

CERTIFICATE

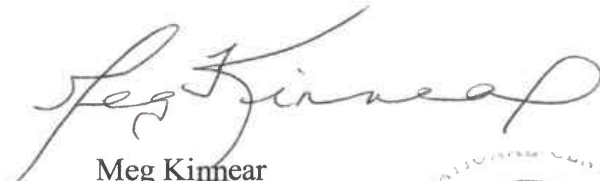
RED EAGLE EXPLORATION LIMITED

v.

REPUBLIC OF COLOMBIA

(ICSID CASE NO. ARB/18/12)

I hereby certify that the attached documents are true copies of the English and Spanish versions of the Tribunal's Award dated February 28, 2024, and the English and Spanish versions of the Dissenting Opinion of Mr. José A. Martínez de Hoz and the Declaration of Prof. Philippe Sands KC.

A handwritten signature in dark ink, appearing to read "Meg Kinnear", is written over a light blue circular stamp.

Meg Kinnear
Secretary-General



Washington, D.C., February 28, 2024

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

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TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
ANM	<i>Agencia Nacional de Minería</i>
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	<i>Corporación Autónoma Regional para la Defensa de la Meseta de Bucaramanga</i>
<i>Eco Oro</i>	<i>Eco Oro Minerals Corp. v. Republic of Colombia</i> , ICSID Case No. ARB/16/41
GATT	General Agreement on Tariffs and Trade
Hearing	Hearing on jurisdiction, merits and <i>quantum</i> held from February 27 to March 3, 2023
IAVH	<i>Instituto de Investigación Alexander von Humboldt</i>
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	<i>Plan de manejo ambiental</i> (Environmental Management Plan)
PTO	<i>Plan de trabajos y obras</i> (Mining Works Program)
Project, Vetás Project, Vetás Gold Project	Large-scale mining project in las Vetás
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
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For the Respondent:

Mr. Fernando Mantilla-Serrano	Latham & Watkins
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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. Giovanni 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						
<i>Title</i>	<i>Option</i>	<i>Acquisition</i>	<i>Assignment</i>	<i>Approval</i>	<i>Registration</i>	<i>Environmental Permit</i>
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 Vetás (“**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.

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 Vetás had to determine whether developing the remainder of the Vetás 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 Vetás 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 Vetás, December 22, 2016, **Exhibit C-751**.

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

¹⁸ Cl. Mem., ¶ 84, *citing* ANM Letter to Minera Vetás, 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

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

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.

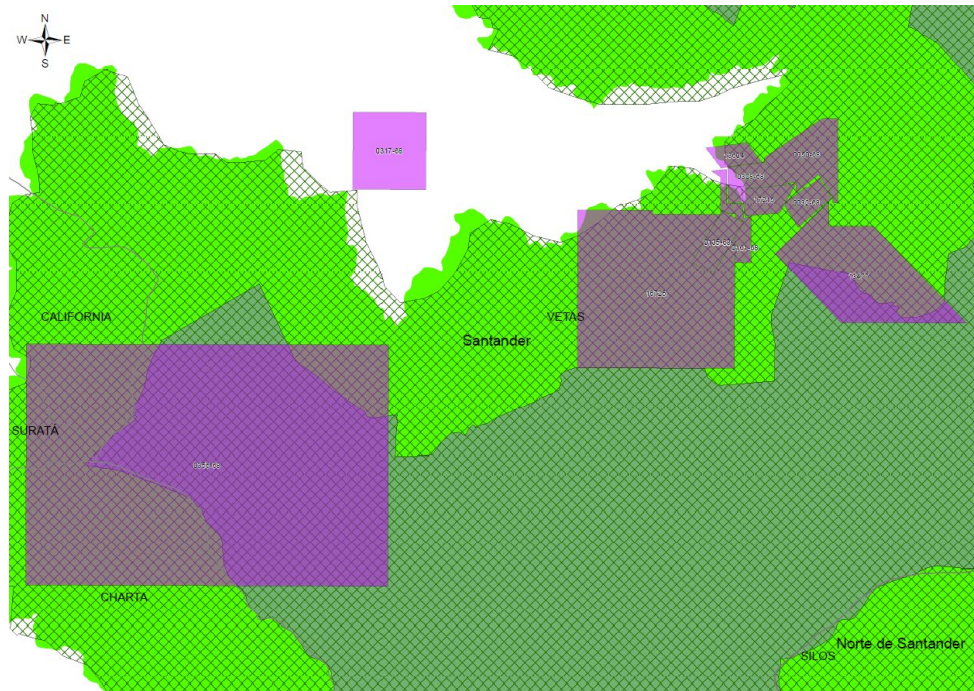


Fig. 1: Map showing the overlap of Red Eagle's titles with the 2007 IAVH Páramo Atlas (in purple squares), Resolution 2090 (in light green) and the Santurbán Regional Park (in dark green) (Resp. C-Mem., ¶ 285, Figure 11).

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.

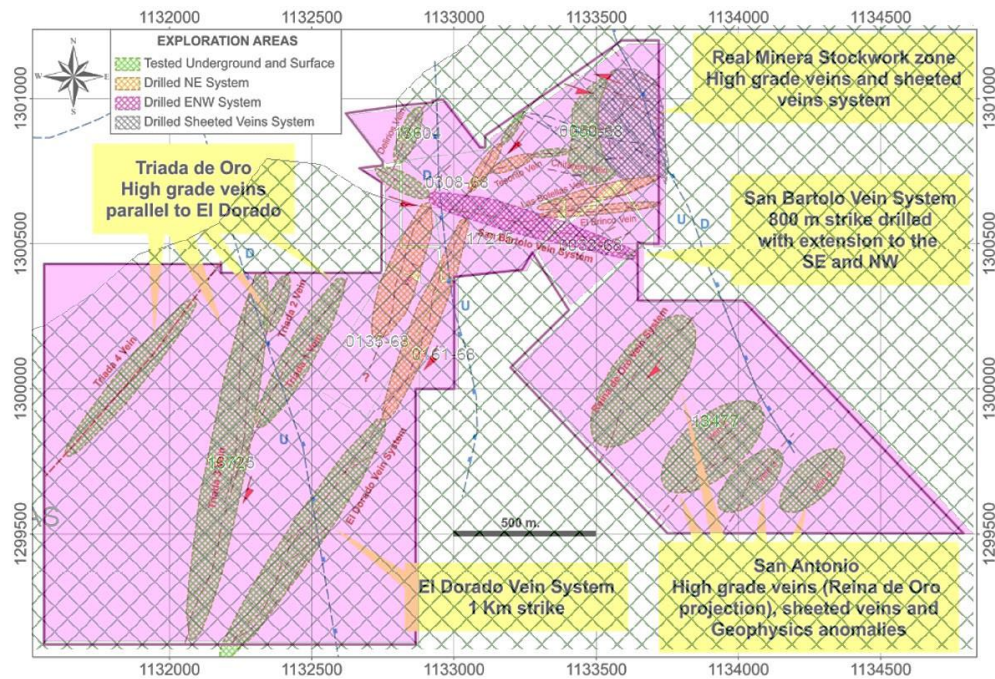


Fig. 2: Map showing the overlap of Red Eagle’s exploration areas with the 2007 IAVH Páramo Atlas (in green squares), including Red Eagle’s Mining Titles outlined in purple (Resp. Reply, ¶ 35, Figure 2).

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 Vetás 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 Grencitel 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 Vetás,⁶⁶ (ii) issuing a favorable opinion recognizing Minera Vetás' right to convert the Real Minera exploitation license into a concession contract, and approving the execution,⁶⁷ (iii) issuing a technical report recognizing Minera Vetás' 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

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 Vetás “would only be able to conduct mining exploitation activities in those titles provided Minera Vetás applied to amend its PMAs to allow the large-scale exploitation activities associated with the Vetás 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 Vetás 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 Vetás 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-

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. Swissbourn 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

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

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 *Compañía 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

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

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 within 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.

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 Statute 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

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

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

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

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, January 19, 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

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 Vetás 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

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 Vetás 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 Vetás 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 Vetás 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 Vetás regarding Real Minera, May 17, 2016, **Exhibit C-21**; ANM Letter to Minera Vetás 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 Vetás, August 31, 2017, **Exhibit C-20**.

²⁵⁴ CDMB Letter to Minera Vetás, 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 Vetás 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

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.

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 Vetás 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

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.

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 préparatoires* 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

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, *Minimum 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.*

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

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

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 Erömu 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

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 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 Vetás 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

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 Vetás' 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 *paramo* 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 Vetás. 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

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

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

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 Vetás 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 Vetás 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

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 Vetás 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 expropriation⁴⁰⁸ 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

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 Vetás 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

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**, *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, 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 Triada 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 Vetaz 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 minero 16725 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

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 Vetás 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 Vetás 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 Vetás 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:

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

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 Vetás 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 Vetás 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 Vetás Proposal prepared by the Municipality of Vetás 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

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

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 Vetás 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 Vetás 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 Vetás Gold Project for CB Gold*, Santander Department, Colombia, April 29, 2014, **Exhibit C-561**, p. 6. See also First Brattle Report, Section V.A.

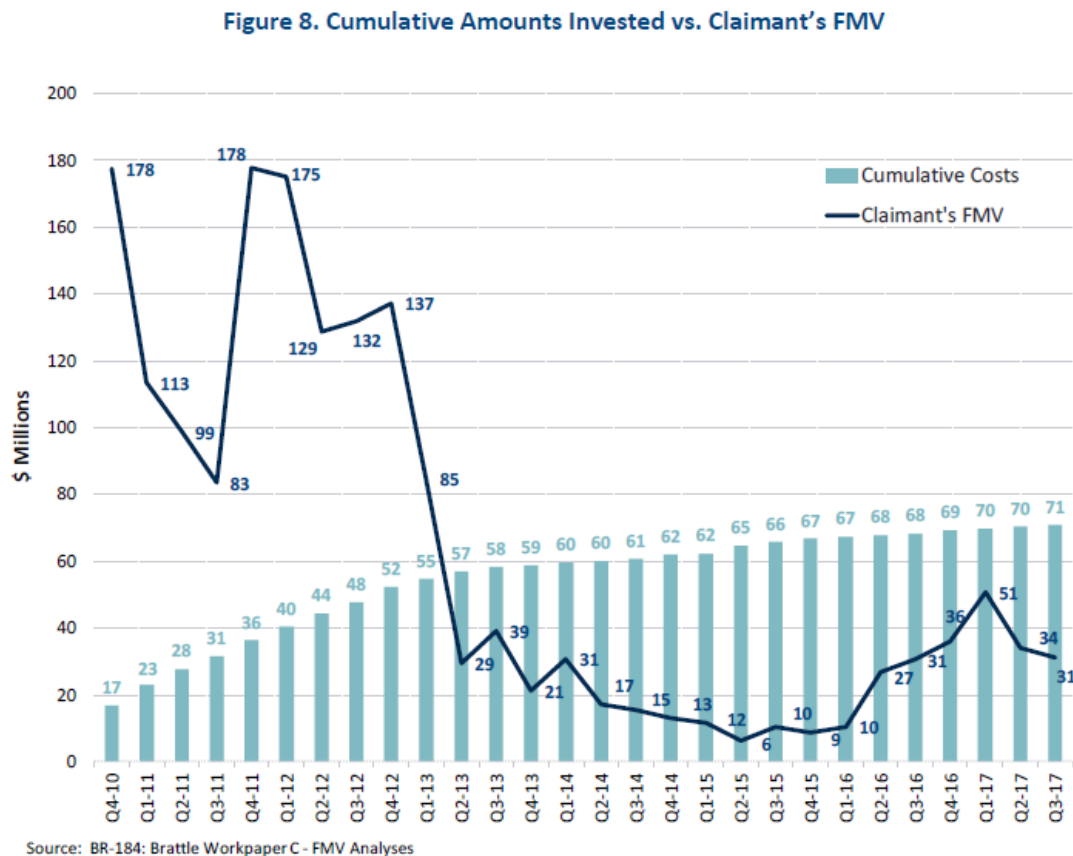
⁵¹⁶ Resp. C-Mem., ¶ 463.

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



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 Vetás 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

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

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 Vetás 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

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 Vetás 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 *paramo* 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

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 Vetás 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

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

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*

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	<u>922,237.89</u>

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.



Mr. José Martínez de Hoz
Arbitrator

Subject to attached dissenting opinion

Date: February 23, 2024

Prof. Philippe Sands KC
Arbitrator

Date:

Dr. Andrés Rigo Sureda
President of the Tribunal

Date:

Mr. José Martínez de Hoz
Arbitrator

Subject to attached dissenting opinion

Date:



Prof. Philippe Sands KC
Arbitrator

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 KC
Arbitrator

Date:



Dr. Andrés Rigo Sureda
President of the Tribunal

Date: February 23, 2024

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

RED EAGLE EXPLORATION LIMITED

- Claimant -

and

THE REPUBLIC OF COLOMBIA

- Respondent -

ICSID Case No. ARB/18/12

DISSENTING OPINION

José A. Martínez de Hoz (Co-arbitrator)

Members of the Tribunal

Dr. Andrés Rigo Sureda - President

Mr. José Martínez de Hoz - Arbitrator

Prof. Philippe Sands - Arbitrator

Secretary of the Tribunal

Ms. Catherine Kettlewell

February 23, 2024

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DISSENTING OPINION

1. Introduction

- (1) I agree with the reasoning contained in Section V of the award issued by the Tribunal (the "Award") in relation to the jurisdictional objections raised by Respondent and the conclusion to uphold jurisdiction in this case.
- (2) I respectfully disagree with my colleagues in relation to their reasoning and conclusions on Liability (Section VI of the Award), particularly regarding whether Colombia's measures violated Article 805 of the Free Trade Agreement between Canada and Colombia (the "FTA" or the "Treaty").
- (3) I do however agree that Colombia's measures do not constitute an indirect expropriation of Claimant's investments under Article 811 of the Treaty.
- (4) In view of the decision of the majority of the Tribunal, although this opinion includes certain general considerations as to the characterization and assessment of the damages claimed by Red Eagle Exploration Limited ("Red Eagle" or "Claimant"), I do not enter into a detailed analysis of the compensation payable to Claimant.
- (5) All capitalized terms not defined herein shall have the meaning ascribed to them in the Award.

2. Signals to Investors. Regulatory Framework and Measures

2.1. Initial comment

- (6) The Parties discussed at length during the proceedings the signals that investors generally, and Claimant in particular, would have received from Colombia regarding the likelihood of the imposition by Respondent of a ban or restrictions on mining operations in the areas forming part of the Santurbán páramo ("SP" or "Páramo"), and their implications on the legitimate expectations of Claimant. This matter was also addressed in detail in both Parties' Post-Hearing Briefs ("PHBs") in response to the first question that the Tribunal directed to the Parties on March 2, 2023.¹
- (7) I will first review the signals invoked by each of the Parties in relation to the regulatory framework in force at the time Claimant acquired its 11 mining titles (the "Mining Titles") and the subsequent measures and actions taken by Colombia's authorities. I will afterwards analyze the depth of the due diligence carried out by Claimant and finalize with my conclusions on this first issue.

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

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

- (8) Respondent argues that at the time Claimant acquired its Mining Titles between May 2010 and April 2012, Red Eagle knew that there was a substantial risk that they would overlap with the final delimitation of the Páramo, and that the Aquaprosesos Report prepared by Mr. Franco in December 2009 identified this risk.² Moreover, Respondent points out that, long before Red Eagle was even incorporated, under the 2001 Mining Code (the "Mining Code") Colombia had already signaled that it could prohibit mining in certain areas for environmental considerations, and that in 2002, through Judgement C-339, the Colombian Constitutional Court specifically identified páramo ecosystems as one of the types of areas in which the Colombian legislature was likely to enact a ban on mining in the future.³
- (9) Law 1382, enacted in 2010, amended the Mining Code and specified for the first time that páramo ecosystems could be declared mining exclusion zones ("Mining Exclusion Zones"). However, Article 3 thereof (that amended Article 34 of the Mining Code), did not establish itself a prohibition of mining activities in páramo areas.⁴
- (10) Respondent concedes that according to Law 1382, restrictions in páramo ecosystems and national parks would apply insofar as three requirements were met: (i) restrictions would only apply to areas delimited by the competent environmental authority "*based on technical, environmental and social studies*"; (ii) for a restriction to apply the Ministry of Mines and Energy should issue a previous non-binding opinion approving the restriction; and (iii) restrictions would apply to mining titles (x) issued after Law 1382 was enacted (this is, after February 9, 2010); (y) that did not have an environmental license or equivalent; and (z) where no construction, mounting and exploitation activities had been undertaken.⁵
- (11) Thus, Law 1382 was a forward-looking regulation; though it contemplated the possibility that the competent authorities could establish new Mining Exclusion Zones, it also established that their identification and delineation would be subject to a number of requirements. In any case, Law 1382 fell short from identifying specific areas within the páramo ecosystem subject to a mining ban. Additionally, it established a transitional or "grandfathering" regime in respect of mining titles issued prior to February 9, 2010, which had an environmental license or equivalent.
- (12) On the other hand, Colombia had a tradition of balancing the protection of property rights and environmental considerations. In fact, Colombia's Constitution protects both property rights and the right to engage in mining as well as the right to the environment and does not contain a specific prohibition on mining in páramo ecosystems.⁶ Also, Law 99 of 1993, setting forth the principles of Colombian environmental policy, did not contain any specific

² Resp. PHB, ¶¶ 2 and 8.

³ *Id.*, ¶ 10.

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

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

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

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

- (13) Consistently with the above-mentioned principles, although Article 36 of the Mining Code allows for the retroactive effect of environmental regulations, it also states that compensation is payable in accordance with Article 58 of the Constitution if the investor suffers a loss of an acquired right.⁹
- (14) In its submissions, Respondent also draws attention to the fact that through the *Atlas de Páramos de Colombia* (the “2007 IAVH Páramos Atlas” or the “IAVH Atlas”), published in May 2007, investors should have been put on notice by Colombia of the areas that could be considered to form part of the páramo ecosystem. Though the IAVH Atlas was prepared on a large scale of 1:400.000, Mr. Franco relied on this Atlas in the *Aquaprosesos* Report and concluded that three Mining Titles fell within the páramos as mapped by the IAVH Atlas.¹⁰
- (15) Respondent also emphasizes that the IAVH Atlas, although not binding, was prepared as part of a long-running effort from the Ministry of the Environment to acquire knowledge about the páramos and was the official cartography designated by the Colombian legislature as a minimum reference for the ban on mining in páramo ecosystems. Ms. Baptiste also explained in her witness testimony that the *Instituto de Investigación Alexander Von Humboldt* (“IAVH”) had prepared a map on 1:250.000 scale that was available upon request.¹¹
- (16) However, regardless of the discussion on whether the 1:400.000 scale of the IAVH Atlas was adequate or not for precisising the extent to which Claimant’s Mining Titles could eventually overlap the SP, it is a fact that the Atlas itself did not prohibit mining in any of the areas identified therein nor established any Mining Exclusion Zones, as recognized by Respondent’s witness, Ms. Baptiste.¹²
- (17) As explained above, Law 1382 was forward looking, did not establish any mining prohibition in respect of specific areas and set forth several requirements applying to the declaration and delimitation of Mining Exclusion Zones that had not been met at the time Red Eagle acquired its Mining Titles.¹³
- (18) Colombia’s Constitutional Court declared Law 1382 unconstitutional because the government had failed to carry out community consultations. Shortly thereafter, Colombia enacted Law 1450 of 2011 which prohibited mining activities in páramo ecosystems and tasked the Ministry of the Environment with the responsibility of delimiting the páramos on the basis of economic, technical, environmental and social studies. It established a process for delimiting páramo Mining Exclusion Zones at a scale of 1:25.000, a scale more than ten times more precise than the IAVH Atlas. Law 1450 was also forward looking as it

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

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

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

¹⁰ Resp. PHB, ¶ 11.

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

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

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

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

- (19) Resolution 937 of 2011 of the Ministry of the Environment adopted the cartography elaborated by the IAVH at a scale of 1:250.000 for identifying páramo ecosystems, and stated that delimitations made by the authorities would be given legal effect *provided that* the scale of the map was equal or more detailed than 1:25.000 (ten times more detailed as provided by Law 1450). This Resolution also fell short of determining the existence of any Mining Exclusion Zones, which had to be expressly established following the requirements set forth by Law 1382.¹⁵
- (20) It has been evidenced that Claimant's process of acquisition, transfer and registration of the Mining Titles, involved 22 separate approvals from Colombian authorities for its 11 Mining Titles during the course of four years between 2010 and 2013.¹⁶ Red Eagle filed environmental guidelines for 5 titles permitting it to carry out exploratory work. Six of the Mining Titles acquired by Claimant already had Planes de Manejo Ambiental ("PMAs") and it requested the authorities to transfer to it those 6 PMAs. The authorities approved the transfer of the PMAs for 4 Mining Titles while the approval of the transfer of the PMAs for the 2 other titles remains pending without Colombia having stated any reasons for its inaction.¹⁷
- (21) It has also been evidenced that Colombia granted Red Eagle the permissions required to protect existing rights associated with several Mining Titles, while authorizing a suspension of exploitation activities, so Claimant could continue with remediation activities and conduct detailed exploratory work. The record shows that Colombia also continued to approve the transfer of PMAs to Red Eagle after Resolution 937 and Law 1450 were enacted, even though the *Corporación Autónoma Regional para la Defensa de la Meseta de Bucaramanga* ("CDMB") knew that the Mining Titles in question could eventually form part of páramo ecosystems. Moreover, in 2012, the Colombian authorities approved the conversion of exploitation licenses over several Mining Titles into concession contracts, and in 2015 Colombia granted 5 Concession Contracts to Red Eagle.¹⁸
- (22) Respondent argued that these signals lacked relevance by clarifying that the CDMB had warned Red Eagle that mining exploration and exploitation was prohibited in páramo ecosystems, as identified in the IAVH Atlas, but that it had no authority to stop such activities until a final delimitation was completed. Respondent also points out that, between August 2011 and May 2013, when the CDMB approved the assignment of the PMAs associated to 4 Mining Titles, it warned Red Eagle that it would have to modify the PMAs prior to commencing

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

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

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

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

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

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

- (23) Respondent adds that in December 2011, the *Agencia Nacional de Minería* (“ANM”) alerted Red Eagle that it would not be able to process its *derecho de preferencia* application with regards to the areas in the Mining Titles overlapping the páramo areas, and that following the delimitation made in December 2014 by Resolution 2090 (as defined below), the ANM explicitly stated that mining was not permitted in areas of the titles overlapping the Preservation Area (as defined below) created by said resolution.²⁰
- (24) Finally, Respondent states that the Colombian authorities never represented to Red Eagle that its Mining Titles would be exempted from mining prohibitions related to the páramos, and that it had never given an authorization to develop a large -scale mining project in those areas.²¹

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

- (25) Resolution 2090 of the Ministry of Environment and Sustainable Development of December 19, 2014 (“Resolution 2090”) delimited the SP for the first time, establishing a Mining Exclusion Zone over the Páramo.²²
- (26) Although in Section 4 below I will review in more detail the implications and impact of Resolution 2090, this resolution imposed a ban and restriction on mining activities in respect of certain areas that until then had not been specifically delimited as Mining Exclusion Zones or subject to other restrictions.
- (27) Resolution 2090 distinguished two situations: (i) páramo or Preservation Areas identified in green and (ii) Restoration Areas identified in yellow.
- (28) In the Preservation Areas, (i) as from February 9, 2010, new concession contracts would be prohibited as well as the granting of mining titles or environmental licenses authorizing mining activities in those areas, but (ii) mining activities covered by concession contracts or mining titles, with an environmental license or environmental control instrument or equivalent environmental management (*manejo ambiental*) granted prior to February 9, 2010, would be able to continue until their expiration, with no possibility of extension, subject to strict control by the mining and environmental authorities.²³
- (29) The Restoration Areas, although part of the páramo ecosystem identified in the IAVH Atlas, were not part of the Exclusion Mining Zone, but were considered to be functionally linked to the SP. In the Restoration Areas, mining activities could be authorized subject to applicable environmental regulations and management

¹⁹ Resp. PHB, ¶¶ 20 and 24.

²⁰ Resp. PHB, ¶ 26.

²¹ Resp. PHB, ¶¶ 28-36.

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

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

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

- (30) According to Claimant, Article 5 of Resolution 2090 provided for the “grandfathering” of existing rights, such that mining activities were allowed to continue in areas corresponding to mining titles and environmental licenses or their equivalent that were issued prior to February 9, 2010.²⁵
- (31) While Claimant characterizes the scope of the aforementioned grandfathering on the basis of the existing titles, according to Colombia, the grandfathering did not apply to the title *per se*, but to pre-existing “activities”. Thus, the right to exploit would only materialize when a PMA or environmental license was granted or approved for a specific activity. Since Red Eagle’s Vetas Project (the “Project”) comprised a large-scale integrated project with activities that according to Colombia were not covered by an environmental license or equivalent issued prior to February 9, 2010 (Red Eagle never conducted activities pursuant to the PMAs associated to 6 of its Mining Titles and 5 of the Titles did not have any environmental license or equivalent), Colombia argues that the Project was not grandfathered.²⁶
- (32) I will address the implications of the aforementioned matter when analyzing the impact of Colombia’s measures on Red Eagle’s investment in Section 4 below. In any event, regardless of the issue relating to the scope of the grandfathering provided by Article 5 of Resolution 2090 and Law 1382, it is a fact that Resolution 2090 implied a change in the applicable rules by creating for the first time a Mining Exclusion Zone in the SP in areas that were found to overlap Red Eagle’s Mining Titles and establishing restrictions in adjacent areas; this is, the Restoration Areas.
- (33) On June 9, 2015, Colombia enacted Law 1753 (“Law 1753”). Article 173 thereof prohibited mining in areas delimited as páramos. It mandated the Ministry of Environment and Sustainable Development (“Ministry of the Environment”) to delimit the páramo areas within the area defined by the IAVH Atlas at a scale of 1:100.000 or 1:25.000 when available on the basis of technical, environmental, social and economic criteria. It also provided for the grandfathering of mining exploration and exploitation activities with a contract and environmental license or instrument of environmental control and management issued prior to February 9, 2010.²⁷
- (34) The Parties disagree on whether Law 1753 banned mining in the Restoration Areas. According to Claimant, the text of Article 173 “*generated uncertainty by banning mining within the interior of the area delimited as páramo (potentially also within Restoration Areas).*”²⁸ Colombia disagrees, and states that mining is not allowed in “*areas delimited as páramos*”, that the only areas delimited as such by Resolution 2090 were the Preservation Areas, and when referring to Restoration Areas Article 9 thereof states that they are “*functionally linked*” to, but not part of the SP.²⁹ This circumstance would confirm that the entire páramo

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

²⁵ Cl. PHB, ¶ 45.

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

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

²⁸ Cl. PHB, ¶ 47.

²⁹ Resp. PHB, ¶¶ 88-89.

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

- (35) In any case, on February 8, 2016, the Colombian Constitutional Court issued Judgement C-35³⁰ ("Judgement C-35") that held that the transitional regime established by Law 1753 was unconstitutional "*because it determined that allowing mining activities to continue in páramo ecosystems did not fully protect the páramos from the harmful effects of the extraction of non-renewable natural resources*".³¹
- (36) Respondent concedes that the elimination of the grandfathering regime of Law 1753 meant that Article 5 of Resolution 2090 lost its *base legal* (statutory foundation) and as a result ceased to be in force.³²
- (37) Colombia argues that the elimination of the grandfathering regime of Law 1753 (and by extension, Resolution 2090) had no practical effect on the Project because it was never grandfathered. Although I will return to this matter in Section 4 when analyzing the impact of Colombia's measures, it is nevertheless a fact that Judgement C-35 implied a new change of rules for the mining sector and of criteria to the extent it held that environmental protections prevailed over the acquired rights of private parties.³³
- (38) Subsequent to the issuance of Judgement C-35, the ANM sent several notices to Claimant enforcing the ban on portions of several of the Mining Titles that overlapped the SP.³⁴
- (39) On May 30, 2017 Colombia's Constitutional Court issued Judgment T-361 ("Judgement T-361") which held Resolution 2090 to be unconstitutional and ordered the Ministry of the Environment to issue a new delimitation within one year.³⁵ The Constitutional Court found that the aforementioned Ministry had not conducted an adequate and effective consultation process, and ordered it to cure the defect by holding an appropriate consultation process at the end of which a new delimitation of the SP should be published. The Constitutional Court also ruled that the new delimitation should be more expansive. However, no precisions were given as to what this meant in terms of whether the new demarcation should cover additional land or different areas or take a different form.³⁶
- (40) The Parties agree that Resolution 2090 remains in force. However, to date, after more than six years, Colombia has failed to issue a new delimitation of the SP as ordered by Judgement T-361. This situation increased the legal uncertainty, and as explained below, prevented in practice any subsequent mining activities and the CDMB from issuing approvals and other decisions in relation to the Claimant's Mining Titles.

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

³¹ Resp. PHB, ¶ 92.

³² *Id.*

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

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

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

³⁶ *Id.*, pp. 262-263 and 282-284.

- (41) In this regard, the record shows that following the issuance of the aforementioned judgment, the CDMB and ANM sent notices to Claimant identifying areas of the Mining Titles that could not be mined on grounds of the need to wait for a final delimitation of the SP, including also portions of Restoration Areas.³⁷ In addition, the CDMB failed to approve the transfer of PMAs of two titles due to the same reasons,³⁸ and the authorities also refused to allow Red Eagle to retain portions of its Mining Titles that could not be economically exploited, thus risking forfeiture of the title.³⁹
- (42) Respondent contested the relevance of the aforementioned communications of the CDMB.⁴⁰ However, it is reasonable to consider that these communications aggravated the situation of uncertainty created by the sequence of Resolution 2090, Law 1753, Judgement C-35 and Judgement T-361. In practice, the compounded effect of these legislative and regulatory changes and letters of the authorities, was to prevent any mining activity in the areas covered by the Mining Titles held by Claimant, including the Restoration Areas.⁴¹
- (43) Based on the evidence submitted by the Parties, the uncertainty continues as of this date as the SP has not yet been delimited. In addition, recently, Colombia's President Petro declared that *"in Santurbán, there can be no mineral exploitation"*, while adding that *"all mining titles in the country will be reviewed"*.⁴²

2.4. Claimant's Due Diligence

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

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

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

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

⁴⁰ Resp. PHB, ¶ 104.

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

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

⁴³ Cl. PHB, ¶¶ 25-26.

Páramo for the purpose of creating an Exclusion Mining Zone had been completed until Resolution 2090 in December 2014.⁴⁴

- (45) Claimant's expert confirmed that at the time of acquisition of Red Eagle's Mining Titles there was no official mining exclusion for those areas, that the IAVH Atlas only constituted a "preliminary approximation" of the páramo ecosystem and did not offer sufficient detail for the creation of mining exclusion zones.⁴⁵ Claimant's witness Ms. Vásquez testified that she met the Minister of Mines and various Colombian officials to understand the scope of the law and that *"the conclusion we reached at that point was that all titles that had been granted before this law [Law 1382] would continue with their operation"*.⁴⁶
- (46) Mr. Franco, the author of the 2009 diligence report that was later hired by Claimant, testified that the titles were accompanied by the necessary exploitation licenses, and that various titles had PMAs; and that this gave Claimant reasonable grounds to believe that environmental permits could be transferred, as most were, and that it could submit new environmental guidelines for those titles that lacked environmental management plans.⁴⁷
- (47) Claimant contends that it also commissioned technical due diligence reports that conformed to the stringent National Instrument 43-101 standard that regulates disclosure of information related to mineral projects that are governed by Canadian securities laws, and they confirmed the viability of Red Eagle's project.⁴⁸
- (48) Respondent disputes Claimant's assertions on the due diligence it conducted. First, it argues that in the Aquaprocesos Report, Mr. Franco warned Red Eagle, among other matters that the titles under assessment were located in a páramo system, that the páramos would be identified in accordance with the IAVH Atlas and that three of the titles overlapped the SP. Noting that the IAVH Atlas was not a definitive delimitation, Respondent points out that Mr. Franco recommended Red Eagle to consult Ingeominas, the IAHV and the Ministry of the Environment as well as legal counsel.⁴⁹
- (49) Respondent noted that in her testimony, Ms. Vásquez was unable to provide documentary evidence of her purported meetings with government officials.⁵⁰
- (50) Respondent also noted that the opinion of the Cardenas & Cardenas law firm did not actually advise Red Eagle on the implications of the mining ban on the Project, and that it did not contain a meaningful analysis of Law 1382, still less any specific advice on its impact on the Project. Respondent characterizes the aforementioned opinion as merely having paraphrased Law 1382 at a high level and omitted to advise on a number of relevant issues, including the ability to obtain compensation under Article 58 of the Colombian Constitution or whether the existing PMAs could be modified to accommodate a large-scale project.

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

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

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

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

⁴⁸ See Cl. PHB, ¶ 30.

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

⁵⁰ Resp. PHB, ¶ 40.

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

- (51) Respondent also contends that the Cardenas & Cardenas opinion includes some errors and that Red Eagle failed to produce certain documents related to its due diligence, and thus that the Tribunal should conclude that no further documents related to its due diligence exist.⁵²
- (52) In my view, Claimant's due diligence should be evaluated against the backdrop of the regulatory framework described in Section 2.2 above, including the absence of existing Mining Exclusion Zones over any of the areas of the Mining Titles at the time Red Eagle acquired the same, Colombia's policy of grandfathering and the lack of specific delimitation of the SP until December 2014 after Red Eagle had completed the acquisition of its Mining Titles.⁵³
- (53) Although the IAVH Atlas identified the páramo ecosystem in 2007, it did so at a very large scale which lacked the necessary precision to make a final determination on the extent to which the Mining Titles of Red Eagle overlapped with the SP.⁵⁴ After the publication of the IAVH Atlas in 2007, Colombia took more than seven years until it formally delimited for the first time the SP through Resolution 2090.
- (54) In my opinion, considering the regulations in force at the relevant time and in the absence of defined Mining Exclusion Zones when Red Eagle acquired its titles, Colombia's position requiring Red Eagle to anticipate future regulatory changes and the delimitation of the SP is unsupported. In fact, such position, if upheld, would have led, in practice, to a total freeze of all mining investments in the region. Colombia's general statements and regulations as to environmental protection could not reasonably be considered to have alerted Red Eagle to very specific issues associated to the delimitation of the SP and the scope of future potential restrictions, as well as to the uncertainty created by the measures and actions of the Colombian authorities that followed Resolution 2090. In my opinion, Colombia's position implies shifting onto the investor the responsibility for constantly anticipating potential changes in the regulations and governmental delays in the delimitation of the páramos.
- (55) In the same vein, the *Eco Oro* tribunal stated that:

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

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

⁵² Resp. Rej., ¶¶ 45-47.

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

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

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

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

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

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

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

- (58) In my opinion, the signals from the regulatory framework and Colombia's actions and omissions were mixed and unclear.
- (59) On the one hand, the delimitation of the SP was uncertain until Resolution 2090 was issued in December 2014.
- (60) As explained above, Law 1382/2010 specified for the first time that páramo ecosystems could be declared Mining Exclusion Zones. However, it did not establish itself a prohibition of mining in páramo areas.⁵⁸
- (61) Moreover, the text of Law 1382 evidences that it was forward looking. Although it contemplated the possibility that the competent authorities could establish new Mining Exclusion Zones, not only their identification and delineation was subject to specific requirements, but also the law did not identify specific areas within the páramo ecosystem subject to a mining ban. In this regard, there is reasonable evidence on the record that, at the time Red Eagle acquired its Mining Titles, no Mining Exclusion Zone had been approved in respect of the areas covered by said titles.⁵⁹
- (62) The IAVH Atlas was published in 2007, and it generally identified páramo areas. The scale used by the cartography was very large (1:400.000) (as evidenced by the fact that subsequent regulations required the delimitations to be made using a much more precise scale), and though it gave a general idea as to the location of the páramos and potential overlapping of Red Eagle's Mining Titles with páramo areas, it did not constitute a definitive delimitation and was insufficient to establish with precision the details and form of the areas located within the SP. This is proven by the fact that subsequent regulations required

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

⁵⁶ *Id.*, ¶ 696.

⁵⁷ *Id.*, ¶¶ 476 and 768.

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

⁵⁹ See *Id.*, ¶ 499.

delimitations to be carried out with a much accurate scale and stated that the IAVH Atlas would only serve as a minimum reference. Moreover, insofar Resolution 2090 did not include the Restoration Areas within the SP (and only established that they would be only “*funcionalmente vinculadas*” to the SP⁶⁰), this would confirm the lack of coincidence of the areas identified by the IAVH Atlas as part of the SP with the delimitation made by Resolution 2090.

- (63) It should also be considered that the IAVH Atlas did not contain any prohibition to mining activities, and Colombia delayed more than seven years until it formally delimited the páramos for the first time in December 2014 through Resolution 2090. Colombia’s criticism to Red Eagle for allegedly having ignored the signals stemming from the IAVH Atlas of 2007, would imply that even in the absence of the existence of a Mining Exclusion Zone (required by the regulatory framework to ban mining activities) over the areas of its Mining Titles, Claimant and other investors in a similar situation should have frozen investments and activities during such period.
- (64) Law 1450 of 2011 was enacted after the Constitutional Court of Colombia declared unconstitutional Law 1382. Although it prohibited mining activities in páramo ecosystems and tasked the Ministry of the Environment to delimit the páramos, it was also forward looking as it referred to future delimitations. In fact, as explained above, there is evidence in the record that the Head of the Legal Department of the Ministry of Mining and Energy recognized in a letter of September 2011 that the requirements for delimiting the páramos had not been met.
- (65) Resolution 937 of 2011 of the Ministry of the Environment adopted the cartography elaborated by the IAVH at a scale of 1:250.000 for identifying páramo ecosystems, and provided that delimitations made by the authorities would be given legal effect when the scale of the map was equal or more detailed than 1:25.000 (ten times more detailed as provided by Law 1450). This Resolution did not declare any Mining Exclusion Zones.
- (66) In addition, in my view, Article 36 of the Mining Code does not support Colombia’s position regarding what should have been the Claimant’s expectations. Although such provision allows the retroactive application of environmental regulations, it also requires compensation in accordance with Article 58 of the Constitution of Colombia if the investor suffers a loss of an acquired right.
- (67) It has also been evidenced that Colombia issued several signals of approval. During the course of three years between 2010 and 2012, the authorities issued 22 approvals in relation to 11 Mining Titles. Red Eagle also sought and obtained the approval for the transfer of PMAs in relation to 4 Mining Titles, some of which took place after the enactment of Resolution 937 and Law 1450. Colombia qualified the relevance of these approvals and pointed out that the CDMB had warned Red Eagle that mining was prohibited in páramo ecosystems (although it recognized it had no authority to stop such activities until a final delimitation was made), and that Claimant would have to modify the PMAs prior to commencing exploitation activities as well as taking into account any restrictions resulting from overlapping the SP. Nevertheless, none of these circumstances reasonably suggested the outcome that resulted from the compounded impact of Resolution 2090, Law 1753, Judgement C-35,

⁶⁰ Resp. PHB, ¶ 88.

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

- (68) Resolution 2090 delimited the SP for the first time in December 2014. Resolution 2090 implied a change in the rules by creating also for the first time a Mining Exclusion Zone in the SP in areas overlapping Red Eagle's Mining Titles and establishing restrictions in adjacent areas; this is, the Restoration Areas.
- (69) In June 2015, Colombia enacted Law 1753 that introduced changes to the grandfathering rules established by Resolution 2090. It also created some uncertainty as to whether it also banned mining in the Restoration Areas established by Resolution 2090.
- (70) In any event, Judgement C-35 of February 2016 declared Law 1753 unconstitutional and, as admitted by Colombia, this deprived the grandfathering regime created by Article 5 of Resolution 2090 from its statutory foundation. Regardless of the discussion of the extent, if any, of the practical effect of Judgment C-35 on the Project, it is clear that it implied a new change of the rules in the sector.
- (71) In May 2017, Colombia's Constitutional Court, by means of Judgement T-361, declared Resolution 2090 to be unconstitutional and ordered a new delimitation of the páramos to take place within one year without giving any precisions on the criteria of the new delimitation. This delay created further uncertainty. After more than six years Colombia has not yet issued a new delimitation of the SP as ordered by said judgement.
- (72) Judgement T-361 was not without consequence. As explained above, subsequently, the CDMB and ANM sent notices to Claimant identifying areas of the Mining Titles that could not be mined on grounds of the need to wait for a final delimitation of the SP, affecting also portions of Restoration Areas. The CDMB failed to approve the transfer of PMAs of two titles due to those same reasons. The authorities also refused to allow Red Eagle to retain portions of its Mining Titles that could not be economically exploited, thus risking forfeiture of the title. The unavoidable consequence of these actions was a paralysis of any mining activity in Red Eagle's titles.
- (73) In fact, these communications aggravated the situation of uncertainty created by the sequence of Resolution 2090, Law 1753, Judgement C-35 and Judgement T-361. As a result of the compounded practical effect of the aforementioned legislative and regulatory changes and the letters from the authorities, Claimant could not to carry out any mining activity in the entirety of the Mining Titles, including the Restoration Areas.
- (74) The above shows that Colombia repeatedly changed its policies and rules, significantly altering the pre-existing balance between mining development and environmental concerns included and recognized in Colombia's regulatory framework in effect at the time the Claimant acquired the Mining Titles.
- (75) Moreover, it is also a proven fact that Colombia had a legal obligation to delineate the páramos and to do so with precision on the basis of technical, environmental, social and economic studies as required by applicable law and

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

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

3. Whether Claimant had Vested Rights

- (77) Claimant argues that pursuant to its Mining Titles it acquired the right to explore and exploit the minerals in the subsoil of those areas.⁶⁴
- (78) As explained above, Claimant contends that Colombia recognized these rights in relation to the process of acquisition, transfer and registration of its 11 Mining Titles, which, during the course of four years, involved 22 separate approvals from the Colombian authorities. Claimant also observes that Colombia approved the transfer of PMAs for 4 titles, granted permissions to protect its existing rights by authorizing a suspension of exploitation activities until Red Eagle could continue remediation activities and exploratory work, and in 2015 granted 5 Concession Contracts.⁶⁵
- (79) Claimant also points out that even in relation to the transfer of one of the PMAs which Colombia failed to approve, the ANM *de facto* recognized that the title could operate, by having requested the payment of insurances, the approval of the *Formato Básico Minero*, and the approval of a revenue declaration, among others.⁶⁶
- (80) Claimant further argues that, as a result of its investments in the acquisition of the Mining Titles and transfer of vested rights, it was able to proceed with a "systematic gold exploration program" that did not exist on paper alone but involved actual investments, time and efforts in exploratory works.⁶⁷ In that regard, according to Claimant, the need for an environmental approval does not change the nature of the vested right because those authorizations "accompany the right, but this does not mean that they give rise to the right, but, rather, they allow for its exercise".⁶⁸

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

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

⁶³ Cl. Reply, ¶ 137.

⁶⁴ Cl. PHB, ¶¶ 14-15.

⁶⁵ See ¶¶ 21-22 above.

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

⁶⁷ Cl. PHB, ¶ 35.

⁶⁸ Cl. PHB, ¶ 15.

- (81) Colombia disagrees and argues that Red Eagle had no acquired or vested right to develop the Project because it never obtained the environmental authorization (whether a PMA or an environmental license) to allow its development. If anything, Red Eagle might have acquired a right to conduct small-scale exploitation activities in certain limited areas in accordance with the terms of their respective PMAs. Colombia also contends that even if Claimant had been deprived of an opportunity to apply for such a license it would have been exceedingly unlikely to obtain one.⁶⁹
- (82) Colombia explains that the grandfathering established by Article 5 of Resolution 2090 and Article 173 of Law 1753 only applies to *mining activities* conducted under concession contracts or mining titles, as well as environmental licenses or equivalent environmental control and management instruments, granted before February 9, 2010. According to Colombia, the Project was not covered by this grandfathering provisions because that project contemplated activities that were not mining activities contemplated under the existing PMAs or any environmental license issued prior to February 9, 2010, and moreover, Red Eagle never conducted any mining activities pursuant to the PMAs associated to 6 of the 11 Mining Titles because it focused on exploratory work that did not require any authorization.⁷⁰
- (83) Colombia also states that the Project was not grandfathered because 5 of the 11 Mining Titles that comprised that project, including the “flagship” Real Minera, did not have any environmental license or equivalent instrument whatsoever.⁷¹
- (84) Colombia further explains that the regulations, including Decree 1076 of 2015, do not allow the modification of an existing PMA to include additional activities when it intends to include activities subject to environmental licensing in areas not covered by the existing PMA.⁷² In such cases a new environmental license must be sought. Thus, irrespective of the scope of the grandfathering provisions, Red Eagle could not have possibly modified the existing PMAs to incorporate new activities subject to licensing requirement and would have inevitably required to apply for a new environmental license.⁷³
- (85) Colombia further argues that, in any event, Red Eagle would have relinquished any rights under the existing PMAs when in 2015 it signed the Concession Contracts which expressly provide that mining was not allowed in the Preservation Areas of the SP.⁷⁴
- (86) Claimant contests Colombia’s affirmations in relation to the interpretation of Decree 1076 of 2015 and the impossibility to amend the existing PMAs in order to adapt them to an integrated project comprising the different Mining Titles. According to Claimant, title integration without the need of a new environmental license is possible.⁷⁵ In support of its position, Claimant cites and quotes the

⁶⁹ Resp. PHB, ¶¶ 68 et seq.

⁷⁰ Resp. PHB, ¶¶ 78-79.

⁷¹ Resp. PHB, ¶ 80.

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

⁷³ Resp. PHB, ¶¶ 73-74 and 82.

⁷⁴ Resp. PHB, ¶ 84.

⁷⁵ Cl. PHB, ¶ 43.

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

- (87) Claimant also points out that, under cross examination, Respondent's witness, Mr. Pinzón, corrected his testimony and admitted that it had effectively received from Red Eagle the terms of reference for its environmental management plans; this is Claimant had effectively sought a modification of its environmental management plan.⁷⁷
- (88) Each of Claimant and Respondent focus their arguments on certain articles of Decree 1076 that, they understand, back their position. Based on the record, in my view, under the applicable regulatory framework, the holder of a mining title had the right to explore and exploit the minerals therein, although the exercise of this right would be subject to compliance with the applicable environmental regulations and the approval of an environmental license or equivalent environmental instrument.⁷⁸ Thus, regardless of the outcome of any debate on which is the proper interpretation of the relevant provisions of Decree 1076, at the inception of the Mining Titles, Red Eagle, as the holder thereof, had the right to apply for either (i) a modification of the existing PMAs to adapt them to a large-scale project such as the Project, or (ii) seek the issuance of a new environmental authorization or equivalent instrument covering the activities required for such project.
- (89) Colombia argues that in any event it is *"exceedingly unlikely that Red Eagle would have secured the required environmental authorization to develop the Vetas Gold Project"*.⁷⁹ According to Colombia, *"of the Mineral Resources which were rendered inaccessible, 90% of the Indicated and 33% of the Inferred Mineral Resources were open-pit resources. Open pit mining is highly environmentally destructive, and the only mooted open pit project in the páramo was abandoned due to social opposition and its impact on the páramo"*.⁸⁰ Colombia further states that *"there is not a single large-scale project licensed in the páramo, nor a single other company in the whole of Colombia even planning on pursuing an open-pit project in the páramo"*.⁸¹
- (90) Colombia also states that SRK's declaration of open-pit mineral resources is *"untenable"* in light of the fact that Red Eagle was not expecting to mine them, and that *"Red Eagle unequivocally stated in its Reply Memorial that it was not pursuing an open-pit mine."*⁸²
- (91) Claimant disagrees with Respondent's views on these matters. Claimant denies having abandoned its plan for an open-pit mine and argues that the 2014 Technical Report prepared by SRK contemplated that Real Minera (the title containing all of the Project's valuable Indicated Resources) would be exploited via an open-pit (while other portions of the project would be exploited via underground mining methods), and estimated resources on that basis. While open-pit was a convenient method to exploit the Real Minera title, it was not the

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

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

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

⁷⁹ Resp. PHB, ¶ 75.

⁸⁰ *Id.*, ¶ 120.

⁸¹ *Id.*, ¶ 121.

⁸² *Id.*, ¶ 122.

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

- (92) Claimant further argues that Real Minera was an obvious target for an open-pit mining scenario because the material was “*right there at surface*”.⁸⁴
- (93) In addition to expressing its views on the reasons that supported its position that open-pit mining was viable, Claimant states that “*it is undisputed that there is no ban on open pit mining in Colombia*”.⁸⁵
- (94) Claimant finally states that, in any case, foregoing the open-pit method would have resulted in the reduction of some of its mineral resources due to the increased costs of underground mining, but not their total elimination.⁸⁶
- (95) Colombia argues that the authorities rejected an environmental application by Eco Oro in an area close to Claimant’s Mining Titles due to its overlapping with the SP.⁸⁷ This would confirm, in Respondent’s view, that it was extremely unlikely that Red Eagle would have been able to obtain an environmental license for the Project.
- (96) Claimant contends that after its environmental application was rejected, Eco Oro redeveloped its project as an underground mine and that Respondent has not offered any reason why the same could not have been done in relation to Red Eagle’s Project. Claimant notes that at the Hearing, Respondent’s expert, Mr. Rossi, conceded that in his report it had failed to take into account this possibility.⁸⁸ The outcome of the *Eco Oro* case also casts queries on Colombia’s arguments.⁸⁹
- (97) In light of the aforementioned debate, it cannot be concluded with certainty that an application by Red Eagle to amend its PMAs to adapt to a large-scale project or a prospective application of a new environmental license or equivalent environmental instrument, would have been inevitably denied.⁹⁰
- (98) Based on its Mining Titles and considering the absence of any Mining Exclusion Zones over the areas covered thereby at the time of acquisition of said titles, Claimant had the right to explore and exploit mineral resources subject to obtaining the appropriate PMAs or equivalent environmental license.⁹¹ Thus, it seems reasonable to conclude that the compounded impact of Colombia’s measures starting with Resolution 2090, and the uncertainty and confusion derived therefrom and from certain inconsistent measures and actions of Respondent, deprived Red Eagle of its ability to access a very substantial portion of the mineral resources in its Mining Titles, and also, at least, of the opportunity to either (i) amend the existing PMAs in relation to 4 titles and the 2 other PMAs whose transfer had been sought and the authorities failed to approve in order to adapt them to a large-scale integrated project such as the Project, and/or (ii)

⁸³ Cl. PHB, ¶¶ 94-96.

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

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

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

⁸⁷ Resp. C-Mem., ¶¶ 87-95.

⁸⁸ Cl. PHB, ¶ 95.

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

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

⁹¹ *Id.*, ¶ 623.

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

- (99) As a result of Colombia's measures and actions it is a fact that Red Eagle lost the possibility to obtain any of those instruments in relation to any prospective activities within the Preservation Areas and the Restoration Areas.⁹²
- (100) The fact that these rights may be difficult to value cannot mean that there is no acquired right to the extent explained above. Determining their value is a separate and distinct matter.⁹³

4. Impact of the Measures

- (101) According to Claimant, Colombia's measures caused Red Eagle to lose access to a significant majority of the gold reserves identified in its exploration work, in particular:
- 100% of the Indicated class mineral resources disclosed in the SRK 2014 Technical Report (the "SRK 2014 Report") are within the Páramo and restricted from mining.
 - 99% of the entire resource is affected by the Páramo delimitation and Restoration Area.
 - 77% of the gold disclosed in the SRK 2014 Report is contained in the 3 most mineral rich Mining Titles and is within the Páramo and restricted from mining.
 - 66% of the total mineral resource of gold disclosed in the SRK 2014 Report is within the Páramo restriction.
 - 51% of the total mineral resource of silver disclosed in the SRK 2014 Report is within the Páramo restriction.⁹⁴
- (102) Claimant points out that Respondent did not challenge any of these conclusions, and that Colombia's expert, Mr. Rossi, confirmed during the Hearing that he does not dispute those conclusions.⁹⁵
- (103) Respondent does however challenge the weight of the 2014 SRK Report. According to Respondent, the mineral resources declared by the SRK 2014 Report, and in particular the Indicated Resources, "*are illusory*" and "*there were never any reasonable prospects for eventual economical extraction.*"⁹⁶
- (104) Respondent argues that the SRK 2014 Report was prepared on the basis of assumptions which are both materially inaccurate and in direct contradiction with Red Eagle's contemporaneous knowledge of the relevant páramo risk. Moreover, Respondent points out that SRK testified that it was unaware of any

⁹² *Id.*, ¶¶ 632-633.

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

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

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

⁹⁶ Resp. PHB, ¶ 116.

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

- (105) Respondent also argues that the open-pit resources should not have been declared by the SRK 2014 Report because there was no prospect of them being developed, and that of the mineral resources which were rendered inaccessible, 90% of the Indicated and 33% of the Inferred mineral resources were open-pit.⁹⁹
- (106) Respondent further states that *"if Red Eagle's licensing prospects were not zero, they would, at best, be exceedingly speculative."*¹⁰⁰
- (107) Respondent also contends that Red Eagle's Mining Titles were not rendered valueless by the measures taken by Colombia because they retained exploration potential.¹⁰¹ Claimant notes that on cross examination, Colombia's expert, Mr. Rossi, conceded that exploration targets cannot support an economic viability of the Project (which can only be based on Indicated and Measured Resources), and that he admitted that his analysis was based on the incorrect assumption that mining was permitted in the areas of the Project that were designated as Restoration Areas (yellow).¹⁰²
- (108) In relation to the impact of Respondent's measures that gave rise to the controversy, both Parties have addressed extensively in their submissions and at the Hearing the legal implications of the status of Red Eagle's Mining Titles and of the different laws, regulations, judgments and other actions of the authorities of Colombia. These arguments have been summarized in previous sections of this Dissenting Opinion.¹⁰³ Hence, to avoid repetitions, I will only refer briefly to the respective positions of the Parties.
- (109) Respondent argues that the Project was not grandfathered by Resolution 2090 or Law 1753 because, among other reasons, it contemplated activities that were not mining activities conducted pursuant to an environmental license or equivalent instrument issued before February 9, 2010.¹⁰⁴ Colombia also contends that the different measures had no practical implications on Red Eagle's rights nor on the acreage and development of the Project and did not introduce additional restrictions.¹⁰⁵
- (110) Claimant focuses on the series of actions of Colombia's authorities recognizing the Mining Titles and the right to exploit associated thereto, on its ability to amend the existing PMAs or to apply for a new environmental license, as well as the repeated changes in the rules and regulatory criteria, and the uncertainties and confusion resulting from Resolution 2090, Law 1753, Judgment C-35, Judgment T-361 and the communications issued by the ANM and CDMB, and

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

⁹⁸ Resp. PHB, ¶ 119.

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

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

¹⁰¹ Resp. PHB, ¶ 112.

¹⁰² Cl. PHB, ¶¶ 54-56.

¹⁰³ See Section 2 above.

¹⁰⁴ Resp. PHB, ¶¶ 77-86.

¹⁰⁵ *Id.*, ¶¶ 87-105.

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

- (111) Respondent also argues that Claimant recognized in public presentations and in the Management Discussion and Analysis (“MD&A”) for the first quarter of 2016, after the issuance of Judgment C-35, that Colombia's measures had not affected the Project or its Mining Titles, and that it failed to write-off the Vetás Project.¹⁰⁷ Respondent also cites the MD&A for the first quarter of 2018 in which Red Eagle stated that the company “*will be able to progress the Vetás Gold property*” and a presentation made by Mr Slater, Red Eagle's CEO, in a conference in Vancouver in May 2018 in which he did not mention that the Project had been destroyed by Colombia's measures.¹⁰⁸
- (112) Claimant responds to these arguments pointing out that Colombia continued to enforce the mining restrictions even after the Constitutional Court through Judgement T-361 ruled that Resolution 2090 that had delimited the páramos was unconstitutional. As a result of this ruling, and pending the final delimitation of the páramos as ordered by such Court, the authorities prohibited mining in the entirety of the Mining Titles of Red Eagle, even in the Restoration Areas (yellow), and refrained from approving any transfer or updating of PMAs. Claimant's expert, Mr. Dishaw, testified that they were under the impression that mining was only restricted in the Preservation Areas (green), but not in the Restoration Areas.¹⁰⁹
- (113) Regardless of the divergent views of the Parties on most of the relevant issues, in my opinion, as explained above, the reiterated changes of rules imposed by Colombia since Resolution 2090, as well as the uncertainty and confusion derived therefrom and from the inconsistencies of some of these measures and actions, had the compounded effect of impeding Red Eagle to access a very substantial portion of the mineral resources in its Mining Titles. They also deprived Claimant, at least, of the opportunity to amend the existing PMAs to adapt them to a large-scale integrated project as the Project or to apply for a new environmental license or equivalent instrument for such a project.
- (114) The uncertainty associated to the fact that the viability of exploration projects, such as Claimant's activities, is confirmed at a later pre-feasibility or feasibility stage, and that their value is difficult to assess, does not mean that these projects do not have any value at all. These and the other uncertainties identified by Respondent such as those related to the viability of open-pit mining in the context of the páramos and its impact on the volume of recoverable mining resources, particularly the Indicated Resources, and the licensing risk of the Project, do have an impact on the value of Red Eagle's project and on the compensation payable to Claimant for having been deprived from the aforementioned loss of opportunity. This matter will be addressed in Section 6 below.

¹⁰⁶ See Sections 2 and 3 above.

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

¹⁰⁸ Resp. PHB, ¶¶ 103 and 109-111.

¹⁰⁹ Cl. PHB, ¶¶ 57-60.

5. Did Colombia Violate the Treaty?

5.1. Article 805 of the FTA

- (115) The Parties discussed at length the issues relating to the scope of the minimum standard of treatment (“MST”), the extent to which such standard evolved and its convergence with the standard of fair and equitable treatment (“FET”), and in particular whether the MST encompasses protection of, *inter alia*, legitimate expectations and transparency.¹¹⁰ The Award has also summarized the positions of both Parties in Section VI.¹¹¹
- (116) Article 805 requires each contracting party to:
- “1. Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.*
- 2. The obligation in paragraph 1 to provide “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process.*
- 3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.”¹¹²*
- (117) As mentioned, the Parties disagree on the relationship between MST and FET. The starting point of the analysis should be the text of the Treaty.
- (118) By stating that the Contracting Parties must accord investments “*treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment*”, Article 805 of the Treaty indicates that FET is considered part of international law. However, in clarifying this rule, paragraph 1 thereof specifies that the concept of fair and equitable treatment does “*not require treatment in addition to beyond that which is required by the customary international law minimum standard of treatment of aliens.*”
- (119) This can only mean that FET is prescribed by Article 805 of the Treaty to the extent that standard of treatment is mandatory under the customary international law minimum standard.
- (120) The foregoing leads to the question of the content of the MST and of the FET obligation incorporated into it.
- (121) It is now broadly accepted that in light of the evolutionary character of the concept of the international law minimum standard of treatment, the high

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

¹¹¹ See Award, Section VI-B-1.

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

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

- (122) Moreover, many tribunals have held that there is a convergence between the treatment guaranteed by the MST and the FET.¹¹⁵
- (123) Nevertheless, numerous investment tribunals have held that the threshold for a breach of the MST is high,¹¹⁶ and that a significant deference and margin of appreciation should be given to governmental judgement in certain matters.¹¹⁷
- (124) In addition to the level of protection to which investors are entitled under the MST, the Parties also disagree on which specific obligations are encompassed within the MST protection under Article 805 of the Treaty, including legitimate expectations and transparency. In particular, Respondent submits that the MST does not include the concepts of legitimate expectations and transparency.¹¹⁸

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

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

¹¹⁵ *Merrill v. Canada*, (Exhibit CL-79), ¶¶ 207-208, 210-213; *Clayton v. Canada*, (Exhibit CL-114), ¶ 433; *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award on the Merits, April 10, 2001, (“*Pope & Talbot v. Canada*”), (Exhibit CL-262), ¶ 118; *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, June 29, 2012, (“*RDC v. Guatemala*”), (Exhibit CL-98), ¶ 219; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, July 29, 2008, (“*Rumeli v. Kazakhstan*”) (Exhibit CL-63), ¶ 611; *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, August 18, 2008 (“*Duke v. Ecuador*”), (Exhibit CL-65), ¶ 337; *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, July 14, 2006, (“*Azurix v. Argentina*”), (Exhibit CL-44), ¶¶ 361 and 364; and *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, July 24, 2008, (“*Biwater Gauff v. Tanzania*”), (Exhibit CL-62), ¶ 592.

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

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

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

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

- (125) Many investment arbitration tribunals have brought the concept of legitimate expectations within the purview of provisions on the treatment of aliens under the MST. According to case law, the protection of legitimate expectations stems from the good faith principle in customary international law.¹²⁰
- (126) Several NAFTA tribunals have recognized that legitimate expectations which met certain requirements, including by reference to an objective standard, were protected under Article 1105.¹²¹
- (127) Moreover, several tribunals have included within the concept of legitimate expectations the stability and predictability of the legal framework and of preexisting government decisions.¹²²
- (128) Based on the above, in my opinion, although the requirements for finding a violation of the MST contained in Article 805 of the Treaty are stringent, it does include an obligation not to frustrate the investor's legitimate expectations, provided they are reasonable and objective in light of the circumstances and the State's conduct.¹²³
- (129) While malicious intent, willful neglect of duty or bad faith are not required elements of the MST under customary international law,¹²⁴ "there must be some aggravating factor such that the acts identified comprise more than a minor derogation from that which is deemed to be internationally acceptable (...) whilst set against the high measure of deference that international law extends to States to regulate matters within their own borders."¹²⁵
- (130) Thus, although I share the view that the MST has evolved and is nowadays broader than the standard set out in *Neer*, in analyzing whether Colombia's conduct infringes Article 805 of the Treaty, I will not consider the FET as a standalone standard, but the minimum standard as described above without interpreting expansively Colombia's obligation thereunder.

¹¹⁹ Award, ¶¶ 179-227 and 228-282.

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

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

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

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

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

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

- (131) Based on the factual and regulatory background described in Sections 2 and 3 above, in my opinion, Red Eagle had legitimate expectations at the time it acquired the Mining Titles that: (i) it would be entitled to undertake exploration and exploitation activities in the areas covered thereby, including the right to apply for and pursue the issuance of the necessary environmental licenses or equivalent; (ii) in the event Colombia were to deprive it from any portion of such rights (including the right to adapt existing PMAs to a large-scale integrated project such as the Project or to apply for a new environmental license or equivalent for such purpose), compensation would be payable by Colombia; and (iii) Colombia would ensure a predictable legal framework for business planning and investments in the aforementioned activities.
- (132) As explained in Section 2, Colombia repeatedly changed its policies and rules governing the activities covered by Red Eagle's Mining Titles. Resolution 2090 of December 2014 implied a change in the rules by creating for the first time a Mining Exclusion Zone in areas overlapping with Claimant's Mining Titles and established restrictions in adjacent areas (Restoration Areas) also overlapping said titles. In June 2015, Colombia enacted Law 1753 that introduced changes to the grandfathering rules established by Resolution 2090. Some of the subsequent changes were inconsistent with previous changes, such as the case of Law 1753 and Judgment C-35. This judgement held that the transitional regime established by Law 1753 was unconstitutional because it considered that allowing mining activities to continue in the páramos did not protect the páramos from the harmful consequences of mineral extraction. Judgment C-35 not only implied a change of rules and of criteria to the extent it held that environmental protections prevailed over the acquired rights of investors, but moreover, by eliminating the grandfathering regime of Law 1753, it deprived Article 5 of Resolution 2090 of its statutory foundation, and as a consequence such regime ceased to be in force.¹²⁶
- (133) In May 2017, Judgment T-361 implied a new change in the rules as it declared unconstitutional Resolution 2090 and ordered a new delimitation of the páramos to take place within one year.
- (134) In addition to the reiterated regulatory changes, through its constant omissions, actions and inconsistent behavior, Colombia created uncertainty, that coupled with the modifications of the rules, in practice, rendered unviable mining activities in the entirety of Red Eagle's Mining Titles, including in the Restoration Areas.¹²⁷
- (135) Although the IAVH Atlas of 2007 contained a preliminary delimitation of the páramos at a large scale, Colombia delayed more than seven years until it delimited the páramos in December 2014 at a more precise scale through Resolution 2090. Colombia's fluctuating regulations created uncertainty and confusion, when, for example, Law 1753 cast doubts on whether it had banned mining also in the Restoration Areas. This situation worsened, when as explained, Judgment C-35 deprived the then existing grandfathering regime of its legal basis.¹²⁸
- (136) The uncertainty and confusion was compounded by Judgment T-361 when it declared Resolution 2090 to be unconstitutional and ordered a new delimitation

¹²⁶ See Sections 2.3 and 2.5 above.

¹²⁷ *Id.*

¹²⁸ *Id.*

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

- (137) The aforementioned constant changes and sometimes contradictory decisions of the different authorities of Colombia, as well as the ensuing uncertainty, caused – *inter alia* – by its (continuing) delay to delimit the páramos, derived in what the *Eco Oro* tribunal characterized as a “regulatory roller-coaster” and a situation of “limbo” for mining investors.¹³⁰
- (138) In my opinion, although there is no evidence that Colombia acted in bad faith, the confusion and uncertainty created by the aforementioned actions and omissions of Respondent, viewed as a whole, amount to a failure to ensure a predictable and stable regulatory framework in a way that constitutes gross unfairness and manifest arbitrariness falling below acceptable international standards. This is not a minor derogation of Colombia's international obligations nor a minor inconsistency or inadequacy of conduct, but a behavior that amounts to a failure to accord Red Eagle's investment a treatment in accordance with the customary international law minimum standard of treatment of aliens, including the obligation to provide fair and equitable treatment as required by Article 805 of the Treaty.
- (139) Respondent has argued throughout this arbitration that Claimant did not have legitimate expectations regarding the possibility of developing the Project, due to the absence of specific representations from the Colombian authorities that they would not impose a ban and/or restrictions on mining activities in the páramo areas covered by Red Eagle's Mining Titles, and the absence of a due diligence by Claimant that would have alerted it as to the existence of the risk of such ban on mining in the páramos.¹³¹
- (140) In Section 2.4 above, I addressed the issue of due diligence, and concluded that when evaluated against the backdrop of the regulatory framework in force when Red Eagle acquired the Mining Titles and the absence of Mining Exclusion Zones in the areas covered by such titles at such time, Colombia's position on this point implies shifting onto the investor the responsibility of anticipating constant changes in the regulations and delays in the delimitation of the páramos.¹³²
- (141) As to the question of the extent, specificity and significance of the representations given by Respondent, as explained above, Colombia's breach of Article 805 of the Treaty derives from a number of actions and omissions described in this Opinion, including its failure to delimit the SP in a precise and

¹²⁹ *Id.*

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

¹³¹ See Section 2.4 above.

¹³² See ¶¶ 54-57 above.

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

5.2. Article 2201(3) of the FTA

(142) Claimant¹³³ and Respondent¹³⁴ also discussed the meaning and implications of Article 2201(3) of the Treaty. I will therefore not replicate this debate.

(143) Article 2201(3) provides that:

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

(a) to protect human, animal or plant life or health, which the Parties understand to include environmental measures necessary to protect human, animal or plant life and health;

(b) to ensure compliance with laws and regulations that are not inconsistent with this Agreement; or

(c) for the conservation of living or non-living exhaustible natural resources.”¹³⁵

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

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

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

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

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

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

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

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

- (146) Moreover, if Article 2201(3) were interpreted to exclude liability in the circumstances contemplated thereby for any damages caused by Colombia as a result of a breach of its obligations under Chapter Eight of the Treaty, then the text of Annex 811 would become unnecessary or redundant.¹³⁹
- (147) Thus, in my opinion, Article 2201(3) of the Treaty does not necessarily exclude the wrongfulness of an action or conduct of the State in violation of the Treaty such as Article 805.
- (148) In this regard, Article 2201(3) of the Treaty is not comparable with certain provisions contained in some bilateral investment treaties that provide that the State is not precluded from taking certain measures in exceptional circumstances. This is the case of Article XI of the Argentina-U.S.A. bilateral investment treaty that provides that “*This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security or the Protection of its own essential security interests.*”¹⁴⁰
- (149) The exceptional circumstances referred to in the aforementioned provision are not comparable to those contemplated in Article 2201(3).
- (150) Even if it were assumed that Article 2201(3) would preclude the wrongfulness of an action of Colombia otherwise in breach of the Treaty, international law contemplates situations in which the invocation of a circumstance that precludes wrongfulness does not exclude the obligation to compensate. Such is the case of Article 27(b) of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts.
- (151) Pursuant to Article 27(b) thereof:

“*Consequences of invoking a circumstance precluding wrongfulness. The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to.... (b) the question of compensation for any material loss caused by the act in question.*”¹⁴¹
- (152) Thus, in my opinion Article 2201(3) of the Treaty does not exclude Colombia's obligation to compensate Red Eagle for any damages arising out of a breach of Article 805 thereof.

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

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

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

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

5.3 Article 811 of the FTA

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

(154) Claimant's claim is for indirect expropriation¹⁴³ and is based on Article 811 of the Treaty. The concept of indirect expropriation is set forth in Annex 811(2) of the Treaty that provides:

"2. The second situation is indirect expropriation, which results from a measure or series of measures of a Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

(a) The determination of whether a measure or series of measures of a Party constitute an indirect expropriation requires a case-by-case, fact-based inquiry that considers among other factors:

(i) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred,

(ii) the extent to which the measure or series of measures interfere with distinct, reasonable investment-backed expectations, and

(iii) the character of the measure or series of measures;

(b) Except in rare circumstances, such as when a measure or series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted in good faith, non-discriminatory measures by a Party that are designed and applied to protect legitimate public welfare objectives, for example health, safety and the protection of the environment, do not constitute indirect expropriation."¹⁴⁴

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

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

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

¹⁴² See Section VI-C-1 of the Award.

¹⁴³ Cl. Mem., ¶ 168.

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

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

- (158) Regarding the "character" of Colombia's measures, I also agree with Respondent and the majority of the Tribunal that the measures were *bona fide* regulatory measures adopted to protect the environment and did not target Claimant's Mining Titles in particular.¹⁴⁹
- (159) Thus, for Colombia's measures to constitute an actionable indirect expropriation under Article 811 and Annex 811 of the Treaty, as opposed to a legitimate exercise of State police powers, there must be an aggravating element or factor in the conduct of the State that does not appear in this case.
- (160) In spite of the uncertainty and confusion created by Colombia, I do not find elements to conclude that Colombia did not act in good faith in the exercise of its regulatory powers.
- (161) Therefore, the measures taken by Colombia qualify as an exercise of police powers, and do not constitute an indirect expropriation, unless they were to comprise a rare circumstance mentioned in Annex 811(2)(b) that, in my view, does not exist in this case.

6. Damages

- (162) In light of the decision of the majority of the Tribunal dismissing Claimant's claim for violation of the Treaty, I will not elaborate in detail on this matter.
- (163) Claimant based its calculation of damages on its sunk costs by reference to its audited financial statements. Claimant's expert, Mr. Sequeira, concluded that Red Eagle invested a total of USD 70,704,000 (before interest) in pursuit of the Project.¹⁵⁰
- (164) Claimant criticizes Respondent's arguments (i) that it should not receive compensation for areas outside the Mining Exclusion Zones determined by Resolution 2090, on grounds of the absence of the residual value of the mineral resources in those areas due to the integrated nature of the Project, and (ii) in relation to the non-exploration expenses incurred by Red Eagle because such expenses were also incurred in pursuit of the Project.¹⁵¹
- (165) Claimant also rebuts Respondent's argument that sunk costs would overcompensate Claimant because the loss it suffered would fluctuate

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

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

¹⁴⁷ See Sections 2.4 and 2.5 above.

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

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

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

¹⁵¹ Cl. PHB, ¶¶ 114-115.

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

- (166) Claimant offers three alternative calculations for the value of the Project. The first one is based on the "but-for" FMV of the Project at the end of 2012 and adjusts that value using three market indices of gold mining companies. The second alternative is based on the analysis of comparable transactions for similar gold mining assets, and the third alternative is based on a multiple of exploration costs approach. These alternative valuations yield a value between USD 46.81 million (calculated *ex-ante*) and USD 87.21 million (calculated *ex-post*; *i.e.* at the date of the award). Claimant compares these figures with its purported sunk cost of approximately USD 70 million, stating that there is no significant deviation.¹⁵³
- (167) Respondent criticizes Claimant's approach in relation to the first FMV alternative on grounds that it ignores the supposedly disappointing 2014 SRK Report on Maiden Resources estimate as well as the Colombian asset market turndown between 2013 and 2016.¹⁵⁴ Respondent contends that Claimant's second FMV alternative based on comparable transactions is flawed because the transactions were not adequate comparators.¹⁵⁵ As to Claimant's third FMV alternative, Brattle argues that although admitted by the CIMVAL Code for the Valuation of Mineral Properties of the Canadian Institute of Mining, Claimant's expert, Mr. Sequeira, was not qualified to apply the Prospectivity Enhancement Multiplier.¹⁵⁶
- (168) In any case, Respondent points out that Claimant's allegation that its FMV estimate of the Mining Titles as at the date of the award is higher than its sunk costs claim, is misleading. This because, although the FMV of the Mining Titles as at the date of the award (approximately USD 87 million) is higher than the approximately USD 70 million sunk cost figure claimed by Red Eagle, the latter figure does not include interest that Claimant claims from September 2017 onwards, which would drive the figure up to between USD 112 million and 130 million. In contrast, when claiming damages on the basis of FMV of the Mining Titles as at the date of the award, there would be no pre-judgement interest.¹⁵⁷
- (169) I concluded in Sections 3 and 5 above that Respondent's measures deprived Red Eagle from access to a very significant portion of the mineral resources in its Mining Titles and the opportunity to obtain a modification of the existing PMAs to adapt them to a large-scale integrated project or to obtain a new environmental license for such purpose; this is, Claimant was deprived from the opportunity to pursue the Project and eventually make a success of it.

¹⁵² *Id.*, ¶¶ 116-118.

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

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

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

¹⁵⁶ Resp. PHB, ¶ 155.

¹⁵⁷ Resp. PHB, ¶ 133.

- (170) As stated above, exploration projects may be difficult to value, but they are not worthless. Moreover, the aforementioned opportunity had some value. However, it is necessarily less valuable than the value of a developed project or one with a favorable pre-feasibility or feasibility study which would require assessing the environmental licensing risk.
- (171) The facts of the cases cited by Respondent relating to the circumstances in which sunk costs have been admitted involving projects in a more advanced stage than the Project differ from the circumstances in this case.¹⁵⁸ This circumstance, coupled with the significant difference between the sunk cost figure claimed by Red Eagle (including interest) and a purported conservative FMV of the Mining Titles, leads me to conclude that the use of sunk costs in this case would be inappropriate.
- (172) Moreover, Claimant has not submitted an alternative valuation on the value of its loss of opportunity of pursuing the Project. This circumstance prevents quantifying such value, due to the speculative nature of such an exercise without additional information as the one that could have been obtained in a subsequent quantum phase in this proceeding in the context of a different decision of the majority of the Tribunal.

7. Conclusions

- (173) Based on the foregoing, in my opinion, through the different measures and actions taken by the Colombian authorities beginning with Resolution 2090, Respondent breached its obligations under Article 805 of the Treaty.
- (174) Notwithstanding the foregoing conclusion, the amount of any compensation payable to Claimant should be determined considering that it was deprived by the aforementioned measures of the opportunity to pursue the Project, whose loss of opportunity is less valuable than the value of a developed project or one with a favorable pre-feasibility or feasibility study. The assessment of this value, which should include a discount based on the uncertainties inherent to the development of a large-scale mining project (including the licensing risk) cannot be carried out in this case on the basis of the information submitted by the Claimant and, in any event, would depend on additional information that could be potentially produced during a subsequent quantum phase of this arbitration had there been a finding of the Tribunal or a majority of the Tribunal that Colombia violated the Treaty.



José A. Martínez de Hoz

February 23, 2024

¹⁵⁸ Resp. PHB, ¶¶ 138-146.

DECLARATION

I am in full agreement with the Award on matters of jurisdiction and the merits. I would, however, have preferred a different approach with regard to the decision on costs, as the Claimant prevailed on jurisdiction and the Respondent on the merits, which were more costly to litigate and significant in consequence.

As to the costs of the Tribunal and ICSID, it would be appropriate for the Claimant to bear 75% of the costs, and the Respondent to bear 25%.

As to the legal fees and other costs of the Parties, it would be appropriate for the Respondent to pay 25% of Claimant's costs, and for the Claimant to pay 75% of the Respondent costs.

Taken together, this would lead to a result in which the Claimant would be ordered to make a modest payment in favour of the Respondent. The conclusion that has been adopted, namely that the Respondent should have been ordered to make a payment to the Claimant, however modest in amount, strikes me as counter-intuitive and contrary to a broad principle that, all other points being equal, the award of costs should generally follow the outcome of the case.

Philippe Sands



Date: 23 February 2024