3, Partial Award, July 19, 2019, **Exhibit CL-206**, ¶ 112 (*citing* NAFTA's Free Trade Commission: "After referring to both Articles 1118 and 1119, the FTC states '[t]he notice of intent naturally serves as the basis for consultations or negotiations between the disputing investor and the competent authorities of a Party.'"); *Mesa Power Group, LLC v. Government of Canada,* UNCITRAL, PCA Case No. 2012-17, Award, March 24, 2016, **Exhibit CL-231**, ¶¶ 296, 297 ("it bears recalling the reason why States provide for cooling off or waiting periods in investment treaties. The object and purpose of these periods is to appraise the State of a possible dispute and to provide it with an opportunity to remedy the situation before the investor initiates an arbitration. Typically, consultations between the disputing parties take place after a notice of intent has been submitted."); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania,* ICSID Case No. ARB/05/22, Award, July 24, 2008, **Exhibit CL-62**, ¶ 343 ("Its underlying purpose is to facilitate opportunities for amicable settlement. Its purpose is not to impede or obstruct arbitration proceedings, where such settlement is not possible.").

[136] Cl. Rej., ¶ 78.

[137] Cl. Reply, ¶ 325, *citing Supervisión y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award, January 18, 2017, **Exhibit RL-122**, ¶¶ 147, 336, 341, 345.

[138] Cl. Reply, ¶ 326, *citing Guaracachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia,* PCA Case No. 2011-17, Award, January 31, 2014, **Exhibit RL-22**, ¶¶ 385-401.

[139] Cl. Reply, ¶ 327.

[140] Cl. Reply, ¶ 330.

mischaracterized the Claimant's claims by arguing that the Notice of Intent was limited to four mining titles. According to the Claimant, its narrative has been consistent throughout the submissions. In the Notice of Intent it explained that it had acquired eleven titles and that the Respondent's actions were limited to the rights of four mining titles.[141] In the Request, the Claimant also pointed to its acquisition of the eleven titles, four of which had been severely affected.[142] In its Memorial, the Claimant alleges also that it confirmed how the Respondent's measures impacted those titles which rendered the project unviable.[143]

136. In its Rejoinder on Jurisdiction, the Claimant recalls that Article 821(c) has four requirements and points out those that allegedly have been undisputed by the Respondent: (i) "The name and address of the disputing investor", undisputed, (ii) "the provisions of this Agreement alleged to have been breached and any other relevant provisions", undisputed, (iii) "the legal and factual basis of the claim, including the measure at issue", objection, and (iv) "the relief sought and the approximate amount of damages claimed", undisputed.[144]

137. According to the Claimant, the Treaty does not require notices of intent to state a "complete set of measures which it alleges amount to breaches of the FTA in its Notice," as argued by the Respondent. The Claimant argues that this is inconsistent with the holdings of numerous tribunals which have held that the purpose of a notice of intent is to inform the State of the existence of a dispute and trigger the cooling-off period.[145] Moreover, the Claimant adds, tribunals have rejected attempts to deny jurisdiction on the basis of

[141] Claimant's Notice of Intent, ¶ 18.

[142] Claimant's Request for Arbitration, ¶ 18.

[143] Cl. Reply, ¶¶ 331-332. *See also* Cl. Mem., ¶ 43.

[144] Cl. Rej., ¶ 66.

[145] Cl. Rej., ¶ 69, *citing ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, January 9, 2003, **Exhibit CL-30**, ¶ 134; *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award, August 2, 2010, **Exhibit CL-82**, ¶ 104; *Ethyl Corp. v. Government of Canada*, UNCITRAL, Award on Jurisdiction, June 24, 1998, **Exhibit CL-222**, ¶ 85; *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Decision on Motion regarding "Super Fee," August 7, 2000, **Exhibit CL-233**, ¶ 26. *See also* Statement of the Free Trade Commission on notices of intent to submit a claim to arbitration, NAFTA, **Exhibit CL-235**, p. 2; *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, July 19, 2019, **Exhibit CL-206**, ¶ 112; *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Award, March 24, 2016, **Exhibit CL-231**, ¶¶ 296, 297; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, July 24, 2008, **Exhibit CL-62**, ¶ 343.

insufficient notice of intent and the Respondent has failed to identify any cases in which the Treaty's notice requirements (or a similar language) has been interpreted to require the complete list of measures.[146] The Claimant further argues that the Tribunal has "already considered this issue in connection with Respondent's request for bifurcation and found that 'the Notice of Intent did identify a legal and factual basis of Claimant's claim.'"[147] Moreover, the Claimant adds, the Respondent has not suffered any damage resulting from the alleged defect.[148] Finally, the Claimant argues that the Treaty does not impose any restrictions on the investor's reservation to provide a more detailed and ample description of the claims at a later stage.[149]

(2) The Tribunal's Analysis

138. As pointed out by the Claimant, the Tribunal considered the issue of the Notice of Intent in its Decision on the Request for Bifurcation, and found that, "the Notice of Intent did identify a legal and factual basis of Claimant's claim."[150] The Tribunal also found the objection lacked seriousness and substance because it ignored the references to Law 1753 and Resolution 2090. The Tribunal confirms these findings.

139. As to the question of whether the Request for Arbitration was submitted within 39 months from the date of Resolution 2090, the Resolution was published on December 22, 2014 but it was announced on the website of the Ministry of the Environment on December 19, 2014. This causes the Respondent to argue that the Claimant was aware of the Resolution 2090 on December 19, and not from the date when it was published. In so arguing, the Respondent assumes an instant knowledge by the Claimant in a manner not contemplated by the FTA, which allows at least time to gain awareness of the damage or loss incurred by the measure concerned. Thus, the Request for Arbitration filed with ICSID on

[146] Cl. Rej., ¶ 69, *citing Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, July 24, 2008, **Exhibit CL-62**, ¶ 343.

[147] Cl. Rej., ¶ 73, *citing* Decision on Bifurcation, ¶ 50.

[148] Cl. Rej., ¶ 74.

[149] Cl. Rej., ¶ 77.

[150] Decision on Bifurcation, ¶ 50. *See also* Cl. Rej., ¶ 73.

March 21, 2018 is within the time limit of 39 months counted as from December 22, 2014, which is the date of publication of Resolution 2090.

D. WHETHER COLOMBIA VALIDLY DENIED THE BENEFITS OF CHAPTER EIGHT OF THE TREATY

(1) The Parties' Positions

a. The Respondent's Position

140. The Respondent alleges that the Tribunal should dismiss the Claimant's claims because Colombia has validly exercised its right to deny benefits of the Treaty pursuant to Article 814(2) of the Treaty which reads 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.

141. On April 19, 2018,[151] Colombia exercised its right to deny benefits to Red Eagle on the grounds that it was owned or controlled by nationals of non-Parties to the Treaty and that it did not have substantial business in the territory of Canada. According to the Respondent, as the benefits denied to the Claimant include the right to arbitrate, the Tribunal should decline jurisdiction over this dispute.[152]

142. The Respondent argues that "in line with the object and purpose of the denial of benefits provision of the FTA, these requirements must be assessed by reference to ultimate ownership and control of Red Eagle."[153] Colombia alleges that Red Eagle was "both owned and controlled by nationals of a non-party as of March 21, 2018."[154] First, the Respondent says, publicly available sources confirm that the Claimant's parent company, Red Eagle

[151] Letter from the National Agency for the Legal Defense of the State (ANDJE) (Mr. Vélez Cabrera) to Red Eagle Exploration Limited (Mr. Slater), April 19, 2018, **Exhibit R-14**.

[152] Resp. Mem., ¶¶ 58-77; Resp. Reply, ¶¶ 88-122.

[153] Resp. Mem., ¶ 62.

[154] Resp. Mem., ¶ 63.

Mining Corporation, was 63.93% owned by the general public through shares listed in the Toronto Stock Exchange, while 23.2% was owned by Liberty Metals & Mining Holdings (a US private equity fund), 13.33% by Orion Resources Partners (a US private equity fund), and 3.98% by Stracon, S.A. (a Peruvian mining contractor). According to the Respondent, none of them are Canadian shareholders.[155]

143. Second, the British Columbia Securities Act presumes that a combination of persons holding more than 20% of the voting rights materially affects the company's control.[156] The Respondent argues that Liberty Metals & Mining Holdings, a US company, has control as it has more than the 20% threshold. Accordingly, the Respondent concludes, Red Eagle was ultimately controlled by a US company, not by Canadian nationals.[157]

144. Colombia also argues that the Claimant does not have a substantial business in Canada but rather that its business is the mining exploration projects in Colombia. The Respondent alleges that even though Red Eagle is incorporated under the laws of the Province of British Columbia, holds shareholder meetings in Canada and signs notices in Canada, it does not have 'substantial business activities' in Canada for purposes of the Treaty.[158] The activities that Red Eagle relies on are, according to the Respondent, ancillary to or supportive of the Claimant's actual business which is mining. Additionally, the Respondent argues that the various professional services that the Claimant lists are activities of third parties upon which Red Eagle cannot rely to satisfy the 'substantial business requirement.' Finally, the Respondent argues that the *Gran Colombia v. Colombia* tribunal's decision which did find 'substantial business activities' is not applicable in this case because the Claimant has not provided evidence of the core corporate functions carried in Canada, or full-time employees in Canada.[159] Even if the *Gran Colombia v. Colombia* case was analogous, the

[155] Resp. Mem., ¶ 63, *citing* "Who Are The Major Shareholders Of Red Eagle Mining Corporation (TSX:R)?", *Simply Wall St News*, November 4, 2017, **Exhibit R-80**; Red Eagle Mining Corporation, Form 62-103F1, August 17, 2017, **Exhibit R-24**; Red Eagle Mining Corporation, Form 62-103F1, April 25, 2018, **Exhibit R-25**; Red Eagle Mining Corporation, Form 62-103F1, February 28, 2017, **Exhibit R-23**; Orion Resource Partners, Disclaimer, **Exhibit R-28**. *See also* Resp. Reply, ¶ 103; Resp. NDP Comments, ¶ 16.

[156] Resp. Mem., ¶ 65, *citing* British Columbia Securities Act, RSBC 1996, Chapter 418, **Exhibit RL-44**, Article 1(1).

[157] Resp. Mem., ¶¶ 65-66.

[158] Resp. Mem., ¶¶ 69-70; Resp. Reply, ¶¶ 115-122.

[159] Resp. Reply, ¶¶ 117-120.

Respondent adds, it would not be applicable because the tribunal in that case failed to distinguish between 'business' activities, and ancillary, corporate or financing activities which relate to the corporate existence and financing of a company. The Respondent argues that "while the former activities are 'substantial', the latter are not."[160]

145. Finally, Colombia alleges that it validly denied the benefits of Chapter Eight of the Treaty to Red Eagle in accordance with Article 814(2) of the Treaty. On April 19, 2018, Colombia transmitted the following to the Claimant:[161]

> The Republic of Colombia ('Colombia') hereby notifies Red Eagle Minerals Corp. ('Red Eagle') of the denial of benefits of Chapter 8 of the Canada-Colombia Free Trade Agreement signed on 21 November 2008 and entered into force on 15 August 2011 (the FTA'), in accordance with Article 814 of the FTA.
>
> […]
>
> Based on the available information, those who own or control Red Eagle are not Canadian nationals and Red Eagle has no substantial business activities in the territory of Canada.
>
> Consequently, pursuant to Article 814(2) of the FTA, Colombia denies the benefits of Chapter 8 of the FTA to Red Eagle and its alleged investments. Colombia expressly reserves its rights, including the right to raise objections of admissibility and jurisdiction in relation to Red Eagle's invocation of Chapter 8 of the FTA.

146. In its Reply on Jurisdiction, the Respondent alleges that the Claimant mischaracterizes the 'ownership' or 'control' requirement of Article 814(2) of the Treaty. According to the Respondent, Colombia only needs to establish that on March 18, 2018, Red Eagle was either (i) owned by non-Canadian nationals, or (ii) controlled by non-Canadian nationals. It is an alternative and not a joint requirement, as the Claimant alleges. The Respondent also responded that Article 838 (Definitions) does not qualify or limit the Treaty's denial

[160] Resp. Reply, ¶ 121.

[161] Resp. Mem., ¶ 71, *citing* Letter from the National Agency for the Legal Defense of the State (ANDJE) (Mr. Vélez Cabrera) to Red Eagle Exploration Limited (Mr. Slater), April 19, 2018, **Exhibit R-14**.

of benefits provision. It is not limited to 'direct' ownership.[162] As to the Claimant's argument regarding control, the Respondent argues that the content of the concept of 'control' has to be determined by domestic corporate law as it has been determined by tribunals and commentators.[163] Finally, Colombia alleges that the evidence shows that Red Eagle was owned and controlled by non-Canadian nationals as of March 18, 2018.[164]

147. Separately, the Respondent also claims that the notification was issued promptly upon the Claimant's invocation of protections under the Treaty, this is, after Colombia received the Claimant's Request. The Treaty, the Respondent argues, does not provide for a particular time when the denial of benefits notification must be given which was a deliberate choice by the Contracting States.[165] The denial of benefits provision, says the Respondent, is clear and unambiguous.

148. In its Reply on Jurisdiction, the Respondent insists that in its ordinary meaning Article 814(2) does not require that the denial of benefits be submitted at any particular time.[166] The Respondent also notes that the Claimant agrees that the relevant time for the

[162] Resp. Reply, ¶ 106.

[163] Resp. Reply, ¶ 107, *citing* for example, *Mason Capital L.P. and Mason Management LLC v. Republic of Korea*, PCA Case No. 2018-55, Decision on Respondents Preliminary Objections, December 22, 2019, **Exhibit RL-189**, ¶¶ 135-137; *Mr. Joshua Dean Nelson v. United Mexican States*, ICSID Case No. UNCT/17/1, Final Award, June 5, 2020, **Exhibit RL-191**, ¶¶ 190-191: "Based on this definition and other definitions of 'control' according to English and Spanish language dictionaries, Respondent sustains that the meaning of corporate control must be determined considering the lex situs (i.e., in this case Mexican law). The Tribunal agrees with Respondent in that, in the case of a company such as Tele Fácil, the determination of whether or not Claimant has 'corporate control' of the corporation is also a matter of Mexican law.". *See also* Z. Douglas, The International Law of Investment Claims (2009), **Exhibit RL-169**, p. 300: "The question is then how to define 'control' for the purposes of satisfying the requisite nexus between the claimant and the investment. In giving effect to the ordinary meaning of the word 'control' or the implicit requirement that mirrors it, reference must be had to general principles of property law and company law. An assertion that the meaning of control in the investment treaty context is sui generis and thus can be tailored by a tribunal to meet the exigencies of a particular case must be treated with skepticism. The majority of investment treaties say nothing about the indices of control and international law in general does not purport to regulate the relationship between an individual or legal entity and its assets"; Resp. NDP Comments, ¶ 16, *citing* Canada's Non-Disputing Party Submission, ¶ 22; Canada's Non-Disputing Party Submission in *Galway Gold Inc. v. Republic of Colombia* (ICSID Case No. ARB/18/13), January 31, 2022, **Exhibit RL-197**, ¶ 25; Canada's Non Disputing Party Submission in *Gran Colombia Gold Corp. v. Republic of Colombia* (ICSID Case No. ARB/18/23), August 14, 2020, **Exhibit RL-198**, ¶ 23; Canada's Non-Disputing Party Submission in *Eco Oro Minerals Corp v. Republic of Colombia* (ICSID Case No. ARB/16/41), February 27, 2020, **Exhibit RL-134**, ¶ 6.

[164] Resp. Reply, ¶¶ 109-114.

[165] Resp. Mem., ¶¶ 72-77, Resp. Reply, ¶¶ 91-101; Resp. NDP Comments, ¶ 15.

[166] Resp. Reply, ¶ 93.

assessment of the satisfaction of the substantive requirements was the time of filing of the Claimant's Request.[167]

149. In response to Canada's Non-Disputing Party Submission, the Respondent noted that Canada confirmed that there is no requirement that Article 814(2) be invoked at the time an investment is made or prior to the claim being submitted to arbitration. Therefore, the Respondent concludes, Colombia is not barred from denying the Claimant the benefits of Chapter Eight of the Treaty as of the date of the Claimant's Request.[168]

b. The Claimant's Position

150. First, the Claimant alleges that the Respondent belatedly tried to deny the Treaty benefits.[169] Colombia's letter containing the denial of benefits was submitted on April 19, 2018 while the Request for Arbitration was submitted on March 21, 2018. The Claimant argues that the Respondent "cannot unilaterally withdraw its consent to arbitration after that consent has been perfected nor can it seek to apply the denial of benefits clause retroactively."[170]

151. According to the Claimant, the Respondent is trying to invoke the denial of benefits retroactively which is inconsistent with the Treaty's text. The Claimant supports this argument by saying that there has been a consistent line of jurisprudence that confirms that "an attempt to deny benefits once the arbitration has started is not plausible."[171] It also adds that the retroactive denial would be inconsistent with the Treaty's object and purpose as it

[167] Resp. Reply, ¶ 101.

[168] Resp. NDP Comments, ¶ 15.

[169] Cl. Reply, ¶¶ 337-350, Cl. Rej., ¶¶ 86-94; Cl. PHB, ¶ 69.

[170] Cl. Reply, ¶ 337.

[171] Cl. Reply, ¶ 340, *citing Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, May 16, 2018, **Exhibit CL-130,** ¶ 239; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision of Jurisdiction, February 8, 2005, **Exhibit CL-180,** ¶¶ 159-165 (explaining that a denial of benefits clause cannot be applied retroactively, including, among other things, because "such an unexercised right could lure putative investors with legitimate expectations only to have those expectations made retrospectively false at a much later date."); *Yukos Universal Limited (Isle of Man) v. Russian Federation*, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, November 30, 2009, **Exhibit CL-239**, ¶ 458 ("Retrospective application of a denial of rights would be inconsistent with such promotion and protection and constitute treatment at odds with those terms."); *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award, June 22, 2010, **Exhibit CL-228**, ¶ 225.

would undermine its goals.[172] In support of this argument, the Claimant refers to the *Khan v. Mongolia, Plama v. Bulgaria* and the *Masdar v. Spain* cases.[173]

152. On this point, the Claimant argues that once the parties have consented to arbitration, one of those parties cannot unilaterally withdraw its consent. The consent was perfected by both Parties when the Request for Arbitration was received by the ICSID Secretary-General. The Claimant refers to the Tribunal's Decision on Bifurcation where the Tribunal noted that it was correct that consent cannot be withdrawn.[174] The Claimant finds support for this argument in the *Bayindir v. Pakistan*[175] and *Ampal-Israel v. Egypt*[176] cases. Accordingly, the Claimant requests that the Respondent's denial of benefits should fail because consent cannot be unilaterally withdrawn.[177]

153. Secondly, the Claimant alleges that the Respondent has failed to establish that (i) the Claimant is owned and controlled by investors of a non-Party or of the denying party, and (ii) the Claimant has no substantial business activities in Canada.[178] The Claimant argues that this is a cumulative test, and that Respondent has the burden of proof with respect to the denial of benefits. The Claimant argues that the legal standard has been mischaracterized by the Respondent.[179]

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[172] Cl. Reply, ¶ 341.

[173] Cl. Reply, ¶¶ 341-344, *citing Khan v. Mongolia,* PCA Case No. 2011-09, Decision on Jurisdiction, July 25, 2012, **Exhibit CL-227**, ¶ 426; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, February 8, 2005, **Exhibit CL-180**, ¶¶ 159-165; *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, May 16, 2018, **Exhibit CL-130**, ¶ 239.

[174] Cl. Reply, ¶ 347, *citing* Decision on Bifurcation, August 3, 2020, ¶ 64.

[175] Cl. Reply, ¶ 348, *citing Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan,* ICSID Case No. ARB/03/29, Decision on Jurisdiction, November 14, 2005, **Exhibit CL-213,** ¶ 178.

[176] Cl. Reply, ¶ 349, *citing Ampal-American Israel Corporation and others v. Arab Republic of Egypt,* ICSID Case No. ARB/12/11, Decision on Jurisdiction, February 1, 2016, **Exhibit CL-187**, ¶¶ 168-169. *See also Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Jurisdiction, November 14, 2005, **Exhibit CL-219**, ¶ 63 ("The consequence of this rule is that, once established, jurisdiction cannot be defeated. It simply is not affected by subsequent events. Events occurring after the institution of proceedings (other than, in a case like this, an ad hoc Committee's Decision to annul the prior jurisdictional finding) cannot withdraw the Tribunal's jurisdiction over the dispute.").

[177] Cl. Reply, ¶ 350.

[178] Cl. Reply, ¶¶ 351-378; Cl. Rej., ¶¶ 82-119.

[179] Cl. Rej., ¶ 97.

154. According to the Claimant, the Treaty refers to ownership without further distinction while it does refer to 'direct' or 'indirect' control. The Claimant argues that tribunals have analyzed control to mean that it can be exercised in various manners and that it is to be defined by its ordinary meaning, as a matter of international law and not domestic law. On this basis, the Claimant argues, the Respondent's argument to define control in reference to the British Columbia's Securities Act would be incorrect.[180] The Claimant responds to the Respondent's argument regarding ownership indicating that the Respondent has not explained to the Tribunal why it should depart from the ordinary interpretative principle of giving the same term a consistent meaning.[181] In relation to control, the Claimant responds to the Respondent's definition through domestic law that it should be rejected because the cases cited by the Respondent are not applicable to this case as there was no reference to national law.[182]

155. With respect to substantial business activities, the Claimant argues that, as required by the Treaty, 'any' substantial business activity in Canada would prevent the application of a denial of benefits objection as it has been decided in cases such as *Gran Colombia v. Colombia* which analyzed the same Treaty provision.[183] On the basis of the same case, the Claimant argues that the Treaty contains no limitations as to what is considered business so long as those activities "are not merely a 'sham with no business activity whatsoever, other than an objective of maintaining its corporate existence.'"[184]

156. In this case, Claimant argues that it is owned and controlled by Canadian nationals as demonstrated by publicly available information that Red Eagle Mining Corporation, a Canadian company, owned 76.43% of Claimant's shares.[185] The Claimant argues that on

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[180] Cl. Reply, ¶¶ 354-356, *citing International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Award, January 26, 2006, **Exhibit CL-42**, ¶ 106.

[181] Cl. Rej., ¶ 97.

[182] Cl. Rej., ¶ 97.

[183] Cl. Reply, ¶ 358, *citing Gran Colombia Gold Corp. v. Republic of Colombia,* ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Issue, November 23, 2020, **Exhibit CL-208**, ¶¶ 136-138. *See also* Cl. Rej., ¶ 97.

[184] Cl. Reply, ¶ 360, *citing Gran Colombia Gold Corp. v. Republic of Colombia,* ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Issue, November 23, 2020, **Exhibit CL-208**, ¶ 137.

[185] Cl. Mem., ¶ 35. *See also* Red Eagle Exploration Limited, Form 51-102F3 (Material Change Report), April 26, 2018, **Exhibit C-718**. *See further, e.g.*, Red Eagle Mining, Red Eagle Mining Completes Amalgamation, April 24,

separate dates, the Claimant's shareholders that owned or controlled Red Eagle Mining Corporation were Canadian. In its Rejoinder on Jurisdiction, the Claimant confirms that the evidentiary record with respect to ownership and control has been clearly established by the following: (a) at the time of the filing of the Request of Arbitration, Red Eagle Mining Corporation, a Canadian company, owned 76.43% of Claimant's shares; (b) on March 21, 2018, over 97% of Claimant's shareholders were Canadian nationals; (c) on December 31, 2017, only 3.05% of Claimant's shareholders were non-residents, and (d) on February 28, 2018, over 99% of Claimant non-objecting beneficial owners had Canadian addresses.[186]

157. To the Respondent's argument that Red Eagle Mining Corporation was owned 61.93% by the general public through shares in the Toronto Stock Exchange, the Claimant responds that these shares were not in a position to exert any control over the company or its nationality. According to the Claimant, it has "produced evidence that Canadians held the largest percentage of Red Eagle Mining Corporation's common shares as of March 21, 2018."[187]

158. As to Respondent's allegation on Liberty Metals & Mining Holdings, the Claimant recalls that the relevant date is March 21, 2018 (not the alleged August 2017 referenced by Colombia) and asserts that it held a "relatively small percentage of the share capital and had no control over Red Eagle Mining."[188]

2018, **Exhibit C-704**; Slater Corporate Services Corporation, Notice of Articles, August 7, 2018, **Exhibit C-734**; BC Registry Services, BC Company Summary for Red Eagle Mining Corporation, October 22, 2018, **Exhibit C-733**; Instrument of Transfer, November 15, 2018, **Exhibit C-706**.

[186] Cl. Rej., ¶ 83 (citations omitted because they include confidential documents). *See also* Cl. Rej., ¶¶ 101-102; Cl. NDP Comments, ¶ 27.

[187] Cl. Reply, ¶ 367, *citing* Red Eagle Mining Corporation, Geographic Breakdown Snapshot, December 31, 2017, **Exhibit C-902**.

[188] Cl. Reply, ¶ 369, *citing* Red Eagle Mining Corporation, Annual General Meeting of Shareholders, Management Information Circular, June 7, 2018, **Exhibit C-901**.

159. Orion Resources Partners, according to the Claimant, only held 10.35%, and not 13.33% as the Respondent alleges, of the company shares. Stracon S.A. held only 3.98%, a relatively small percentages to have control over Red Eagle Mining.[189]

160. The Claimant also addressed the substantial business activities requirement by noting the following: (i) Claimant's head office is located in Vancouver, Canada; (ii) Claimant is incorporated/registered in Canada; (iii) Claimant's directors and officers were Canadian nationals or residents as of March 21, 2018; (iv) Claimant's board/corporate meetings take place in Canada; (v) Claimant is listed on the Toronto Stock Exchange; (vi) Claimant rents office space in Vancouver, Canada; (vii) Claimant engages in various professional services in Canada (including accounting and advisory services, legal services, and shareholder and investor activities, such as the listing fee for the Toronto Stock Exchange); (viii) Claimant files taxes in Canada; (ix) Claimant has bank accounts in a Canadian Bank; (x) Claimant has insurance in Canada, and (xi) Claimant is subject to the British Columbia Securities Commission ("**BCSC**").[190]

161. The Claimant argues that, even if the BCSC were relevant to determine 'control' in this proceeding, under the BCSA a 'control person' means "each person in a combination of persons, acting in concert by virtue of an agreement, arrangement, commitment or understanding, which holds in total a sufficient number of the voting rights attached to all outstanding voting securities of an issuer to affect materially the control of the issuer."[191] On the basis of this definition, the Claimant alleges that the Respondent has failed to prove its argument of 'control.' According to the Claimant, the record as to the Claimant's Canadian ownership and control is clearer than what has been considered by other investment tribunals that have rejected the matter.[192]

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[189] Cl. Reply, ¶ 370, *citing* Red Eagle Mining Corporation, Form 62-103F1, April 25, 2018, **Exhibit R-25**; Red Eagle Mining Corporation, Form 62-103F1, February 28, 2017, **Exhibit R-23**; Red Eagle Mining Corporation, Annual General Meeting of Shareholders, Management Information Circular, June 7, 2018, **Exhibit C-901**.

[190] Cl. Reply, ¶ 373; Cl. Rej., ¶ 84 (citations omitted because they include confidential documents).

[191] British Columbia Securities Act, Chapter 418, **Exhibit RL-44**, Article 1(1).

[192] Cl. Rej., ¶ 108, *citing Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, August 27, 2008, **Exhibit CL-66**, ¶ 84; *Ulysseas v. Republic of Ecuador*, UNCITRAL, Interim Award, September 28, 2010, **Exhibit RL-101**, ¶¶ 183-189.

162. In its Rejoinder on Jurisdiction, the Claimant responds to the allegations made by the Respondent on the Claimant's list of substantial business activities.[193] According to the Claimant, the activity involving 'performing an action or operation' that the Respondent argues is meritless and includes a new text that is not in the Treaty or in jurisprudence. The incorporation of a company, the officers and the office space all in fact involve an action. The Claimant also responds to the Respondent's argument of "ancillary or supportive to Red Eagle's actual and only 'business' activity, namely mining exploration in Colombia" alleging that it is not a standard that has support in the Treaty. On the engagement of professional services, the Claimant adds that it was also addressed in the *Gran Colombia v. Colombia* case which concluded that "annual purchases of goods and services in Canada" are "clearly 'substantial'" activities.[194] Finally, the Claimant argues that the Respondent's arguments to differentiate this case from *Gran Colombia v. Colombia* are futile. According to the Claimant, there are several examples that show that this is incorrect. For example, all of the Claimant's directors and officers were Canadian nationals or residents as of March 18, 2018.[195] The Claimant argues that the "documentary record confirms that Claimant has vastly exceeded [the substantial business activities] threshold."[196]

163. The Claimant concludes that the Respondent has not discharged its burden of proof with respect to the denial of benefits of the Treaty to the Claimant.[197]

(2) The Tribunal's Analysis

164. The Claimant has proven that on March 21, 2018, the critical date, Red Eagle was owned or controlled by Canadian parties and as listed above, the activities of the Claimant in Canada were substantial. There is no room in the Treaty text for the introduction of an

[193] Cl. Rej., ¶¶ 110-118. *See also* Cl. NDP Comments, ¶¶ 31-38.

[194] Cl. Rej., ¶ 115, *citing*, *Gran Colombia Gold Corp. v. Republic of Colombia*, ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Issue, November 23, 2020, **Exhibit CL-208**, ¶ 139.

[195] Cl. Rej., ¶ 117.

[196] Cl. Rej., ¶ 119.

[197] Cl. Reply, ¶ 378.

ancillary category of activities or to require that the investor engage also in mining activities in Canada as argued by the Respondent.[198]

165. It remains to be considered the time-limit by which a respondent State may invoke the denial of benefits clause. The Treaty does not set such a deadline, but the applicable arbitration rules may (and usually do) set a deadline by which jurisdictional objections may be raised.

166. While it is correct that consent under ICSID Rules may not be withdrawn, the Claimant has to meet the conditions set forth in the Treaty for the consent to be perfected. There is no time limitation for a State to deny benefits in the Treaty itself.

167. The Tribunal finds that, even though the denial of benefits was timely raised, the Respondent did not provide evidence to prove that the Claimant was owned or controlled by non-Parties to validly deny the Claimant the benefits of Chapter Eight of the Treaty.

E. WHETHER THE DISPUTE IS OUTSIDE OF THE TRIBUNAL'S *RATIONE MATERIAE* JURISDICTION

(1) The Parties' Positions

a. The Respondent's Position

168. The Respondent argues that this dispute concerns "Colombia's sovereign right to adopt measures to protect the páramo from human interference, including through mining and other extractive activities, and climate change."[199] Article 2201(3) of the Treaty provides that the Contracting Parties have the ability to adopt measures which are necessary to protect human, animal or plant life or health. According to the Respondent, the claims asserted by the Claimant concern measures withing the scope of Article 2201(3) of the Treaty. Therefore, the Respondent argues, the Tribunal has no jurisdiction over such claims.[200]

[198] *See* ¶ 153, *supra*.

[199] Resp. Mem., ¶ 78.

[200] Resp. Mem., ¶ 79. *See also* Resp. Reply, ¶¶ 123-127.

169. The Respondent adds, "where the measures are taken for the purposes set out under Article 2201(3) sub-paragraphs a, b or c, provided that the measures are (i) necessary, (ii) do not constitute arbitrary or unjustifiable discrimination, and (iii) are not disguised restrictions on international trade, no claim for breach of any obligation under the FTA can arise."[201] Colombia argues that the mining prohibition in the *páramo* has not been applied in a manner that constitutes arbitrary or unjustifiable discrimination between investments or between investors. The Respondent affirms that the prohibition has been applied to all holders of mining rights in a non-discriminatory manner.[202]

b. The Claimant's Position

170. The Claimant argues that it has established that it made investments in Colombia protected by Article 838 of the Treaty. The Claimant notes that since 2009, it acquired the Mining Titles in the Department of Santander, including exploitation and exploration licenses, as well as some concession contracts. The Claimant states that it made further investments to carry out a systematic exploration program in the area.[203]

171. According to the Claimant, "per the text of the Treaty, read consistently with the object and purpose, the exceptions in Article 2201 only apply once that there has been a determination of breach of the Treaty."[204]

172. In its Rejoinder on Jurisdiction, the Claimant argues that this objection is not proper and that the exception does not apply.[205] The Claimant alleges that this is not a jurisdictional objection but rather a defense on the merits which is also contrary to the object and purpose of the Treaty. The Claimant argues that this defense is not a ground for the Respondent to have a *carte blanche* to implement measures against covered investments by way of an environmental justification. The text of Article 2201, the Claimant says, "expressly confirms an investor's right to submit a claim against 'environmental measures' and is not

[201] Resp. Mem., ¶ 81.
[202] Resp. Mem., ¶ 86.
[203] Cl. Reply, ¶ 379; Cl. PHB, ¶ 69.
[204] Cl. Reply, ¶ 380.
[205] Cl. Rej., ¶¶ 120-128.

excluded from the protection of the Treaty as the Respondent argues."[206] The Claimant adds that it is Colombia who bears the burden of proving this objection, as indicated by the Joint Commission of the Free Trade Agreement between Canada and the Republic of Colombia:[207]

> (i) [T]hat all of the measures Claimant is submitting to arbitration fall within the scope of the exception provided in Article 2201(3); (ii) that such measures are necessary to protect human, animal or plant life and health; (iii) that such measures are not applied in a manner that constitute arbitrary or unjustifiable discrimination between investment or between investors; (iv) that such measures relate to one of the policy objectives set out in paragraphs (a)-(c); and (v) that such measures are not a disguised restriction on international trade or investment. Respondent has failed to meet this burden.[208]

173. Finally, the Claimant adds, Article 25(4) of the ICSID Convention provides that the Member States should notify the Centre of any disputes which should not be considered within the jurisdiction of the Centre. According to the Claimant, Colombia has had an opportunity since 1997 to exclude a class or classes of disputes from the jurisdiction of the Centre and has decided not to do so.[209] The Claimant argues that "because the Respondent has failed to comply with this requirement, its objection should be dismissed."[210]

(2) The Tribunal's Analysis

174. The Tribunal takes note of the analysis of the same article of the Treaty by the *Eco Oro v. Colombia* tribunal, which addressed:

> 379. […] 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.

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[206] Cl. Rej., ¶ 123.

[207] Cl. Rej., ¶ 124, *citing* Joint Commission of the Free Trade Agreement between Canada and the Republic of Colombia, Decision No. 2, February 28, 2014, **Exhibit CL-281**, p. 3.

[208] Cl. Rej., ¶ 124, *citing* Treaty, Article 2201(3).

[209] Cl. Rej., ¶ 127.

[210] Cl. Rej., ¶ 128.

> 380. The Tribunal construes Article 2201(3) in accordance with its ordinary meaning pursuant to the [Vienna Convention on the Law of Treaties ('**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 it 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.[211]

175. The Tribunal therefore considers that Article 2201(3) is not an objection to the jurisdiction but rather a defense on the merits. The Tribunal will revisit this matter if it determines that there has been a breach of a primary obligation.

F. WHETHER THE TRIBUNAL LACKS JURISDICTION AS A RESULT OF THE DISCONTINUANCE OF THE PROCEEDINGS UNDER RULE 45

176. This matter was decided by the Tribunal in an earlier phase of these proceedings and the Tribunal remits itself to that decision.

*. *. *

[211] *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, September 9, 2021, ¶¶ 379-380.

177. This brings the Tribunal to the end of its consideration of the objections to its jurisdiction. Since the Tribunal has dismissed all the objections, it will turn now its attention to the merits.

VI. LIABILITY

A. APPLICABLE LAW

178. In accordance with Article 832(1) of the FTA,

> [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.

B. WHETHER COLOMBIA VIOLATED THE MINIMUM STANDARD OF TREATMENT

(1) The Parties' Positions

a. The Claimant's Position

179. The Claimant argues that pursuant to Article 805 of the Treaty, "Colombia is under the obligation to grant the Claimant and its investments treatment in accordance with the customary international law minimum standard of treatment ('**MST**'), including fair and equitable treatment ('**FET**')."[212] The Claimant adds that pursuant to the most favored nation ("**MFN**") clause in Article 804 of the Treaty, the Claimant and its investment must be granted treatment no less favorable than it accords investors of other States, including the FET standard that is provided in other investment treaties with Colombia as a standalone standard not necessarily linked to customary international law.[213]

180. The Claimant responds to the Respondent's argument that the Contracting Parties chose not to include a standalone FET standard in the Treaty but rather a limited customary international law standard by stating that the text of Article 805 of the Treaty is clear.[214] A

[212] Cl. Mem., ¶ 95.

[213] Cl. Mem., ¶¶ 95-96; Cl. Reply, ¶ 384; Cl. PHB, ¶ 71.

[214] Cl. Reply, ¶ 395.

footnote to Article 805 says "[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 Statue of the International Court of Justice."[215] According to the Claimant, the Respondent's interpretation would deprive the reference to include fair and equitable treatment and full protection and security of meaning in contravention with the *effet utile* principle of interpretation. This, the Claimant argues, is confirmed by the preamble of the Treaty as well.[216]

181. According to the Claimant, the Respondent's obligation to accord fair and equitable treatment under the Treaty is consistent with jurisprudence and confirmed by commentators.[217] The Claimant argues that Respondent's reliance on *Glamis Gold v. United States* to support its argument of the minimum standard of treatment is an outlier which has been criticized by other tribunals. The Claimant contends that there has been an evolution of customary international law since the *Neer v. Mexico* decision.[218]

182. The FET standard contained in the Treaty, says the Claimant, is similar to the DR-CAFTA and NAFTA. The Claimant affirms that the tribunals that have interpreted the minimum standard provisions have converged in substance with the FET standard which has evolved to a more significant level of protection. Both in the NAFTA and DR-CAFTA context, the Claimant says, tribunals have found that the international minimum standard does not represent a lower standard than FET. Other tribunals have adopted a broad standard that

[215] Cl. Reply, ¶ 387.

[216] Cl. Reply, ¶ 388.

[217] Cl. Reply, ¶ 392, *citing Técnicas Medioambientales Tecmed S.A. v. United Mexican States,* ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003, **Exhibit CL-31**, ¶¶ 154-156*; William Ralph Clayton and Bilcon of Delaware Inc. et al. v. Canada,* PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015, **Exhibit CL-114**, ¶ 433; *Mondev International Ltd. v. United States of America*, NAFTA Chapter Eleven, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, **Exhibit CL-28**, ¶¶ 116, 117, 119, 124, 125; *ADF Group Inc. v. United States of America*, NAFTA Chapter Eleven, ICSID Case No. ARB(AF)/00/1, Award, January 9, 2003, **Exhibit CL-30**, ¶ 179; *Waste Management, Inc. v. United Mexican States*, NAFTA Chapter Eleven, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, **Exhibit CL-32**, ¶¶ 91, 98; *Merrill & Ring Forestry L.P. v. Government of Canada*, NAFTA Chapter Eleven, UNCITRAL, Award, March 31, 2010, **Exhibit CL-79**, ¶¶ 207, 211, 213. *See also, generally,* Stephen Myron Schwebel, "The Influence of Bilateral Investment Treaties on Customary International Law", TDM 5, 2005, **Exhibit CL-148**.

[218] Cl. Reply, ¶ 402. *See also* Cl. NDP Comments, ¶ 43.

has been widely accepted as reflecting the fundamental standards of good faith, due process, non-discrimination and proportionality.[219]

183. For example, the Claimant adds, the tribunal in the *Tecmed v. Mexico* case, while interpreting a similar provision in NAFTA, recognized the minimum standard of treatment included the obligation to provide fair and equitable treatment and also requires the "State to, *inter alia*, (i) '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'; (ii) 'to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor,' and (iii) '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 business activities.'"[220]

184. The Claimant argues that the Respondent's assertion on customary international law is not supported by jurisprudence nor has the Respondent identified treaties that contain the exact same language as the Treaty.[221]

185. According to the Claimant:

> A State will be deemed to have violated the obligation to accord a foreign investor the minimum standard of treatment if it violates an investor's legitimate expectation on which the investor relied to make investments, fails to afford due process, and observe fundamental principles of its regulatory framework, if it failed to act in good faith, or if it is engaged in unreasonable, arbitrary, or disproportionate conduct.[222]

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[219] Cl. Mem., ¶¶ 98-102; Cl. Reply, ¶¶ 395-398.

[220] Cl. Reply, ¶ 392, *citing Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003, **Exhibit CL-31**, ¶ 154.

[221] Cl. Reply, ¶ 394.

[222] Cl. Mem., ¶102, *citing CME Czech Republic B.V. v. Czech Republic* (UNCITRAL), Partial Award, September 13 2001, **Exhibit CL-26**, ¶ 611 ("The Media Council breached its obligation of fair and equitable treatment by evisceration of the arrangements in reliance upon with the foreign investor was induced to invest."); *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, December 19, 2013, **Exhibit CL-107**, ¶ 688 ("the CNEE acted in breach of the fundamental principles of due process as well as in contradictory and aberrant manner"). *See also id.*, ¶ 711 ("The Arbitral Tribunal finds that such repudiation of the two fundamental regulatory

186. The Claimant argues that investment tribunals have decided that a showing of bad faith by the State is not necessary to find a breach of the FET standard.[223] And conversely, a showing of good faith or legitimate cause on Colombia's part is not an excuse to violate the FET standard. According to the Claimant, the fact that Colombia's measures were taken on the basis of a legitimate public policy, which the Claimant does not accept, does not make the investment protections inapplicable. The Claimant argues that the measures that Colombia adopted to protect the *páramo* do not meet the test of being necessary to achieve the objective pursued.[224]

187. The Claimant adds that a series of measures can also collectively amount to a composite act in breach of the FET standard.[225]

188. On the separate argument regarding the MFN clause, the Claimant notes that several tribunals have agreed that the essence of the MFN clause is to afford investors all substantive protections provided in all other treaties and consider importing them. The Claimant requests the following:

> Should the Tribunal consider that the FET standard referred to in Article 805 is somehow limited by the application of the minimum standard of treatment under customary international law, through the application of Article 804 of the Treaty, Claimant, and its investments, are entitled to benefit, at a minimum, from the substantive protections that Colombia has granted to investors from third States, and that are not provided in the present Treaty.[226]

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principles applying to the tariff review process is arbitrary and breaches elementary standards of due process in administrative matters. Such behavior therefore breaches Guatemala's obligation to grant fair and equitable treatment under article 10.5 of CAFTA-DR."); *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, August 30 2000, **Exhibit CL-19**, ¶ 91 ("Moreover, the permit was denied at a meeting of the Municipal Town Council of which Metalclad received no notice, to which it received no invitation, and at which it was given no opportunity to appear."); *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, **Exhibit CL-32**, ¶ 98 ("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.").

[223] Cl. Mem., ¶ 103; Cl. Reply, ¶ 416.

[224] Cl. Mem., ¶ 105. *See also* Treaty, **Exhibit CL-1**, Article 2201(3)a.

[225] Cl. Mem., ¶¶ 106-108.

[226] Cl. Mem., ¶ 111, *citing* R. Dolzer and C. Schreuer, PRINCIPLES OF INTERNATIONAL LAW 211, 2012, **Exhibit CL-91** ("The weight of authority clearly supports the view that an MFN rule grants a claimant the right to benefit from substantive guarantees contained in third treaties.").

189. The Claimant argues that it can benefit from other FET provisions such as Article 4(2) of the Colombia-Switzerland bilateral investment treaty and Article 2(3) of the Spain-Colombia bilateral investment treaty.[227]

190. The Claimant responds to the Respondent's argument regarding the MFN clause by saying that Colombia's interpretation would deprive the provision of all its meaning.[228] The Claimant adds that there is no requirement that the treaty from which the substantive provision is imported needs to post-date a treaty to incorporate the treatment no less favorable than that accorded to investors of a non-party. The Claimant supports its argument in the *Bayindir v. Pakistan* case where the claimant relied on an MFN clause to import the FET standard from other treaties and the respondent opposed it on the grounds that the FET provisions pre-dated the applicable treaty. The tribunal in that case decided that the "chronology does not appear to preclude the importation of an FET obligation from another BIT concluded by Respondent."[229] In any event, the Claimant adds, there are treaties that have been concluded by Colombia that entered into force after the Treaty and undertake a similar obligation to accord fair and equitable treatment such as the Colombia-United Kingdom treaty and the Colombia-France treaty.

191. The Claimant also addresses Article 2201(3) of the Treaty and points out that it is not a *carte blanche* for Colombia to frustrate an investment of Canadian investors. The Claimant refers to other tribunals such as in the *Crystallex v. Venezuela* case which indicated that deference to policy makers cannot be unlimited. Otherwise, the treaty protections would be rendered nugatory.[230]

192. The Claimant argues that the exception in Article 2201(3) does not apply in this case because:

> (a) Respondent discriminated between Claimant and local artisanal miners, who are allowed to continue mining in the páramo areas; (b)

[227] Cl. Mem., ¶ 111; Cl. Reply, ¶¶ 404-415; Cl. NDP Comments, ¶ 45.

[228] Cl. Reply, ¶¶ 406-412.

[229] Cl. Reply, ¶ 412, *citing Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, August 27, 2009, **Exhibit CL-75**, ¶ 160.

[230] Cl. Mem., ¶ 113, *citing Crystallex International Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, April 4, 2016, **Exhibit CL-118**, ¶¶ 583-584.

> Respondent has restricted Claimant's investment, by first allowing it openly, and then withdrawing its permission; and (c) Respondent's measures were not necessary, as shown not least by the fact that Respondent provided no technical, environmental, economic, or social basis for its measures.[231]

193. The Claimant argues that Colombia's measures, individually or in combination, amount to a breach of the FET standard, specifically: (i) Colombia adopted measures that frustrated the Claimant's legitimate expectations, also failing to provide a stable, and predictable legal framework for the Claimant's investments; (ii) Colombia's conduct was non-transparent and inconsistent; (iii) Colombia's measures have been unreasonable or arbitrary; (iv) Colombia's measures are disproportionate, and (v) Colombia's measures are discriminatory.[232]

194. In its Post-Hearing Brief, the Claimant points out that Respondent's reliance on the Non-Disputing Party submission of Canada as binding to the Tribunal is plainly erroneous. The Claimant explains that under customary international law, these statements are not binding. While Canada's views may be instructive, the Claimant says, they are neither binding nor can change the scope of Article 805. The Claimant adds that Canada's position on FET is "inconsistent with well-established jurisprudence on this issue."[233]

195. In its Reply, the Claimant responds to the Respondent's argument that the tribunals give States a substantial margin of appreciation in their public policy determinations and grant deference to public policy decisions when regulating the environment. The Claimant argues that tribunals have ruled that State's police powers to regulate are not absolute and any measures have to be in consideration of the State's international obligations.[234] The Claimant points out that the Respondent's argument finds support in cases which do not relate to the environment. The Claimant refers to the *Bear Creek v. Peru* case where the

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[231] Cl. Mem., ¶ 115.

[232] Cl. Mem., ¶ 117; Cl. Reply, ¶ 422.

[233] Cl. PHB, ¶ 74, *citing* Claimant's Comments on the Non-Disputing Party Submission, § III.A.

[234] Cl. Reply, ¶ 418, *citing ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary,* ICSID Case No. ARB/03/16, Award, October 2, 2006, **Exhibit CL-47**, ¶ 423; *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, December 19, 2013, **Exhibit CL-107**, ¶ 492; *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, July 8, 2016, **Exhibit CL-261**, ¶¶ 305-307.

tribunal rejected respondent's argument that there was a police power exception under international law to which it could resort.[235]

(i) Legitimate expectations

196. The Claimant argues that "[a] central feature of the State's obligation to ensure FET for investments is the general principle that the State must not frustrate a foreign investor's reasonable and legitimate expectations on which that investor relied at the time it made its investment."[236]

197. The Claimant refers to the award in the *Tecmed v. Mexico* case where the tribunal held that, in light of the good faith principle in international law, the parties to a treaty are required to provide a treatment that does not affect the basic expectations which were taken into account when the investor made the investment. In the same award the tribunal found that "[t]he foreign investor also expects the host State to act consistently, i.e., without arbitrarily revoking any preexisting decisions […] that were relied upon by the investor to assume its commitments as well as plan and launch its commercial and business activities."[237]

198. According to the Claimant, it is now "well established that a State's conduct, which may contribute to the creation of a reasonable expectation, and upon which an investor relies, may take the form of the legal framework in relation to, or surrounding the investment."[238]

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[235] Cl. Reply, ¶ 421, *citing Bear Creek v. Republic of Peru,* ICSID Case No. ARB/14/21, Award, November 30, 2017, **Exhibit CL-127**, ¶¶ 473-474.

[236] Cl. Mem., ¶ 119, *citing Saluka Investments B.V. v. Czech Republic,* UNCITRAL, Partial Award on Jurisdiction and Merits, March 17, 2006, **Exhibit CL-18**, ¶ 302; *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, Award, ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003, **Exhibit CL-31**, ¶ 154; *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award, September 13, 2001, **Exhibit CL-26**, ¶ 611. *See also* Cl. Reply, ¶¶ 424-436; Cl. PHB, ¶ 71.

[237] Cl. Mem., ¶ 128, *citing Técnicas Medioambientales Tecmed, S.A. v. United Mexican States,* ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003, **Exhibit CL-31**, ¶ 154.

[238] Cl. Mem., ¶ 129. *See also*, *e.g.*, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, September 22, 2014, **Exhibit CL-111,** ¶ 572; *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, December 1, 2011, **Exhibit CL-90**, ¶ 316; *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, November 8, 2010, **Exhibit CL-84**, ¶ 420; *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, March 3, 2010, **Exhibit CL-78,** ¶ 440; *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, July 29, 2008, **Exhibit CL-63**, ¶ 572; *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey,*, ICSID Case No. ARB/02/5, Award, January19, 2007, **Exhibit CL-49**, ¶ 240; *LG&E Energy Corp. et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, October

The Claimant states that many tribunals have followed the tribunal's approach in the *Tecmed v. Mexico* case with regards to the interpretation of the FET standard, including the protection of the legitimate expectations. In the context of NAFTA, the Claimant adds, tribunals have addressed the requirements for the existence of legitimate expectations as well as which legitimate expectations are protected under Article 1105.[239]

199. On the specific breach of this obligation by a State, the Claimant argues that other tribunals have held that "[w]hen a State 'frustrates or thwarts those legitimate expectations, arbitral tribunals have found' a breach of the FET standard."[240]

200. The Claimant affirms that an important element of legitimate expectations is protection from State action that threatens the stability of the legal and business framework.[241] The Claimant argues that Colombia cannot dispense unilaterally of the legal framework it had

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3, 2006, **Exhibit CL-52**, ¶ 127; *Eureko B.V. v. Republic of Poland*, *Ad hoc*, Partial Award, August 19, 2005, **Exhibit CL-40**, ¶ 235; *Occidental Exploration and Production Company v. Republic of Ecuador*, UNCITRAL, LCIA Case No. UN3467, Final Award, July 1, 2004, **Exhibit CL-101**; ¶ 185; *Watkins Holdings S.à r.l. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Award, January 21, 2020, **Exhibit CL-141**, ¶ 518; *El Paso Energy International Company v. Argentine Republic,* ICSID Case No. ARB/03/15, Award, October 31, 2011, **Exhibit CL-89**, ¶ 342; *Ioan Micula and others v. Romania I*, ICSID Case No. ARB/05/20, Award, December 11, 2013, **Exhibit CL-106**, ¶¶ 532-534; *Toto Costruzioni Generali S.p.A. v. Lebanese Republic*, ICSID Case No. ARB/07/12, Award, June 7, 2012, **Exhibit CL-96**, ¶ 152; *Cargill, Incorporated v. Republic of Poland II,* UNCITRAL, Award, March 5, 2008, **Exhibit CL-76**, ¶¶ 456, 459, 511.

[239] Cl. Mem., ¶¶ 130-131, *citing International Thunderbird Gaming Corp. v. United Mexican States,* Award, January 26, 2006, **Exhibit CL-42**, ¶ 147; *Glamis Gold, Ltd. v. United States of America,* UNCITRAL, Final Award, June 8, 2009, **Exhibit CL-61**, ¶ 621; *Grand River Enterprises Six Nations, Ltd. and others v. United States of America,* UNCITRAL, Award, January 12, 2011, **Exhibit CL-88**, ¶ 140; *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, May 22, 2012, **Exhibit CL-95**, ¶ 152; *William Ralph Clayton and others v. Government of Canada,* PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015, **Exhibit CL-114**, ¶¶ 445, 455.

[240] Cl. Mem., ¶ 132, *citing Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, July 30, 2010, **Exhibit CL-81**, ¶ 223.

[241] Cl. Mem., ¶ 132, *citing Saluka Investments B.V. v. Czech Republic,* UNCITRAL, Partial Award on Jurisdiction and Merits, March 17, 2006, **Exhibit CL-18**, ¶ 301 ("An investor's decision to make an investment is based on an assessment of the state of the law and the totality of the business environment at the time of the investment as well as on the investor's expectation that the conduct of the host State subsequent to the investment will be fair and equitable"); *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, November 30, 2012, **Exhibit CL-102**, ¶ 7.75 ("[T]he most important function" of the FET standard is the protection of the investor's legitimate expectations"); *Joseph Charles Lemire v. Ukraine,* ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, January 21, 2010, **Exhibit CL-77**, ¶ 264 ("The FET standard is thus closely tied to the notion of legitimate expectations – actions or omissions by Ukraine are contrary to the FET standard if they frustrate legitimate and reasonable expectations on which the investor relied at the time when he made the investment"); and R. Dolzer, *Fair and Equitable Treatment: Today's Contours*, 12 Santa Clara Journal of International Law 7, January 17, 2014, **Exhibit CL-110**, p. 17 ("The protection of legitimate expectations by the FET standard will today properly be considered as the central pillar in the understanding and application of the FET standard."). *See also* Cl. Mem., ¶ 134.

put in place to attract investments in the mining sector. Colombia must honor the legitimate expectations of foreign investors like the Claimant.[242]

201. The Claimant argues that it has made a substantial investment in the eleven Mining Titles on the basis of the regime in place at that time in the Mining Code which provided for (i) stabilization commitments placing concession contracts under the legal and regulatory mining regime in force at the time of the concession contracts' conclusion; (ii) possibility of converting rights arising from exploration and exploitation licenses into a single mining concession (a concession contract), and (iii) concession terms of 30 years, which could be renewed for an additional 30-year term.[243]

202. At the moment that the Claimant made its investments, the Claimant says, the Respondent had not placed any restrictions on mining. To the contrary, Colombia assured the Claimant that the legal framework under Law 1382/2010 would not interfere in the development of the Claimant's Project. The Claimant recounts the instances between 2010 and 2012 when it received these reassurances from the Respondent.[244] By February 2010 when Law 1382 was enacted, the Claimant had already entered into ten of the eleven option contracts to acquire the Mining Titles and by October 2013 all were duly registered in the name of Minera Vetas in the National Mining Registry.[245] The Claimant argues that pursuant to that regime it acquired the Mining Titles, expecting to be able to carry out the mining activities contemplated in those titles and being able to develop the Project.

203. The Claimant argues that, contrary to what the Respondent affirms, many tribunals have held that explicit or specific assurances or commitments are not indispensable for the creation of legitimate expectations.[246] The Claimant finds support for this argument, for

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[242] Cl. Mem., ¶¶ 137-140. *See also ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, October 2, 2006, **Exhibit CL-47**, ¶¶ 423-424 ("[W]hen a State enters into a bilateral investment treaty like the one in this case, it becomes bound by it and the investment protection obligations it undertook therein must be honoured rather than be ignored by a later argument of the State's right to regulate."); *Eiser Infrastructure Limited and Energia Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, May 4, 2017, **Exhibit CL-124**, ¶ 425; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, September 22, 2014, **Exhibit CL-111**, ¶ 607.

[243] Cl. Mem., ¶ 120; Mining Code, **Exhibit C-570**, Articles 14-15, 46, 77, 84.

[244] Cl. Mem., ¶ 123; Cl. Reply, ¶ 425.

[245] Cl. Mem., ¶ 124.

[246] Cl. Reply, ¶ 428.

example, with *Gavrilovic v. Croatia* case where the tribunal held that "reasonable expectations to be entitled to protection under the treaty need not be based on an explicit assurance" but that "it is sufficient that the claimant when making its investment could reasonably expect that the State would act in a consistent and evenhanded way."[247]

204. The Claimant alleges that the following measures enacted in or after 2014 frustrated the Claimant's legitimate expectations and dismantled the legal and business framework under which the Claimant made its investments:[248]

(a) Resolution 2090 of December 2014 – imposed a ban on mining activities in *páramo* areas except for concession contracts or mining titles that had an environmental license or equivalent instrument by February 9, 2010. The Claimant argues that the Mining Titles that were under this exception were Santa Isabel, La Peter, El Dorado, Los Delirios, San Bartolo, Arias, and La Tríada de Oro;

(b) Communications from ANM between January 2010 and June 2015 – the Claimant argues that these communications imposed restrictions on portions of seven of the Mining Titles based on the delimitation pursuant to Resolution 2090. The Claimant alleges that four of these Mining Titles were covered by the grandfathering provision of Resolution 2090;

(c) Law 1753 of June 9, 2015 – imposed a ban on mining activities in the *páramo*, except for mining activities carried out under a contract and an environmental license in place by February 9, 2010;[249]

[247] Cl. Reply, ¶ 428, *citing Georg Gavrilovic y Gavrilovic D.O.O. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, July 26, 2018, **Exhibit CL-251**, ¶ 1017. *See also Sun Reserve Luxco Holdings SRL v. Italian Republic*, SCC Case No. 132/2016, Final Award, March 25, 2020, **Exhibit CL-265**, ¶ 699; *El Paso Energy International Company v. Argentine Republic*, ICSID Case No ARB/03/15, Award, October 31, 2011, **Exhibit CL-89**, ¶¶ 513, 514, 517; *Eiser Infrastructure Limited and Energia Solar Luxembourg S.à r.l. v. Kingdom of Spain,* ICSID Case No. ARB/13/36, Award, May 4, 2017, **Exhibit CL-124**, ¶ 382.

[248] Cl. Mem., ¶ 142.

[249] Law 1753, June 9, 2015, **Exhibit C-17**.

(d) Constitutional Court's Judgment C-035 of February 8, 2016 – declared the unconstitutionality of certain portions of Law 1753 on the basis that it failed to protect the *páramo* ecosystems. The Claimant argues that through this decision, Colombia permanently banned all mining activities regardless of any pre-existing rights;[250]

(e) Communications from the ANM to Minera Vetas between May 2016 and April 2017 – according to the Claimant, these communications enforced the ban on mining activities on portions of Real Minera and La Tríada de Oro and on unspecified portions of La Vereda overlapping with the *páramo* based on the delimitation of Resolution 2090;[251]

(f) Constitutional Court Judgment T-361 of May 30, 2017 – declared Resolution 2090 unconstitutional on the basis of lack of participation by communities located within the Santurbán *Páramo* and ordered environmental authorities to issue a new, broader delimitation through a participatory, effective and deliberative process;[252]

(g) Communication from ANM to Minera Vetas in August 2017 – ratified the mining ban on portions of Real Minera that overlapped with the Santurbán *Páramo* based on Resolution 2090 and Judgment C-035,[253] and

(h) Letter from CDMB to Minera Vetas in December 2019 – informed that 74.51% of the La Vereda overlapped with the Santurbán *Páramo* based on Resolution 2090 and Judgment T-361.[254]

205. According to the Claimant, in any event, the Respondent provided specific commitments to the Claimant. These have included, among others, (i) Colombian officials visiting

[250] Constitutional Court, Judgment C-035, February 8, 2016, **Exhibit C-18**.

[251] ANM Letter to Minera Vetas regarding Real Minera, May 17, 2016, **Exhibit C-21**; ANM Letter to Minera Vetas regarding La Tríada de Oro, May 17, 2017, **Exhibit C-490**; ANM, Technical Concept No. 168, August 25, 2016, **Exhibit C-727**; ANM, Auto GSC ZN 286, December 20, 2016, **Exhibit C-729**.

[252] Constitutional Court, Judgment No. T-361, May 30, 2017, **Exhibit C-22**, p. 264.

[253] ANM Letter to Minera Vetas, August 31, 2017, **Exhibit C-20**.

[254] CDMB Letter to Minera Vetas, December 6, 2019, **Exhibit C-462**.

Canada between 2009 and 2013 seeking to attract Canadian miners to invest in Colombia's mining sector;[255] (ii) the Respondent mining laws provided a clear framework to facilitate and promote mining investments and protected vested rights against expropriation without compensation;[256] (iii) the Respondent greenlighted the Project from the start, approving the assignment of the Mining Titles, which were registered in the Mining Registry, and approving the transfer of the PMAs associated with four Mining Titles;[257] (iv) the Respondent imposed specific environmental obligations on the Claimant that were to apply once exploitation activities resumed and the Respondent did not object to the Mining Guidelines submitted with respect to several Mining Titles to continue exploration activities;[258] (v) the Respondent assured the Claimant of the environmental feasibility of the Project noting that the Mining Titles did not fall within the Santurbán Natural Regional Park,[259] and (vi) the Respondent's officials attended meetings with the Claimant where the Project was discussed.[260]

(ii) Transparency

206. The Claimant argues that the transparency standard is often assessed in connection with the State's obligation to respect an investor's legitimate expectations. The Claimant contends that "[a]nother essential element of the FET standard [is] the obligation of the host State to act transparently."[261] According to the Claimant, this obligation is understood

[255] Cl. Reply, ¶ 430, *citing* Pav Jordan, *PDAC-Colombia sees jump in mining investment in 2010*, Reuters, March 9, 2010, **Exhibit C-841**, available at: https://www.reuters.com/article/pdac-colombia-idCAN0915624920100309; Presentation by Carlos Rodado Noriega, Minister of Mines and Energy, at the Prospectors & Developers Association of Canada ("PDAC") Convention of 2011, **Exhibit C-667**.

[256] Cl. Reply, ¶¶ 430, 28-55.

[257] Cl. Reply, ¶¶ 430, 56-92.

[258] Cl. Reply, ¶ 430; Witness Statement of Mr. Juan Arturo Franco, ¶¶ 17, 20-21.

[259] Cl. Reply, ¶ 430, *citing* CDMB Letter to Leyhat, No Parque Real Minera, December 15, 2010, **Exhibit C-509**, p. 1; CDMB Letter to Leyhat, No Parque Santa Isabel, December 15, 2010, **Exhibit C-512**; CDMB Letter to Leyhat, No Parque La Peter, December 15, 2010, **Exhibit C-510**; CDMB Letter to Leyhat, No Parque Los Delirios, December 15, 2010, **Exhibit C-511**; CDMB Letter to Leyhat, No Parque San Bartolo, December 15, 2010, **Exhibit C-513**; CDMB Letter to Leyhat, No Parque El Dorado, December 15, 2010, **Exhibit C-726**.

[260] Cl. Reply, ¶ 430.

[261] Cl. Mem., ¶ 144.

to refer to the absence of any administrative ambiguity or opacity and that the regime applicable to the investment must be readily apparent.[262]

207. The Claimant argues that the tribunal's decision in the *Tecmed v. Mexico* case is not the only case that refers to the transparency requirements. The Claimant also refers to the *Metalclad v. Mexico* case where the tribunal concluded that the respondent had breached the FET standard for lack of transparency.[263] The Claimant adds that in the *Electrabel v. Hungary* case the tribunal noted that transparency includes the obligation of the State to give in advance information about intended changes in policy and regulations that may significantly affect investments.[264]

208. The Claimant describes the alleged measures that breach the transparency requirement. First, the Claimant argues that while the Ministry of Environment issued a preliminary delimitation of the Santurbán *Páramo* in April 2014, it was not until Resolution 2090 that the final delimitation was announced. According to the Claimant, the impact on the Claimant's Mining Titles remained unclear with Resolution 2090 and contradicted by the ANM communications addressed to Minera Vetas from January to June 2015.

209. Second, the Claimant refers to Law 1753 which provided the general ban with the exception of those contracts that had an environmental license or an "equivalent handling and control instrument in place prior to February 9, 2010."[265] The Claimant adds that this, when compared with Judgment C-035, which declared the grandfather provision of Law 1753 as unconstitutional, shows the Respondent's pattern of inconsistent and contradictory

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[262] Cl. Mem., ¶¶ 144-146, *citing Frontier Petroleum Services Ltd. v. Czech Republic*, UNCITRAL, Final Award, November 12, 2010, **Exhibit CL-85**, ¶ 285; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, August 27, 2008, **Exhibit CL-66**, ¶ 178; *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003, **Exhibit CL-31**, ¶ 154; *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, November 25, 2015, ¶ 7.79, **Exhibit CL-102**; *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, August 30, 2000, **Exhibit CL-19**, ¶¶ 89, 99. *See also* Cl. Reply, ¶¶ 437-444; Cl. PHB, ¶ 71.

[263] Cl. Reply, ¶ 440, *citing Metalclad Corp. v. United Mexican States,* ICSID Case No. ARB(AF)/97/1, Award, August 30, 2000, **Exhibit CL-19**, ¶ 76.

[264] Cl. Reply, ¶ 440, *citing Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, November 25, 2015, **Exhibit CL-102**, ¶ 7.79.

[265] Cl. Mem., ¶ 149, *citing* Law 1753, June 9, 2015, **Exhibit C-17**, Article 173 (emphasis omitted).

conduct.[266] According to the Claimant, the Constitutional Court itself recognized this lack of transparency in its Judgment T-361 when it declared that the government had "failed to comply with basic transparency standards in the delimitation of the páramo under Resolution 2090 and, on that basis, annulled Resolution 2090" and ordered a new delimitation of the *páramo*.[267]

210. Finally, the Claimant refers to Judgment T-361 which ordered a new delimitation which cannot be less extensive and also to the ANM rejections and pending decision of Minera Vetas' applications to extend the suspension of exploitation obligations. All these measures, the Claimant argues, has increased the uncertainty preventing Minera Vetas from developing the Mining Titles and frustrating the Project.[268]

211. In its Reply, the Claimant responds to the Respondent's allegation that the policy of protecting the *páramo* had been in place before the Claimant made its investment. The Claimant alleges that it has established that the Respondent failed to act with transparency towards the Claimant and its investment.[269] According to the Claimant, Colombia's actions did not refer to the policy protecting the *páramo*.

212. The Claimant alleges that the Respondent induced investment in the mining sector by promising stability and protection of those investments. The Claimant asserts that, when it invested, there was no restriction on mining in the Santurbán *Páramo* and there was protection for 'vested rights' under Colombian law. Additionally, the Respondent had acted to advance the Project, including approving the assignment of the Mining Titles and four PMAs, and the registration in the Mining Registry.

213. The Claimant also recalls that in May 2011, Law 1382 was declared unconstitutional creating uncertainty and with no clear measure on the mining restriction in the Santurbán *Páramo*, delaying the publication of the delimitation and even publishing inconsistent drafts. The Claimant argues that the Respondent continued to encourage the Claimant to

[266] Cl. Mem., ¶ 149.
[267] Cl. Mem., ¶ 151.
[268] Cl. Mem., ¶ 152.
[269] Cl. Reply, ¶ 442.

make additional investments in the Project including after the issuance of Resolution 2090. The Claimant also argues that after enacting Law 1753, the Constitutional Court declared it unconstitutional, effectively eliminating grandfathering provisions. The Claimant also recalls the Constitutional Court decision that declared Resolution 2090 unconstitutional for failing to meet transparency requirements. The Claimant alleges that the Respondent has deprived the Claimant of its 'vested rights' in violation of Colombian law. The Claimant also argues that the Respondent has not issued the final delimitation of the Santurbán *Páramo* to date and continues failing to prevent illegal and unregulated mining in the Santurbán *Páramo*.[270]

(iii) Unreasonable or Arbitrary

214. The Claimant argues that a State is deemed to have violated the FET obligation if it engages in arbitrary or unreasonable conduct against the investor. According to the Claimant, the State's decisions must be based on reason and must not be arbitrary or irrational.[271]

215. The Claimant argues that the delimitation of the Santurbán *Páramo* in Resolution 2090 and subsequent measures restricting Minera Vetas' mining rights and frustrating the development of the Project were unreasonable and arbitrary.[272] First, the Claimant alleges, the ANM disregarded the provisions of Resolution 2090 restricting and enforcing mining activities on the valid Mining Titles that were grandfathered.[273]

216. Second, the Claimant referred to the Ministry of Environment's delimitation in Resolution 2090 alleging that it was not based on economic or social studies and was enacted in disregard of Law 1450. The Claimant alleges that the Ministry did not take into account

[270] Cl. Reply, ¶ 443.

[271] Cl. Mem., ¶ 153, *citing Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, **Exhibit CL-32**, ¶ 98; *S.D. Myers, Inc. v. Government of Canada,* First Partial Award, November 13, 2000, **Exhibit CL-20**, ¶ 263; *Merrill and Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Award, March 31, 2010, **Exhibit CL-79**, ¶ 187. *See also* Cl. Reply, ¶¶ 445-448; Cl. PHB, ¶ 71.

[272] Cl. Mem., ¶ 154.

[273] Cl. Mem., ¶ 155.

key social or economic factors of the area when delimiting the *páramo* and failed to consider that the mining activities were a major economic driver for the region.[274]

217. Third, the Claimant argues that the Respondent's treatment of the Claimant's mining rights was unreasonable and inconsistent because it did not take any action with respect to local artisanal and illegal miners that continued mining in the *páramo*.[275]

218. Finally, the Claimant alleges that the Respondent's deprivation of Minera Veta's vested rights through the restriction of the development of the Project is a willful disregard of Colombian law, specifically, the guarantee of payment of compensation pursuant to Article 58 of the Constitution when vested rights are expropriated.[276]

219. In its Reply, the Claimant asserts that the Respondent mischaracterized the applicable standard by citing the *Cargill v. Mexico* decision. According to the Claimant, in that case the tribunal incorrectly applied the *Neer* standard that has been rejected by tribunals and commentators. The Claimant argues that the "State must afford protection against the measure that 'inflicts damage on the investor without serving an apparent legitimate purpose' or is 'not different from those put forward by the decision maker;' or 'taken in wilful disregard of due process and proper procedure.'"[277] The Claimant adds that the violation of one of these aspects would result in Colombia's violation of its obligation under the Treaty.

220. According to the Claimant, the Respondent has violated all of them as it has already demonstrated.

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[274] Cl. Mem., ¶ 156; Cl. Reply, ¶ 447; Witness Statement of Mr. Juan Arturo Franco, ¶¶ 30-35. *See also* Municipality of Vetas, Proposal for a New Delimitation of the Santurbán Páramo, March 15, 2019, **Exhibit C-528.** pp. 36, 68.

[275] Cl. Mem., ¶ 157. The Claimant adds that "former President Juan Manuel Santos once noted that 'this criminal practice has not only generated pressures and extortions for miners that work legally, but also that it has caused nefarious harm to the environment.'" *See* "La minería ilegal es 'un cáncer que debemos extirpar:' Santos," El Espectador, February 23, 2012, **Exhibit C-814**. *See also* Cl. Reply, ¶ 447.

[276] Cl. Mem., ¶ 158, *citing* Colombian Constitution, July 4, 1991, **Exhibit C-565**, Article 58. *See also* Cl. Reply, ¶ 447; Cl. Opening, slide 19.

[277] Cl. Reply, ¶ 447.

(iv) Proportionality

221. The Claimant alleges that the FET standard also includes a requirement of proportionality. There must be a reasonable relationship between the burden imposed on the foreign investor and the objective sought by the measure. The Claimant argues that Colombia's measures were disproportionate. According to the Claimant, the measures have resulted in the impossibility for the Claimant to access its mineral resources which has resulted in the Project being economically unviable. The measure of the delineation of the *páramo* is disproportionate, according to the Claimant, because the illegal mining has not been addressed. The Claimant points out that Colombia's actions are disproportionate because it dismantled the legal and regulatory framework with no sound and reasonable economic, social and environment reasons, and had a harmful effect on Claimant's investment.[278]

222. In its Reply, the Claimant asserts that the *Tecmed v. Mexico* is not the only case that has held that the fair and equitable treatment standard requires proportionality. The Claimant recalls other cases such as the *Cairn Energy v. India* where the tribunal confirmed that tribunals have identified proportionality as one of the core principles of the FET standard and that "measures should not be more burdensome for individual's rights and interests than required by the pursued public purpose, especially if a less burdensome measure would be available to satisfy the same public purpose."[279]

223. The Claimant argues that it has established that the Respondent has failed to meet this standard. The Claimant sustains that the Respondent dismantled the legal framework imposing a retroactive mining ban which deprived the Claimant of its mining rights. Additionally, the Claimant argues that it has demonstrated that the Respondent sought to enforce the mining restrictions against Claimant even though its Constitutional Court has ruled them to be unlawful which has resulted in the Claimant's impossibility to access the mineral and rendering the Project economically unviable. The Claimant also alleges that it has demonstrated that the Respondent's measures were not based on economic, social and

[278] Cl. Mem., ¶¶ 159-161; Cl. Reply, ¶¶ 449-455.

[279] Cl. Reply, ¶ 452, *citing Cairn Energy PLC and Cairn U.K. Holdings Limited (CUHL) v. Republic of India*, PCA Case No. 2016-07, Award, December 21, 2020, **Exhibit CL-244**, ¶ 1788.

environmental studies and its disproportionate effects have impacted the Vetas population. Finally, the Claimant adds, Colombia has failed to take action against illegal mining.[280]

224. In response to the Respondent's argument that the State may adopt public policy measures, the Claimant recalls that in *Phillip Morris v. Uruguay* the tribunal decided that the "adoption of public policy measures by the State, was not unlimited and subject to complying with certain conditions as proportionality and non-discrimination."[281] The Claimant also recalls the tribunal's decision in *Bear Creek v. Peru* where the tribunal rejected a similar argument by the respondent on the basis of the Canada-Peru Free Trade Agreement.[282]

(v) Discriminatory

225. The Claimant argues that measures that arbitrarily or unjustifiably discriminate are in violation of the FET standard.[283] The Claimant alleges that Colombian authorities allow local artisanal miners to continue mining activities in the boundaries of the *páramo* while it has banned the mining activities in portions of the Claimant's Mining Titles overlapping with the Santurbán *Páramo*. According to the Claimant, the Respondent has treated the Claimant's investment in a discriminatory manner, violating the Treaty.[284]

226. In its Reply, the Claimant responds to the Respondent's argument that the Claimant needs to point to the targeting of a particular investor or investment based upon nationality or some other characteristic by saying that the Respondent has misrepresented the standard. According to the Claimant, it is well established that the applicable standard of the FET with respect to discrimination is not necessarily restricted to nationality.[285]

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[280] Cl. Reply, ¶ 452.

[281] Cl. Reply, ¶ 454, *citing Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, July 8, 2016, **Exhibit CL-261**, ¶ 305.

[282] Cl. Reply, ¶ 454, *citing Bear Creek v. Republic of Peru,* ICSID Case No. ARB/14/21, Award, November 30, 2017, **Exhibit CL-127**, ¶¶ 473-474.

[283] Cl. Mem., ¶ 162, *citing Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, **Exhibit CL-32**, ¶ 98; *Ronald S. Lauder v. Czech Republic,* UNCITRAL, Final Award, September 3, 2001, **Exhibit CL-144**, ¶¶ 292-293. *See also* Cl. Reply, ¶¶ 456-459, Cl. PHB, ¶ 71.

[284] Cl. Mem., ¶ 163.

[285] Cl. Reply, ¶ 458.

227. The Claimant finds support for its argument in the *Enron v. Argentina* case where "the tribunal noted that, when determining whether or not the measure is discriminatory, the key question is whether the State's measures were harsher and more beneficial with respect to a certain sector as of the economy than to others."[286] In this case, the Claimant argues, the Claimant has established that it has been prevented from mining the Project in an arbitrary and unjustifiable manner while failing to take action to prevent illegal mining in the *páramo* which the Respondent claims to be protecting. The Claimant adds that even if nationality or any other characteristic were a requirement, the test would not be met because Respondent has failed to establish that any of those engaged in illegal mining are Canadian nationals.[287]

b. The Respondent's Position

228. The Respondent argues that Article 805(1) of the Treaty requires that Colombia treat covered investment in accordance with the customary international law minimum standard of treatment. According to the Respondent, "Red Eagle's claim under Article 805(1) is without merit not least because Canada and Colombia deliberately eschewed any 'standalone FET' standard under the FTA, and the FTA's MFN provision cannot be used to circumvent Canada and Colombia's agreement." The Respondent adds that regardless of the standard, the claims fail on the facts because the Respondent's measures aimed to protect the *páramo* never changed and the Mining Titles were always treated fairly and equitably.[288]

(i) Minimum Standard of Treatment

229. The Respondent affirms that the standard of protection of the Treaty is the customary international law minimum standard of treatment of aliens.[289] According to Colombia, it was the State parties that decided not to provide treatment in accordance with the standalone FET standard but rather limited it to the customary international law standard.

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[286] Cl. Reply, ¶ 458, *citing Enron Corp. and Ponderosa Assets, L.P. v. Argentine Republic,* ICSID Case No. ARB/01/3, Award, May 22, 2007, **Exhibit CL-51**, ¶ 282.

[287] Cl. Reply, ¶ 459.

[288] Resp. C-Mem., ¶ 372. *See also* Resp. NDP Comments, ¶ 24.

[289] Resp. C-Mem., ¶¶ 377-385; Resp. Rej., ¶¶ 274-281. *See also* Resp. NDP Comments, ¶¶ 23-32.

The Respondent requests that the Tribunal give effect to the State parties' policy decision not to accord treatment beyond the customary international law standard.[290] The Respondent argues that Article 805(3)[291] of the Treaty is clear in that the MFN provision cannot be used to establish a breach of Article 805.

230. The Respondent argues that, even as a matter of treaty interpretation, the Claimant's argument would fail because it was the State parties that specifically and explicitly limited the FET standard to the customary international law MST. Therefore, the intention would not have been to offer a broader standard of protection found in other treaties on the basis of an MFN provision.

231. Even if Article 804 of the Treaty allowed for importation of standards, it is a prospective obligation, according to the Respondent. Colombia entered into the Spain-Colombia Bilateral Investment Treaty ("**BIT**") and the Switzerland-Colombia BIT before the Treaty entered into force. Those treaties cannot give rise to any breaches under Article 804 of the FTA.

232. The Respondent alleges that the Claimant has failed to refer to anything in both BITs or their *travaux preparatoires* that supports the broad interpretation that the Claimant seeks to import into the Treaty. The decisions that the Claimant used to support its 'standalone' FET provision are of no probative value insofar the Spain-Colombia and Switzerland-Colombia BITs are concerned. The Respondent requests that the Tribunal "assess Red Eagle's claims in accordance with the customary international law MST standard of FET as agreed by the State Parties to this FTA, and not any extraneous standard imported through the FTA's MFN provision."[292]

233. In its Rejoinder, the Respondent affirms that Claimant's argument that FET should be read as an autonomous obligation that is not limited to the customary international law minimum standard of treatment of aliens is without merit. First, the Respondent argues, Article

[290] Resp. C-Mem., ¶¶ 375-376.

[291] Article 805(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."

[292] Resp. C-Mem., ¶ 385.

805(1) is clear in its text and confirms that "'fair and equitable' is not to be read as imposing any obligation 'beyond [the treatment] required by the customary international law minimum standard.'"[293] Second, the Respondent adds, the Claimant's interpretation cannot be reconciled with Canada's statement of the meaning of this provision.[294] Third, the Respondent alleges that the Claimant's interpretation conflicts with the legislative history of Article 805(1) "from which it is clear that the State Parties intended to provide treatment in accordance with the customary international law minimum standard of treatment, and no more."[295] According to the Respondent, it was precisely the decisions of NAFTA tribunals which prompted the incorporation by Canada and the United States in their model treaties of language confirming that treatment above customary international law MST is not required.[296] Finally, the Respondent adds, contrary to the Claimant's assertions, MST fair and equitable treatment and full protection and security are applicable to the extent that they are part of customary international law.[297]

234. In relation to the importation of an autonomous FET standard through an MFN clause argued by the Claimant, in its Rejoinder, the Respondent affirms that Article 804 cannot serve to import FET provisions from other treaties because (i) doing so would be contrary to the plain language of Article 805(3) of the Treaty which prohibits it; (ii) the customary international law MST standard set forth in Article 805 is *lex specialis* with respect to the FET standard; and (iii) "Red Eagle failed to prove that the provisions it intended to import from third BITs are not merely reflective of customary international law, and provisions from BITs concluded before the entry into force of the FTA cannot be imported through the MFN clause of Article 804."[298] As noted by Canada in its Non-Disputing Party submission, Article 804 cannot be used to alter the substantive content of the minimum standard of treatment obligation of Article 805, or to broaden the treatment beyond

[293] Resp. Rej., ¶ 276.

[294] Resp. Rej., ¶ 277, *citing* Canada's Non-Disputing Party Submission in *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, June 9, 2016, **Exhibit RL-117**, ¶ 7.

[295] Resp. Rej., ¶ 278.

[296] Resp. Rej., ¶ 278, *citing* P. Dumberry, "Fair and Equitable Treatment", in M. M. Mbengue, S. Schacherer (eds.), *Foreign Investment under the Comprehensive Economic and Trade Agreement* (2019), **Exhibit RL-188**, pp. 101-102.

[297] Resp. Rej., ¶¶ 279-280.

[298] Resp. Rej., ¶ 282; Resp. NDP Comments, ¶¶ 33-34.

treatment that is required by the customary international law minimum standard of treatment of aliens.[299]

(ii) Requirements under customary international law

235. The Respondent alleges that the Claimant's MST claim should be dismissed because it has not met its burden of proving the rules of customary international law.[300]

236. The Respondent contends that the minimum standard of treatment incorporates a set of rules which are part of customary international law of State responsibility with respect to injuries to aliens. The purpose of the rules, Colombia says, is to ensure that the treatment of aliens does not fall below a floor or 'civilized standard'. [301] The investor alleging a breach must prove the existence and binding nature of the customary international law. The Respondent argues that the ICJ and international investment tribunals have confirmed that "where a party seeks to rely on a rule of customary international law, it must prove that this custom has become binding on the State party."[302] Thus, according to the Respondent, the Claimant must prove (i) a general and consistent State practice; and (ii) *opinio juris*.[303]

237. The Respondent argues that the decisions of other tribunals are not evidence of State practice or *opinio juris* and recalls the decision of the tribunal in the *Cargill v. Mexico* case in which it was held that "investment treaty awards 'do not create customary international law but rather, at most, reflect customary international law.'"[304] The Respondent responds that the decisions relied upon by the Claimant interpret FET standards from other treaties which are not qualified by international law.[305]

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[299] Resp. NDP Comments, ¶ 33, *citing* Canada's Non-Disputing Party Submission, ¶ 31.

[300] Resp. C-Mem., ¶¶ 386-395.

[301] Resp. C-Mem., ¶ 387, *citing* E. Borchard, *Minimun Standard of the Treatment of Aliens,* February 1940, **Exhibit RL-135**, pp. 445, 454.

[302] Resp. C-Mem., ¶ 390; Resp. Rej., ¶ 290.

[303] Resp. C. Mem., ¶ 391, *citing* Canada's Non-Disputing Party Submission in *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, June 9, 2016, **Exhibit RL-117**, ¶ 9; *Asylum Case (Colombia v. Peru)* [1950], ICJ Reports 266, **Exhibit RL-66**, p. 276; *North Sea Continental Shelf (Federal Republic of Germany v. Netherlands/Denmark)* [1969], ICJ Reports 3, February 20, 1969, **Exhibit RL-69**, ¶ 74.

[304] Resp. C-Mem., ¶ 393, *citing Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/02, Award, September 18, 2009, **Exhibit RL-95**, ¶ 277.

[305] Resp. C-Mem., ¶ 394. *See also* Resp. NDP Comments, ¶ 25.

238. In its Rejoinder, the Respondent alleges that the Claimant conflates the FET standard with the customary international law MST and mischaracterizes the scope.[306] The Respondent insists that the Claimant has not discharged its burden because it continues to seek to support its case based on decisions of arbitral tribunals rather than on *opinio juris*.[307]

(iii)MST and regulatory changes

239. The Respondent argues that the Claimant's claim should be dismissed because the facts of this case do not meet the high threshold for establishing a breach of MST, specifically because of the wide margin of deference granted to States under international law to adopt public policy measures to protect the environment.[308]

240. According to the Respondent, it is generally accepted that the formulation of customary international law minimum standard of treatment was established in the *Neer v. Mexico* case which held that "the standard is only violated where the government measures 'amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.'"[309] The Respondent states that tribunals have held that this standard is a high bar for claimants and remains rooted in its origin in the *Neer* case.[310] The Respondent argues that, in line with this case, customary international law (i) does not recognize a principle that would give rise to an obligation of legitimate expectations; (ii) does not amount to a guarantee of stability of the regulatory environment; (iii) does not establish a general, self-standing duty of transparency; (iv) is

[306] Resp. Rej., ¶ 288.

[307] Resp. Rej., ¶ 291.

[308] Resp. C-Mem., ¶¶ 396-415.

[309] Resp. C-Mem., ¶ 397, *citing L.F.H. Neer and Pauline Neer v. United Mexican States,* Award, IV RIAA 60, October 15, 1926, **Exhibit RL-64**, pp. 61-62.

[310] Resp. C-Mem., ¶¶ 398-399, *citing Glamis Gold Ltd. v. United States of America*, UNCITRAL, Award, June 8, 2008, **Exhibit CL-61**, ¶ 614; *International Thunderbird Gaming Corp. v. United Mexican States,* UNCITRAL, Award, January 26, 2006, **Exhibit CL-42**, ¶ 194.

not related to arbitrariness; and (v) contains no general prohibition against discrimination.[311]

241. In response to the Claimant's argument that the tribunal's decision in the *Glamis Gold* case is an 'outlier', the Respondent responds that numerous tribunals have come to the same conclusion as in *Glamis Gold*. The Respondent recalls on this point the decision in *Thunderbird v. Mexico* where the tribunal also concluded that the minimum standard of treatment remains high.[312] The tribunal in the *Al Tamimi v. Oman* case held that "it is broadly accepted that the minimum standard of treatment under customary international law imposes a relatively high bar for breach."[313] The Respondent added that the *Tecmed v. Mexico* award has been widely rejected and criticized as a standard. The United Nations Conference on Trade and Development ("**UNCTAD**") observed, Respondent notes, that the *Tecmed* standard is nearly impossible to achieve, and this is why it should be rejected.[314]

242. The Respondent also argues that the Tribunal must defer to public policy decisions for the protection of the environment as recognized under international law. The Respondent refers to international courts and tribunals that have reviewed public policy measures under international law which have concluded that it is apposite to accord States a wide margin of appreciation.[315] The Respondent supports this argument with the award of the tribunal in the *Philip Morris v. Uruguay* case where the tribunal confirmed that great deference should be given to governmental judgments of national need in matters such as the protection of health.[316] The Respondent also recalls the tribunal decision in *RREEF v.*

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[311] Resp. C-Mem., ¶¶ 401-402. *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL (Partial Award), November 13, 2000, **Exhibit CL-20**, ¶ 261; *International Thunderbird Gaming Corp. v. United Mexican States,* UNCITRAL, Award, January 26, 2006, **Exhibit CL-42**, ¶ 127.

[312] Resp. Rej., ¶ 294, *citing International Thunderbird Gaming Corp. v. United Mexican States*, Separate Opinion of Thomas Wälde, December 1, 2005, **Exhibit CL-41**, ¶ 194.

[313] Resp. Rej., ¶ 295, *citing Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, November 3, 2015, **Exhibit RL-114**, ¶ 382.

[314] Resp. Rej., ¶ 297, *citing* UNCTAD, Fair and Equitable Treatment 7 (UNCTAD Series on Issues in International Investment Agreements II, United Nations), 2012, **Exhibit CL-267**, p. 65.

[315] Resp. C-Mem., ¶ 406; Resp. Rej., ¶¶ 300-304; Resp. NDP Comments, ¶¶ 28-30.

[316] Resp. C-Mem., ¶ 406, *citing Philip Morris Brands SARL., and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, July 8, 2016, **Exhibit RL-118**, ¶ 399.

Spain where the tribunal observed that Spain had a margin of appreciation and that it would not substitute its views on the appropriateness of the measures.[317] Similarly, in the case of *Electrabel v. Hungary*, the tribunal referred to Hungary's margin of appreciation in taking measures related to regulatory pricing of electricity.[318] The Respondent asserts that,

> [t]here can be no doubt that the protection of a rare and biodiverse ecosystem, the integrity of which is essential to supply of water to an entire region and which is already being impacted by climate change, is also an important area of public policy to which the State must be granted a particularly 'wide' margin of appreciation.[319]

243. The Respondent observes in its Rejoinder that the Claimant has not "addressed the wealth of international law authorities and commentaries cited by Colombia confirming that states enjoy a wide margin of appreciation in their public policy determinations, particularly when it comes to protecting the environment."[320] The Respondent alleges that the Claimant has mischaracterized Colombia's position as an 'absolute' right. The Respondent maintains that it has shown that the threshold required to establish violations is high and particularly with respect to measures adopted to protect the environment.[321] The Respondent alleges that the Claimant has not seriously disputed these principles.[322]

244. The Respondent alleges that its measures were rationally related to a long-standing policy objective of protecting the *páramo*. This, the Respondent adds, was done in accordance with international legal obligations and Colombia's domestic law.[323]

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[317] Resp. C-Mem., ¶ 406, *citing RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain,* ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, November 30, 2018, **Exhibit RL-128**, ¶ 468.

[318] Resp. C-Mem., ¶ 406, *citing Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, November 30, 2012, **Exhibit RL-107**, ¶ 8.35.

[319] Resp. C-Mem., ¶ 407.

[320] Resp. Rej., ¶ 302. *See also* Resp. C-Mem., ¶¶ 333-334; Resp. PHB, ¶¶ 48-51.

[321] Resp. Rej., ¶ 303; Resp. C-Mem., ¶¶ 396-403.

[322] Resp. Rej., ¶ 304, *citing S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, **Exhibit CL-20**, ¶ 263; *International Thunderbird Gaming Corp. v. United Mexican States,* UNCITRAL, Award, January 26, 2006, **Exhibit CL-42**, ¶ 127. *See also Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Award, March 24, 2016, **Exhibit CL-231**, ¶ 505.

[323] Resp. C-Mem., ¶¶ 408-415.

245. The Respondent argues that it is legally bound to protect the *páramo* under international law and must apply the precautionary principle reflected in its Law 99 of 1993. This law provides for a series of steps to strengthen the protection of the *páramo* over time. The Respondent recalls some examples: (i) the introduction of a general ban on mining in the *páramo* contained in Laws 1382, 1450 and 1753 to prevent harm from occurring while Colombia continued to work on the precise delineation of the *páramo*; (ii) Judgment C-366 which would allow sufficient time for the legislature to reinstate the mining ban after striking down Law 1382 and to avoid a legal vacuum for the protection of the *páramo*, and (iii) Judgments C-035 and T-361 that maintained the prohibition in accordance with Resolution 2090 until a new delimitation was completed.[324]

246. According to the Respondent, had the Claimant conducted any due diligence, it would have understood that Colombian law and policy precluded large-scale mining projects in the *páramo*. The Respondent adds that with due diligence, the Claimant would have ascertained that Colombia's Constitutional Court was bound to apply the precautionary principle in all decisions to protect the *páramo* and no large-mining project would have been permitted. The Respondent alleges the Claimant knew that the Eco Oro's environmental license application on a nearby site had been rejected in April 2010 and there was also social opposition to mining in the *páramo* areas.[325]

247. The Respondent notes that, starting in 2007, the legislature had been preparing the law prohibiting mining in the *páramo* which resulted in Law 1382 enacted on February 9, 2010. Judgment C-035, Law 1382, Resolution 2090 and Law 1753 grandfathering provisions did not apply to the Claimant's Project. The Respondent argues that the Claimant should have known that the limited grandfathering provision could be subject to review by the Colombian Constitutional Court. The Respondent adds that the Claimant cannot argue that Resolution 2090 was arbitrary or not adopted on a reasonable and proportional basis to

[324] Resp. C-Mem., ¶ 409.

[325] Resp. C-Mem., ¶¶ 410-411.

protect the *páramo* because it had participated and argued to uphold Resolution 2090 during the proceeding before the Constitutional Court resulting in Judgment T-361.[326]

248. Finally, the Respondent refers to Judgments C-035 and T-361 to confirm that all parties had a fair opportunity to be heard and the Court applied the constitutional principles and law to protect the *páramo*. The Respondent noted that the Claimant did not adduce any expert evidence to challenge the reasonableness of the delimitation. The Claimant rather argued that Judgment T-361 did not consider social and economic studies. The Respondent contends, in response, that in Judgment T-361 was a challenge to Resolution 2090 and the Court was not asked to pronounce itself on social or economic studies.[327] For these reasons, the Respondent concludes, "neither the decisions of the Constitutional Court, nor any of Colombia's other measures adopted for the protection of the páramo amount to violations of the MST."[328]

(iv) Legitimate expectations, transparency, reasonableness and not arbitrary, proportionate, non-discriminatory

249. The Respondent affirms that there is no general obligation on legitimate expectations under the customary international law minimum standard of treatment. Furthermore, none of Colombia's measures violated such standard.[329]

250. The Respondent accepts that investor's legitimate expectations are protected pursuant to a standalone FET standard in narrow circumstances: (i) legitimate expectations may arise from a State's specific commitment or representation made to the investor on which this has relied upon, and (ii) the investor must be aware of the general regulatory environment to balance its expectations against legitimate regulatory activities.[330]

251. In its Rejoinder, the Respondent further argues that the Claimant has failed to address the several authorities called upon by the Respondent in support of its argument that, to create

[326] Resp. C-Mem., ¶¶ 412-413.

[327] Resp. PHB, ¶ 50.

[328] Resp. C-Mem., ¶ 415.

[329] Resp. C-Mem., ¶¶ 416-444; Resp. Rej., ¶¶ 305-353.

[330] Resp. C-Mem., ¶ 417, *citing* United Nations Conference of Trade and Development, UNCTAD Series on Issues in International Investment Agreements II, Fair and Equitable Treatment, 2012, **Exhibit RL-56**, p. 68.

legitimate expectations, the State conduct must be specific and unambiguous.[331] The Respondent also argues that tribunals' decisions that support the Claimant's argument that explicit or specific assurances are not required are of no assistance. As an example, the Respondent recalls that in the *Micula v. Romania* case, the tribunal held that absent an assurance to the contrary, a State cannot be expected to freeze its laws and regulations.[332]

252. The Respondent alleges that in the instant case, the Claimant did not have any assurance, specific or otherwise, from the Colombian government that it would be permitted to develop a large-scale mining project in the *páramo* or that the legal framework protecting the *páramo* would not change. The Respondent further argues that "in light of Red Eagle's failure to prove that Colombia made any specific commitment to it that it would not change the regulatory regime, Red Eagle's claim must be dismissed."[333]

253. In its Rejoinder, Colombia argues that the Claimant's claim should be rejected because it has failed to establish that it actually relied on the alleged expectations it purports to have at the time of the investment.[334] According to the Respondent, tribunals have required investors to prove the expectations they relied upon at the time of the investment.[335] The Respondent alleges that the Claimant did not offer any evidence that "it invested in reliance on any expectation that Colombia would grandfather Red Eagle's 'Vetas Gold Project' or delimit the páramo in a manner that would not impact such a project."[336]

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[331] Resp. Rej., ¶ 312, *citing White Industries Australia Limited v. Republic of India,* UNCITRAL, Final Award, November 30, 2011, **Exhibit RL-174**, ¶ 10.3.17, *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Award, June 8, 2008, **Exhibit CL-61**, ¶ 620; *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, Award, ICSID Case No. ARB/02/5, January 19, 2007, **Exhibit CL-49**, ¶ 241; *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, August 18, 2008, **Exhibit CL-65**, ¶ 351.

[332] Resp. Rej., ¶ 313, *citing Ioan Micula and others v. Romania I*, ICSID Case No. ARB/05/20, Award, December 11, 2013, **Exhibit CL-106**, ¶ 460.

[333] Resp. Rej., ¶ 31.

[334] Resp. Rej., ¶¶ 317-330.

[335] Resp. Rej., ¶ 318, *citing Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador,* ICSID Case No. ARB/04/19, Award, August 18, 2008, **Exhibit CL-65**, ¶¶ 340, 365. *See also AES Summit Generation Limited and AES-Tisza Erömü Kft v. Republic of Hungary,* ICSID Case No. ARB/07/22, Award, September 23, 2010, **Exhibit RL-173**, ¶ 9.3.8*; Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan,* ICSID Case No. ARB/03/29, Award, August 27, 2009, **Exhibit CL-75**, ¶¶ 190-191.

[336] Resp. Rej., ¶ 323.

254. The Respondent further explains that the legal framework expressly prohibited mining in the *páramo*. Specifically, when the Claimant acquired its Mining Titles, (a) it knew or should have known that Colombia was committed as a matter of international law to protect the *páramos* from mining activities; (b) the Project required an environmental license which the environmental authorities would not grant because they were under the legal obligation to reject any potential harm in the *páramo* on the basis of the precautionary principle; (c) the Project did not benefit from a grandfathering provision because it applied only to existing small-scale exploitation activities on four of the Claimant's Mining Titles; (d) Article 46 of the 2001 Mining Code did not provide a 'stabilization' of the environmental requirements applicable to mining projects but rather it reserved the right of the State to declare any part of a concession contract as a mining exclusion zone without payment of compensation; (e) the alleged 'measures to encourage investment' that the Claimant argues did not concern the Project and did not suggest any intention on part of the State to allow the Claimant to develop mining projects that did not comply with Colombia's environmental laws, and (f) the administrative acts and communications referred to by the Claimant were not endorsements from Colombia and in no manner were authorizing the Project which would have been inconsistent with the commitment to protect the *páramo*.[337]

255. On this last point, the Respondent clarifies that the ANM visited the Mining Titles to monitor compliance of existing obligations and not to monitor the progress in the development of the Project, like the Claimant asserts. At that time, Red Eagle had not even applied for an environmental license or a mining works program for the Project. On the conversion of the Real Minera exploitation license into a concession contract, the Respondent explains that this was nothing more than a standard certificate issued by the ANM requested by the title holder which does not confer any new rights. As to the confirmation by the ANM that six of the Mining Titles were not within the boundaries of the Santurbán Páramo Park, this confirmation concerned the delineation of the park and not the *páramo* ecosystem. They were separate delineations carried out under different

[337] Resp. C-Mem., ¶ 418.

legislation, criteria, and objectives.[338] The alleged recognition by ANM of the Minera Vetas right to convert La Peter exploitation license to a concession contract only acknowledges the right to change the legal form of the existing title. The alleged ANM's approval of the assignment of all Mining Titles was not derogating from the environmental restrictions. It was just approval of the assignment process which did not require the ANM to give notice of any restrictions or limitations on the mining activities. As to the alleged registration by ANM of the contract for Real Minera, this did not mean that it was conferring any additional rights or derogated from existing restrictions or conditions. The alleged recognition of Minera Vetas' right to convert two licenses into concession contracts was only ANM's recognition of the right to change the legal form of the titles. Finally, the alleged confirmation by ANM of the Minera Vetas' rights over El Dorado, did not indicate that the title would be exempt from the *páramo* ecosystem delimitation process but was only concerned with the overlap with the Santurbán Páramo Park, which was delimited separately and on the basis of different criteria.[339]

256. The Respondent argues that the Claimant's reliance on a series of administrative acts and communications from ANM to decide to invest was no basis to have a legitimate expectation to be permitted to carry out a large-scale project in the *páramo*. Rather, the Respondent states, these communications confirm that ANM treated the Claimant equitably, in accordance with the law and fairly at all times with respect to all of the Mining Titles when processing each of its requests. If the Claimant had applied for an environmental license for the Project in the *páramo* area, the Respondent asserts that this would have been denied.[340]

257. Also in its Rejoinder, the Respondent argues that Red Eagle's legitimate expectations claim should fail because the Claimant failed to show that the alleged expectations were 'legitimate' or 'reasonable' in all circumstances, including the regulations and stated policy

[338] Letter from Colombian Geologic Service to Leyhat, 31 May 2012, **Exhibit C-577**.

[339] Resp. C-Mem., ¶ 418.

[340] Resp. C-Mem., ¶ 419.

objectives at the time the Claimant invested.[341] The Respondent also argues that it is uncontroversial that investors have the duty of due diligence when investing in a particular State. As such, the Respondent adds, if an investor has reason to expect a potential course of action by the host State, its expectations that such a course of action will not be pursued is not reasonable.[342]

258. In this case, the Respondent argues in its Rejoinder, the Claimant could not have reasonably expected that it would be permitted to mine in the *páramo* area of its Mining Titles, or that the final delimitation would carve out the Mining Titles.[343] Specifically, because (a) the mining had already been banned as of February 9, 2010; (b) the Project was never grandfathered; (c) Law 1450 continued the ban on mining contained in Law 1382 without exceptions or grandfathering; (d) Colombia's authorities enforced this ban with respect to the Claimant's Mining Titles at all times; (e) the Claimant did not engage in 'mining', even less in 'responsible' mining because it only conducted exploration activities; (f) Article 46 of the 2001 Mining Code did not 'stabilize' the laws applicable to the Claimant's mining projects; (g) the approval of the assignment of the Mining Titles to Claimant or non-binding opinions concerning conversion requests for some exploitation licenses did not amount to any form of approval of the Project; (h) the Respondent did not make any specific representations to the Claimant that a large-scale project would be permitted or exempted from prohibition; (i) neither the Ministry of Environment nor IAVH stated that the delimitation of the Santurbán *Páramo* would be identical to the area that the CDMB chose to protect as part of the Santurbán Park; (j) a reasonable diligent investor would have studied the Ministry of Environment's rejection of the Eco Oro environmental license

[341] Resp. Rej., ¶¶ 324-328, *citing* M. Potestà, "Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept", 2013 ICSID Review 88, **Exhibit RL-177**, p. 118; *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, August 18, 2008, **Exhibit CL-65**, ¶ 340; *Toto Costruzioni Generali S.p.A. v. Lebanese Republic*, ICSID Case No. ARB/07/12, Award, June 7, 2012, **Exhibit CL-96**, ¶ 245; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, August 27, 2009, **Exhibit CL-75**, ¶ 195; A. Newcombe, L. Paradell, "Minimum Standards of Treatment" in *Law and Practice of Investment Treaties: Standards of Treatment* (2009), **Exhibit RL-168**, p. 288; C. McLachlan, L. Shore, M. Weiniger, "Treatment of Investors" in *International Investment Arbitration: Substantive Principles* (2017), ¶ 7.239.

[342] Resp. Rej., ¶ 328, *citing International Thunderbird Gaming Corp. v. United Mexican States,* UNCITRAL, Award, January 26, 2006, **Exhibit CL-42**¶ 164. *See also Metalpar S.A. and Buen Aire S.A. v. Argentine Republic*, ICSID Case No. ARB/03/5, Award on the Merits, June 6, 2008, **Exhibit RL-167**, ¶ 187.

[343] Resp. Rej., ¶ 329.

request in 2011, and (k) no reasonable investor would have assumed that because a State has not been able to fully prevent illegal mining activities from being carried out, the restrictions on mining in the *páramo* areas would not apply to the Project.[344]

259. In sum, Colombia argues that the Claimant "proceeded with its investment at its own risk, either without conducting adequate due diligence into the existing legal framework or Colombia's environmental policies, […] Red Eagle could not have reasonably expected that its Vetas Gold Project would be excepted from Colombia's prohibition on mining activities in the páramo."[345]

260. According to the Respondent, the Claimant's argument that Colombia violated its legitimate expectations by failing to provide a stable and predictable legal framework is without merit.[346]

261. The Respondent argues that, as elaborated previously, the legal framework that applied to the Mining Titles remained stable and predictable and never had a material change. The *páramos* had been under constitutional and legal protection at least since 1993 and Law 1382 banning mining activities in the *páramo* took immediate effect on February 9, 2010, before the Claimant acquired any of its Mining Titles. The Respondent argues that the effect of the different laws is the same because the Claimant's limited rights conferred in the Mining Titles were not materially impacted by Colombia's measures even if the Project had been exempted from Law 1382. Colombia's policy of guaranteeing the protection of

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[344] Resp. Rej., ¶ 329. *See also* Witness Statement Mr. Juan Pablo Franco, ¶ 24; Witness Statement of Ms. Brigitte Baptiste, ¶ 30.

[345] Resp. C-Mem., ¶ 420. The Respondent referred to tribunal decisions recognizing an investor's failure to exercise due diligence as a significant consideration against finding a breach of the FET standard on the basis of legitimate expectations and supports this argument on the following examples: *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, July 14, 2008, **Exhibit CL-62**, ¶ 601; *Joseph Charles Lemire v. Republic of Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability , January 21, 2010, **Exhibit CL-77**, ¶ 285; *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, September 16, 2003, **Exhibit CL-186**, ¶ 20.37; *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, **Exhibit CL- 89**, ¶¶ 359-364; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, August 27, 2009, **Exhibit CL-75**, ¶¶ 192-193; *International Thunderbird Gaming Corp. v. United Mexican States,* UNCITRAL, Award, January 26, 2006, **Exhibit CL-42**, ¶¶ 163-164; *UAB E energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award, December 22, 2007, **Exhibit RL-90**, ¶ 837.

[346] Resp. C-Mem., ¶¶ 421-428; Resp. Rej., ¶¶ 331-337.

the *páramo* from mining activities based on the precautionary principle guided the legislative measures and was the basis for the Constitutional Court decisions.[347]

262. Colombia argues that for a "State to violate the legitimate expectations of an investor by amendments to the legal framework applicable to its investment, the State must have undertaken not to amend that framework."[348] The Respondent further argues that, on the basis of the Treaty's objective reflected in its preamble, changes taken for the purpose of enhancing or enforcing environmental laws and regulations cannot violate the Treaty in absence of a very specific and binding commitment with the investor.[349] According to the Respondent, the Claimant has not provided any evidence to demonstrate Colombia made a commitment, such as a 'stabilization contract' with respect to the Claimant's Mining Titles.[350]

263. In its Rejoinder, the Respondent corrects the Claimant's allegation that it has conceded that there is precedent for holding that inconsistency in administrative action alone can trigger responsibility. The Respondent states that it has not conceded this but rather to the contrary, it has shown that the Claimant's reliance on *Tecmed v. Mexico* was inapposite, and that this decision has been widely criticized. The Respondent adds that the *Tecmed v. Mexico* case does not provide persuasive basis that there is a duty of transparency under MST but rather the UNCTAD and tribunals have concluded that transparency has been unsuccessfully linked to the FET standard by past tribunals and it has not been proven that it is part of the customary law standard.[351] The Respondent also refers to the *Metalclad v. Mexico* decision, on which the Claimant relies, to point out that it has been set aside by the Supreme Court of British Columbia because it wrongly considered there to be a duty of transparency in

[347] Resp. C-Mem., ¶ 422.

[348] Resp. C-Mem., ¶ 423, *citing Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, September 11, 2007, **Exhibit RL-89**, ¶ 332.

[349] Resp. C-Mem., ¶ 424. *See also* Treaty, **Exhibit CL-1**, Preamble.

[350] Resp., C-Mem., ¶ 425.

[351] Resp. Rej., ¶ 333, *citing* United Nations Conference of Trade and Development, UNCTAD Series on Issues in International Investment Agreements II, Fair and Equitable Treatment, 2012, **Exhibit RL-56**, p. 63; *Merrill & Ring Forestry LP v. Government of Canada*, ICSID Case No UNCT/07/1, Award, March 31, 2010, **Exhibit RL-172**, ¶¶ 208, 231.

NAFTA's Article 1105.[352] The Respondent argues that the reference to the *Electrabel v. Hungary* award is not applicable since that decision was based on the Energy Charter Treaty which contains a wording that does not exist in the Treaty in this case.[353]

264. According to the Respondent, "Red Eagle cannot establish a violation of the FTA on the basis of any failure by Colombia to provide a stable and predictable legal framework for its investment."[354]

265. The Respondent argues that the Claimant's claims regarding lack of transparency and consistency of Colombia's actions are without merit.[355] The Respondent alleges that it has never approved or endorsed in any manner Red Eagle's large-scale mining project in the *páramo*. Contrary to the Claimant's contentions, Colombia says, Resolution 2090 was issued on December 19, 2014, and there was no preliminary delimitation in April 2014 as Claimant argues.[356] The impact of the Resolution 2090 was not unclear either. The Respondent argues that the Ministry of Environment published an electronic file on its website with the delineation at a 1:25,000 scale and it was clear on the prohibition of the mining activities, except for the ones that benefitted from the grandfathering provision under Law 1450 of 2011.[357] According to the Respondent, this meant that the Claimant was not allowed to conduct any large-scale mining in the delineated preservation area.[358] The Respondent also argues that Law 1753 was not inconsistent with Resolution 2090.

266. Minera Vetas had four PMAs issued for small-scale activities which, according to the Respondent, would have not been able to be covered under the mining exception of both

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[352] Resp. Rej., ¶ 334, *citing United Mexican States v. Metalclad Corporation,* 2001 BCSC 664, Supreme Court of British Columbia, Supplementary Reasons for Judgment of the Honourable Mr. Justice Tysoe, October 31, 2001, **Exhibit RL-159**, ¶¶ 71-72.

[353] Resp. Rej., ¶ 335, *citing Electrabel S.A. v Republic of Hungary,* ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, November 30, 2012, **Exhibit CL-102**, ¶ 3.9.

[354] Resp. C-Mem., ¶ 428. The Respondent adds that the Claimant cannot rely on changes to the law as it was prior to the entry into force of the FTA in August 2011 as explained in its objections to the jurisdiction. *See* Section V.B(1)a, *supra*.

[355] Resp. C-Mem., ¶¶ 429-432.

[356] Resp. C-Mem., ¶ 431(a).

[357] Resp. C-Mem., ¶ 431(b), *see also* Ministry of Environment, Map of the Delimited Santurbán Páramo, December 19, 2014, **Exhibit C-562**.

[358] Resp. C-Mem., ¶ 431(c).

Law 1753 and Resolution 2090.[359] The Respondent also argues that the Constitutional Court Judgments C-035 and T-361 were of no relevance to the Claimant's Project because they were not covered by the grandfathering provision. The Respondent states that these decisions were not referring to transparency with respect to investors but rather towards the local community members and the impact on them. In any case, these decisions were consistent with the Constitution and Colombia's legal framework.[360] Finally, the Respondent argues on this point that, while the ANM rejected Minera Vetas' applications to extend the suspension of exploitation for seven Mining Titles, the ANM's decisions were adopted for well-founded reasons, consistent with Judgment T-361 noting that mining was allowed in Restoration Areas of Resolution 2090. Therefore, there was no *force majeure* preventing the Claimant from conducting exploitation activities in those areas.[361]

267. The Respondent also adds in its Rejoinder that Colombia has acted with transparency and none of the Claimant's assertions has merit.[362] Specifically, the Respondent explains that (a) when the Claimant invested, Articles 34 and 36 of the 2001 Mining Code allowed designation of mining exclusion areas, which at that time included the ban on mining in the *páramos*; (b) Colombia never guaranteed or promised any form of stability with respect to environmental laws or investors in the mining sector, in particular; (c) the approval of the assignment of the Claimant's Mining Titles and PMAs was not an endorsement of the Project but rather routine, administrative procedures by which the instruments were changing hands; (d) the Claimant was not exempt from the ban on mining in *páramo* ecosystems introduced by Law 1382; (e) Judgment C-366 did not create uncertainty with respect to the ban on mining in the *páramos* but it specifically deferred its effects for two years to allow the legislature to enact a replacement legislation while Law 1450 was later

[359] Resp. C-Mem., ¶ 431(d).

[360] Resp. C-Mem., ¶ 431(e).

[361] Resp. C-Mem., ¶ 431(f), *citing* ANM, Resolution No. 536 (Real Minera title), August 12, 2019, **Exhibit R-58**, pp. 6-7; ANM, Resolution No. 544 (El Dorado title), August 15, 2019, **Exhibit R-59**, pp. 7-9; ANM, Resolution No. 569 (Santa Isabel Title), August 23, 2019, **Exhibit R-61**, pp. 7-8; ANM, Resolution No. 573 (La Vereda title), August 23, 2019, **Exhibit R-62**, pp. 7-8; ANM, Resolution No. 561 (Los Delirios title), August 23, 2019, **Exhibit R-63**, pp. 6-8; ANM, Resolution No. 602 (La Triada de Oro title), August 27, 2019, **Exhibit R- 64**, pp. 7-8; ANM, Resolution No. 543 (San Alfonso title), August 15, 2019, **Exhibit R-60**, pp. 5-6; ANM, Resolution No. 516 (San Bartolo title), August 9, 2019, **Exhibit R-57**, pp. 5-7.

[362] Resp. Rej., ¶ 336.

enacted resulting in a ban on mining that was uninterruptedly in force since February 2010; (f) the approval of the conversion of the Mining Titles into concession contracts in June 2015 was not an endorsement of the Project; (g) Law 1753 did not create any uncertainty because it also contained a similar grandfathering regime as in Resolution 2090 and Law 1382; (h) Judgment T-361 struck down Resolution 2090 because of the need of community consultations and it did not take issue with the IAVH's method of delimitation but Resolution 2090 continues to be in force; (i) the Claimant has not been deprived of any acquired right under Colombian law, and (j) the Respondent did not fail to take action to combat illegal mining but rather has served eviction orders against the illegal miners carrying out activities within the Claimant's Mining Titles.[363]

268. The Respondent affirms that "Colombia's measures were adopted in pursuit of Colombia's unchanging policy of protecting the páramo, in accordance with Colombia's constitutional and international commitments to do so."[364] The Respondent argues that the Claimant has to demonstrate that the action that would violate the FET standard constitutes an unexpected and shocking repudiation of a policy's purpose or goals or grossly subverts a domestic law or policy for an ulterior motive. The Respondent asserts that the Claimant has not provided evidence to make such finding.[365]

269. In its Rejoinder, the Respondent argues that the *Cargill v. Mexico* tribunal correctly applied the customary international law MST which is also consistent with the ICJ's authoritative explanation of the concept of 'arbitrariness' in the *ELSI* case, in which the ICJ defined arbitrariness as a "willful disregard of due process of law, and act which shocks, or at least surprises, a sense of juridical propriety."[366] The Respondent argues that other tribunals

[363] Resp. Rej., ¶ 336.

[364] Resp. C-Mem., ¶¶ 433-440.

[365] Resp. C-Mem., ¶ 433, *citing Cargill, Inc. v. United Mexican States,* NAFTA Chapter Eleven, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, **Exhibit CL-76**, ¶ 293*; Glamis Gold Ltd. v. United States of America,* UNCITRAL, Award, June 8, 2008, **Exhibit CL-61**, ¶ 626.

[366] Resp. Rej., ¶ 339, *citing Elettronica Sicula S.p.A. (ELSI) (United States v. Italy),* (Judgment) [1989], Report of the International Court of Justice 15, July 20, 1989, **Exhibit RL-71**, ¶ 128.

correctly applying the customary international law MST have applied similar formulations of the concept of arbitrariness.[367]

270. The Respondent also addressed in its Rejoinder the Claimant's claims of 'unreasonableness' and 'arbitrariness' alleging that these are based on distorted facts. Contrary to the Claimant's arguments, Colombia says that the ANM did not willfully disregard the provisions of Resolution 2090 or enforce restrictions on mining activities of Minera Vetas. The Respondent argues that it was not inconsistent with the 'enforcement' of the banning of mining activities when the ANM granted the Claimant's applications to convert the licenses into concession contracts of some of Claimant's Mining Titles without mentioning the grandfathering of the titles that applied to small scale mining.[368] As to the Constitutional Court decisions, these praised the quality of the labor of the Ministry of Environment in fulfilling its mandate under Law 1450 and just directed the Ministry to carry out economic and social studies in order for the delimitation of the *páramo* to take into account the impact on local communities. This, the Respondent says, was not in the interest of mining companies, therefore, it is not an arbitrary treatment towards the Claimant.[369]

271. The Respondent also argues that, contrary to the Claimant's arguments, Colombia has prohibited all mining in *páramo* areas whether it covered mining companies or artisanal and illegal miners with no exception. According to the Respondent, the authorities have issued *amparos administrativos* enjoining any mining activities to be carried out. In any case, the Respondent argues, this does not relate to the reasonableness of the measure but rather it points to the threat to the integrity of the *páramo* by any mining activity.[370]

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[367] Resp. Rej., ¶ 340, *citing Glamis Gold Ltd. v. United States of America*, UNCITRAL, Award, June 8, 2008, **Exhibit CL-61**, ¶ 626; *International Thunderbird Gaming Corp. v. United Mexican States,* UNCITRAL, Award, January 26, 2006, **Exhibit CL-42**, ¶ 194; *Marion Unglaube and Reinhard Hans Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award, May 16, 2012, **Exhibit RL-176**, ¶ 258.

[368] Resp. C-Mem., ¶ 434(a).

[369] Resp. C-Mem., ¶ 434(b).

[370] Resp. C-Mem., ¶ 434(c).

According to the Respondent, it did not deprive the Claimant from any vested right in the Project and as such, there is no compensation payable under Colombian law.[371]

272. Colombia further argues that Red Eagle's claims must fail because none of the allegedly violating measures has any merit. Specifically, the Respondent asserts that (a) the Respondent did not deprive the Claimant of any acquired rights under Colombian law; (b) the delimitation contained in Resolution 2090 was based on extensive technical research carried out by the IAVH, which included a detailed study of social and economic aspects of the *páramo* as a socioecosystem; (c) it was not unreasonable nor arbitrary that the ban on mining in the *páramo* contained in Laws 1382 and 1450 would result in prohibition of a mining town's main activities; (d) the inclusion of transformed areas within the definition of the *páramo* ecosystem was a rational and deliberate methodological decision resulting from the Ministry of Environment's own definition of *páramo* ecosystems and the objective of allowing for the restauration of the ecosystem; (e) deferring the effects of Judgment T-361 until a new delimitation was completed allowed Colombian mining and environmental authorities to rely on the existing delimitation to enforce the ban on mining in the Santurbán *Páramo*; (f) given the social and economic interests involved and due to the complex process, the delimitation of the Santurbán *Páramo* remains in progress,[372] and (g) illegal miners are not permitted and the Respondent has taken steps to combat illegal mining in the Santurbán *Páramo* in general and the Claimant's Mining Titles, in particular.[373]

273. For these reasons, Colombia concludes, "the Tribunal should dismiss Red Eagle's claim based on alleged 'unreasonableness' and 'arbitrariness.'"[374]

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[371] Resp. C-Mem., ¶ 434(d).

[372] *See* Ministry of Environment, "The Administrative Tribunal of Santander Extends Deadline for the New Delimitation of Santurbán", October 9, 2018, **Exhibit R-156**; Administrative Tribunal of Santander, Order, October 9, 2018, **Exhibit R-155**; Request submitted by the Ministry of Environment before the Administrative Court of Santander, July 5, 2019, **Exhibit R-159**; Administrative Tribunal of Santander, Order, December 2, 2019, **Exhibit R-163**; Ministry of Environment, Press Release, December 18, 2019, **Exhibit R-164**; Administrative Tribunal of Santander, Order, May 15, 2020, **Exhibit R-165**; Request submitted by the Ministry of Environment before the Administrative Court of Santander, August 15, 2020, **Exhibit R-167**.

[373] Resp. Rej., ¶ 345.

[374] Resp. C-Mem., ¶ 435.

274. The Respondent affirms that it is a flawed argument to claim that Colombia's measures violated the FET standard because they were 'disproportionate' to the aim of protecting the paramo."[375] First, the autonomous FET standard does not impose a 'proportionality' requirement.

275. Second, the Respondent argues that the Claimant's 'proportionality' argument, if sustainable, would "require the tribunal to second-guess the appropriateness of Colombia's environmental authorities' regulatory judgments and scientific basis on which [the public policy measures] rest[]."[376]

276. Third, the Respondent notes that the Claimant accepts that, to show disproportionality, it would need to show the existence of a less intrusive measure to achieve the same goal, which the Claimant did not do.[377]

277. Fourth, the Respondent argues that the Claimant would need to establish that there were other measures available to achieve the same policy goal. According to the Respondent, the Claimant has "adduced no evidence that any measures short of prohibition on mining activities in the *páramo* would have achieved the aim of protecting the *páramo*."[378]

278. In its Rejoinder, the Respondent argued that the Claimant had not been able to cite to a tribunal decision, *opinio juris* or evidence of State practice which would point to 'proportionality' being a requirement of MST.[379] The Respondent alleges that, in any case, the Claimant has not demonstrated that Colombia's measures were disproportionate. Specifically, according to the Respondent: (a) the Respondent has not 'dismantled the legal framework' in place at the time of the Claimant's investment rather it has applied the existing framework banning mining in *páramo* ecosystems since February 9, 2010 and allowed mining exclusion zones in which mining is banned; (b) the Respondent's mining and environmental authorities through Judgment T-361 are allowed to enforce the mining

[375] Resp. C-Mem., ¶¶ 436-440.

[376] Resp. C-Mem., ¶ 438, citing *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Award, June 8, 2008, **Exhibit CL-61**, ¶ 805.

[377] Resp. C-Mem., ¶ 439.

[378] Resp. C-Mem., ¶ 440.

[379] Resp. Rej., ¶¶ 346-349.

ban until a new delimitation is completed; (c) the Respondent's measures have not prevented the Claimant from accessing the resources of its Mining Titles; (d) the Resolution 2090 was based on economic, social and environmental studies and the Ministry of Environment and the IAVH carefully considered the scientific definition of *páramo* ecosystem with the aim of preserving their integrity, and (e) the Respondent has outlawed illegal mining and has taken steps to remove illegal miners from the Santurbán *Páramo* in general and the Claimant's Mining Titles, in particular.[380]

279. The Respondent asserts that Colombia's measures were not discriminatory.[381] First, even if the discriminatory treatment is capable of violating the MST obligation, the Claimant would need to point to a particular investor or investment difference of treatment on the basis of nationality or another characteristic, which the Claimant has not done.[382]

280. Second, the Respondent argues that the Claimant would also have to show that other investors or investments in the same position have been treated more favorably by measures applied by Colombia which the Claimant has not shown.[383] The comparison with illegal mining is not applicable and Colombia has prohibited illegal mining in the *páramo* area and issued injunctions against such activities in the area of the Claimant's Mining Titles.[384] For these reasons, the Respondent concludes, "Colombia has not breached the FET standard by treating Red Eagle or its investments discriminatorily."[385]

281. In its Rejoinder, the Respondent reiterates that, on the basis of cases such as *Grand River v. USA*, the MST does not prohibit States from discriminating.[386] The Respondent further

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[380] Resp. Rej., ¶ 348.

[381] Resp. C-Mem., ¶¶ 441-444.

[382] Resp. C-Mem., ¶ 442, *citing Glamis Gold Ltd. v. United States of America,* UNCITRAL, Award, June 8, 2008, **Exhibit CL-61**, note 1087. *See also*, Resp. PHB, ¶¶ 53-55.

[383] Resp. C-Mem., ¶ 443.

[384] Resp. C-Mem., ¶ 443, *citing* ANM, Resolution No. 377 (Granting an Amparo with Respect to the Arias Title), September 7, 2016, **Exhibit R-56**; Letter from the Mayor of Vetas to the ANM (Attaching Minutes and Photographs Evidencing the Enforcement of the Amparo Granted Through Resolution 377), April 5, 2017, **Exhibit R-74**; ANM, Resolution 64 (Granting an Amparo with Respect to the Real Minera Title), March 19, 2014, **Exhibit R-52**; ANM, Resolution 64 (Granting an Amparo with Respect to the Real Minera Title), March 19, 2014, **Exhibit R-52**.

[385] Resp. C-Mem., ¶ 444.

[386] Resp. Rej., ¶ 351, *citing Grand River Enterprises Six Nations, Ltd. and others v. United States of America*, UNCITRAL, Award, January 12, 2011, **Exhibit CL-88**, ¶¶ 176, 208; *Elliott Associates, L.P. v. Republic of Korea*, PCA Case No. 2018-51, Submission of the United States of America, February 7, 2020, **Exhibit RL-190**, ¶ 19.

argues that, even if decisions under autonomous FET standards were relevant, as UNCTAD has noted, violations have been found for discrimination when there is 'specific targeting of a foreign investor' that would amount to a 'deliberate conspiracy to destroy or frustrate the investment.'[387] Lastly, the Respondent asserts that it has not failed to take action to fight illegal mining and that it has consistently processed and enforced eviction orders against illegal miners occupying the Claimant's Mining Titles.[388] Further to this argument, the Respondent argues that even if this was true, the Claimant has not identified which illegal miners it is comparing itself to and if these miners are in 'like circumstances.'[389]

282. The Respondent noted that the *Eco Oro* majority found an MST breach but not based on Colombia's failure to prevent illegal mining. The majority of the tribunal in that case noted that illegal mining was an issue of concern, and that Colombia should have taken steps to prevent it. In the *Eco Oro* case, the Respondent argues, the claimant did not argue that Colombia's conduct with respect to illegal mining was discriminatory or a breach of international law. The tribunal in that case, contrary to this one, was not informed as to the situation of illegal mining when it made its decision. The Respondent argues that it has put before this Tribunal submissions and evidence in this regard.[390]

(2) The Tribunal's Analysis

283. The following analysis and conclusions of the Tribunal on whether Colombia breached Article 805 of the Treaty are taken by the majority of the Tribunal formed by President Dr. Rigo Sureda and Prof. Sands, with Mr. Martínez de Hoz dissenting in a separate opinion.

284. For ease of reference, the text of Article 805 of the Treaty is reproduced below:[391]

> 1. Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard

[387] Resp. Rej., ¶ 352, *citing* UNCTAD, Fair and Equitable Treatment 7 (UNCTAD Series on Issues in International Investment Agreements II, United Nations), 2012, **Exhibit CL-267**, p. 100 [pp. 81-82].

[388] Resp. Rej., ¶ 353. *See also*, Resp. PHB, ¶¶ 56-59.

[389] Resp. PHB, ¶ 56.

[390] Resp. PHB, ¶ 59.

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

> 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.

285. Article 805 establishes the Treaty Parties' intention to ensure that fair and equitable treatment and full protection and security are applicable as part of the MST, and that "all customary international law principles that protect the economic rights and interests of aliens" are also applicable. At the same time, the Treaty Parties affirm "for greater certainty" that the concepts of "fair and equitable treatment" and "full protection and security" do not require treatment additional to that required by the MST.

286. There is an ambivalence in the text of Article 805 between the recognition of what is included in the references to the MST and, at the same time, a concern for limiting in paragraph 2 the consequence of such recognition. This ambivalence leads the Treaty Parties to explain that such concepts 'do not require treatment in addition to or beyond that which is required by that standard and do not create additional substantive rights.' Article 805(3) extends this limitation to ensure that breaches of other provisions of the Treaty or of other international agreements do not establish a breach of Article 805.

287. In sum, the Treaty Parties affirm their obligation to accord investments of investors fair and equitable treatment, but without extending the treatment beyond the MST. This conclusion raises the question of the nature of the relationship between fair and equitable treatment as linked by the Treaty to the minimum standard of treatment. After a review of case law, the *Waste Management v. Mexico* tribunal offers the following approach:

> Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest 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 –as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.[392]

288. In this respect, the interpretation of the MFN clause agreed by the Treaty Parties is of relevance. It provides as follows:

> 30. The text of the binding Decision of the Canada-Colombia Joint Commission Interpretation of Certain Chapter Eight Provisions (the 'binding interpretation') reflects the Parties' joint understanding of the provision:
>
> > 2. National Treatment and Most-Favoured-Nation Treatment
> >
> > (a) Whether treatment is accorded in 'like circumstances' under Article 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.
> >
> > (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.
>
> 31. This binding interpretation confirms that Article 804 cannot be used to alter the substantive content of the minimum standard of treatment obligation of Article 805, or to broaden the treatment

[392] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/03, Award, April 30, 2004, **Exhibit CL-32**, ¶ 98.

> beyond treatment that is required by the customary international law minimum of standard of treatment of aliens.[393]

289. The Parties to the Treaty agreed that the FET is not self-standing and that changes in their standard agreements reflected their intent. They further agreed that the MST cannot be extended or broadened by the operation of the MFN clause.

290. In its arguments, the Claimant appears not to have had full regard to these provisions, the effects of which are to provide that the norm by reference to which the Respondent's conduct is to be assessed is FET as part of the MST, and not the FET standard applied alone. As noted above, the conduct of the State has to reach certain level in order for it to rise to a breach of the MST. One element that is lost in the arguments of the Claimant is, for the sake of completeness, addressed below.

291. The Claimant argues that the breach of the MST is based on: (a) a frustration by the Respondent's actions of the Claimant's legitimate expectations; (b) a lack of transparency in the actions of the State; and (c) actions by the State which are said to be arbitrary, irrational or disproportionate or discriminatory.

(i) Legitimate expectations of the investor

292. At the outset, it is necessary to consider whether the customary MST protects the Claimant's legitimate expectations. As with any rule of customary international law, it is necessary to consider whether the existence of such a rule is supported by the existence of state practice and *opinio juris*. Previous decisions by international courts and tribunals may, in some instances, provide helpful guidance in assessing the possible existence of a customary rule, but such decisions cannot themselves be determinative.

293. The majority of the Tribunal is of the view that on the record before it there is insufficient evidence to support the proposition that the doctrine of legitimate expectations, which forms a part of the FET standard in other treaties, is part of the customary MST. The Claimant has not provided the Tribunal with any evidence of either state practice or *opinio juris* to support the existence of such a rule, and the Tribunal is aware of none. The most

[393] Canada's Non-Disputing Party Submission, ¶¶ 30-31.

that can be said is that a State's failure to fulfil a promise made to an investor *may* amount to a breach of the customary MST if it can be shown that the State's actions fall foul of the usual standard outlined above. Legitimate expectations do not, however, receive any privileged treatment under the MST.

294. In this respect, the majority of the Tribunal agrees with the awards of tribunals which have considered the MST as it is established in the context of NAFTA. As explained by the tribunal in *Glamis Gold v. United States*, the MST may be breached where the claimant demonstrates the existence of "at least a quasi-contractual relationship between the State and the investor, whereby the State has purposely and specifically induced the investment."[394] It bears repeating, however, that the mere existence of such a relationship does not necessarily or as such mean that there has been a breach of the MST.

295. In its submissions, the Claimant has relied heavily on the award of the tribunal in *Tecmed v. Mexico*. In that case, the tribunal suggested that the investors have a wide range of legitimate expectations relating to the stability and consistency of a host State's regulatory framework, without the need to show the existence of a representation, the existence of a reasonable expectation or reliance on that representation. The *Tecmed* tribunal also stated that a State's failure to fulfil such expectations would amount to a breach of the customary MST.[395] It is not a surprise that the award in *Tecmed* is often cited by claimants in investor-state disputes, in seeking to claim the broadest possible protection under the relevant investment treaty. With respect to the tribunal that sat in *Tecmed*, however, the majority of this Tribunal is very far from being persuaded that this view of the MST is correct or even plausible. As explained above, that award relied on no evidence of state practice or *opinio juris* to support its conclusion as to the existence of such a customary rule, and it appears there is none. It is striking that the *Tecmed* standard is now rarely (if ever) followed by

[394] *Glamis Gold Ltd v. United States of America,* UNCITRAL, Award, June 8, 2009, **Exhibit CL-61**, ¶ 766.

[395] *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, **Exhibit CL-31,** ¶ 154.

tribunals and has been strongly criticized in explicit terms by the annulment committee in *MTD v. Chile*.[396] The *Tecmed* award is not one on which reliance may be placed.

296. The issue for the majority of the Tribunal in the present case is whether any of Respondent's statements or acts could be described as giving rise to a quasi-contractual relationship such that the Respondent may have breached the customary MST under Article 805 of the Treaty. Much of the Claimant's claim relies on general expectations of stability and consistency which are not supported by any specific representation or promise on the part of the Respondent. For the reasons explained above, these aspects of the claim must fail.

297. The majority of the Tribunal refers here to the evidence of the expectations which the investor had at the time it made the investment. When the investor bought the eleven Mining Titles, the *páramo* mining ban was already in place, in effect and known to the Claimant. The Claimant could not have expected that the large-scale Vetas Project would be permitted because: (a) mining had already been banned as of February 9, 2010; (b) the Project was never grandfathered; (c) Law 1450 continued the ban on mining contained in Law 1382 banning all mining without exceptions or grandfathering; (d) Colombia's authorities enforced this ban with respect to the Claimant's Mining Titles at all times; (e) the Claimant did not engage in 'mining' because it only conducted exploration activities; (f) Article 46 of the 2001 Mining Code did not 'stabilize' the laws applicable to the Claimant's mining projects; (g) the approval of the assignment of the Mining Titles to Claimant or non-binding opinions concerning conversion requests for some exploitation licenses did not amount to any form of approval of the Project; (h) the Respondent did not make any specific representations to the Claimant that a large-scale project would be permitted or exempted from prohibition; (i) neither the Ministry of Environment nor IAVH stated that the delimitation of the Santurbán *Páramo* would be identical to the area that the CDMB chose to protect as part of the Santurbán Park; (j) a reasonable diligent investor would have studied the Ministry of Environment's rejection of the Eco Oro environmental license request in 2011, and (k) no reasonable investor would have assumed that because a

[396] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile,* ICSID Case No. ARB/01/7, Decision on Annulment, March 21, 2007, ¶¶ 67-68.

State has not been able to fully prevent illegal mining activities from being carried out, the restrictions on mining in the *páramo* areas would not apply to the Project.[397]

298. However, the Claimant also argues that it relied on a number of alleged representations from the Respondent. In the majority of the Tribunal's view, the evidence of such reliance is not substantiated and none of these alleged representations may be said to give rise to the quasi-contractual relationship which the Claimant needs to establish in order to show a breach of the customary MST. This is because:

> (i) the visits to Canada of Colombian officials between 2009 and 2013 in order to attract Canadian miners amounts to no more than a generalized factual statement articulated without any link to the investor;
>
> (ii) the statement that "the Respondent mining laws provided a clear framework to facilitate and promote mining investments"[398] is the expression of a favorable opinion by the Claimant and not a commitment by the Respondent; and
>
> (iii) the fact that State officials attended meetings with the Claimant where the Project was discussed is immaterial.

299. In the absence of any evidence as to what – if anything – was said or offered in these meetings, the majority of the Tribunal plainly cannot infer or assume that any representations were made, or that reliance was placed upon them.

300. The majority of the Tribunal is particularly troubled by the absence of specific evidence on the record that may demonstrate that the Claimant actually relied on, or was induced by, the alleged representation. Evidence of such reliance or inducement is an essential part of any claim based on legitimate expectations, whether an MST or FET claim, as it demonstrates the causal connection between the representation and loss.[399] This evidential

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[397] Resp. Rej., ¶ 329. *See also* Witness Statement Mr. Juan Pablo Franco, ¶ 24; Witness Statement of Ms. Brigitte Baptiste, ¶ 30.

[398] Cl. Reply, ¶ 430.

[399] *Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, July 30, 2010, **Exhibit RL-100**, ¶ 226; *Ioan Micula and others v. Romania I*, ICSID Case No. ARB/05/20, Award, December 11, 2013, **Exhibit CL-106**, ¶¶ 688 and 722.

failure alone is fatal to the Claimant's MST claim, insofar as it is based on legitimate expectations.

301. Based on the foregoing, the majority of the Tribunal finds that the Claimant has not demonstrated the existence of a legitimate expectation, and certainly not the existence of a quasi-contractual relationship. The Claimant's claim that there has been a breach of the MST based on the existence of legitimate expectations therefore fails.

(ii) Lack of transparency

302. In arguing that the Respondent acted with a lack of transparency, the Claimant relies heavily on its allegation that the Respondent failed to respect its legitimate expectations. For the reasons outlined above, the majority of the Tribunal has concluded that the Claimant has failed to demonstrate that any legitimate expectations arose, or were relied upon. Such arguments therefore cannot lend any support to the claim that the Respondent has failed to act with transparency.

303. In support of its argument on transparency, the Claimant has also relied on (i) the existence of a preliminary delimitation of the *páramo* before the final delimitation in Resolution 2090; (ii) Judgment C-035 declaring Law 1753 to be unconstitutional, and (iii) Judgment T-361 of the Constitutional Court annulling Resolution 2090 and ordering a new delimitation of the *páramo*. The majority of the Tribunal has concluded that none of these arguments supports the existence of a lack of transparency on the part of the Respondent.

304. With regard to (i), the public availability of *páramo* maps in draft form (and clearly marked as such) is an indication of openness rather than obscurity. It is difficult to conceive how the provision of *more* information whilst the final delimitation is being confirmed could ever lead to the conclusion that a host State has acted with a lack of transparency. With regard to (ii) and (iii), the list of items in support of the argument of lack of transparency includes judgments of Colombian courts, including the Constitutional Court. These are public judgments that serve to confirm transparency in the legal system. At no time has the Claimant asserted that it had no access to the courts or referred to any failures of due process. The system established to protect the *páramos* is obviously complex, which requires the investor to pay close attention and learn how it works. The Treaty does not

prohibit complexity. Rather, it imposes on an investor the need to act with care and due diligence.

305. In conclusion, the argument of lack of transparency is bound to fail, and the majority of the Tribunal so concludes.

(iii)Arbitrary and unreasonable conduct

306. The majority of the Tribunal agrees with the tribunal in *EDF v. Romania* that arbitrary or unreasonable conduct may be demonstrated in a number of ways, including measures which harm the interests of the Claimant but do not have a legitimate purpose, measures that are taken for reasons other than those put forward, and decisions taken in willful disregard of due process and proper procedure.[400] However, in this case, the Claimant has failed to provide sufficient evidence of any of these elements of arbitrariness or unreasonableness.

307. At the outset, it must be emphasized again that the measures in issue did not deprive the Claimant of any acquired right. The Claimant had planned to carry out a mining project in the *páramo* area, but was never granted the legal right to do so. The Claimant's argument that the Respondent acted arbitrarily or unreasonably due to a failure to respect its right under domestic law therefore fails.

308. Contrary to the Claimant's arguments, the majority of the Tribunal finds that Resolution 2090 was based on extensive technical research, including the social and economic aspects of the *páramo*.[401] The fact that the Respondent entered into a deliberative process considering a variety of interests and factors does not show that it failed to act for a legitimate purpose; to the contrary, the existence of this exercise demonstrates that the Respondent gave meaningful consideration as to how to weigh these competing economic, environmental and social interests to produce a balanced policy. There are almost an

[400] *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, October 8, 2009, **Exhibit CL-249**, ¶ 303.

[401] *See* Resp. C-Mem., ¶¶ 272-278 and 434(b); Resp. Rej., ¶¶ 154-176 and 345; Witness Statement of Ms. Brigitte Baptiste, ¶ 53; Ministry of Environment, *Memoria técnica para la gestión integral del Territorio para la conservación del Páramo Jurisdicciones – Santurbán – Berlín. Incorporación de aspectos sociales y económicos*, December 19, 2014, **Exhibit R-96**; IAVH, *Aportes a la delimitación del páramo*, 2014, **Exhibit R-92**, Chapter 6 and pp. 62-63.

infinite number of other ways in which this balance could have been reached, some of which may have been less harmful to the Claimant's economic interests. However, the mere existence of these alternatives does not, in any way, undermine the legitimacy of the conclusion adopted by the Respondent. As long as the Tribunal is satisfied that the Respondent has acted for a legitimate purpose – which in this case, it very plainly has, as the Tribunal is unanimous in concluding,[402] then it has no business questioning how the Respondent has chosen to balance these competing interests (unless it can be shown that the choice was made in an arbitrary or discriminatory way).

309. In this case, the exercise of that choice cannot, on any reasonable basis, be said to have been arbitrary. The Respondent was plainly involved in a difficult exercise, in seeking to act to protect the environment and to do so by means which are reasonable and proportionate. In determining whether measures taken by a State are arbitrary to the point of being shocking, a tribunal is bound to be sensitive to the real-world difficulties of government decision-making in the face of legitimate objectives that may pull in different directions. In the search for balance, and in the face of competing pressures, different arms of the same government may give expression to different and potentially conflicting priorities, and over time the direction taken may change. This is particularly the case when the protection of the environment or human health is at stake. On the basis of the evidence before it, the majority of the Tribunal concludes that the measures taken by the Respondent do not come close to being characterized as arbitrary, were genuinely intended to protect the environment and were reasonable and proportionate on the basis of the objectives they sought to achieve. To be clear, the majority does not consider that the unpredictability or instability identified in the Dissenting Opinion (in relation to a legitimate expectation) may be said to have crossed a line of arbitrariness. To the contrary, it is inevitable that on a matter of complexity, such as the one in the present case, a degree of uncertainty is inevitable, as the path to be taken is considered and ultimately determined.

310. This conclusion is not affected by the possible existence of illegal artisanal mining in the *páramo* area. As discussed below in relation to the Claimant's argument on discrimination,

[402] *See* Dissenting Opinion of Mr. Martínez de Hoz, ¶ 158.

the prohibition on mining did not discriminate between the Claimant and artisanal mining, and the evidence shows that the Respondent has taken steps to enforce eviction orders against artisanal miners. That some illegal mining may still take place despite the Respondent's efforts merely serves to demonstrate the practical difficulties the Respondent faces in seeking to protect the *páramo*. It does not, however, in any way throw any doubt on the legitimacy of its purpose, or the authenticity of the environmental concerns it sought to address.

311. For these reasons, the majority of the Tribunal concludes that the Claimant has not proven that the conduct of the Respondent was unreasonable or arbitrary.

(iv) Proportionality

312. The Claimant's arguments on proportionality overlap to a large extent with its arguments on arbitrariness and unreasonableness, particularly in relation to (i) the purpose of the balance struck by the Respondent between competing interests, and (ii) the actions being taken against artisanal illegal mining. The majority of the Tribunal therefore repeats its conclusions on these issues.

313. With regard to (i), the majority of the Tribunal is satisfied that the Respondent was pursuing legitimate public policy objectives when it banned mining in the *páramo*, as demonstrated by the extensive social, economic and environmental studies carried out.[403] Further, and importantly, the Respondent did not go further than was necessary to pursue its objectives. The mining ban is limited to the *páramo* area, and the Claimant is still able to access the resources within its Mining Titles which are located outside of the *páramo* ecosystems. It is notable that the Claimant has not identified any alternative measures which would have achieved the same level of environmental protection whilst having a lesser effect on the Claimant's economic interests.

314. With respect to (ii), the Respondent has taken, and continues to take steps to remove illegal miners from the *páramo*. It cannot reasonably be said, on the basis of the evidence in the record, that the Respondent has not sought to take measures to end illegal mining activity.

[403] IAVH, *Aportes a la delimitación del páramo*, 2014, **Exhibit R-92**, p. 16.

Accordingly, it is difficult to see how illegal mining could support the Claimant's argument that the measures adopted by the Respondent were disproportionate.

(v) Discrimination

315. The claim of discrimination for favoring the illegal artisanal miners ignores that they are small-scale miners. They cannot be said to be in like circumstances to the large- or medium-scale mining of the Vetas Project. In any case, the Respondent asserts that it has enforced eviction orders against the illegal miners, a fact not rebutted by the Claimant.[404] No reasonable investor would have assumed that because a State has not been able to fully prevent illegal mining activities from being carried out, the restrictions on mining in the *páramo* areas would not apply to the Project.[405]

316. Having considered all the circumstances, and carefully considered all of the evidence before it, the majority of the Tribunal concludes that the Respondent has not acted in breach of the MST. The conduct of the Respondent did not rise to the level required to breach the MST as interpreted by the Parties to the Treaty and understood by the Tribunal.

C. WHETHER COLOMBIA EXPROPRIATED CLAIMANT'S INVESTMENT

(1) The Parties' Positions

a. The Claimant's Position

317. The Claimant alleges that Colombia has unlawfully expropriated Claimant's investments, contrary to the requirements set in Article 811 of the Treaty by substantially depriving Claimant of the economic benefit, enjoyment and value of their returns under the Mining Titles.[406]

[404] *See* Resp. Rej., ¶ 410, *citing* ANM, Resolution No. GSC 562, September 20, 2018, **Exhibit R-154**, pp. 8-9; ANM, Resolution No. GSC-ZN 619, October 18, 2018, **Exhibit R-157**.
[405] *See* Resp. Rej., ¶ 329.
[406] Cl. Mem., ¶¶ 164-192.

(i) Economic impact, interference with legitimate expectations and character of the measure

318. The Claimant argues that, in determining whether Colombia violated its obligations under Article 811 of the Treaty, the Tribunal must first determine whether an expropriation occurred. The Claimant adds that under international law an investment is expropriated when: "seizure, confiscation, nationalization, sequestration, condemnation – and an even larger number of ways that property can be expropriated. Expropriation can be direct, indirect, regulatory, creeping, *de facto*, or a government act may be 'tantamount to,' 'equivalent to,' or 'have similar effects as' expropriation."[407]

319. According to the Claimant, international tribunals have recognized that a concession or other administrative rights or permits may be object of expropriation[408] and since the measures of Colombia were not an outright seizure of the Mining Titles, the Claimant's claim under Article 811 of the Treaty is for the indirect expropriation of the Mining Titles.[409] In its Post-Hearing Brief, the Claimant also notes that in *Eco Oro v. Colombia*, where the claimant's rights were substantially similar, the majority of the tribunal rejected Colombia's identical argument and affirmed that the claimant's rights in the ten titles constituted vested property rights capable of being expropriated.[410]

320. Therefore, the Claimant says, there are three factors to consider: (i) the economic impact of the measure, (ii) interference with 'legitimate expectations', and (iii) the 'character of the measure.'[411]

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[407] Cl. Mem., ¶ 166, *citing* C. Dugan & D. Wallace, et al., Investor-State Arbitration, 2008, **Exhibit CL-56**, p. 450.

[408] Cl. Mem., ¶ 167, *citing Phillips Petroleum Company Iran v. Islamic Republic of Iran*, Iran-U.S. Claims Trib., Case No. 39, Chamber 2, Award No. 425-39-2, June 29, 1989, **Exhibit CL-11**, ¶ 105. *See also* Cl. NDP Comments, ¶¶ 53-56.

[409] Cl. Mem., ¶ 168.

[410] Cl. PHB, ¶ 79, citing *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, September 9, 2021, ¶¶ 420, 439.

[411] Cl. Mem., ¶ 171, *citing Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Non-Disputing Party Submission of Canada, February 27, 2020, **Exhibit CL-38**, ¶ 9. *See also* Cl. NDP Comments, ¶ 57.

321. With respect to the 'economic impact' the Claimant alleges that, to constitute an expropriation, the effect of the measure must be to substantially deprive the investor of the economic benefit, enjoyment or value of the investment.[412]

322. According to the Claimant, it is "[d]ecisive, in assessing whether an expropriation has taken place is a substantial deprivation, [it] is the loss of economic value or economic viability of the investment."[413] In the present case, the Claimant says, the following measures deprived the Claimant of its rights under the Mining Titles: (i) Resolution 2090 adopted a flawed delimitation of the Santurbán *Páramo*, (ii) Judgment C-035 imposed the general ban on mining in the paramos without exceptions, (iii) ANM's restricted Minera Vetas from mining in nine of the eleven Mining Titles that overlap the Santurbán *Páramo*, and (iv) Judgment T-361 declared Resolution 2090 unconstitutional and ordered a new delimitation.[414] The Claimant asserts that the stabilization commitments under Article 46 of the Mining Code further support a finding of expropriation of Claimant's investment.[415]

323. On the interference with "legitimate expectations", the Claimant argues that Annex 811(2)(a)(ii) of the Treaty also refers to "the extent to which the measure or series of measures interfere with distinct, reasonable investment-backed expectations" as an additional factor in the balancing test for expropriation. The Claimant says this is relevant in cases such as this one where there has been a stabilization commitment. The Claimant argues that the acquisition of the Mining Titles and the reliance on continuation of the applicable regime, together with the approval from the relevant government agencies, was the basis for the Claimant to continue investing in the development of the Project.[416]

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[412] Cl. Mem., ¶ 172, *citing Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award, July 26, 2007 , **Exhibit CL-53**, ¶ 120, *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, August 30, 2000 **Exhibit CL-19**, ¶ 111, *Phelps Dodge Corp. and Overseas Private Investment Corp. v. Islamic Republic of Iran*, (1986) 10 Iran-US CTR 121, at p. 130, **Exhibit CL-142**, *Tecnicas Medioambientales Tecmed S.A. v. United Mexican State*s, ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003, **Exhibit CL-31**, ¶ 116; *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, February 17, 2000, **Exhibit CL-17**, ¶ 71. *See also* Cl. NDP Comments, ¶ 60; Cl. Opening, slide 98.

[413] Cl. Mem., ¶ 174.

[414] Cl. Mem., ¶ 175.

[415] Cl. Mem., ¶ 176.

[416] Cl. Mem., ¶ 179; Cl. Opening, slide 99.

324. In its Reply, the Claimant argues that it is uncontested by Colombia that the Claimant had the vested right to explore and exploit the Mining Titles once (i) the mining authority approved the transfer of the mining titles governed under the 1988 Mining Code, or (ii) when the Mining Titles governed by the 2001 Mining Code were registered by the Respondent in the national registry.[417] That right, according to the Claimant, "was not conditioned on the acquisition of any subsequent license."[418] Indeed, the Claimant adds, the Respondent does not raise any objection that the Mining Titles constitute an investment under the Treaty, nor does it raise a jurisdictional objection in that regard.[419] The Claimant understands that the Colombian law distinguishes between vested rights granted by a mining title's registration or by the transfer of title to explore and exploit, and the ability to exercise that right through obtaining applicable environmental permits and approvals of a PTO.[420]

325. The Claimant contends that a key factor in its decision to invest was the existing provisions regarding legal stability at the time of the concession contract, as envisioned by Article 46 of the Mining Code, which ensures that laws and conditions applicable to mining titles do not change during the duration of a title, unless they are more beneficial to the investor than pre-existing laws:

> [The] concession contract, including any extensions granted therewith, shall be governed by the mining laws in force at the time in which the contract is perfected, without exception. If the laws are subsequently modified or amended, the new laws will be applicable to the concessionaire only if they extend, confirm, or improve its prerogatives.[421]

326. In light of these conditions, the Claimant acquired vested rights in Mining Titles in the Vetas region, namely, one exploration license (San Bartolo), eight exploitation licenses

[417] Cl. Reply, ¶ 497. *See also* First Martínez Report, ¶¶ 37-38.

[418] Cl. Reply, ¶ 497.

[419] Cl. Reply, ¶ 495.

[420] Cl. Reply, ¶ 497, *citing* First Martínez Report, ¶¶ 36, 44, 95.

[421] Cl. Reply, ¶¶ 498-500, *citing* Mining Code of 2001, **Exhibit C-570**, Article 46. *See also* First Martínez Report, ¶¶ 4, 23-25.

(Arias, El Dorado, la Peter, Los Delirios, Real Minera, San Alfonso, and Santa Isabel), and two concession contracts (La Tríada de Oro and La Vereda).[422]

327. Following the transfer of the Mining Titles and its approval by the mining authority, the Claimant continued investing, also seeking the conversion of some Mining Titles from exploration or exploitation to concession contracts by exercising preferential rights after acquiring the majority of the Mining Titles.[423]

328. Specifically, in February 2011, after exercising its preferential rights over Real Minera, the Claimant executed its first concession contract with the National Institute of Geology and Mines (INGEOMINAS), granting it exploration and exploitation rights over the Real Minera title for a period of twenty years, which was subsequently registered with the NMR on 24 January 2012.[424] Similarly, in March 2012, Colombia confirmed the Claimant's right to convert the La Peter exploitation license into a concession contract.[425] Finally, from March 2012 through October 2013, the Claimant contends that Colombia registered the following Mining Titles: Arias, San Bartolo, San Antonio, La Vereda, San Alfonso, and La Tríada de Oro.[426] In its Reply, the Claimant introduces the following table, indicating the various dates of approval and registration for each of its Mining Titles.[427]

[422] Cl. Reply, ¶ 501; Cl. Mem., Figure 1. *See also* Resp. C-Mem., ¶ 129.

[423] Cl. Reply, ¶ 502, *citing* First Vásquez Statement, ¶ 24.

[424] Cl. Reply, ¶ 502, *citing* Concession Contract of the Title No. 0050-68, Real Minera, February 11, 2011, **Exhibit C-5**. *See also* First Vásquez Statement, ¶¶ 21, 24.

[425] Cl. Reply, ¶ 502, *citing* INGEOMINAS, Favorable Opinion (*Concepto Favorable*) to Proffer a Concession Contract for Title No. 17215, La Peter, March 30, 2011, **Exhibit C-741**.

[426] Cl. Reply, ¶ 502.

[427] Cl. Reply, ¶ 502.

Mining Title	Approval of transfer	Date of Registration
Real Minera (0050-68)	May 21, 2010	June 9, 2010
La Peter (17215)	July 13, 2010	August 10, 2010
Santa Isabel (0308-68)	July 13, 2010	August 10, 2010
El Dorado (0135-68)	August 31, 2010	December 2, 2010
Los Delirios (13604)	October 28, 2010	February 2, 2011
Arias (161-68)	December 10, 2010	February 17, 2011
San Bartolo (0032-68)	March 26, 2012	November 7, 2012
San Antonio (13477)	April 18, 2012	February 12, 2013
La Vereda (356-68)	April 12, 2012	February 12, 2013
San Alfonso (0137-68)	April 18, 2012	September 17, 2013
La Tríada de Oro (16725)	April 18, 2012	October 18, 2013

329. The Claimant replies to the Respondent's argument that further licenses were needed in order to have sufficient rights to constitute an investment capable of expropriation. The Claimant argues that it had secured both environmental licenses and PTOs under Decree 2655, which provides that an environmental license is implicit to the acquisition of the mining titles.[428] Six of the Mining Titles acquired by Red Eagle had PMA's approved by Colombia, and following the Claimant's acquisition, the CDMB transferred four of those PMA's to the Claimant, while the transfer of two is still pending. With respect to the PTOs, some of the Claimant's contracts had already approved PTOs, and the others were submitted in due time.[429]

330. The Claimant maintains that the Respondent was aware of its plan to develop a large-scale, integrated mining project, including after requesting and receiving approval from Colombia for the suspension of exploitation activities in eight of its Mining Titles.[430]

[428] Cl. Reply, ¶¶ 503-504, Cl. Mem., note 19.

[429] Cl. Reply, ¶ 504, *citing* Second Martínez Report, ¶ 95.

[430] Cl. Reply, ¶ 505, *citing* INGEOMINAS, Resolución GTRB No. 0158, Mediante la cual se resuelve una solicitud de suspensión de actividades del título minero 0135-68 El Dorado, August 31, 2009, **Exhibit C-495**; Res. GTRB No. 0205 Regarding petition of suspension of activities of exploitation license No. 17215, October 22, 2010, **Exhibit C-357**; Servicio Geológico Colombiano, Resolución GTRB No.054, Mediante la cual se resuelve una solicitud de suspensión de actividades del título minero 13604 Los Delirios, April 12, 2012, **Exhibit C-496**; Servicio Geológico Colombiano, GTRB Resolution No. 060, April 17, 2012, **Exhibit C-397**; Servicio Geológico Colombiano, GTRB Resolution No. 063 requesting suspension of 0161-68, April 18, 2012, **Exhibit C-399**; Servicio Geológico

331. Specifically, the Claimant argues that it voluntarily undertook the obligation to: (i) not use mercury; (ii) not discharge cyanide- and mercury-contaminated solids into the Vetas River; (iii) dismantle the plants within the watercourse and protection rounds of the nearby water sources; and (iv) redefine mine tailings disposal sites in areas sufficiently distant from the water sources. Similarly, the Claimant undertook additional obligations of prevention, mitigation, correction, compensation and management of the environmental effects that were applicable once the exploitation activities in the Mining Titles resumed.[431]

332. Despite this undertaking, the Claimant asserts that it was unable to advance the Project because Colombia's unlawful delimitation of the *páramos* area rendered the Project unviable.[432] According to the Claimant, "to the extent that further regulatory authorizations were possible, that does not mean that Respondent is exonerated from expropriating those undeniably held by Claimant without any compensation. Indeed, such a holding would render the expropriation provision of the Treaty meaningless."[433]

333. In response to Colombia's argument that for the State measures to amount to expropriation the Claimant would need to prove that the measures deprived the investment of its economic value and that the enjoyment of the investment had effectively been neutralized,[434] Red Eagle argues that this is an "arbitrary threshold" that would require a claimant to establish the loss of the full value of its investment.[435] Citing *Bear Creek v. Peru*, the Claimant argues that the measures do constitute indirect expropriation because they had an adverse effect on the economic value of its investment, even if, as numerous

Colombiano, GTRB Resolution No. 64 Regarding suspension extension of activities within the exploitation License No. 13477, April 18, 2012, **Exhibit C-400**; Agencia Nacional de Minería, Resolución No.0517, Mediante la cual se resuelve una solicitud de suspensión de actividades del título minero 0050-68 Real Minera, May 21, 2014, **Exhibit C-644**; Agencia Nacional de Minería, Resolución No.782, Mediante la cual se resuelve una solicitud de suspensión de actividades del título minero16725 La Triada de Oro, August 21, 2014, **Exhibit C-645**. *See also* Witness Statement of Mr. Juan Franco, ¶ 16.

[431] Cl. Reply, ¶ 508, *citing* Witness Statement of Mr. Juan Franco, ¶ 21. *See also* First Witness Statement of Mr. Juan Manuel Pinzón, ¶¶ 15-16, 24.

[432] Cl. Reply, ¶ 509.

[433] Cl. Reply, ¶ 511.

[434] Resp. C-Mem., ¶ 459.

[435] Cl. Reply, ¶ 470.

other tribunals have recognized, the full value of the investment was not lost.[436] Rather, the applicable standard for the determination of whether indirect expropriation has occurred, as recognized by other tribunals, is that of a "substantial deprivation", whether the measures expropriated the entirety of the investment or just a part of it.[437]

334. In the present case, the Claimant argues that it was the Respondent's measures that in fact substantially deprived the Project of its value and not the falling gold prices or the allegedly insufficient mineral resources, as Colombia asserts based on the 2014 Independent Technical Report by SRK.[438] Instead, the Claimant recalls that the report concluded that there had been insufficient exploration work to allow for a conclusion on the wealth of mineral resources in the area, but did confirm "the existence of epigenetic lode gold-silver mineralization."[439]

335. The report confirmed that the area contained 123,000 ounces of indicated gold resources and 289,000 ounces of inferred gold resources (or 412,000 of indicated and inferred gold resources).[440] It further estimated that the area contained 1,090,000 ounces of indicated and inferred silver resources.[441] SRK also indicated that, even though resource estimation is

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[436] Cl. Reply, ¶¶ 471-472, *citing Bear Creek v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, November 30, 2017, **Exhibit CL-127**, ¶¶ 359, 376, 415; *Ampal-American Israel Corp. et al. v. Arab Republic of Egypt,* ICSID Case No. ARB/12/11, Decision on Liability, February 21, 2017, **Exhibit CL-243**, ¶¶ 179-180; *Middle East Cement v. Arab Republic of Egypt,* ICSID Case No. ARB/99/6, Award, April 12, 2002, **Exhibit CL-27**, ¶¶ 138-148; *Waste Management, Inc. v. United Mexican States*, NAFTA Chapter Eleven, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, **Exhibit CL-32**, ¶ 141.

[437] Cl. Reply, ¶¶ 472-474, *citing Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award, July 7, 2011, **Exhibit CL-266**, ¶ 144; *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, August 30, 2000, **Exhibit CL-19**, ¶ 103; *AIG Capital v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, October 7, 2003, **Exhibit CL-241**, ¶ 10.3.1; *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, November 8, 2010, **Exhibit CL-84**, ¶ 408. *See also Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, December 14, 2012, **Exhibit CL-103**, ¶¶ 396-397; *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Interim Award, June 26, 2000, **Exhibit ¶ RL-75**, 102; *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, July 8, 2016, **Exhibit CL-261**, ¶ 284; *GAMI Investments Inc. v. United Mexican States*, UNCITRAL, Final Award, November 15, 2004, **Exhibit RL-82**, ¶ 125.

[438] Cl. Reply, ¶¶ 519-520; Resp. C-Mem., ¶ 463.

[439] Cl. Reply, ¶ 521, *citing* SRK Consulting, Independent Technical Report on the Vetas Gold Project, Santander Department, Republic of Colombia, April 29, 2014, **Exhibit C-561**, p. 7.

[440] Cl. Reply, ¶ 522 *citing* SRK Consulting, Independent Technical Report on the Vetas Gold Project, Santander Department, Republic of Colombia, April 29, 2014, **Exhibit C-561**, p. 94. *See also* Cl. Reply, note 1150.

[441] Cl. Reply, ¶ 522.

often more conservative, there was "significant potential for expanding […] to support the development of a large-scale project."[442]

336. The Claimant further contends that the exogenous factors referenced by the Respondent, including the evolution of gold prices and the exploration results indicated in the 2014 SRK Report, cannot account for the fall in Red Eagle's share price, since there was considerable market uncertainty also experienced by other Colombian gold companies operating in the vicinity due to the government's series of "back-and-forth, arbitrary, flawed, and unlawful measures that ultimately rendered the Project unviable."[443]

337. Relying on the SRK expert report, the Claimant argues that Colombia's mining prohibition resulted in the Vetas Gold Project losing access to a significant majority of the gold resources that had been identified by exploration work, including:

- 66% of the total Mineral Resource of gold disclosed in the SRK 2014 Technical Report is within the Páramo restriction, including 80% of the of gold disclosed in the SRK 2014 Technical Report in the Real Minera title.

- 77% of the contained gold disclosed in the SRK 2014 Technical Report in the 3 most mineral rich mining titles are within the Páramo and restricted from mining.

- 100% of the Indicated class Mineral Resources disclosed in the SRK 2014 Technical Report are within the Páramo and restricted from mining. Those were the Mineral Resources that had been identified with the highest level of confidence (sufficient to undertake a Pre- or Feasibility Study) and that could have supported the further development of the Project.[444]

338. On the character of the measure or series of measures provided in Annex 811(2)(a)(iii) of the Treaty, the Claimant argues that Colombia deprived it of its rights to develop the Mining Titles through a series of measures which, taken cumulatively, had a clear

[442] Cl. Reply, ¶¶ 524-525, *citing* SRK Report, ¶ 21.

[443] Cl. Reply, ¶¶ 526-527.

[444] Cl. Reply, ¶ 527, *citing* SRK Report, ¶ 21.

expropriatory effect and were adopted following a pattern of manifest repudiation of the Claimant's vested rights, arbitrarily, with lack of transparency and with disregard of Claimant's legitimate expectations.[445]

339. The Claimant contends in its Reply that Annex 811(2)(a)(ii) of the FTA providing that "the extent to which the measure or series of measures interfere with distinct, reasonable investment-backed expectations" is relevant, particularly in cases where the investor relied on a regulatory regime that contained stabilization commitments.[446] Citing *Bear Creek v. Peru*, the Claimant argues that, even in the absence of specific stabilization commitments, the investor is entitled to rely on governmental licenses and permits.[447] Similarly, other tribunals have held that reasonable expectations are not necessarily based on explicit "specific commitments" or "specific promises" made by the State,[448] but can also be based on statements made by government officials, implicitly or explicitly, or conditions offered by the State at the time of the investment.[449]

340. The Claimant further contends that the relevant date to assess the existence of legitimate expectations is the date on which the investment was made,[450] and not the date of entry into force of the FTA, as Colombia argues.[451] Rather, Claimant argues that Article 838 of the FTA makes clear that expectations can be based on an "act or fact" "existing on the

[445] Cl. Mem., ¶ 180. *See also* Cl. NDP Comments, ¶ 62.

[446] Cl. Mem., ¶ 177; Cl. Reply, ¶ 475.

[447] Cl. Mem., ¶ 178, *citing Bear Creek v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, November 30, 2017, **Exhibit CL-127**, ¶ 376.

[448] Resp. C-Mem., ¶¶ 467-469, *citing Methanex Corporation v. United States of America,* UNCITRAL, Final Award on Jurisdiction and Merits, August 3, 2005, **Exhibit RL-87**, ¶ 7; *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/01, Award, December 16, 2002, **Exhibit RL-79**, ¶¶ 132-133, 143, 149; *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, December 27, 2010, **Exhibit CL-86**, ¶ 197.

[449] Cl. Reply, ¶¶ 476-478, *citing Cube Infrastructure Fund SICAV and others v. Kingdom of Spain,* ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Award on Quantum, February 19, 2019, **Exhibit CL-247**, ¶ 388; *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Award, July 31, 2019, **Exhibit CL-137**,¶ 313; *Georg Gavrilovic y Gavrilovic D.O.O. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, July 26, 2018, **Exhibit CL-251**, ¶ 1017; *Sun Reserve Luxco Holdings SRL v. Italian Republic*, SCC Case No. 132/2016, Award, March 25, 2020, **Exhibit CL-265**, ¶ 699; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, May 22, 2007, **Exhibit CL-51**,¶ 262; *Bear Creek v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, November 30, 2017, **Exhibit CL-127**, ¶ 376.

[450] Cl. Reply, ¶¶ 479-480.

[451] Resp. C-Mem., ¶¶ 472-473.

date of entry into force of [the FTA]."[452] This principle, according to the Claimant, is consistent with existing jurisprudence.[453]

341. In the present case, following its acquisition of the Mining Titles and in reliance on representations by Colombian authorities to attract investors to its mining sector,[454] as well as the continued application of the mining regime in force at the time, the Claimant continued investing in the development of the Project under the approval from relevant governmental authorities.[455] Moreover, under the supervision of the Colombian mining authorities, the Claimant invested substantial resources in the development of a systematic gold exploration program in the Mining Titles.[456]

342. Finally, although the Claimant recognizes that explicit or specific promises, assurances or commitments are not indispensable for the creation of legitimate expectations, it argues that Colombia engaged in a series of actions that confirmed the viability of the Project and the Claimant's expectations for its future development.[457]

343. With regards to the character of the measures, the Claimant argues that Colombia's measures were specifically targeted to the Claimant's investments, had "a clear expropriatory character and were adopted following a pattern of manifest repudiation of Claimant's vested rights, arbitrariness, lack of transparency and plain disregard of Claimant's legitimate expectations."[458]

344. The Claimant further references Annex 811(2)(b), which stipulates that certain measures, including environmental measures, do not constitute indirect expropriation:

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[452] Cl. Reply, ¶ 480.

[453] Cl. Reply, ¶ 480, *citing Cube Infrastructure Fund SICAV and others v. Kingdom of Spain,* ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Award on Quantum, February 19, 2019, **Exhibit CL-247**, ¶ 360; *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award on Jurisdiction and Merits, March 17, 2006, **Exhibit CL-18**,¶ 302; *Tecmed v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, **Exhibit CL-31**, ¶ 154; *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award, September 13, 2001, **Exhibit CL-26**, ¶ 611.

[454] Cl. Reply, ¶¶ 531-532.

[455] Cl. Mem., ¶ 179.

[456] Cl. Mem., ¶ 179.

[457] Cl. Reply, ¶¶ 534-536.

[458] Cl. Mem., ¶ 180 and note 422 for a list of included measures.

> 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, nondiscriminatory 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.[459]

345. Citing *Eco Oro v. Colombia*, the Claimant argues that this provision is not applicable to the present case, as the phrase "except in rare circumstances" does not create a blanket exception for regulatory measures, as Annex 811(2)(b) requires that the measure be reasonably necessary and be adopted with proportionality between the impact of the measure and its intended purpose.[460] However, in the present case, the Respondent's measures "had a disproportionate adverse effect […] and were not necessary to achieve the objective of protecting the páramo."[461] Accordingly, the Respondent may not be exonerated from its liability under international obligations.[462]

346. According to the Claimant, neither can Colombia escape liability by arguing that its actions were justified by the "State's inherent sovereign power to regulate," since the Treaty provides for no general police power exception under international law.[463] The Claimant asserts that Colombia mischaracterizes the "character" factor, in an attempt to prove that its measures do not constitute expropriation because they relate to the regulation of the environment.[464] The Claimant argues that there is no such exception under international law based on the Treaty, and that the State's police power is not absolute, but must rather comply with the principle of proportionality *vis-à-vis* the purpose to protect the public interest.[465]

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[459] Cl. Mem., ¶ 181, *citing* Treaty, Annex 811(2)(b), **Exhibit C-1**.

[460] Cl. Mem., ¶ 182, *citing Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Non-Disputing Party Submission of Canada, February 27, 2020, **Exhibit CL-38**, ¶ 11; Cl. Reply, ¶ 488.

[461] Cl. Mem., ¶ 182; Cl. Reply, ¶¶ 490, 519.

[462] Cl. Reply, ¶¶ 490-493.

[463] Cl. Reply, ¶¶ 539-540, Resp. C-Mem., ¶ 474.

[464] Cl. Reply, ¶ 481. Resp. C-Mem., ¶¶ 474-478.

[465] Cl. Reply, ¶¶ 481-487, *citing Bear Creek v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, November 30, 2017, **Exhibit CL-127**, ¶¶ 414-415, 473-474; *ADC Affiliate Limited, et. al, v. Republic of Hungary*, ICSID Case No.

347. Specifically, the Claimant asserts that Colombia's measures were not based on economic and social studies, and thus failed to consider the impact on the mining title holders, but also on the Vetas population that largely depends on the mining sector as a source of income.[466]

348. The Claimant further contends that, in addition to frustrating the Project, the Respondent's measures rendered approximately 60% of the Vetas population that worked in the mining sector unemployed, while it failed to protect the Santurbán *Páramo* from illegal miners that invaded the area following the suspension of mining activities.[467] At the same time, Claimant argues that, even though Colombia banned mining activities in the Mining Titles, it authorized local artisanal mining activities within the *páramo* boundaries, sometimes with training and assistance received from the Ministry of Mining for the purposes of developing sustainable mining practices there.[468] According to the Claimant, Colombia's expropriatory measures were "specifically targeted" at the Claimant's investments and were thus discriminatory, which would preclude Colombia from invoking Annex 811(2)(b) of the FTA as a defense.[469]

349. Additionally, the Claimant argues that the Respondent has not shown that its measures were necessary, while the Claimant has demonstrated the existence of viable alternatives for the government, namely (i) adopting the Vetas Proposal prepared by the Municipality of Vetas that would provide a better delimitation, which would be more expansive, would cover more territory, and would exclude areas of land which were no longer part of the *páramo* ecosystems, thus leaving the Project largely unaffected by the delimitation; and (ii) maintaining significant protections for projects with pre-existing licenses, thus creating

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ARB/03/16, Award, October 2, 2006, **Exhibit CL-47**, ¶ 423; TECO *Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, December 19, 2013, **Exhibit CL-107**, ¶ 492; *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, July 8, 2016, **Exhibit CL-261**, ¶¶ 305-307. *See also* Cl. Opening, slide 100.

[466] Cl. Mem., ¶ 183; Cl. Reply, ¶ 542.

[467] Cl. Mem., ¶ 183; Cl. Reply, ¶ 544; Cl. PHB, ¶ 78.

[468] Cl. Mem., ¶¶ 183-184.

[469] Cl. Mem., ¶¶ 180, 184.

an appropriate balance between the Claimant's right to its Project, and the protection of the environment and of the economic interests of the local community.[470]

350. In summary, the Claimant says, "through a series of arbitrary, unreasonable, disproportionate, and discriminatory measures, Colombia has rendered the Project inviable, depriving it of its economic value and frustrating Claimant's legitimate expectations."[471]

(ii) Unlawful expropriation

351. In addition to the "arbitrary, unreasonable, disproportionate, and discriminatory" nature of Colombia's measures that constitute indirect expropriation that deprived the Claimant's Project of its economic value, the Claimant argues that these measures were also unlawful.[472]

352. The Claimant makes reference to Article 811(1) of the FTA which sets forth four cumulative conditions for an expropriation to be considered lawful under international law:[473]

> 1. Neither Party may nationalize or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation"), except:
>
> (a) for a public purpose;
>
> (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.[474]

[470] Cl. Reply, ¶¶ 546-547.
[471] Cl. Mem., ¶ 185. *See also* Cl. NDP Comments, ¶ 64.
[472] Cl. Mem., ¶ 185.
[473] Cl. Mem., ¶ 186; Cl. Reply, ¶ 463; Cl. Opening, slide 101; Cl. PHB, ¶ 80.
[474] Cl. Mem., ¶ 164, *citing* Treaty, **Exhibit C-1**, Article 811.

353. Accordingly, the Claimant argues that Colombia violated the provisions set out under Article 811 by unlawfully expropriating the Claimant's investments, thus "substantially depriving Claimant of the economic benefit, enjoyment and value" of its investment.[475]

354. In relation to the measures serving a public purpose, the Claimant cites the *British Petroleum v. Libya*, *LETCO v. Liberia*, *ADC v. Hungary* and *Siemens v. Argentina* tribunals, all of which held that expropriation was unlawful because the measures were not adopted for a public purpose.[476]

355. Similarly, the Claimant argues, Colombia's measures did not serve a public purpose, but rather, the protection of the *páramo* ecosystems was used as a justification tool to prevent the continuation of regulated, large-scale mining activities in the Mining Titles, in spite of the measures causing unemployment and environmental damage due to the exponential growth in illegal mining activity.[477] Specifically, Colombia's measures prohibited mining activities in at least 80% of the Vetas Municipality territory, when only 1.42% of the areas within the Municipality was suitable for agricultural activities and approximately 90% of the Vetas population relied on the mining sector for employment.[478]

356. These measures were further inconsistent since the Respondent continued to authorize and support artisanal miners. Thus, the Claimant concludes, Colombia's measures "did not serve any public purpose."[479]

357. The Claimant further states that Colombia's measures were also discriminatory, since they allowed artisanal mining activities within the *páramo*, thus "arbitrarily, and unjustifiably, banning Minera Vetas."[480] In particular, among other things, Colombia's measures directly

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[475] Cl. Mem., ¶ 165.

[476] Cl. Mem., ¶ 187, *citing BP Exploration Company (Libya) Ltd., v. Government of The Libyan Arab Republic*, Award, August 1, 1974, 53 ILR 297, **Exhibit CL-4**, ¶ 329; *LETCO v. Government of The Republic of Liberia*, Award, Mar. 31, 1986, 2 ICSID Reports 343, **Exhibit CL-8**, ¶¶ 366-367; *ADC Affiliate Limited, et. al., v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, October 2, 2006, **Exhibit CL-47**, ¶ 432; *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, February 6, 2007, **Exhibit CL-50**, ¶ 273.

[477] Cl. Reply, ¶ 556.

[478] Cl. Reply, ¶ 551, citing **C-528**, Municipality of Vetas, Proposal for a New Delimitation of the Santurbán Páramo, 15 March 2019, p. 21.

[479] Cl. Mem., ¶ 188; Cl. Reply, ¶¶ 549-550.

[480] Cl. Mem., ¶ 189.

targeted Red Eagle by impairing it "from its use, enjoyment, and value of its investment," while allowing for illegal miners to operate in the same area with impunity.[481]

358. With regard to the principle of "prompt, adequate and effective compensation," the Claimant cites Article 811 of the FTA which states that for an expropriation to be considered lawful:

> 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.

359. According to the Claimant, Article 811 "requires Colombia to pay, without delay, compensation to Claimant in the amount of the fair market value of its investments in Colombia, plus interest from the date of the expropriation until payment, as a result of its expropriation of Claimant's rights over the Project."[482] Considering that the Respondent's expropriatory measures were conducted without any compensation, Article 811 of the Treaty renders the expropriation of the Claimant's investments as unlawful.[483]

360. On unlawfulness, the Claimant adds that the Respondent's expropriatory measures were conducted without complying with due process as stipulated by the Colombian Constitution which provides for judicial proceedings in which Minera Vetas could present its position.[484] Specifically, under Article 58 of the Constitution, "expropriation must be in

[481] Cl. Reply, ¶ 556; Cl. Opening, slide 101.

[482] Cl. Mem., ¶¶ 190-191.

[483] Cl. Mem., ¶¶ 191, 556.

[484] Cl. Mem., ¶ 192, *citing* Colombian Constitution, **Exhibit C-565**, Article 58; Cl. Reply, ¶ 556.

accordance with due process of law, and compensation must be paid."[485] In its Reply, the Claimant argues that the Respondent's interpretation is unsupported by the Mining Code, which holds that the "State only maintains the right to designate mining exclusion zones from areas covered by a concession contract if those areas were created before the concession contract was granted."[486]

361. Citing Ms. Martínez's second expert report, the Claimant admits that Article 36 of the Mining Code makes no reference to areas where mining could be potentially prohibited in the future, but rather where it is already prohibited.[487] At any event, the Claimant argues that Respondent's interpretation seems to be granting it "a perpetual all-encompassing reservation of rights to simply take from anyone their ability to use, enjoy, and derive value from their property without providing any compensation whatsoever simply by declaring that property as a 'mining exclusion zone[].'"[488]

b. The Respondent's Position

362. The Respondent argues that for the Claimant to be successful in its indirect expropriation claim, two conditions must be satisfied:

- The rights alleged to have been expropriated were covered investments under the FTA and were vested in Red Eagle at the time of Colombia's measures.

- The 'fact-based inquiry' to be conducted pursuant to Annex 811(1)(a) leads to a prima facie conclusion that the measures constitute an indirect expropriation, having regard, inter alia, to:

  (i) the economic impact of the measures

  (ii) the extent to which the measure[s] interfere with distinct, reasonable investment-backed expectations, and

[485] Cl. Reply, ¶ 513, *citing* Colombian Constitution, **Exhibit C-565**, Article 58.
[486] Cl. Reply, ¶ 513, *citing* Second Martínez Report, ¶¶ 71-72.
[487] Cl. Reply, ¶ 513, *citing* Second Martínez Report, ¶¶ 71-72.
[488] Cl. Reply, ¶ 512.

(iii) the character of the measures.[489]

363. Even if the fact-based inquiry conducted pursuant to Annex 811(2)(a) leads the Tribunal to a *prima facie* conclusion that the Respondent's measures constitute indirect expropriation, the Claimant must show that 'rare circumstances' apply, because the measures were "non-discriminatory regulatory actions designed and applied to protect legitimate public welfare objectives, such as the environment."[490]

(i) No deprivation of Claimant's rights

364. The Respondent argues that the Tribunal must consider the scope of the rights constituting an investment under Colombia's governing laws to assess whether a deprivation of rights has occurred. Accordingly, it argues that the Claimant must demonstrate that it had a vested right *in rem* recognized by Colombian law before claiming that the right has been expropriated. However, the expropriation claim fails in that the Claimant's Mining Titles never conferred any right to carry out the Vetas Gold Project, which the Claimant asserts is the alleged investment. Thus, since the Claimant argues that the Project was contingent upon its ability to conduct exploitative mining activities in the *páramo* area, the Respondent maintains that the Claimant never had such a right for three reasons.[491]

365. First, the Claimant would have to apply for an environmental license and a PTO to secure a right to carry out the Project, but it never applied for either of those licenses. The Respondent argues that, under Colombian law, the right to exploit minerals becomes an "acquired right" only when approval is obtained for the two, while "the mere assignment of a mining title does not confer an acquired right to exploit."[492]

366. Furthermore, the Respondent contends that, considering the rejection of Eco Oro's environmental license application for a similar large-scale mining project adjacent to the

[489] Resp. C-Mem., ¶ 448.

[490] Resp. C-Mem., ¶ 449.

[491] Resp. C-Mem., ¶¶ 452, 455. *See also* Resp. NDP Comments, ¶ 18; Resp. PHB, ¶¶ 68-86.

[492] Resp. Rej., ¶ 365. *See also* De Vivero Second Report, Section III.B; Tr. Day 3, pp. 782:4-784:18; 791:3-792:22.

Claimant's titles, there was every indication that any application for such a license for mining within the *páramo* area would be rejected.[493]

367. Second, citing the expert report of Prof. De Vivero and Articles 34 and 36 of the 2001 Mining Code, the Respondent maintains that the Claimant's Mining Titles were subject to the State's reservation of its right to designate exclusion zones at any time without payment of compensation. In response to the Claimant's argument that the Colombian Constitution provides a guarantee of compensation when vested rights are expropriated,[494] Colombia argues that Article 58 of the Constitution provides for such compensation when the taking of acquired rights is a result of "*leyes posteriores*" enacted by Congress.[495] In the present case, however, the Respondent argues that restrictions to Claimant's ability to conduct mining were adopted in accordance with the Mining Code, which existed before the Mining Titles were issued.[496] The Respondent further argues that the Claimant has provided no evidence that acts of the judiciary, such as the Colombian Constitutional Court, give rise to compensation under Article 58 of the Constitution.

368. According to Colombia, during the Hearing, Ms. Martínez admitted that she was not aware of any precedent where compensation has been awarded to a title holder for the application of subsequent environmental norms.[497] Colombia argues that the Claimant has provided no proof of any other Colombian law doctrine that would entitle it to compensation for the measures adopted by Colombia in order to protect the Santurbán *Páramo*. Even assuming, however, that Red Eagle were entitled to compensation, it never asked for any such compensation before the Colombian courts. As such, it cannot claim that Colombia has frustrated its expectation that it would receive such compensation.[498]

[493] Resp. C-Mem., ¶ 456; Resp. Rej., ¶ 363.

[494] *See* Cl. Mem., ¶ 158, *citing* Colombian Constitution, July 4, 1991, **Exhibit C-565**, Article 58. *See also* Cl. Reply, ¶ 447; Cl. Opening, slide 19.

[495] De Vivero Second Expert Report, ¶ 56.

[496] *See* Resp. PHB, ¶ 35, *citing* Tr. Day 3 (Spanish), pp. 789:8-736:15.

[497] *See* Resp. PHB, ¶ 35, *citing* Tr. Day 3 (Spanish), p. 776:17-20.

[498] Resp. PHB, ¶ 35.

369. The Claimant voluntarily assumed such risk, the materialization of which does not constitute a dispossession of proprietary rights.[499] Indeed, according to the Respondent, the approval of the assignment to the Claimant of its Mining Titles was not an endorsement or an approval of the project, nor was it an indication that such a project would be exempt from a mining ban.[500] Further, the approval of the Claimant's conversion requests did not amount to an approval of the Project, nor did it confer any acquired rights to exploit in the *páramo* areas. Rather, these were accepted "with the express caveat" that concession contracts would be subject to the mining ban.[501]

370. In its comments to Canada's Non-Disputing Party submission, the Respondent pointed to Canada's interpretation that "where property rights are subject to legal limitations existing at the time property rights are acquired, any subsequent burdening of property rights by such limitations does not constitute an impairment of the original property interest."[502] Therefore, Colombia maintains that the implementation of the mining exclusion zones provided under Articles 34 and 36 of the Mining Code does not constitute an impairment of the Claimant's Mining Titles or an expropriation under international law.[503]

371. Third, the Claimant received authorization for small-scale mining exploitation activities for four of its titles, which did not relate to, or form part of the large-scale mining project that the Claimant alleges was subject to indirect expropriation.[504] Under the transitional regime of Resolution 2090 and Law 1753, overturned by the Constitutional Court's Judgment C-035, the Claimant did not secure "grandfathering" rights, and thus, the Claimant was not deprived of any vested rights.[505]

372. According to the Respondent, even if the Claimant's Project had been grandfathered, *quod non*, the Claimant cannot show that Judgment C-035 deprived it of any vested, acquired

[499] Resp. C-Mem., ¶ 457; Resp. Rej., ¶ 364, Resp. PHB, ¶ 69.
[500] Resp. Rej., ¶ 365.
[501] Resp. Rej., ¶ 365.
[502] Resp. NDP Comments, ¶ 20, *citing* Canada's Non-Disputing Party Submission, note 48.
[503] Resp. NDP Comments, ¶ 20.
[504] *See* Resp. Opening, slide 71.
[505] Resp. C-Mem., ¶ 458.

rights under Colombian law.[506] Judgment C-035 confirmed that the State enjoys substantial discretion over setting the extraction conditions of its non-renewable natural resources.[507] The rights arising from mining titles are not absolute, but are subject to the State's power to implement measures addressing environmental conditions.[508] The Respondent argues that the Claimant never had any right to mine in the portions of its titles overlapping with the Santurbán *Páramo*.[509]

373. Even assuming, *arguendo*, that the Claimant was deprived of its vested rights under the Treaty, the Respondent argues that its measures did not deprive the Claimant of the value or the control of its investment, since for indirect expropriation to have occurred, the Claimant would have to prove that its investment was "effectively neutralized" and "destroyed or radically diminished [in] economic value."[510]

374. The Respondent finds support for its argument in the *Glamis Gold v. United States* case which held that delays and denials of environmental permits in a gold mining project do not amount to expropriatory measures.[511] Similarly, Colombia cites the *Philip Morris v. Uruguay* tribunal, which held that "a partial loss of the profits that an investment would have yielded absent the measure does not confer an expropriatory character on the measure."[512] Canada's Non-Disputing Party Submission in *Eco Oro v. Colombia* also confirms that "[m]ere interference with an investor's use or enjoyment of the benefits

[506] Resp. Rej., ¶ 366.

[507] Resp. Rej., ¶ 367, *citing* Constitutional Court, Judgment C-035, February 8, 2016, **Exhibit C-18**, pp. 141-142.

[508] Resp. Rej., ¶ 368.

[509] Resp. Rej., ¶ 370.

[510] Resp. C-Mem., ¶¶ 459-460, *citing CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award, May 12, 2005, **Exhibit CL-37**,¶ 262; *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, September 3, 2001, **Exhibit CL-144**,¶ 200; *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Interim Award, June 26, 2000, **Exhibit RL-75**, ¶ 102; *GAMI Investments Inc. v. United Mexican States*, UNCITRAL, Final Award, November 15, 2004, **Exhibit RL-82**, ¶ 126; *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Award, June 8, 2009, **Exhibit CL-61**, ¶¶ 357-360.

[511] Resp. C-Mem., ¶ 461, *citing Glamis Gold Ltd. v. United States of America*, UNCITRAL, Award, June 8, 2009, **Exhibit CL-61**, ¶¶ 357-360, 536.

[512] Resp. C-Mem., ¶ 462, *citing Philip Morris Brands SARL., Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, July 8, 2016, **Exhibit RL-118**, ¶ 286.

associated with property is insufficient to constitute an expropriation at international law."[513]

375. Colombia contends that its measures did not deprive Red Eagle of the value of its investment since Red Eagle's own mineral resource estimate, published in April 2014, before any of the Respondent's alleged measures, "confirmed that at the time there were insufficient mineral resources within the area of the Claimant's titles to allow for the Project as Red Eagle initially envisaged."[514] According to the Respondent, the Claimant's mining consultants, SRK, advised to conduct further exploration activities in order to assess whether additional mining resources could be discovered, and on that advice, the Claimant sought additional funding to conduct further exploratory activities.[515] In doing so, the Claimant "publicly confirmed that none of Colombia's measures (including Judgment C-035 overturning the páramo ban transitional regime) impacted on its project's boundaries."[516] As an example, the Respondent cites an April 2017 Red Eagle presentation which confirmed that "[p]rimary project boundaries [were] not impacted by Páramo ecosystem classifications."[517] The Respondent contends that the Claimant "cannot now credibly claim that Colombia's measures destroyed the value of its Mining Titles."[518]

376. At any rate, according to Brattle, to the extent that none of the Respondent's measures precluded Red Eagle from developing the Project within its titles not subject to the *páramo* classifications, the Mining Titles retain their value on account of their remaining prospectivity , meaning that the Claimant's investment could not have suffered a substantial deprivation in value.[519] This is further supported by the changes in the

[513] Resp. Rej., ¶¶ 373-374, *citing Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Non-Disputing Party Submission of Canada, February 27, 2020, **Exhibit CL-38**, ¶ 7.

[514] Resp. C-Mem., ¶ 463.

[515] Resp. C-Mem., ¶ 463, *citing* SRK, *Independent Technical Report on the Vetas Gold Project for CB Gold,* Santander Department, Colombia, April 29, 2014, **Exhibit C-561**, p. 6. *See also* First Brattle Report, Section V.A.

[516] Resp. C-Mem., ¶ 463.

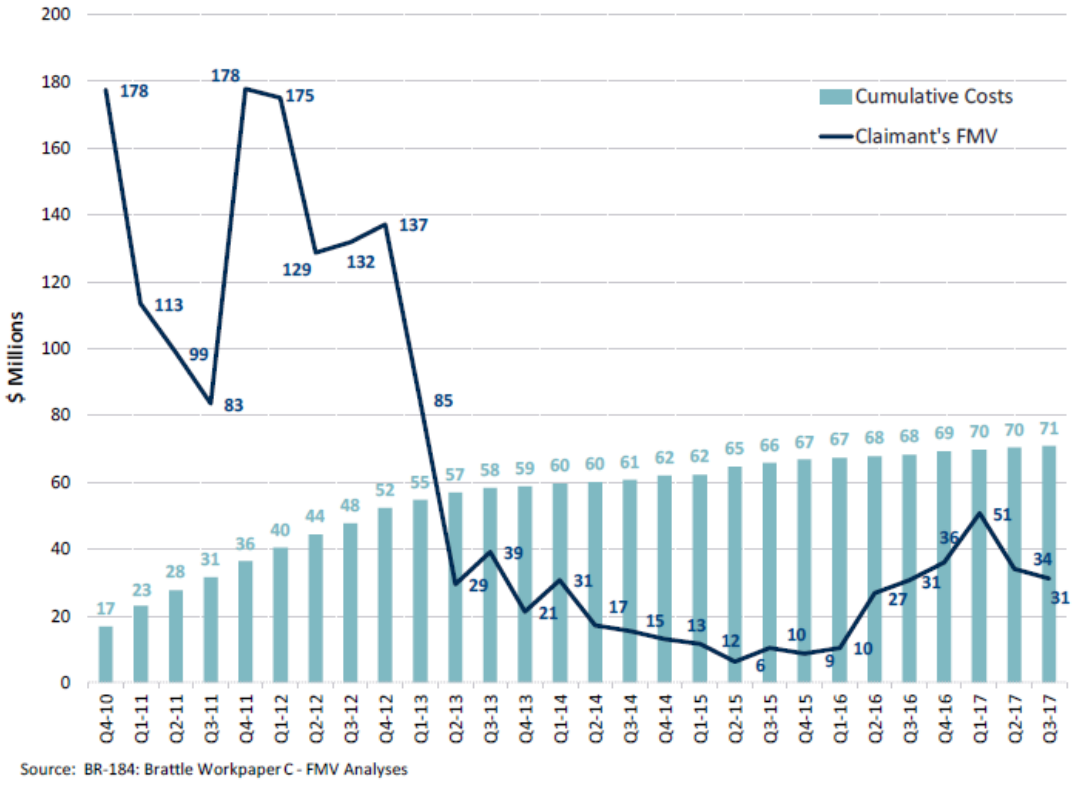
[517] Resp. C-Mem., ¶ 463, *citing Red Eagle Exploration Presentation*, April 18, 2017, **Exhibit BR-57**, p. 6; First Brattle Report, Section VI.B.2.

[518] Resp. C-Mem., ¶ 463.

[519] Resp. C-Mem., ¶ 464.

Claimant's share price over time, reflected in Figure 8 of the First Brattle Report reproduced below:[520]

Figure 8. Cumulative Amounts Invested vs. Claimant's FMV



Source: BR-184: Brattle Workpaper C - FMV Analyses

377. Figure 8 shows that, at the time of Red Eagle's disclosure in April 2014, the fair market value of its shares was already "severely impaired" by 2013, and that after the disclosure, the fair market value continued to decline even further. The Respondent argues that, had Colombia's measures resulted in a substantial deprivation of the Claimant's value of investments, the share price would show a sharp drop after the disclosure, but the drop had occurred well before any of those measures. Accordingly, the measures cannot amount to an indirect expropriation through a substantial deprivation of value.[521]

378. This is further supported, according to the Respondent, by the Claimant's repeated public statements at the time, which demonstrate that the Respondent's measures had no

[520] Resp. C-Mem., ¶ 465, *citing* First Brattle Report, Figure 8.

[521] Resp. C-Mem., ¶ 466, *citing* First Brattle Report, Section VI.A.4.

significant impact on the project. The Respondent argues that the Claimant's belated reliance on the SRK report is untenable because the report relies on the false assumption that the entire resource estimated by SRK in April 2014 formed part of the Project prior to the measures and would have been mined but for the Respondent's measures. The Respondent contends that the Claimant admits that it did not intend to mine the open pit resources.[522]

379. The Respondent further argues that SRK draws its conclusions based on the false assumption that the project included both the underground and open pit resources, but that the delineation did not cover the vast majority of the exploration targets identified by the Claimant and which the Claimant believed contained the bulk of the resources that would ultimately form part of the Project. In reality, Colombia argues that the resources falling within the delineation measure only covered 90,000 ounces (or 35%) of the total underground resources —a fraction of the multi-million ounce mine that was ultimately envisioned by the Claimant for its Project.[523]

380. Moreover, according to the Respondent, the Claimant confirmed in its public statements that the delimitation had "a relatively minor impact on the Project," that "no exploration has been conducted in the affected area," and that the revocation of the grandfathering in Judgment C-035 "does not impact development plans for the Vetas Gold Project."[524] Repeated public statements made by the Claimant that the Project remained viable could have only been made on the basis that the project never included the open pit resources that SRK assumes formed part of the Project.[525]

381. Finally, the Respondent argues that, had its measures "destroyed" the Project, the Claimant would need to have written off the value of its titles in its accounts and filed a material

[522] Resp. Rej., ¶ 376. *See also* Rossi Report, Section VI.A; Second Brattle Report, ¶ 50.

[523] Resp. Rej., ¶ 376, *citing* Rossi Report, ¶ 120. *See also* Second Brattle Report, ¶ 29.

[524] Resp. Rej., ¶ 376, *citing* CB Gold Inc., Management's Discussion and Analysis for the First Quarter of 2016, May 30, 2016, **Exhibit BR-54**, p. 3. *See also* First Brattle Report, Figure 13: Timeline of Claimant's Public Statements Concerning the Impact of Colombia's Measures.

[525] Resp. Rej., ¶ 376.

change report under the British Columbia Securities Act to inform the stock market accordingly, but the Claimant never did so.[526]

382. As to the reasonable investment-back expectations provided for under Annex 811(2)(a)(ii) of the Treaty, the Respondent maintains that the analysis is focused on whether the State promised or assured an investor, at the time it was considering its investment, that the regulatory framework would be maintained.[527] The Respondent finds support for its argument in the decisions of the *Methanex v. United States*, *Feldman v. Mexico*, and *Total v. Argentina* tribunals. Colombia asserts that, in the absence of specific commitments through a stabilization agreement entered into with the investor, changes to the regulatory framework do not amount to expropriation under international law.[528]

383. According to the Respondent, in the present case, the government never specifically assured the Claimant that measures would *not* be taken to protect the *páramo* ecosystems, nor did it enter into a stabilization agreement with the Claimant to that effect.[529] Moreover, Red Eagle could not have held any reasonable investment-backed expectation that it would be allowed to conduct mining exploitation activities on the entirety of the area covered under its Mining Titles. The Respondent argues that, even having conducted "the most basic" due diligence, it would have been clear to the Claimant that mining on at least a portion of that area would be prohibited in light of Colombia's long-lasting policy of *páramo* protection. Thus, the Claimant could not have held legitimate expectations that it would be permitted to conduct mining exploitation activities throughout the area covered by its Mining Titles despite the presence of *páramo* ecosystems.[530]

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[526] Resp. Rej., ¶ 376, *citing* British Columbia Securities Act, Securities Act [RSBC 1996] Chapter 418, October 21, 2014, **Exhibit BR-63**, ¶ 85(b).

[527] Resp. C-Mem., ¶ 467; Resp. Rej., ¶ 379.

[528] Resp. C-Mem., ¶¶ 466-469, *citing Methanex Corporation v. United States of America,* UNCITRAL, Final Award on Jurisdiction and Merits, August 3, 2005, **Exhibit RL-87**, ¶ 7; *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/01, Award, December 16, 2002, **Exhibit RL-79**, ¶¶ 132-133, 143, 149; *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, December 27, 2010, **Exhibit CL-86**, ¶ 197. *See also PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, January 19, 2007, **Exhibit CL-49**, ¶ 241.

[529] Resp. C-Mem., ¶ 470; Resp. Rej., ¶ 381.

[530] Resp. C-Mem., ¶ 471.

384. The Respondent further argues that even assuming that the Claimant could have legitimately expected that Colombia would preserve the regulatory framework, those expectations are not covered under the Treaty, since Article 801(2) makes clear that:

> 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.

385. In other words, the facts giving rise to the Claimant's claims regarding its legitimate expectations took place *prior* to the entry into force of the Treaty in August 2011, and as such, according to the Respondent, there can be no question that the Claimant knew, at that time, that a significant portion covered under its Mining Titles would be subject to the 2007 Atlas delineation pursuant to Law 1382 of 2010 and Law 1450, both of which were enacted prior to the Treaty entry into force date.[531]

386. Nor has the Claimant demonstrated that it relied on any general statements made by government officials in making its investment pursuant to the language of Annex 811(2) of the Treaty.[532] At any rate, none of these statements can form the basis of specific and reasonable expectations that the Claimant would need to show it held at the time it invested in order to support its expropriation claim.[533] The Respondent argues that such representations, were, without exception, general in nature and did not speak to whether the mining ban would apply to the Claimant's Mining Titles.[534] The Respondent further argues that a diligent investor would rely on detailed due diligence on Colombia's legal framework for mining activities and environmental protection, rather than the "general words of encouragement or support to investors."[535]

[531] Resp. C-Mem., ¶¶ 472-473; Resp. Rej., ¶ 363.
[532] Resp. Rej., ¶ 381.
[533] Resp. Rej., ¶ 382.
[534] Resp. Rej., ¶¶ 382-383.
[535] Resp. Rej., ¶¶ 19-23; Resp. PHB, ¶ 36.

(ii) Respondent's measures are a legitimate exercise of sovereign powers

387. Regarding the "character" of a measure or a series of measures provided under Annex 811 of the Treaty, the Respondent argues that tribunals have repeatedly held that the State may not be held liable for exercising its "inherent sovereign power to regulate for the protection of the environment."[536] The Respondent supports this argument on the basis of the decisions in the *Tecmed v. Mexico*, *Feldman v. Mexico*, *Saluka v. Czech Republic*, and *AWG Group v. Argentina* tribunals, which ruled that the State's regulatory powers to protect the public good do not constitute expropriation and do not entitle the investor to any compensation under the Treaty and under customary international law.[537]

388. The Respondent argues that its measures were general regulatory measures adopted to protect the environment and did not target the Claimant's investments in particular.[538] Specifically, the *páramo* ecosystems are rare and sensitive ecosystems, as well as one of Colombia's main water sources since all Andean rivers spring from these ecosystems. Thus, according to the Respondent, mining activities pose a threat to water resources and require the alteration of surface and subsoil sources, as well as additional infrastructure, and waste and residue management. As such, the Respondent contends that mining activities "were incompatible with the conservation and restoration of the páramo ecosystems."[539]

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[536] Resp. C-Mem., ¶ 474, *citing Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/01, Award, December 16, 2002, **Exhibit RL-79**, ¶ 103; *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, September 3, 2001, **Exhibit CL-144**, ¶ 198; *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award, August 2, 2010, **Exhibit CL-82**, ¶ 266; *AWG Group Ltd. v. Argentine Republic*, UNCITRAL, Decision on Liability, July 30, 2010, **Exhibit RL-100**, ¶ 128; *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final Award, March 14, 2003, **Exhibit RL-80**, ¶ 603.

[537] Resp. C-Mem., ¶¶ 474-478, *citing Tecmed v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, **Exhibit CL-31**, ¶ 119; *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/01, Award, December 16, 2002, **Exhibit RL-79**, ¶ 103; *Saluka Investments B.V. v Czech Republic*, UNCITRAL, Partial Award on Jurisdiction and Merits, March 17, 2006, **Exhibit CL-18**, ¶ 255; *AWG Group Ltd. v. Argentine Republic*, UNCITRAL, Decision on Liability, July 30, 2010, **Exhibit RL-100**, ¶ 139. *See also* Resp. Rej., ¶¶ 384-386, *citing Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Non-Disputing Party Submission of Canada, February 27, 2020, **Exhibit CL-38**, ¶ 4; Resp. Opening, slide 44; Canada's Non-Disputing Party Submission, ¶ 44.

[538] Resp. Rej., ¶ 387.

[539] Resp. Rej., ¶ 387.

389. The Respondent affirms that the delimitation of the Santurbán *Páramo* did not target the Claimant's investment but was rather imposed on all 36 of Colombia's *páramo* ecosystems, and thus applied to all titles overlapping with these regions, also restricting other activities beyond mining.[540] The Respondent further argues that the courts acted reasonably to defer the effects of the ban until the new delimitation was completed, even though the Claimant could not have reasonably expected to benefit from any grandfathering clause. Moreover, Colombian authorities have adequately and appropriately protected the Claimant from illegal mining by processing, deciding and enforcing eviction orders to remove illegal miners operating within the Claimant's Mining Titles.[541]

390. Finally, the Respondent argues that the Claimant failed to provide any "workable alternative methodology" to the Ministry of Environment that would have allowed the government to protect the 36 *páramo* ecosystems, since the Guayacanal Foundation and the Municipality of Vetas proposals excluded areas that no longer presented visual characteristics of *páramo* ecosystems.[542]

(iii) Non-discriminatory measures

391. In response to the Claimant's argument that the phrase 'except in rare circumstances' provided under Annex 811(2)(b) of the Treaty does not create a blanket exception for discriminatory measures,[543] the Respondent argues that the Claimant does not "seriously dispute" the fact that Colombia's measures were intended to protect the environment, and as such, *prima facie*, they cannot amount to indirect expropriation under the Treaty.[544]

392. Pursuant to Article 31 of the VCLT, the burden of proving the existence of 'rare circumstances' must thus be interpreted in good faith and in light of (i) the object and purpose of the Treaty; (ii) Canada and Colombia's mutual undertakings, under Article 1702 of the Treaty, not to encourage trade or investment by weakening or reducing the levels of protection afforded in each State Party's respective environmental laws; and (iii) the

[540] Resp. Rej., ¶ 387.
[541] Resp. Rej., ¶ 387.
[542] Resp. Rej., ¶ 388.
[543] *See* Cl. Mem., ¶¶ 181-182.
[544] Resp. C-Mem., ¶¶ 479-480; Resp. Rej., ¶ 389.

Environment Agreement, which, *inter alia*, recognizes "the sovereign right of each Party to establish its own levels of national environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws and policies" and obligates each Party to "ensure that its environmental laws and policies provide for high levels of environmental protection."[545]

393. Although the Treaty does not define the term 'rare circumstances,' the Respondent argues that it does provide an example, namely, "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." By providing this example, which tribunals have generally recognized as a very exceptional finding of a severe and bad faith regulation, the Respondent argues that the Treaty makes clear that a claim of indirect expropriation for non-discriminatory regulatory measures must face an extremely high bar in order to establish that the circumstances were 'rare.'"[546]

394. According to the Respondent, the Claimant has not met this threshold and instead argues that the principle of reasonable necessity and proportionality should be considered pursuant to Annex 811(2)(b).[547] The Respondent, however, argues that Annex 811(2)(b) does not provide that a measure must be 'reasonably necessary' or that its impact must be "'proportional' to its purpose", as the Claimant seems to support.[548] Colombia's measures were non-discriminatory measures intended to protect the public good,[549] and were in line with the Treaty's object and purpose regarding the enhancement of environmental protection by the contracting States, and the preservation of the State's sovereign power to regulate in order to protect the environment.[550]

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[545] Resp. C-Mem., ¶ 482.

[546] Resp. C-Mem., ¶ 483, *citing ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits, September 3, 2013, **Exhibit RL-109**, ¶ 275; *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award, July 7, 2011, **Exhibit RL-104**, ¶ 125.

[547] Resp. C-Mem., ¶ 484.

[548] Resp. Rej., ¶ 392.

[549] Resp. C-Mem., ¶ 485.

[550] Resp. Rej., ¶ 393.

395. At any rate, the Respondent further argues that its measures were both necessary and proportionate to their objective, while the Claimant has not suggested any less stringent measures that could have achieved the same objective, or any measures that could have been adopted in line with the precautionary principle. Instead, according to the Respondent, the Claimant argues that the measures were disproportionate because the Mining Titles covered only a small part of the *páramo* area, and the Claimant should have thus been allowed to conduct mining activities in the entirety of its Mining Titles.[551] According to the Respondent, the Claimant appears to argue "that it was entitled to be treated differently" for that reason, despite the government's long-standing environmental policy, without exception.[552]

396. In sum, the Respondent maintains that it could have not achieved the desired objective by carving out part of the *páramo* area for the Claimant's mining activities. The measures adopted by the Respondent were not arbitrary but were rather based on scientific studies showing that mining activities negatively impact the environment in their area of influence.[553] The Respondent argues that the Claimant cannot prove that 'rare circumstances' existed to support its non-discriminatory claim and as such, Colombia's measures do not amount to an indirect expropriation under the Treaty.[554]

(2) The Tribunal's Analysis

397. The following analysis on whether Colombia breached Article 811 of the Treaty is adopted by the majority of the Tribunal.

398. The Claimant's claim for indirect expropriation of the Mining Titles by the Respondent is based on Article 811 of the Treaty, as supplemented by the Treaty Parties' shared understanding of this Article which is set forth in Annex 811:

> 1. Paragraph 1 of Article 811 addresses two situations. The first situation is direct expropriation, where an investment is nationalized

[551] Resp. C-Mem., ¶ 486, citing Cl. Mem., ¶ 292.
[552] Resp. C-Mem., ¶ 486.
[553] Resp. Rej., ¶ 396.
[554] Resp. C-Mem., ¶¶ 486-487; Resp. Rej., ¶ 395.

> 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.

399. By way of introduction, it is to be noted that for any claim of expropriation to get off the ground, the Claimant needs to demonstrate the existence of a vested right of which it has been deprived. The existence of such a right is a matter of domestic rather than international law; international law does not contain any rules on the existence or scope of private rights, and only regulates the manner in which an investor may be deprived of those rights. The majority of the Tribunal is not satisfied that, as a matter of domestic law, the Claimant ever acquired a vested right to engage in mining activities in the *páramo* area. The Claimant's 'right' to carry out mining in relation to the Vetas Project was always conditional on being

granted an environmental license or the approval of a PTO, which was at the discretion of the Respondent.[555] The Claimant's expropriation claim fails at the first hurdle.

400. Given this, it is not strictly necessary to carry out a further analysis into whether the measures fall within the scope of the Respondent's police powers outlined in Annex 811 of the Treaty and therefore are not expropriatory in nature. For the sake of completeness, however, the Tribunal is of the view that the measures do fall within the scope of the Respondent's police powers. As can be seen from the extensive documentary evidence, discussed in more detail above, the measures were plainly designed and applied to protect the public policy goal of environmental protection.

401. Although the text of Annex 811 leaves open the possibility that in "rare circumstances" public policy measures may fall outside the scope of a State's police powers, the Tribunal has concluded that no such circumstances exist in this case. Tribunals have generally found that such "rare circumstances" will only exist where the host State has acted contrary to a specific commitment made to the investor.[556] Yet, as explained above in relation to legitimate expectations, no such commitment has been made in this case.

402. The Claimant misunderstands the actions taken by Colombia between 2010 and 2012. The Respondent explains that the ANM visited the Mining Titles to monitor compliance of existing obligations and not to monitor progress in the development of the Project like the Claimant asserts. At this point, Red Eagle had not even applied for an environmental license or a PTO for the Project. On the conversion of the Real Minera exploitation license into a concession contract, the Respondent explains that this was nothing more than a standard certificate issued by the ANM requested by the title holder and which does not confer any new rights. As to the confirmation by the ANM for six of the Mining Titles that were not in the boundaries of the Santurbán *Páramo* Park, this confirmation concerned the

[555] *See* Legal Opinion of Professor De Vivero, ¶¶ 105-106.

[556] *Methanex Corporation v. United States of America,* UNCITRAL, Final Award on Jurisdiction and Merits, August 3, 2005, **Exhibit RL-87**, ¶ 7; *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/01, Award, December 16, 2002, **Exhibit RL-79**, ¶¶ 132-133, 143, 149; *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, December 27, 2010, **Exhibit CL-86**, ¶ 197. *See also PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, Award, ICSID Case No. ARB/02/5, January 19, 2007, **Exhibit CL-49**, ¶ 241.

delineation of the park and not the *páramo* ecosystem which were separate delineations and carried out with different legislation, criteria and objectives. The alleged recognition by ANM of the Minera Vetas right to convert La Peter exploitation license into a concession contract only acknowledges the right to change the legal form of the existing title; it is not an actual change of a legal form of a title. The alleged ANM's approval of the assignment of all Mining Titles was not derogating from the environmental restrictions but rather just approval of the assignment process which did not require the ANM to give notice of any restrictions or limitations on the mining activities. As to the alleged registration by ANM of the contract for Real Minera, this did not mean that it was conferring any additional rights or derogated from existing restrictions or conditions. The alleged recognition of Minera Vetas' right to convert two licenses into concession contracts was ANM's recognition of the right to change the legal form of the titles. Finally, the alleged confirmation by ANM of the Minera Vetas' rights over El Dorado, did not indicate that the title would be exempt from the paramo ecosystem delimitation process but only concerned the overlap with the Santurbán Park, which was delimited separately and on the basis of different criteria.[557]

403. The Claimant's misunderstanding of the term 'commitment' is surprising. After listing the measures taken by the Respondent since Resolution 2090, the Claimant considered as specific commitments of the Respondent the visits to Canada of Colombian officials between 2009 and 2013 in order to attract Canadian miners.[558] The statement that "the Respondent mining laws provided a clear framework to facilitate and promote mining investments"[559] is the expression of a favorable opinion by the Claimant but not a commitment by the Respondent. The imposition of specific environmental obligations on the Claimant is not a commitment of the Respondent.[560] Attendance of meetings with Colombian officials is not proof of commitment.[561]

[557] Resp. C-Mem., ¶ 418, *citing* Letter from Colombian Geologic Service to Leyhat, May 31, 2012, **Exhibit C-577**.
[558] Cl. Reply, ¶ 430.
[559] Cl. Reply, ¶¶ 430, 28-55.
[560] Cl. Reply, ¶ 430.
[561] Cl. Reply, ¶ 430.

404. By way of conclusion, with regard to any expectation the Claimant may have had, the same principles are applicable as in relation to the arguments as to MST. They inevitably lead to the conclusion that the Claimant's arguments on expropriation are also bound to fail.

D. WHETHER THE ENVIRONMENTAL EXCEPTION PURSUANT TO ARTICLE 2201 OF THE TREATY IS APPLICABLE

(1) The Parties' Positions

a. The Claimant's Position

405. The Claimant sustains that the Treaty requires the Respondent to honor obligations to protect the Claimant and its investments, as well as the environment.[562] The Claimant opposes the Respondent's interpretation that the investment protections are subordinate to environmental protections. The Claimant explains that for the general exception to apply, the measure must (i) not be applied in a manner that constitutes arbitrary or unjustifiable discrimination between investments or investors, or a disguised restriction on international trade or investment; (ii) relate to one policy objective (*(i.e.*, protect human, animal or plant life or health, ensure compliance with laws and regulations that are not inconsistent with the Treaty and conservation of living and non-living exhaustible natural resources), and (iii) be necessary to achieve the objectives.[563]

406. The Claimant argues that the measure would have to conform with other obligations in the Treaty such as those arising from Article 815 of the Treaty. The Claimant explains that the intent of the Parties of the Treaty was to maintain the existing environmental measures instead of providing a *carte blanche* to implement new measures. The Claimant also refers to the obligations under Articles 1701, 1702, 1703, and 1704 on the environment as being "mutually supportive". According to the Claimant, "these articles, read in the context of the entire Treaty, including its object and purpose, refer to the 'mutual supportiveness' of investment/trade and environmental policies."[564] Accordingly, the Claimant argues, they

[562] Cl. Reply, ¶¶ 557-593.

[563] Cl. Reply, ¶ 560. *See also* Cl. NDP Comments, ¶¶ 65-73.

[564] Cl. Reply, ¶ 567.

relate only to existing environmental measures and they do not have 'primacy' over investment protection.[565]

407. The Claimant alleges that it is well established that a State decision furthering a legitimate public policy, such as an environmental protection, does not render investment protections under the Treaty inapplicable.[566] The Claimant further argues that treaty exceptions must be interpreted restrictively. The Claimant supports this argument in the *Sempra v. Argentina*[567] and in the *Enron v. Argentina* cases where the tribunal explained that "'any interpretation resulting in an escape route from the obligations' of a treaty must be given a 'mandatory' 'restrictive interpretation.'"[568]

408. The Claimant alleges that it has engaged in responsible and sustainable mining and has committed to not engage in environmentally harmful practices.[569]

409. The Claimant argues that the Respondent's measures do not meet the requirements set out by Article 2201(3). The Claimant adds that consistently with the object and purpose of the Treaty and the relevant jurisprudence, the Respondent cannot 'self-judge' the application of this provision to its measures.[570]

410. According to the Claimant, the Respondent has failed to establish that the measures are necessary.[571] The Claimant argues that the Treaty does not specify the standard to assess

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[565] Cl. Reply, ¶¶ 563-580.

[566] Cl. Reply, ¶ 581, *citing ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, October 2, 2006, **Exhibit CL-47**, ¶ 423; *Crystallex International Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, April 4, 2016, **Exhibit CL-118,** ¶¶ 583-584; *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, March 17, 2015, **Exhibit CL-114**, ¶ 597.

[567] Cl. Reply, ¶ 582, *citing Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, September 28, 2007, **Exhibit CL-264**, ¶ 373.

[568] Cl. Reply, ¶ 582, *citing Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 (also known as "*Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic*"*)*, Award, May 22, 2007, **Exhibit CL-51**, ¶ 331.

[569] Cl. Reply, ¶ 584.

[570] Cl. Reply, ¶ 583, *citing Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic,* ICSID Case No. ARB/01/3, Award of May 22, 2007, **Exhibit CL-51**, ¶ 332; *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, May 12, 2005, **Exhibit CL-37**, ¶ 373; *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, September 5, 2008, **Exhibit CL-246**, ¶ 187.

[571] Cl. Reply, ¶¶ 587-589.

the 'necessity' but that tribunals look at international law to assess such standard, and specifically, to the ILC Articles.[572] The Claimant maintains that necessity happens when there is an irreconcilable conflict between an essential interest on one hand and an obligation of the State on the other.[573] The ILC Articles, the Claimant says, establish that necessity may only be involved if it is the only way to safeguard an interest with no other means available.[574]

411. The Claimant alleges that the Respondent has not met the standard for the following reasons: (i) the Respondent continued to enforce mining restrictions on the Project even though the delimitation was declared unlawful by the Constitutional Court with no final delimitation implemented to date; (ii) the delimitation failed to take into account social and economic criteria resulting in prejudice to the Claimant and harm to the Vetas population; (iii) the measures failed to protect the Claimant's vested rights and eliminated protections for a pre-existing project; (iv) the Respondent fails to prevent illegal mining in the *páramo*, and (v) there were other alternatives, such as delimiting the *páramo* in accordance with the conclusions of the Guayacanal Foundation and/or maintain the significant protections with the pre-existing licenses and eliminate illegal mining.[575]

412. The Claimant argues that the Respondent failed to establish that the measures are not applied in a manner that is not arbitrary or discriminatory between investors or investments. According to the Claimant, Colombia's measures cannot comply with these requirements because the Respondent has sought to enforce mining restrictions with respect to the Claimant, even though the Constitutional Court has ruled them unlawful and has allowed illegal mining to continue within the delimitation of the *páramo*.[576]

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[572] Cl. Reply, ¶ 587, *citing* Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001, **Exhibit CL-248**, p. 80.

[573] Cl. Reply, ¶ 588, *citing* Rep. of the Int'l Law Comm'n on the Responsibility of States for International Wrongful Acts, 53rd Sess., UN Doc. A/56/10, reprinted in [2001] 2(2) Y.B. Int'l L. Comm'n 20, UN Doc. A/CN.4/SER.A/2001/Add.1, **Exhibit CL-23**, Article 25.

[574] Cl. Reply, ¶ 588, *citing* Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001, **Exhibit CL-248**, p. 83.

[575] Cl. Reply, ¶ 589.

[576] Cl. Reply, ¶ 590.

413. The Claimant also alleges that the Respondent has failed to protect the *páramo* from illegal mining and, consequently, failed to establish that the measures relate to environmental measures necessary to protect human, animal or plant life and health.[577]

b. The Respondent's Position

414. The Respondent argues that the measures implemented in this case fall squarely within the scope of Article 2201(3) and cannot therefore give rise to liability under Chapter Eight.[578] Article 2201(3) provides as follows:

> 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.

415. According to the Respondent, this provision, interpreted in accordance with the object and purpose of the Treaty and Chapter Seventeen and the Environmental Agreement, "provides for the subordination of the investment protections under Chapter Eight to the State Parties' sovereign rights and duties to protect the environment."[579]

416. The Respondent argues that Article 2201(3) is to be read consistently with Article XX of the General Agreement on Tariffs and Trade ("**GATT**") on which the Environmental

[577] Cl. Reply, ¶ 592.

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

[579] Resp. C-Mem., ¶ 490.

Agreement and the carve out are based and to which both Canada and Colombia are parties. The Respondent supports this argument with the tribunal's decision in the *Continental Casualty v. Argentina* case to observe that GATT would be an appropriate reference in relation to necessity.[580] GATT Article XX excludes from the ambit of GATT any non-discriminatory measure taken to protect human, animal or plant life and health which is similar language to that of Article 2201(3) of the Treaty.

417. In its comments to Canada's Non-Disputing Party Submission, the Respondent noted that Canada confirmed that the general exception operates as a 'safety net' to protect State's exercise of regulatory powers in certain specific cases with legitimate objectives. Canada further explained that in the application of these regulatory powers there is no violation of the Treaty and therefore no State liability which means no payment of compensation is required. According to the Respondent, Canada explained that any other interpretation would render this general exception meaningless.[581]

418. The Respondent recognizes three requirements with respect to an environmental measure: (i) it is 'necessary', (ii) it does not constitute an arbitrary or unjustifiable discrimination, and (iii) it is not a disguised restriction on international trade or investment.[582] Thus, the Respondent concludes,

> [P]rovided that these narrow conditions are satisfied, where a measure falling within Article 2201(3) would otherwise amount to a breach of the investment protections provided under Chapter Eight of the FTA, that Article provides that a State will not be liable for any violation of Chapter Eight with respect to that measure.[583]

419. Colombia argues that the measures were taken for purposes of protecting the *páramo* ecosystems with respect to the Claimant's Mining Titles as well as throughout the 36

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[580] Resp. C-Mem., ¶ 492, *citing Continental Casualty Company v. Argentine Republic,* ICSID Case No. ARB/03/9, Award, September 5, 2008, **Exhibit RL-92**, ¶ 96.

[581] Resp. NDP Comments, ¶ 35, *citing* Canada's Non-Disputing Party Submission, ¶ 52. *See also* Canada's Non-Disputing Party Submission in *Galway Gold Inc. v. Republic of* Colombia, ICSID Case No. ARB/18/13, January 31, 2022, **Exhibit RL-197**, ¶ 50; Canada's Non-Disputing Party Submission in *Eco Oro Minerals Corp. v. Republic of* Colombia, ICSID Case No. ARB/16/41, February 27, 2020, **Exhibit RL-134**, ¶ 23.

[582] Resp. C-Mem., ¶ 494.

[583] Resp. C-Mem., ¶ 495.

páramo complexes in Colombia. First, the Respondent says, the measures, which resulted from a considered and elaborate policy-making process involving several governmental agencies and scrutiny of the Constitutional Court, are squarely within the autonomy enjoyed by States to determine their own policies under international law. Second, the Respondent alleges that these measures were necessary.[584] The Respondent explained that in this case, the prohibition of mining in the *páramo*, a rare and fragile ecosystem, serves the objective of protecting the *páramo*. The Respondent contends that the burden is on the Claimant to show that the measures that would have permitted the Project to proceed would contribute to protecting the *páramo*.[585] Third, the Respondent argues that the measures do not constitute arbitrary or unjustifiable discrimination between investment or investors, or a disguised restriction on international trade or investment as the prohibition on mining extends to all *páramo* areas, and all of the measures on which the Claimant relies apply indiscriminately to all investors and mining projects in Colombia.[586]

420. In its Rejoinder, the Respondent rejects the Claimant's interpretation that Article 2201(3) only concerns the enforcement of existing environmental regulations and does not apply where measures impact an investment. The Respondent argues that this interpretation is unfounded and would render Article 2201(3) meaningless.[587]

421. First, Colombia argues that its interpretation is consistent with the ordinary meaning of that provision's clear and unambiguous language. According to the Respondent, there is no indication in the language of Article 2201(3) that the Treaty Parties intended to be read 'restrictively' nor there is any basis for implying the limitation of 'environmental measures' constrained to existing measures.[588] Second, the Respondent alleges that its interpretation is consistent with Canada's understanding of the meaning of Article 2201(3), read in the context of the Treaty's objective and purpose.[589] Third, the Respondent argues

[584] Resp. C-Mem., ¶ 498.

[585] Resp. C-Mem., ¶¶ 499-500, *citing* WTO Appellate Body Report, Brazil – Measures Affecting Imports of Retreaded Tyres, December 3, 2007, **Exhibit RL-54**, ¶ 156.

[586] Resp. C-Mem., ¶ 501.

[587] Resp. Rej., ¶ 400.

[588] Resp. Rej., ¶ 401.

[589] Resp. Rej., ¶ 402.

that the 'restrictive' interpretation given by the Claimant under which any impact of an environmental measure on an investment would amount to a 'disguised restriction on international investment' would conflict with the Treaty's recognition of 'mutual supportiveness between trade and environmental policies.'[590]

422. The Respondent also refers to the tribunal decisions cited by the Claimant in support of its interpretation. According to the Respondent, none of the authorities cited by the Claimant concerned the interpretation of Article 2201(3) or any equivalent provision. The Respondent also argues that the *Enron v. Argentina* and *Sempra v. Argentina* were cases that were based on different treaties, with different objects and purposes, based on different facts, and in the context of Argentina invoking a different exception, therefore, of no assistance to the present case.

423. The Respondent reiterates in its Rejoinder that the Claimant's claim falls within the Treaty's environmental exception.[591] The Respondent argues that the measures were 'necessary' to protect the *páramo* through the prohibition of mining activities and other environmentally destructive activities, such as exploitation of hydrocarbons, which was achieved through Law 1450. According to the Respondent, because of the extreme sensitivity of the *páramo* to such activities, no other alternative exists to achieve this objective. The Respondent argues that the measures were 'necessary' and include the following: (i) Judgment T-361, which ensured the continuity in enforcing the prohibition on mining in *páramo* areas;[592] (ii) Resolution 2090 taking into account social and economic criteria; (iii) transitional regimes in Law 1382 and Resolution 2090 demonstrate that the Ministry of Environment and the legislature sought to allow mining but the Constitutional Court, in looking at the effect on the protection of the *páramo*, invalidated a law that it considered contrary to the Constitution; (iv) the illegal mining activities have not been condoned by Colombia and is taking steps to combat and prevent it, and (v) the Claimant

[590] Resp. Rej., ¶ 403, *citing* Treaty, **Exhibit CL-1**, Preamble.
[591] Resp. Rej., ¶¶ 407-413.
[592] De Vivero Second Expert Report, Section VI.E.

cannot show alternative proposals to protect the *páramo* which would need to take into account the methodology developed by the IAVH and the Ministry of Environment.[593]

424. The Respondent also argues that Colombia's measures did not constitute "arbitrary or unjustifiable discrimination."[594] According to the Respondent, the Claimant has not demonstrated that Colombia's laws or policies allow illegal mining to continue. To the contrary, the Respondent says that it has taken actions prosecuting individuals, issuing and enforcing *amparos administrativos*, closing illegal mines, seizing and destroying materials and equipment to conduct illegal mining.[595]

425. The Respondent further alleges that the ban on mining in the *páramo* and its implementation with respect to the Claimant was necessary to protect the *páramos* from the serious irreversible effects of mining activities. The Respondent adds that it did not prohibit mining in the *páramo* areas to allow illegal miners to operate in it. As explained, the Respondent says, Colombia is engaged in serious efforts to combat illegal mining in the Santurbán *Páramo*.[596]

426. The Respondent maintains that the measures were not a 'disguised restriction on international investment.' Once again, the Respondent explains, the purpose is to protect the Santurbán *Páramo* from harmful effects of mining exploitation activities, not to restrict foreign trade or investment.[597]

427. The Respondent asserts that the Claimant has failed to put forward credible arguments disputing the applicability of the Treaty's environmental exception to the Claimant's claims. Therefore, the Respondent requests, "should the Tribunal find any *prima facie*

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[593] Resp. Rej., ¶ 409.

[594] Resp. Rej., ¶ 410.

[595] Resp. Rej., ¶ 410, *citing* Contraloría General de la República, Informe Especial Minería Ilegal, August 2013, **Exhibit C-939**, p. 5; *Formalization of Small-Scale Mining in Colombia: Experiences from the Field*, Somos Tesoro Foundation and Alianza para la Minería Responsable, February 2016, **Exhibit R-149**, pp. 18-35; "Eleven Individuals Conducting Illegal Mining Activities in the Santurbán Páramo Have Been Detained", *Vanguardia*, August 12, 2020, **Exhibit R-166**; ANM, Resolution No. GSC 562, September 20, 2018, **Exhibit R-154**, pp. 8-9; ANM, Resolution No. GSC-ZN 619, October 18, 2018, **Exhibit R-157**; "ANM Orders Closure of Mines in Santurbán due to Illegal Mining", *El Tiempo* (republished by *Red de Desarrollo Sostenible de Colombia*), August 15, 2014, **Exhibit R-146**.

[596] Resp. Rej., ¶ 411.

[597] Resp. Rej., ¶ 412.

violations of the FTA on the facts of this case, it should find that Article 2201(3) applies and deny Red Eagle's claims in full on this basis."[598]

(2) The Tribunal's Analysis

428. The Tribunal recalls the interpretation of Article 2201(3) where the Tribunal confirmed that the exceptions under this Article apply once there has been a determination that a primary obligation in Chapter Eight has been breached. Since no such breach has been determined by the majority of the Tribunal, there is no need to consider the scope or effect of Article 2201(3).

VII. DAMAGES

429. The Parties have presented extensive arguments on the *quantum* of damages. The majority of the Tribunal, having decided to reject all of the claims presented by the Claimant on their merits, the issue of damages does not require further consideration.

430. The majority of the Tribunal takes note of, and agrees with, the conclusion of Mr. Martínez de Hoz that "on the basis of the information submitted by the Claimant" it is not possible to assess that value of damages "without additional information as the one as the one that could have been obtained in a subsequent quantum phase...".[599]

VIII. COSTS

A. THE CLAIMANT'S STATEMENT ON COSTS

431. In its Statement on Costs, the Claimant argues that the Respondent should bear the total arbitration costs incurred by the Claimant, including legal fees and expenses totaling USD 6,765,834.00, broken down as follows:

[598] Resp. Rej., ¶ 413.

[599] Dissenting Opinion of Mr. Martínez de Hoz, ¶ 174.

CLAIMANT'S STATEMENT ON COSTS

Experts	USD
Legal Expert	53,429
Technical Experts	98,934
Quantum Experts	399,451
Counsel	
Preparation of Case; Procedural Phase	343,044
Bifurcation Phase	137,249
Written Phase	3,218,464
Hearing / Post Hearing Phase	1,651,901
Costs (as of 31 May 2023)	
General Costs	63,362
ICSID Costs – Claimant	400,000
ICSID Costs – Respondent	400,000
TOTAL	**USD 6,765,834**

432. The Claimant makes its claim on the basis that the Respondent has violated the Treaty and has refused to make advance payments to ICSID "in blatant contravention of its obligations under the ICSID Convention and applicable rules." As such, the Claimant argues that it is entitled to the costs related to Colombia's repeated defaults in these proceedings.[600] [601]

B. THE RESPONDENT'S STATEMENT ON COSTS

433. In its Statement on Costs, the Respondent submits that the Claimant should bear all the costs and expenses of these proceedings, including the Respondent's legal fees and expenses totaling USD 2,900,042.24, broken down as follows:

[600] Cl. Statement on Costs, p. 1.

[601] The Tribunal notes that after the Claimant submitted its Statement on Costs, on May 16, 2023, ICSID made a third call for funds for a total of USD 400,000. On August 24, 2023, the Claimant made the advance payment to ICSID for USD 400,000. On August 30, 2023, ICSID confirm its receipt on August 24, 2023 of a wire transfer in the amount of USD 400,010 from the Claimant. The total of payments advanced to ICSID by the Claimant was USD 1,200,010.

Respondent's Statement of Costs

A.	**LEGAL FEES AND EXPENSES:**	
	Latham & Watkins LLP	US$ 2,065,000.00
B.	**PROFESSOR DE VIVERO (COLOMBIAN LAW EXPERT):**	
	Fees	US$ 93,096.03
	Expenses	US$ 4,802.46
C.	**THE BRATTLE GROUP AND MARIO ROSSI (QUANTUM AND MINING EXPERTS):**	
	Fees and expenses	US$ 624,656.00
D.	**COLOMBIA'S IN-HOUSE COSTS:**	
	In-House Team Salaries	US$ 98,862.08[1]
E.	**HEARING COSTS:**	
	Travel to Washington DC, accommodation and sustenance for the Respondent's representatives	US$ 9,538.96
	Travel to Washington DC, accommodation and sustenance for the Respondent's witnesses	US$ 4,086.71
F.	**TOTAL (A + B + C + D + E)**	
	US$	**2,900,042.24**

434. The Respondent argues that the Tribunal should reject the Claimant's claims and order it to pay all of Colombia's costs, in line with established practice. Alternatively, should Red Eagle prevail, the Claimant should still bear Colombia's costs, "in light of Red Eagle's abusive conduct in these proceedings which the Respondent has highlighted in its prior submissions and correspondence."[602]

C. THE TRIBUNAL'S DECISION ON COSTS

435. Article 61(2) of the ICSID Convention provides:

> In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

[602] Resp. Statement on Costs, p. 1.

436. This provision gives the Tribunal discretion to allocate all costs, including attorney's fees and other costs of arbitration, between the Parties as it deems appropriate.

437. The Claimant claims USD 5,965,834 in attorney's fees and expenses and USD 1,200,000 in advance payments to ICSID for the costs of arbitration. The Respondent claims USD 2,900,042.24 in attorney's fees and expenses and has not made any advance payments to ICSID.

438. The costs of the arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to (in USD):

Arbitrators' fees and expenses	
Dr. Andrés Rigo Sureda, President	144,475.00
Mr. José Martínez de Hoz, Co-arbitrator	250,595.04
Prof. Philippe Sands, Co-arbitrator	129,434.00
ICSID's administrative fees	252,000.00
Direct expenses	145,733.85
Total	**922,237.89**

439. The Tribunal has rejected the Respondent's objections to jurisdiction of the Tribunal and found the Claimant's claims to have no merit. In light of these circumstances, with respect to the claimed attorney's fees and expenses, the Tribunal considers reasonable that each party bear its own attorney's fees and expenses.

440. In allocating the arbitration costs, the Tribunal bears in mind that the Respondent ignored the Tribunal's requests to pay its corresponding share of the advances notwithstanding the mandatory wording of the ICSID Convention Article 61(2); ICSID Administrative and Financial Regulation 14 (2006); and Arbitration Rule 28, and that the Claimant paid for the entirety of the advances requested. The Tribunal also notes that the Respondent's bifurcation request and objections to the jurisdiction have been rejected.

441. In light of these circumstances, and subject to the Declaration of Professor Sands, the Tribunal considers reasonable that, notwithstanding the fact that the Claimant's claims have been rejected, the Respondent pay its corresponding half of the costs of arbitration.

442. The costs of arbitration have been paid out of the advances made by the Claimant.[603] As a result, each Party's share of the costs of arbitration amounts to USD 461,118.95.

443. Accordingly, the Tribunal orders the Respondent to reimburse USD 461,118.95 to the Claimant for its corresponding share of the arbitration costs.

IX. AWARD

444. For the reasons set forth above, the Tribunal decides as follows:

(1) dismisses all objections to its jurisdiction presented by the Respondent;

(2) by majority of Arbitrators Rigo and Sands rejects all the claims presented by the Claimant;

(3) by majority of Arbitrators Rigo and Martínez de Hoz orders the Respondent to pay the Claimant USD 461,118.95 towards the costs of the arbitration detailed above.

Mr. José Martínez de Hoz dissents with the opinion of the majority of the Tribunal in a separate Dissenting Opinion that is attached hereto. Professor Sands adds a Declaration attached hereto.

[603] The remaining balance of the advance payments will be reimbursed to the Claimant.

[Signed]

Mr. José Martínez de Hoz
Arbitrator
Subject to attached dissenting opinion

Date: February 23, 2024

Prof. Philippe Sands
Arbitrator

Date:

Dr. Andrés Rigo Sureda
President of the Tribunal

Date:

	[Signed]
Mr. José Martínez de Hoz Arbitrator *Subject to attached dissenting opinion*	Prof. Philippe Sands Arbitrator
Date:	Date: February 23, 2024

Dr. Andrés Rigo Sureda
President of the Tribunal

Date:

Mr. José Martínez de Hoz
Arbitrator
Subject to attached dissenting opinion

Date:

Prof. Philippe Sands
Arbitrator

Date:

[Signed]

Dr. Andrés Rigo Sureda
President of the Tribunal

Date: February 23, 2024