INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

MONTAUK METALS INC. (FORMERLY KNOWN AS GALWAY GOLD INC.)

Claimant

and

REPUBLIC OF COLOMBIA

Respondent

ICSID Case No. ARB/18/13

AWARD

Members of the Tribunal
Mr. Eduardo Siqueiros T., President of the Tribunal
Mr. Alfredo Bullard, Arbitrator
Professor Brigitte Stern, Arbitrator

Secretary of the Tribunal
Ms. Catherine Kettlewell

Date of dispatch to the Parties: June 7, 2024

REPRESENTATION OF THE PARTIES

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and

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TABLE OF CONTENTS

TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS

14833 Assignment	Exercise on December 11, 2013, of the option to acquire exploration and exploitation rights under Concession 14833 in accordance with the provisions of the Option Agreement.
1988 Mining Code	Decree 2655 of 23 December 1988
2001 Mining Code	Law 685 of 15 August 2001, by which the Mining Code and other provisions are issued, Official Registry: 44.545
2007 IAVH *Páramo* Atlas	*Páramo* Atlas issued in 2007 by the Alexander von Humboldt Institute for Biological Resources Research's *(Atlas de Páramos de Colombia)*
ANLA	National Environmental Licensing Authority (Autoridad Nacional de Licencias Ambientales)
ANM or NMA	National Mining Authority (*Agencia Nacional de Minería*) Created by Decree 4134 of 2011, whose main objective is to promote the exploration and development of Colombia's mineral resources and the granting of areas for the exploration and exploitation of mineral resources
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
AVHI or IAVH	Alexander Von Humboldt Institute
C-[#]	Claimant's Exhibit
C-Memorial on Jurisdiction	Claimant's Counter-Memorial on Jurisdiction dated 11 May 2020
C-Memorial on Liability	Respondent's Counter-Memorial on Liability dated 25 November 2020
Canada's NDP Submission	Non-Disputing Party Submission of Canada dated January 31, 2022 made pursuant to Article 827(2) of the FTA
CDMB	Corporación Autónoma Regional para la Defensa de la Meseta de Bucaramanga created by Law 99 of 1993, a regional environmental authority
CDS	CDS & Co., a Canadian company based in Toronto, which is the Canadian Depository for Securities
CL-[#]	Claimant's Legal Authority

Cl. Memorial	Claimant's Memorial on Jurisdiction and Liability dated 18 June 2020
Claimant's comments to NDP Submission	Claimant's comments to Canada's NDP Submission dated March 1, 2022
Claimant's Observations	Responding Submissions of Galway Gold Inc. to the Preliminary Objection of the Republic of Colombia dated November 5, 2019
Claimant's PH Brief	Claimant's Post-Hearing Submissions dated October 26, 2022
Claimant's Response	Responding Submission of Galway Gold Inc. to the Preliminary Objection of the Republic of Colombia dated November 5, 2019
Colombia or Respondent	Republic of Colombia
Concession 14833	Concession to Reina de Oro granted by Colombia through INGEOMINAS at the request of Reina de Oro, in replacement of License 14833 after the Mining Code was amended by Law 685 of 2001
Disputed Measures	A series of legislative, administrative and judicial measures adopted by authorities of Colombia which Claimant contends affected its investment, and which are described in Section VI of this Award
DoB	The so-called Denial of Benefits provision under Article 814(2) of the FTA, allowing a State Party to deny the benefits to investors that are enterprises that have no real economic link or ties with the country in which they are constituted or organized.
Environment Agreement	The Agreement on the Environment between Canada and the Republic of Colombia signed on 21 November 2008
FET	Fair and equitable treatment, as covered under Article 805 of the FTA
FTA	Free Trade Agreement between Canada and the Republic of Colombia signed on November 21, 2008, and which entered into force on August 15, 2011
Galway or Claimant	Galway Gold, Inc. and, before December 2012, "Galway Resources and all of their respective Colombian business subsidiaries and branches", as stated by Claimant.[1] Galway Gold Inc. changed its name to Montauk Metals Inc. on December 14, 2022
GRC	Galway Resources Holdco Ltd. Sucursal de Colombia, the Colombian branch of GRH

[1] Cl. Memorial, ¶ 22.

GRH	Galway Resources Holdco Ltd., a wholly owned subsidiary of Galway Resources Ltd., a Canadian company
GRVC	Galway Resources Vetas Holdco Ltd., Sucursal de Colombia, a Colombian branch of GRVH
GRVH	Galway Resources Vetas Holdco Ltd., a Cayman Islands company wholly owned by Claimant
Hearing	Hearing on jurisdiction and liability held from June 21 to June 23, 2022
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
INGEOMINAS	The national mining authority of Colombia at the time of issuance of Concession 14833. Subsequently replaced by NMA
INGEOMINAS	Servicio Geológico Colombiano, the Colombian mining authority prior to NMA
Judgment C-035	Constitutional Court Judgment C-035, dated 8 February 2016
Judgment C-339	Constitutional Court Judgment C-339, dated May 7, 2002
Judgment C-366	Constitutional Court Judgment C-366, dated May 11, 2011
Judgment T-361	Constitutional Court Judgment T-361, dated May 30, 2017
La Bodega Project	Ventana Gold mining project located along strike and immediately to the southwest of the Angostura Gold Project. Ventana Gold was acquired by AUX Canada 1 on March 16, 2011
Law 1382	Law 1382, dated February 9,2010
Law 1450	Law 1450, dated June 16, 2011
Law 1753	Law 1753, dated June 9, 2015
Law 99	Law 99, dated December 22, 1993
License	The Parties have used the terms “license” and “licence” to refer to the License 14833 or similar administrative approvals granted under Colombian laws in respect to mining and environmental activities. Although both terms are equal, albeit the second used primarily in the United Kingdom, for consistency, the Tribunal shall utilize the term as “license”

License 14833	License for exploration activities granted by Colombia to Reina de Oro through the MME in 1992, which was later converted into Concession 14833
MASL	Meters Above Snow Line
MCIT	Colombian Ministry of Commerce, Industry and Tourism or *Ministerio de Comercio, Industria y Turismo de Colombia*
Memorial on Jurisdiction	Respondent's Memorial on Jurisdiction, dated November 25, 2020
Mineral Reserves	The economically mineable part of a measured or indicated Mineral Resource demonstrated by at least a preliminary feasibility study. This study must include adequate information on mining, processing, metallurgical, economic and other relevant factors that demonstrate, at the time of reporting, that economic extraction can be justified. Includes diluting materials and allowances for losses that may occur when the material is mined
Mineral Resources	A concentration or occurrence of natural, solid, inorganic or fossilized organic material in or on the earth's crust in such form and quantity and of such a grade of quality that it has reasonable prospects for economic extraction
Minercol	Minercol S.A., the Colombian mining authority prior to INGEOMINAS
Mining Area	The surface and subsoil measuring 123 hectares and 7732 square meters encompassed in Concession 14833
Mining Registry	Colombian National Mining Registry (*Catastro Minero Colombiano*)
Ministry of Mines	The Ministry of Mines and Energy (*Ministerio de Minas y Energía*)
Ministry of the Environment	Ministry of the Environment and Sustainable Development of Colombia (*Ministerio de Ambiente y Desarrollo Sostenible)*. Previously also called *Ministerio del Medio Ambiente and Ministerio de Ambiente, Vivienda y Desarrollo Territorial*
MME	Ministry of Mines and Energy
MST	Minimum Standard of Treatment
NMA Notice of Assignment	Notice sent by Reina de Oro to the NMA on February 24, 2015, advising on the assignment of Concession 14833 to GRVC

Notice of Assignment of the Option	Notice sent from GRC to Reina de Oro on December 6, 2012, providing a notice of the assignment of the rights under the Option Agreement made from GRC to GRVC
Notice of Intent	Claimant's Notice of Intent to Submit a Claim to Arbitration dated September 13, 2017 delivered to the MCIT
Option Agreement	Agreement entered into on 22 December 2009, among GRH (through its Colombian branch, GRC) and Reina de Oro relating to Concession 14833, and all mineral exploration and exploitation rights thereunder
Páramo Program	Program for the restoration and sustainable management of high mountain ecosystems –National System of Protected Areas (*Sistema Nacional de Áreas Protegidas*)– created by the Ministry of Environment in 2010
Páramos	Article 2 of Resolution 769 of the Ministry of the Environment of 5 August 2002, defined a *páramo* as: "*High-altitude ecosystem located between the upper limit of the Andean forest and, if applicable, the lower limit of glaciers or snowfields, characterized mainly by herbaceous vegetation and scrubland, frequently frailejones, where there can be low bushy forests and wetlands, like rivers, creeks, streams, peatlands, swamps, lakes, and lagoons*"[2]
PMA	*Environmental Management Plan (Plan de Manejo Ambiental)* approved by the CDMB
PTO	Mining works program (*Programa de Trabajos y Obras*) for approval by the mining authority in accordance with Law 685 (2001 Mining Code)
R-[#]	Respondent's Exhibit
Reina de Oro	Empresa Minera Reina de Oro Limitada, a limited liability mining company founded through public deed No. 1110 before Bucaramanga Notary 1 on April 1, 1986, registered before the Bucaramanga Chamber of Commerce on May 14, 1986, and identified by I.D. 91.292.55530
Reina de Oro Award	Award issued on February 13, 2015, in the arbitration between GRVC and Reina de Oro

[2] The Spanish versión reads as follows: "*Ecosistema de alta montaña, ubicado entre el límite superior del bosque andino y, si se da el caso, con el límite inferior de los glaciares o nieves perpetuas, en el cual domina una vegetación herbácea y de pajonales, frecuentemente frailejones y pueden haber formaciones de bosques bajos y arbustivos y presentar humedales como los ríos, quebradas, arroyos, turberas, pantanos, lagos y lagunas*."

Reina de Oro Arbitration	The arbitration proceedings between GRVC and Reina de Oro which took place before the Arbitration, Conciliation, and Friendly Composition Center of the Bucaramanga Chamber of Commerce *(Centro de Conciliación, Arbitraje y Amigable Composición de la Cámara de Comercio de Bucaramanga)*
Rejoinder	Respondent's Rejoinder on Liability and Reply on Jurisdiction dated September 10, 2021
Reply	Claimant's Reply Memorial on Liability dated June 18, 2020
Request for Arbitration	Request for Arbitration dated March 21, 2018, made by Claimant against Colombia
Resolution 127	CDMB Resolution No. 127 dated May 16, 2002 (Environmental License)
Resolution 2090	Ministry of Environment 's Resolution No. 2090 dated December 19, 2014
Resolution 341	NMA Resolution No. 341 dated April 9, 2018
Resolution 381	CDMB Resolution No. 381 dated May 16, 2016
Resolution 769	Ministry of Environment ' s Resolution No. 769 dated August 5, 2002
Resolution 937	Ministry of Environment's Resolution No. 937 dated May 25, 2011
Respondent's comments to NDP Submission	Respondent's comments to Canada's NDP Submission dated March 1, 2022
Respondent's Further Observations	Respondent's Reply on its Preliminary Objection pursuant to Arbitration Rule 41(5) for Manifest Lack of Legal Merit of Galway Gold Inc.'s Claims dated November 11, 2019
Respondent's PH Brief	Respondent's Post-Hearing Brief dated October 26, 2022
Respondent's Preliminary Objection	Preliminary Objection submitted by the Republic of Colombia under Rule 41(5) of the Arbitration Rules dated October 25, 2019
Restoration Area	Areas whose natural conditions have been altered and should be restored to improve the *páramo's* flow of ecosystem service (*Zona de Restauración*)
RL-[#]	Respondent's Legal Authority
RPA	RPA, Inc., the company that prepared technical report NI 43-101 dated November 6, 2013, on the Vetas Gold Project in compliance with the standards implemented by the Ontario Securities Commission

RPA Report	NI 43-101 Report on the Vetas Gold Project, Department of Santander, Colombia prepared by RPA (November 6, 2013)
Santurbán *Páramo*	The Jurisdicciones-Santurbán-Berlín *páramo* complex
Stabilize, Stabilization	The Parties have used the terms "stabilize" and "stabilise", as well as "stabilization" and "stabilisation" to refer *inter alia* to rights arising under the 2001 Mining Code. Although both terms are equal, albeit the second used primarily in the United Kingdom, for consistency, the Tribunal shall utilize the terms as "stabilize", "stabilization"
Tr. Day [#][page:line]	Transcript of the Hearing
Tribunal	Arbitral tribunal constituted on September 25, 2019
VCLT	Vienna Convention on the Law of Treaties
Vetas Gold Project	Gold exploration and mining project encompassed by Concession 14833. The Vetas Gold Project covers an area of 123 hectares and 7739 square meters and is located within the California-Vetas Mining District, in the Department of Santander, Northern Colombia, located at 7° 20' North Latitude and 72° 52' West Longitude within the California-Vetas Mining District, approximately 400 km north of Bogota and 41 km northeast of Bucaramanga

I. INTRODUCTION AND PARTIES

1. This case involves a dispute submitted by Galway Gold Inc., now Montauk Metals Inc., ("**Claimant**") to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") under the Free Trade Agreement between Canada and Colombia executed on November 21, 2008, and in force as of August 15, 2011. Claimant is a corporation incorporated in accordance with the laws of Canada, and is domiciled at 82 Richmond Street East, Toronto, ON, Canada, M5C, 1P1.

2. The Respondent is the Republic of Colombia ("**Colombia**" or the "**Respondent**").

3. Claimant and Respondent are collectively referred to in this Award as the "Parties" and the term "Party" is used to refer to either Claimant or Respondent.

4. This dispute relates to alleged measures adopted by or attributable to Respondent over investments made by Claimant in mineral exploration and mining in Colombia. Respondent has alleged that the measures adopted were taken in protection of the *páramo* ecosystems.

II. PROCEDURAL HISTORY

5. On March 21, 2018, ICSID received a request for arbitration dated March 21, 2018, from Claimant against Colombia, together with Exhibits C-001 through C-020 (the "**Request**"). In its Request, Claimant appointed Mr. Alfredo Bullard to serve as arbitrator.

6. On April 18, 2018, the Secretary-General of ICSID registered the Request 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.

7. 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.

8. On May 18, 2018, Mr. Alfredo Bullard, a national of Peru, accepted his appointment as arbitrator.

9. On August 16, 2018, Professor Brigitte Stern, a national of France, accepted her appointment as arbitrator.

10. On January 17, 2019, the Centre informed the Parties that, in accordance with Rule 45 of the ICSID Rules of Procedure for Arbitration Proceedings (the "**Arbitration Rules**"), the Secretary-General would proceed to issue an order taking note of the discontinuance of the proceeding if the Parties failed to take any steps in the proceeding during six consecutive months.

11. On February 11, 2019, Claimant notified changes to its representation. On February 15, 2019, Ms. Meg Kinnear informed the Parties that, in light of Claimant's new counsel announcement in the case, the law firm Lenczner, Slaght, Royce, Smith, Griffin LLP where Mr. Christopher Hunter, her son, was an associate, she would take certain steps to ensure no conflict of interest would arise from Mr. Hunter's potential involvement in the arbitration. The steps included, *inter alia*, that Mr. Gonzalo Flores would be acting as Secretary-General in this case.

12. On February 13, 2019, Claimant made a proposal regarding the composition of the Tribunal and indicated that it considered this to be a "*fresh step in the proceeding*." On February 18, 2019, Respondent objected to Claimant's proposal to be considered a step in the proceeding. On February 19, 2019, Claimant answered to Respondent's objection. On February 19, 2019, the Centre confirmed receipt of the communications of the Parties and indicated that, unless the Parties agreed otherwise, the Centre would proceed to appoint the President of the Tribunal pursuant to Article 824(3) of the FTA. On February 22, 2019, Colombia submitted further comments to its objection.

13. On March 15, 2019, the Centre informed the Parties that the Acting Secretary-General would proceed to the appointment of the presiding arbitrator pursuant to Article 824(3) of the FTA through a ballot process. On March 22, 2019, the Parties informed the Centre that they had engaged in discussing mutually acceptable presiding arbitrators and would inform the Centre if any further assistance was required.

14. On August 2, 2019, the Parties communicated their agreement on the method to appoint the president of the Tribunal. On August 12, 2019, the Centre requested the Parties to clarify certain parts of their agreement. On August 16, 2019, Claimant confirmed its agreement to the clarifications. On August 19, 2019, in accordance with the Parties' agreement, the Centre requested that the Parties provide the requirements and characteristics that each Party considered the president should fulfill in addition to the requirements contained in Article 824(4) of the FTA. The Parties provided this information

on August 26, 2019. On August 27, 2019, Respondent commented on the requirements requested by Claimant.

15. On September 13, 2019, pursuant to the Parties' agreement, the Acting Secretary-General provided a list of candidates.

16. On September 23, 2019, following his selection in accordance with the Parties' agreement, Mr. Eduardo Siqueiros T., a national of the United Mexican States, accepted his appointment as the presiding arbitrator.

17. On September 25, 2019, the Acting Secretary-General, in accordance with Arbitration Rule 6(1), 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 Legal Counsel, was designated to serve as Secretary of the Tribunal.

18. On September 26, 2019, the Centre requested that each Party make a first advance payment of USD 200,000 to cover the costs for the first three to six months of the proceeding, including the costs of the first session.

19. On October 14, 2019, the Tribunal (i) invited the Parties to confirm their availability for a first session on two possible dates; and (ii) circulated a draft Agenda and draft Procedural Order No. 1, inviting the Parties to confer and submit a joint proposal advising the Tribunal of any agreements reached and/or of their respective positions where they were unable to reach an agreement by October 23, 2019.

20. On October 14, 2019, the Centre acknowledged receipt of Claimant's payment of its share of the first advance.

21. On October 17, 2019, the Parties informed the Tribunal that they agreed to extend the period to hold the first session pursuant to Arbitration Rule 13(1) and that it would be held on November 26, 2019.

22. On October 25, 2019, Respondent filed preliminary objections pursuant to Arbitration Rule 41(5) together with Exhibits R-001 to R-013 and Legal Authorities RL-001 to RL-010 ("**Respondent's Objection under Arbitration Rule 41(5)**"). On October 28, 2019, the Tribunal communicated to the Parties a proposed procedural calendar for the Parties' written observations on Respondent's Objection under Arbitration Rule 41(5).

23. On November 1, 2019, the Centre sent a reminder to Respondent regarding the finances of the case.

24. On November 5, 2019, Claimant submitted its observations to Respondent's Objection under Arbitration Rule 41(5) together with Exhibits C-021 through C-034 and Legal Authorities CL-001 to CL-012 ("**Claimant's Observations**").

25. On November 11, 2019, Respondent submitted further observations to its Objection under Arbitration Rule 41(5) together with Legal Authorities RL-011 to RL-014 ("**Respondent's Further Observations**").

26. On November 19, 2019, the Parties submitted their joint agreements to the proposed draft of Procedural Order No. 1 and their respective positions where no agreement was reached and requested an extension to submit positions on a proposed procedural calendar. On November 21, 2019, the Parties submitted their agreed positions on the procedural calendar.

27. On November 21, 2019, Claimant submitted its further observations to Respondent's Objection under Arbitration Rule 41(5) together with Legal Authorities CL-013 and CL- 014 ("**Claimant's Further Observations**").

28. In accordance with Arbitration Rule 13(1), the Tribunal held a first session with the Parties on November 26, 2019, by teleconference and heard oral arguments on Respondent's Objection under Arbitration Rule 41(5).

29. Following the first session, on December 10, 2019, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters and the decision of the Tribunal on disputed issues. 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, D.C., United States of America. Procedural Order No. 1 also sets out a schedule for the jurisdictional and merits phases of the proceedings.

30. On December 20, 2019, the Tribunal issued a "Decision on the Respondent's Preliminary Objection Pursuant to Rule 41(5) of the ICSID Arbitration Rules", whereby – for the reasons stated therein– it decided, *inter alia*, to (i) "[Reject the] *request by the Respondent to declare that the Claimant's claim is* 'manifestly without legal merit,' ..."; and (ii) "[Reject the] *request by the Respondent to take note of the discontinuance by abandonment under Rule 45 of the ICSID Arbitration Rules ...*".

31. On January 6, 2020, the Centre notified the Parties of Respondent's default to pay its share of the first advance payment and invited either Party to proceed to the payment of the outstanding amount within 15 days. On February 13, 2020, the Tribunal invited either Party once more to pay the outstanding amount indicating that it would be ready to stay the

proceeding for lack of payment, if the Acting Secretary-General moved the Tribunal to do so.

32. By letter of February 3, 2020, the Tribunal informed the Parties that it was available to set the hearing dates in the procedural calendar for the following dates: September 27 to October 1, 2021, and November 2-6, 2021. The Tribunal invited the Parties to indicate their availability on those dates by February 7, 2020.

33. On February 5, 2020, Respondent confirmed its availability on any of the proposed dates, with a preference for September 27 to October 1, 2021.

34. On February 18, 2020, Claimant confirmed its availability for November 2-6, 2021, and confirmed that they were not available September 27 to October 1, 2021.

35. By letter of the same date, the Tribunal confirmed that the Hearing would be scheduled from Tuesday, November 2, 2021, to Saturday, November 6, 2021.

36. On April 16, 2020, Claimant informed the Tribunal that current circumstances of COVID-19 had impaired Claimant's ability to prepare witness statements and memorials on the existing timetable. The Parties agreed to extend the date for the filing of Claimant's Memorial (and corresponding witness statements) by two months. Accordingly, the April 18, 2020 deadline for the filing of Claimant's Memorial was extended to June 18, 2020. Respondent confirmed this understanding by a separate communication.

37. By letter of the same date, the Tribunal stated that it did not have an objection to the Parties' agreed extensions detailed in Claimant's email of April 16, 2020.

38. On May 27, 2020, the Centre reminded the Parties of the Tribunal's communication of February 13, 2020, regarding the finances of the case and providing an up-to-date interim financial statement.

39. On June 18, 2020, Claimant filed its Memorial on Jurisdiction and Liability ("**Cl. Memorial**"), with Exhibits C-035 to C-119 and Legal Authorities CL-015 to CL-085. The pleading was also accompanied by three witness statements, as follows: (i) Witness Statement of Alfonso Gómez Rengifo, dated June 16, 2020; (ii) Witness Statement of Mr. Robert Hinchcliffe, dated June 17, 2020; and (iii) Witness Statement of Mr. Marcos Nieto, dated June 17, 2020.

40. On June 26, 2020, the Centre informed the Parties that the Acting Secretary-General moved the Tribunal to stay the proceeding for lack of payment pursuant to ICSID Administrative and Financial Regulation 14(3)(d). On June 29, 2020, Claimant objected to Respondent not

making the required advance payment and informed the Tribunal that the advance payment would be made by Claimant.

41. On June 30, 2020, the Centre acknowledged receipt of Claimant's payment of Respondent's share of the first advance.

42. On July 20, 2020, the Tribunal requested that Claimant update its list of representatives pursuant to paragraph 8.1. of Procedural Order No. 1. On July 24, 2020, Claimant confirmed its list of representatives.

43. On November 3, 2020, Respondent informed the Tribunal that the effects of COVID-19 had adversely impacted Respondent's ability to prepare its Counter-memorial, due on November 11, 2020. The Parties agreed to extend the date for the filing of Respondent's Counter-Memorial by two weeks to November 25, 2020. Claimant confirmed this understanding by a separate communication.

44. On November 25, 2020, Respondent filed its Counter-Memorial on Liability and Memorial on Jurisdiction ("**C-Memorial on Liability**") and Memorial on Jurisdiction ("**Memorial on Jurisdiction**"), with Exhibits R-014 to R-129 and Legal Authorities RL-015 to RL-120. The pleading was also accompanied by the Witness Statement of Mr. Eduardo Amaya Lacouture, dated November 25, 2020.

45. On December 9, 2020, the Tribunal conveyed to the Parties Annex B to Procedural Order No. 1 with dates to assist the Parties in having clarity about the upcoming deadlines. The Parties were invited to submit comments, if any, by December 15, 2020.

46. In accordance with paragraph 15 of Procedural Order No. 1, the Parties exchanged document production requests on December 31, 2020. Claimant filed 17 requests for document production, and Respondent filed 7 requests for document production.

47. On January 20, 2021, the Parties exchanged objections to the document production requests.

48. On January 30, 2021, the Parties completed their "Stern Schedules" with their replies related to their respective document requests and submitted these for the Tribunal's decision.

49. On February 12, 2021, the Tribunal issued Procedural Order No. 2, on the Parties' respective requests for documents.

50. After receiving exchanges from the Parties, the Tribunal rendered a decision on the Parties' privilege logs on document production requests on March 17, 2021.

51. On April 14, 2021, Claimant requested the Tribunal for a procedural conference to deal with scheduling matters and future impact expected due to COVID-19 situation.

52. On the same date, Respondent objected to Claimant's request noting that Claimant had not provided any justification for the request for a procedural conference, nor it had submitted any written application with regards to any "scheduling matters." In its communication, Respondent provided documentation regarding recent Parties' exchanges on the aforementioned topics.

53. By letter of the same date, the Tribunal invited the Parties to submit simultaneously their comments on the procedural schedule by April 20, 2021. On the issue of the modality of the scheduled Hearing, the Tribunal advised that it would not object to an in-person Hearing, provided that this was feasible in compliance with health and regulatory standards, in addition to the ICSID Secretariat being available. The Tribunal considered that it was premature at such point to address the issue and invited the Parties to communicate and make a proposal to the Tribunal sometime in late July or early August 2020 (*i.e.,* three months before the Hearing).

54. On May 11, 2021, the Centre requested that each Party pay a second advance payment of USD 200,000 to cover the costs of the Hearing.

55. On May 12, 2021, Claimant filed its Counter-Memorial on Jurisdiction and Reply on Liability ("**Reply**"), with Exhibits C-120 to C-200 and Legal Authorities CL-086 to CL-111. The pleading was also accompanied by two witness statements and one expert report, as follows: (i) Supplementary Witness Statement of Robert Hinchcliffe, dated May 11, 2021; (ii) Witness Statement of Dr. Margarita Ricaurte de Bejarano, dated May 10, 2021; and (iii) Expert Report of Dr. Margarita Ricaurte dated April 15, 2021.

56. On June 11, 2021, the Centre acknowledged receipt of Claimant's payment of its share of the second advance.

57. On August 18, 2021, the Tribunal invited the Parties to provide an update on their communications and proposals regarding the modality of the upcoming Hearing.

58. On September 11, 2021, the Parties informed the Tribunal that in light of the then COVID-19 situation, the Parties proposed that the Hearing be rescheduled to a date on which a full in-person hearing can be conducted with all counsel in attendance.

59. On September 11, 2021, Respondent filed its Rejoinder on Liability and Reply on Jurisdiction ("**Rejoinder**"), with Exhibits R-130 to R-171 and Legal Authorities RL-121 to RL-165. The pleading was also accompanied by one witness statement and one expert report, as follows: (i) Second Witness Statement of Mr. Eduardo Amaya Lacouture, dated September 10, 2021; and (ii) Expert Report of Professor Felipe De Vivero, dated September 9, 2021.

60. On September 14, 2021, the Tribunal informed the Parties that it would be available for a 5-day in-person hearing from June 20 to June 24, 2022. The Tribunal invited the Parties to consult and indicate by September 21, 2021, whether the proposed dates were agreeable to proceed to reschedule the Hearing.

61. On September 21, 2021, Respondent confirmed its availability to participate in the Hearing from June 20 to June 24, 2022. On September 27, 2021, Claimant confirmed its availability as well.

62. On September 27, 2021, the Tribunal informed the Parties that the Hearing was rescheduled to be held from June 20, 2022, to June 24, 2022.

63. On December 3, 2021, the Government of Canada informed the Tribunal that it intended to make a short-written submission at the latest by January 30, 2022. The Government of Canada explained that its submission would be concentrated on questions of interpretation as provided in the Treaty and further stated that "*as a Party to the Treaty, Canada's interpretation of the Treaty obligations can shed some light on the provisions at issue and be of assistance to the Tribunal*."

64. On December 16, 2021, the Tribunal requested Claimant to confirm their distribution list pursuant to paragraph 8.1. of Procedural Order No. 1. The Tribunal once again reminded Claimant of this request on January 12, 2022.

65. By communication of December 16, 2021, Respondent requested the Tribunal to amend the procedural calendar and set new deadlines in light of the Tribunal's letter dated September 27, 2021, confirming that the rescheduled Hearing would be held from June 20 to 24, 2022. In its communication, Respondent proposed that the witness notification be 59 days prior to the Hearing and noted its availability for the pre-hearing organizational meeting on any day of the week of May 30, 2022.

66. On the same date, the Tribunal informed the Parties that it would be available for the pre-hearing organizational meeting on June 2, 2022. In its letter, the Tribunal invited Claimant to comment on Respondent's proposals, including the available date for the pre-hearing organizational meeting. The Tribunal, while suggesting that the Parties' comments to

Canada's submission be submitted within a 15-day period after such submission, invited the Parties to confer and agree on a schedule to submit simultaneous comments to Canada's non-disputing party submission.

67. On December 23, 2021, Claimant responded that it did not agree to extend the previously agreed date for witness notification from 45 to 59 days before the Hearing as proposed by Respondent. Claimant argued that there was no reason for the extended period and that the uncertainty over the current health situation weighed against moving such date. Claimant confirmed its availability to hold the pre-hearing organizational meeting on June 2, 2022.

68. On January 4, 2022, the Tribunal confirmed the date of the pre-hearing organizational meeting for June 2, 2022, and granted the Parties, at their request, a short extension to confer and agree on a deadline for the Parties' comments on Canada's non-disputing party submission. The Tribunal also informed the Parties that if they failed to reach an agreement, the Tribunal would set the period of comments for 15 calendar days as initially suggested in its letter of December 16, 2021.

69. By letter dated January 10, 2022, Claimant's counsel informed the Tribunal of the Parties' agreement to set the deadline for comments to Canada's non-disputing party submission and on the same date Respondent confirmed the Parties' agreement. The agreed deadline was February 29, 2022.

70. On January 12, 2022, the Tribunal requested a clarification on the deadline as the Parties' agreed February 29 date would not occur in 2022. On the same date, Claimant's counsel, confirmed by Respondent, informed the Tribunal the correct date to be March 1, 2022. The Tribunal then confirmed the Parties' agreement.

71. On January 12, 2022, the Tribunal issued its Procedural Order No. 3, on the procedural calendar for the remainder procedural steps.

72. On January 31, 2022, Canada submitted its Non-Disputing Party Submission ("**Canada's NDP Submission**"). On March 1, 2022, the Parties filed simultaneously their comments to Canada's Non-Disputing Party Submission ("**Claimant's Comments to NDP Submission**" and "**Respondent's Comments to NDP Submission**").

73. On March 14, 2022, the Tribunal noted that the emails sent to one member of the team of counsel for Claimant bounced back and requested, pursuant to Rule 18 of the Arbitration Rules, that each Party provide an updated list of the individuals appearing on their behalf in this proceeding together with their affiliation and their correct email addresses.

74. On March 21, 2022, the Tribunal invited the Parties to confer and confirm the in-person modality of the Hearing. On March 25, 2022, Respondent's counsel confirmed on behalf of the Parties that the Hearing should be held in person on the reserved dates. On April 11, 2022, Claimant confirmed its agreement.

75. On April 11, 2022, the Centre notified the Parties of Respondent's default for the second advance and invited either Party to proceed to the payment of the outstanding amount.

76. On April 19, 2022, the Tribunal confirmed the date of the pre-hearing Organizational Meeting and circulated a draft procedural order for the Parties to provide a joint proposal advising the Tribunal of any agreements and/or their respective positions where they are unable to reach an agreement.

77. On May 6, 2022, the Parties submitted their witness notifications.

78. On May 11, 2022, the Centre informed the Parties that the Acting Secretary-General moved the Tribunal to stay the proceeding for lack of payment pursuant to ICSID Administrative and Financial Regulation 14(3)(d). On the same date, Claimant informed the Tribunal that Claimant would proceed to make the outstanding advance payment.

79. On May 18, 2022, Canada informed the Tribunal that it wished to attend the upcoming Hearing, if held virtually.

80. On May 24, 2022, the Centre acknowledged receipt of Claimant's payment of Respondent's share of the second advance.

81. On May 26, 2022, the Parties submitted their joint proposals and their points of view on those items where they did not reach an agreement on the draft procedural order on the organization of the Hearing.

82. On June 2, 2022, the President of the Tribunal, on behalf of the Tribunal and the Parties held a pre-hearing organizational meeting by video conference.

83. On June 8, 2022, Claimant informed the Tribunal that Dr. Margarita Ricaurte would be available for in person examination on the first day of the Hearing, otherwise, she would have to testify by videoconference. On the same date, Respondent provided its proposed Hearing agenda noting that there had been no relevant reason why Dr. Ricaurte should testify in other form than in person and that the agenda of the Hearing should not be tailored to fit the schedule of an expert. Respondent, however, agreed to have Dr. Ricaurte be examined on the first day of the Hearing. On June 10, 2022, Claimant provided its draft for the Hearing agenda.

84. On June 10, 2022, the Tribunal issued Procedural Order No. 4 on the organization of the Hearing.

85. On June 13, 2022, the Centre informed Canada, pursuant to the instructions of the Tribunal and the Parties, that the Hearing would be held solely in person from June 21 to 23, 2022 and that recordings of the Hearing would be made available to the public after the Hearing in accordance with Article 830(2) of the FTA. On the same date, Canada informed the Centre that their representatives would not be able to attend in person.

86. On the same date, the Parties submitted the Electronic Hearing Bundle to the Tribunal.

87. Claimant provided an updated distribution list on June 13, 2022.

88. A hearing on Jurisdiction and the Merits was held in Washington, D.C. from June 21 to 23, 2022 (the "**Hearing**"). The following persons were present at the Hearing:

Tribunal:	
Mr. Eduardo Siqueiros T.	President
Mr. Alfredo Bullard	Arbitrator
Professor Brigitte Stern	Arbitrator
ICSID Secretariat:	
Ms. Catherine Kettlewell	Secretary of the Tribunal
For Claimant:	
Mr. Lawrence Thacker	Lenczner Slaght LLP
Mr. Christopher Yung	Lenczner Slaght LLP
Mr. Andrew Locatelli	Lenczner Slaght LLP
Mr. Chris Kinnear Hunter	Torys LLP
Ms. Jessica Gonzales	Lenczner Slaght LLP
Mr. Alec Verch	Lenczner Slaght LLP
Ms. Grace Tsakas	Lenczner Slaght LLP
Mr. Ricardo Convers Ortega	
Mr. Joe Cartafalsa	Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
For Respondent:	
Mr. Fernando Mantilla-Serrano	Latham & Watkins LLP
Mr. Samuel Pape	Latham & Watkins LLP
Mr. Diego Romero	Latham & Watkins LLP
Mr. Matías Zambrano	Latham & Watkins LLP
Mr. Ignacio Stratta	Latham & Watkins LLP

Mr. Camilo Gómez Alzate	Agencia Nacional de Defensa Jurídica del Estado, Republic of Colombia
Ms. Ana María Ordóñez Puentes	Agencia Nacional de Defensa Jurídica del Estado, Republic of Colombia
Mr. Giovanny Vega Barbosa	Agencia Nacional de Defensa Jurídica del Estado, Republic of Colombia
Ms. Yadira Castillo Meneses	Agencia Nacional de Defensa Jurídica del Estado, Republic of Colombia
Mr. Andrés Reina Arango	Agencia Nacional de Defensa Jurídica del Estado, Republic of Colombia

Court Reporters:

Ms. Dawn Larson	Worldwide Reporting, LLP (English)
Mr. Leandro Iezzi	D-R Esteno (Spanish)
Ms. Virginia Masce	D-R Esteno (Spanish)

Interpreters:

Ms. Silvia Colla	English-Spanish Interpreter
Mr. Daniel Giglio	English-Spanish Interpreter
Mr. Charles Roberts	English-Spanish Interpreter

89. During the Hearing, the following persons were examined:

On behalf of Claimant:

Mr. Robert Hinchcliffe	Galway Gold Inc.
Ms. Margarita Ricaurte	Ricaurte Rueda Abogados

On behalf of Respondent:
Mr. Eduardo Amaya Lacouture
Mr. Felipe de Vivero

90. On June 30, 2022, the Tribunal addressed the following pending matters: (i) transcripts and audio recordings were made available to the Parties for the Revised Transcripts to be due on July 28, 2022; (ii) the Tribunal's questions to the Parties would be due 30 days after the Revised Transcripts were distributed; (iii) the Parties were to upload all electronic versions of demonstratives to the file sharing platform, Box; (iv) instructions regarding Post-Hearing briefs, and (v) transmittal of the Spanish version of Procedural Order No. 4.

91. On July 5, 2022, the Hearing video recordings were made available to the Parties for review of confidential information. Pursuant to paragraphs 49 and 51 of Procedural Order No. 4,

the Hearing video recordings were posted on ICSID's website for 24 hours for public access.

92. On July 15, 2022, as instructed by the Tribunal, the Centre informed the Parties and Canada that the ICSID Secretariat would publish the Hearing video recordings on ICSID's website for a period of 24 hours as indicated in paragraph 51 of Procedural Order No. 4.

93. On July 18, 2022, Canada requested to have access to the videos for a longer period than 24 hours. After consulting with the Parties, the Tribunal instructed the Secretary of the Tribunal to provide Canada with access to a Box folder containing the video recordings until August 31, 2022.

94. On July 28, 2022, the Parties submitted the Revised Transcripts.

95. On August 8, 2022, the Tribunal transmitted to the Parties a list of questions for the Parties to address in their Post-Hearing submissions. The Tribunal also reminded the Parties that the deadline for the Post-Hearing submissions was 90 days from the date of the Revised Transcripts. The Tribunal also noted that, unless the Parties agreed otherwise, the 120-day deadline for the Decision on Jurisdiction and Liability contained in Annex B of Procedural Order No. 1 had to be amended to reflect the Post-Hearing submissions.

96. The Parties filed simultaneous Post-Hearing briefs on October 26, 2022 ("**Claimant's PH Brief**" and "**Respondent's PH Brief"**).

97. On September 27, 2022, the Centre circulated Respondent's new distribution list to replace Mr. Camilo Gómez Alzate with Dr. Martha Lucía Zamora Ávila, as the General Director of the *Agencia Nacional de Defensa Jurídica del Estado*.

98. On November 10, 2022, the Tribunal referred to its communication of June 30, 2022, and invited the Parties to submit their cost statements. The Tribunal also communicated the procedural calendar, as amended.

99. The Parties filed their submissions on costs on November 25, 2022.

100. On February 23, 2023, the Centre requested each Party to make an advance payment towards costs of arbitration. Since ICSID did not receive payment from either Party by the due date, on April 24, 2023, ICSID informed the Parties of the default and gave them an opportunity to make the required payment by May 9, 2023. On May 9, 2023, Claimant requested a 120-day extension to pay the outstanding advance. In light of the circumstances invoked by Claimant in its letter of May 9, 2023, the Centre reduced the amount originally

estimated and on July 14, 2023, and invited the Parties to pay a revised total by July 28, 2023.

101. On August 11, 2023, the Acting Secretary-General decided to suspend the proceeding as of such date pursuant to ICSID Administrative and Financial Regulation 16(2)(c) for failure of the Parties to pay the third advance of costs of arbitration, noting, however, that "*upon payment of the outstanding amount by either party, the proceeding will resume*." Pursuant to ICSID Administrative and Financial Regulation 16(2)(c) "*if* [the] *proceeding is suspended for non-payment for more than 90 consecutive days, the Secretary-General may discontinue the proceeding, after giving notice to the parties and to the* […] *Tribunal* […] *if constituted*."[3]

102. On December 27, 2023, Claimant made the payment of the reduced third advance request. Therefore, on January 11, 2024, the Secretary of the Tribunal notified that the suspension of the proceeding ordered by the Acting Secretary- General on August 11, 2023, was lifted and the proceeding was accordingly resumed as of such date.

103. On February 22, 2024, the firm Ogletree, Deakins, Nash, Smoak & Stewart, P.C. announced that they would withdraw effective on such date as co-counsel for Claimant.

104. On March 12, 2024, Respondent requested the introduction into the record of an award dated February 28, 2024, in the *Red Eagle Exploration Ltd. v. The Republic of Colombia* arbitration (ICSID Case No. ARB/18/12). Within the period granted by the Tribunal, Claimant submitted on March 20, 2024, its comments to the request of Respondent.

105. After consideration of Respondent's request and Claimant's comments, on March 22, 2024, the Tribunal deemed it was not necessary for the Parties to make any written submission on the *Red Eagle Exploration Ltd. v. The Republic of Colombia* award as it is publicly available and not necessary to introduce into the record.

106. On March 12, 2024, the Tribunal requested the Parties to submit their respective updated Statements of Costs. On March 26, 2024, the Respondent indicated that it did not have any updates to its submission on costs of November 25, 2022. On April 1, 2024, the Claimant submitted an updated statement on costs.

107. On April 1, 2024, the Claimant informed the Tribunal that the shareholders of Galway Gold Inc. had authorized a change of the Claimant's name from "Galway Gold Inc." to "Montauk Metals Inc."

[3] Letter of Mr. Gonzalo Flores, ICSID Acting Secretary-General, August 11, 2023, addressed to the Parties.

108. The proceeding was closed on June 7, 2024.

III. LEGAL FRAMEWORK AND RELEVANT AUTHORITIES

A. COLOMBIA'S APPLICABLE LEGAL FRAMEWORK

109. The basic legislation applicable to mining activities in Colombia is the 2001 Mining Code[4], enacted through Law 685 of August 15, 2001, and which replaced the prior Mining Code of 1988.

110. Under the 1988 Mining Code,[5] there were four different types of concession titles:

(a). Exploration license, which granted the holder the exclusive right to perform, in a prescribed area, exploration work for the purpose of identifying commercially exploitable mineral deposits and reserves, and there were several types, depending on the anticipated volume to be extracted and size to be developed;

(b). Exploitation license. Upon expiry of an exploration license for small mining activity and extensions thereof, an "exploration" license could be converted into an "exploitation license". Exploitation licenses had a term of ten years, which could be extended once for an additional ten years. On its expiry, the holder could apply for either a ten-year extension or for conversion of the license into a "concession contract", although upon expiry of an "exploration" license for medium and large activities and any extensions thereof, the license was required to be converted to a concession contract in compliance with prescribed conditions;

(c). *Contratos de aporte* (association or services agreements), whereby the Ministry of Mines and Energy granted to its related entities the exclusive and temporary right to explore and exploit minerals in a determined area; and

(d). Concession contracts which gave the holder the exclusive right to extract certain minerals and conduct the activities necessary for exploitation, transport, and shipment of the same. Concession contracts had a term of 30 years.[6]

111. The License 14833 which was originally issued to Reina de Oro, was an "exploration license" under the 1988 Mining Code.

112. Claimant points to the objective stated in Article 1 of the 2001 Mining Code: to "*stimulate mining exploration and mining activities to satisfy both internal and external demand,*

[4] **Exhibit C-047**, 2001 Mining Code.

[5] **Exhibit C-067**, Decree 2655 of December 23, 1988.

[6] Cl. Memorial, ¶¶ 78-82.

harmoniously with environmental principles, in the context of Colombia's sustainable development and socio-economic strengthening." Claimant rejects the dismissal by Respondent of the significance and impact of the key purpose, rationale and unifying theme of the 2001 Mining Code to provide certainty, stability, and predictability over time, to induce foreign investment and promote economic development and activity in its mineral exploration and mining sector, as well as the stabilization function, and the impact it has on investors' reasonable expectations, while amplifying the State's residual discretionary powers.[7]

113. In support of its position, Claimant quotes the Director of Mines, at the Ministry of Mines, who stated in a document prepared in 2007 that the purpose of the 2001 Mining Code was to establish "*clear and stable rules to allow the private sector to invest in mining developments*,"[8] and from the Statement of Reasons of the law submitted by the Minister of Mines and Energy to the Colombian Congress,[9] together with the *travaux préparatoires* before the Colombian Congress.[10]

114. As way of background, Claimant indicates that, as a consequence of economic initiatives and other social and economic reforms that opened Colombia to foreign investment, in 2001, Colombia amended the Mining Code to allow for increased foreign direct investment into the country, adding that, for example, the State-owned coal company was privatized. The promise of political stability and economic reform, Claimant mentions, portrayed the country's openness to foreign investment and to a stable mining development: "*on a risk-reward analysis, Colombia was suddenly transformed into an extremely attractive opportunity*."[11] Reforms continued, and the Colombian Government later issued and implemented the "Mining and Environmental Guides," which formed part of the commitment under the 2001 Mining Code to create a complete consultation and orientation

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[7] Reply, ¶¶ 32-33.

[8] Cl Memorial, fn. 95, *citing* **Exhibit C-050**, Beatriz Duque Montoya, "Política de Promoción del País Minero".

[9] Reply, ¶ 37; Expert Report of Dr. Margarita Ricaurte, pp. 1-2: "*[…] the Project aims to make the new Mining Code a useful and efficient tool for the development of the sector and therefore, its best legacy is to offer, through categorical and express mandates, a clear and firm legal stability to individuals involved in theexploration and the use of mining resources*." [Emphasis added by Claimant]

[10] Reply, ¶38; Expert Report of Dr. Margarita Ricaurte, p. 2, *citing* **Exhibit C-121,** Gaceta del Congreso No. 238, p. 7: "*… iii. Legal stability. As highlighted in previous chapters, one of the fundamental requirements for strengthening the sector is the clear definition of the rules of the game applicable not only to each one of the operators, but also, in each phase of the mining cycle.*

…

The Normativity of the contract principle is enshrined, thereby guaranteeing that during the term of thecontract, and of its extensions thereof, the applicable rules will be those in force at the time the contract becomes fully binding." [Emphasis added by Claimant]

[11] Cl. Memorial, ¶ 88.

tool to guide the mining industry and advance the management and implementation of a mining exploitation; these Guides highlighted the main objectives of the 2001 Mining Code, which included the promotion of the mining industry and the exploitation of natural resources for the economic and social development of the country.[12] As a consequence of this promotion of the mining industry, Claimant adds, Colombia opened up vast tracts of land for mining. By 2013, 40 million hectares of land were opened for mineral exploration and extraction, and Colombia increased mining titles from 2,965 in 2002 to 9,426 in 2012. According to Claimant, between 2002 and 2010, foreign capital in Colombia increased from USD 466 million to USD 4.5 billion. A significant portion of this increase related to mining. Between 2006 and 2010, gold production increased by 340 percent.[13]

115. Claimant further indicates that one of the key features and improvements of the 2001 Mining Code was the creation of unified mining concession contracts, which consolidated the exploration and exploitation phases under a single mining title, and granted the concessionaire the exclusive right to explore and then exploit the mine within the concession area.[14] Concession contracts could be granted for 30 years from the date of registration in the Mining Registry and were renewable for an additional 30-year term.[15] All necessary environmental plans and report studies had to be approved to obtain the permits required to conduct exploration work.[16]

116. Respondent acknowledges that the 2001 Mining Code "*modernised the legal framework for the exploration and exploitation of the State's subsoil and non-renewable resources*," but highlights that Article 1 states as objective the promotion of mining activities "*within the limits of the overarching principles of rational exploitation, environmental protection and sustainable development*."[17] [Emphasis added by Respondent]

117. Article 14 of the 2001 Mining Code confirmed that mining licenses and permits issued prior to its entry into force would remain valid and prescribed that all *future* mining titles were to take the form of concession contracts, while Article 349 allowed titleholders of *existing* mining titles granted under the 1988 Mining Code (such as the exploration license

[12] Cl. Memorial, ¶ 89.
[13] Cl. Memorial, ¶¶ 90-91.
[14] Cl. Memorial, ¶ 93; **Exhibit C-047**, 2001 Mining Code, Arts. 14, 45.
[15] Cl. Memorial, ¶ 94; **Exhibit C-047**, 2001 Mining Code, Art. 77.
[16] Cl. Memorial, ¶ 94.
[17] C-Memorial on Liability, ¶ 38.

of License 14833) to convert those titles into concession contracts governed by the 2001 Mining Code.[18]

118. Other notable provisions of the 2001 Mining Code include the following propositions: (i) foreign companies were allowed to open a branch in Colombia in accordance with Colombian law, to carry out any permanent mining activities;[19] and (ii) mining exploration activities can be carried out by contractors without requiring any additional authorization from the mining authorities.[20]

119. The 2001 Mining Code established a requirement to provide a notice of assignment of rights under concession contracts by the grantor of the concession, and provides 45 days to the grantor to raise any objection; absent any objection, the assignment was to be recorded in the Mining Registry.[21]

120. Respondent points out that Article 45 of the 2001 Mining Code does not provide any guarantee that the exploitation of the minerals falling within the area covered by the concession will be permitted. Rather, a concession contract merely *authorizes* the concessionaire to undertake studies and exploration work entirely *at its own risk* and under certain terms and conditions in order to develop a specific mining project.[22] Further, the 2001 Mining Code provides that concession contracts under the Mining Code are *multi-tiered* agreements. The rights and obligations accruing to the concession holder change over the course of each phase of the lifecycle of the project, where progression to each subsequent stage of the concession is subject to the strict completion of certain requirements. Accordingly, Respondent adds, concession contracts do not confer, by themselves, an abstract and unlimited right to advance a project or to exploit minerals within a concession area. Rather, adds Respondent, they establish the terms and conditions required for the concessionaire's project to move through its different stages: from exploration, construction and assembly (if applicable) to exploitation.[23]

121. In response, Claimant contends that Article 45 of the 2001 Mining Code "*did not transfer legal risk to the concessionaire*," and provides that the person carrying out mining activities does so at its own "*expense and risk*." The "*risk*" referred to in this section is the technical and economic risk associated with entering into the concession contract and investing in

[18] Cl. Memorial, ¶ 95; **Exhibit C-047**, 2001 Mining Code, Art. 349.

[19] Cl. Memorial, ¶ 98; **Exhibit C-047**, 2001 Mining Code, Art. 20.

[20] Cl. Memorial, ¶ 99; **Exhibit C-047**, 2001 Mining Code, Art. 27.

[21] Cl. Memorial, ¶¶ 100-101; **Exhibit C-047**, 2001 Mining Code, Arts. 22, 23, 24.

[22] C-Memorial on Liability, ¶ 139.

[23] C-Memorial on Liability, ¶¶ 140-141.

technical studies without any guarantee as to the presence of extractible minerals in the area or any visibility into potential price fluctuations of the mineral on the international market. It does not impose, as Respondent suggests, the burden of *any and all risks* associated with the mining activities, including risks associated with legislative changes on the concessionaire or the individual to whom the concession contract is assigned, which is confirmed by judicial precedents in Colombian courts.[24]

122. Claimant also points to Article 46 of the 2001 Mining Code that enshrines the principle of "*contractual inviolability*" by expressly guaranteeing that all civil contracts relating to mining concession contracts would be governed by the mining laws in force at the time of their formalization, without exception. It also provides that, for stabilization and transition in the case of amendments or legal reforms, any new or amended legislation would only apply to the concessionaire insofar as they broaden, confirm, or improve the concessionaire's entitlements.[25] In addition, even if Article 36 of the 2001 Mining Code provides that "*excluded areas*" (under Article 34) and "*restricted areas*" (under Article 35) are automatically excluded or restricted in full from the titles granted, and the rights conferred upon the titleholder, without the need for any express declaration to that effect by the mining authority, or a formal surrender by the concessionaire, this does not mean that Claimant does not have a right to compensation for the loss or restriction of its rights under Concession 14833. Therefore, Claimant argues, the restrictions arising or declared *after* the granting of a title, as they were in this case, are *not* excluded from the title, and the rights acquired by Claimant – protected under Article 58 of Colombia's Political Constitution – are not defeated or invalidated and cannot be disregarded.[26] In this connection, Claimant cites jurisprudence of the Council of State of Colombia referred to by its Expert, Dr. Margarita Ricaurte.[27]

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[24] Reply, ¶¶ 43-44, *citing* **Exhibit C-190**, Administrative Tribunal of Cundinamarca, Decision dated 29 November 2018, Exp. 25000233600020160067200, p. 33.

[25] Reply, ¶ 47.

[26] Reply, ¶¶ 48-54.

[27] Expert Report of Dr. Margarita Ricaurte, pp. 11-12, *citing* **Exhibit C-126**, Consejo de Estado, Sala de lo Contencioso Administrativo. Sección Tercera. Sentencia 38338, 6 de julio de 2017, Danilo Rojas Betancourth. English Translation reads: "[…] *the mining title under the defendant's name, preceded the declaration and delimitation of partof the land comprising the concession as a special reserve area, so it had an acquired right that cannot be disregarded. Article 46 of Law 685, 2001, the Mining Code, which is the norm that provides for the power of the National Government to declare such areas of special interest, clearly states that such areas cannot ignore titles preceding their formation: .... It should be noted that the plaintiff [the mining authority] has insisted that the activities necessary to delimit the reserve area began before the title under Mr. Rendle's name was perfected and registered. However, the final delimitation, which would be opposable for reasons of disclosure to third partiesinterested in obtaining titles in those areas, occurs only by the issuance of the act declaring and delimits the area of special public interest, may not be disregarded.*"[Emphasis added by Claimant]

123. According to Claimant, the issue is not whether public interests prevail over private interests under the Colombian Constitution, as Respondent suggests; the issue is whether there is any obligation to compensate when a subsequent law affects previously acquired rights under the pretense of "*public utility or social interest*." Claimant cites its Colombian law expert, Dr. Ricaurte, who asserts that Colombia's conduct in these circumstances constitutes a clear breach of Colombian domestic law, specifically flowing from Articles 58 and 90 of the Political Constitution, *vis a vis* Claimant's rights.[28]

124. Claimant further asserts that under the 2001 Mining Code three restriction categories for mining were established: "reserved", "excluded" and "restricted areas", and that *páramo* ecosystems were never included in the list of "restricted areas" until 2010, when Article 3 of Law 1382 modified Article 34 of Law 685,[29] and even then, subject to well-defined exclusions described therein.[30]

125. Claimant describes that Government fees and royalties were paid by titleholders; holders of exploration licenses for large mining activities had to pay a fee equal to the prescribed minimum daily wage multiplied by the number of hectares covered by the license, payable annually until the commencement of commercial production on the property. As of 2002, upon commencement of production, a royalty was payable at an effective rate of 4% of the London gold fix price on the ounces produced. For underground mines, the royalty was payable when annual production exceeded 8,000 tons and, for open-pit mines, when annual production exceeded 250,000 cubic meters.[31]

126. Respondent claims, on the other hand, that under international law, Colombia is legally bound to protect the *páramos* within its territory, and must apply the precautionary principle in so doing, which is nonetheless mandated by Article 1 of Law 99 of 1993 and is one of Colombia's General Environmental Principles. This provision directs all environmental authorities to apply the *precautionary principle* in their decision-making, tipping the scale in favor of the protection of the environment in the absence of scientific evidence confirming that no irreversible or grave harm will be done to the environment – the *in dubio pro ambiente* principle.[32]

[28] Reply, ¶ 56; Expert Report of Dr. Margarita Ricaurte, pp. 12-13; **Exhibit C-127**, Constitución Política, Art. 58; **Exhibit C-128**, Constitución Política, Art. 90.

[29] **Exhibit C-047**, 2001 Mining Code, Art. 34.

[30] Reply, ¶ 39.

[31] Cl. Memorial, ¶ 83.

[32] C-Memorial on Liability, ¶ 50.

B. KEY MINING AND ENVIRONMENTAL AUTHORITIES IN COLOMBIA

127. The Parties essentially agree on the relevant governmental authorities that have jurisdiction over all mineral exploration and mining. Key Colombian Government mining and environmental entities include:

(a). the Ministry of Mines and Energy (*Ministerio de Minas y Energía*) or MME, which is responsible for adopting, directing and coordinating the Colombian Government's policies on the exploration, transportation, processing, exploitation and distribution of minerals and the development of the mining and energy sector;

(b). the Colombian Institute for Geology and Mining (*Instituto Colombiano de Geología y Minería*) or INGEOMINAS, the administrative body that, prior to the NMA's formation, managed Colombian mining resources, and since then carries out scientific research on subsoil resources and manages geological information relating to the mineral resources. Respondent indicates that prior to 2011, the administration of the State's mineral resources was within the remit of the Ministry of Mines, which initially delegated those responsibilities to the Empresa Nacional Minera Ltda. (the National Mining Corporation or "**Minercol**"), to INGEOMINAS;[33]

(c). the National Mining Authority (*Agencia Nacional de Minería*) or NMA (also ANM), created by Decree 4134 of 2011, which took over the responsibilities of INGEOMINAS. Its main objective is to promote the exploration and development of Colombia's mineral resources and the granting of areas for the exploration and exploitation of mineral resources. The NMA also enforces compliance by mining companies of their obligations under concession contracts, association agreements, and licenses and administers and enforces royalties, surveillance of health and safety measures, promotion of the mining industry, and management of the Mining Registry. As such, it grants, administers, audits and monitors concession contracts throughout their lifecycles; [34]

(d). the Ministry of the Environment and Sustainable Development (*Ministerio de Ambiente y Desarrollo Sostenible*), created by Law 99 of 1993 to define and oversee the enactment and implementation of Colombia's policies and regulations for "*the recovery, conservation, protection, regulation, handling, use and exploitation of the Nation's renewable natural resources and environment*."[35] It is responsible for (i) implementing the Colombian Government's policies to preserve

[33] C-Memorial on Liability, ¶ 124.

[34] C-Memorial on Liability, ¶ 125.

[35] C-Memorial on Liability, ¶ 126.

the environment, (ii) monitoring the use of natural resources and issuing some environmental licenses, and (iii) exercising control over relevant human activities;

(e). the National Environmental Licensing Authority (*Sistema Nacional Ambiental*) or SINA, created by Decree 3573 of 27 September 2011. The SINA is the body for "*orientations, norms, activities, resources, programs and institutions*" aimed at securing compliance with the general environmental principles defined in Article 1 of Law 99, including specifically the special protection ("*protección especial*") of "*páramo and sub-páramo areas, water springs and aquifer recharge zones*,"[36] and

(f). Regional Autonomous Corporations (*Corporaciones Autónomas Regionales*) or CARs[37] – such as the Corporación Autónoma Regional para la Defensa de la Meseta de Bucaramanga ("**CDMB**") created by Law 99 of 1993 – which are responsible for (i) the administration of the environment, natural resources, (ii) the issuing of licenses and permits to carry out activities that could impact the environment, (iii) the use of the natural resources, and (iv) controlling human activities authorized in the area of its jurisdiction, in compliance with the laws, regulations and policies of the Ministry of Environment. Respondent contends that CARs are competent to issue environmental authorizations for small and medium-scale mining projects, and control and monitor the environmental aspects of mining exploration activities. Respondent indicates that the environmental authority with jurisdiction to issue an environmental license for a mining project is also responsible for controlling and monitoring the project's compliance with that license, and with any applicable environmental norms, for the remainder of the project's lifecycle.[38]

128. According to Respondent, the core mandate of the Ministry of Environment is the enactment and enforcement of regulations necessary to protect the environment. To this end, it is authorized by law to adopt administrative instruments and mechanisms to prevent and control economic activities that cause harm to the environment.[39]

129. Three different CARs exercise jurisdiction over the Santurbán *Páramo*, which falls partly within the *departamento* of Santander and partly within the *departamento* of Norte de Santander, although the regional environmental authority with jurisdiction over Reina de Oro's Concession 14833 is the CDMB.

[36] **Exhibit R-021**, Law No. 99 of 22 December 1993, Arts. 1(4), 2, 4.

[37] Claimant refers to these authorities as Regional Autonomous Corporations (*Corporación Autónoma Regional*).

[38] C-Memorial on Liability, ¶ 132.

[39] C-Memorial on Liability, ¶ 127.

130. Respondent also includes the Constitutional Court as a "*relevant government authority*" and mentions that the role of the Constitutional Court is to conduct judicial review of legislation and certain specific executive actions. Accordingly, the Court has the power to invalidate laws and regulations if found to be incompatible with the Colombian Constitution (*inexequible* or unconstitutional), adding that this process can be initiated by any citizen through an *acción pública de constitucionalidad* (constitutional challenge) or, for specific types of legislation, through the *control automático de constitucionalidad* (mandatory constitutional review). In both cases, the process is open to the public (including access to the full record), and any person can file *intervenciones ciudadanas* (*amicus* briefs) in support or against the constitutionality of the legislation under review.[40] Accordingly, no legislation can be considered final until it has been reviewed and declared *exequible* (constitutional) by the Court. Decisions on the constitutionality of legislation by the Constitutional Court are binding towards everyone (*erga omnes).* Through its *tutela* review powers, the Constitutional Court has jurisdiction to evaluate the constitutionality of virtually any action of the branches of Government, and Respondent asserts that the Constitutional Court routinely grants *tutela* review of decisions involving issues of significant political, economic or social importance in Colombia.[41]

C. THE *PÁRAMOS* OR MOORLAND ECOSYSTEMS

131. Claimant generically describes a *páramo* as a neotropical ecosystem which, in general terms, is located above the forest line and below the permanent snow line, approximately 3,000 MASL to 5,000 MASL, adding that a *páramo* is characterized by the occurrence of unique vegetation.[42]

132. Respondent in turn describes *páramos* in a broader manner, stating that they are rare, fragile and complex ecosystems of invaluable biological diversity. They can be found solely along certain parts of the Equator, within certain altitudinal ranges, within a narrow corridor that stretches from the Mérida Coast Range in Venezuela to the Huancabamba Depression in northern Peru. *Páramos* are often described as "*water factories*" (*fábricas de agua*), as they can harvest vast amounts of water due to their location, topography, climate and vegetation. Specifically, the vegetation and soil of *páramos* often act as a "*sponge*", capturing moisture from the clouds and wind, and storing a high percentage of rainwater. As a result, *páramos* provide a consistent streamflow of water to the regions and communities located below them. It is noteworthy that in Colombia, *páramos* account for nearly 70% of the country's water supply. The *páramos*' most emblematic features include

[40] C-Memorial on Liability, ¶ 134.

[41] C-Memorial on Liability, ¶¶ 135-136.

[42] Cl. Memorial, ¶ 105.

its *frailejones*, a species of plants only found in *páramo* ecosystems and which exemplify their diversity. The dispersion and reproductive mechanisms of these plants are particularly slow and, according to Respondent, very sensitive to environmental change and therefore vulnerable to extinction.[43]

133. Respondent asserts that Colombia is the second most biologically diverse country in the world, which include tropical forests in the Amazon and Chocó regions, high mountain habitats in the Cordilleras and the Sierra Nevada, the grasslands of the *llanos* and Andean *páramos*, and islands in the Pacific Ocean and the Caribbean Sea, adding that the authors of the 1991 Colombian Constitution included a meticulous set of environmental protection principles enshrined as constitutional norms. The inclusion of this set of rules led to Colombia's Constitution becoming known as the "*ecological constitution*" or "*green constitution*".

134. The Santurbán *Páramo* is in the north-eastern part of the Eastern *Cordillera* of the Colombian Andes, within the *departamentos* (provinces) of Santander and Norte de Santander. The Santurbán *Páramo* stretches over approximately 135,253 hectares and is part of a series of *páramos* that includes the Almorzadero, Tamá, and Yariguíes *páramos.* The Santurbán *Páramo* is a particularly humid *páramo*, and for such reason is of fundamental importance for the water supply of its surrounding areas.[44]

135. Claimant contends that, while no formal demarcation of *páramo* ecosystems existed until 2014, Colombian environmental authorities were well aware of the existence of *páramo* ecosystems in that region in 2001 and previously.[45] Respondent adds that studies have been undertaken of the Santurbán *Páramo* since 1982, and while no specific environmental regulation was enacted in Colombia for its protection, it did adhere to the Ramsar Convention on Wetlands of International Importance of 1971, and designated certain *páramos* as Wetlands of International Importance under said Convention.[46]

136. Nonetheless, Respondent contends that, contrary to the allegations by Claimant, *páramos* have been protected since the enactment of Law 99 of 1993, enacted on December 22, 1993 – Colombia's general environmental law – which remains in force to this day. The general principles of Law 99 specifically mandate the "*special protection*" of *páramos*, *subpáramos*, water springs and aquifer recharging areas.[47] Further, it was Law 99 that

[43] C-Memorial on Liability, ¶¶ 16-20.

[44] C-Memorial on Liability, ¶¶ 26-29.

[45] Cl. Memorial, ¶ 105.

[46] C-Memorial on Liability, ¶ 25.

[47] C-Memorial on Liability, ¶¶ 40-41; **Exhibit R-021**, Law No. 99, December 22, 1993, Art. 1.

established the Ministry of Environment and the Regional Autonomous Corporations (*Corporaciones Autónomas Regionales*) as entities tasked with managing the environment and renewable natural resources at the national level.

IV. FACTUAL BACKGROUND

137. The following factual summary provides an overview of the facts underlying the present dispute. This section does not purport to be an exhaustive narrative of all the matters of fact that have been discussed in this proceeding or of all factual allegations made by the Parties. Nonetheless, the Tribunal has considered the entirety of the Parties' submissions of fact in their written and oral submissions, whether or not they are expressly discussed in this section.

A. HISTORY OF MINING AND EXPLORATION IN COLOMBIA'S CALIFORNIA-VETAS DISTRICT

138. Claimant describes the California-Vetas Mining District as located in a steep, mountainous, and relatively rugged terrain at elevations ranging from approximately 3,100 to 3,800 meters above sea level. The slopes are generally greater than 30° and in some areas are near-vertical cliffs. The area has long been deforested, and the slopes are covered with scrub brush and grasses. Reforestation programs have also introduced several varieties of *pinhas*. The area has a long history of small-scale mining (with mining in the site dating back to pre-Colombian time), adding that the Vetas Gold Project is the largest mine in region.[48]

139. Historically, mining and exploration activity on the Vetas Gold Project property was primarily focused on the El Volcán Mine, which is now located within the Mining Area encompassed by Concession 14833.

140. According to Claimant, until its exploration work commenced in 2010, there had been no historical resource estimates for the El Volcán Mine and the surrounding Concession 14833 property, likely due to the mining method employed at the El Volcán Mine, which was used across the California-Vetas Mining District and the fact that, prior to Claimant's involvement, there had been no significant exploration or delineation drilling on the property.[49]

141. From 1992 onward, Reina de Oro continuously operated the El Volcán Mine, located within the Vetas Gold Project, by using small scale tracked/manual methods with

[48] Cl. Memorial, ¶¶ 39-43.

[49] Cl. Memorial, ¶ 47.

production of approximately 40 tonnes per day with an average grade of 9.5 g/t Au in 2013. Claimant adds that there were no Mineral Resources or Mineral Reserves for the El Volcán Mine. This is due to the mining method employed at the El Volcán Mine which has been historically applied in the California-Vetas Mining District, and the fact that "… *there has been no diamond drilling or other modern mineral exploration or assessment of resources and reserves in the Mining Area.*"[50]

142. The El Volcán Mine consists of two main levels, the Reina de Oro and Tajo Abierto levels, with eight mineralized quartz veins. The El Volcán Mine veins have been mined from surface to approximately 250 meters below surface. Within this area, and over a 570 meters vein length, only approximately 30% of the area has been mined out.

143. Claimant further describes that works were carried out by mining a two-meter-high cut at an angle of 20° to 30° up from both sides of a steep raise, leaving a six-meter pillar, and then mining another two-meter cut. However, by 2013, approximately 20 to 30% of the area between the surface and the bottom level had been mined in this way, and development done by drilling on two levels, and several sublevels, plus the "*Alaska tunnels*". According to Claimant, the approximate amount of drifting and silling completed in the past is difficult to ascertain due to loss of access to some areas, but it is estimated that some 7,000 meters are open out of an approximate total of 10,000 meters. Some of the approximately 3,000 meters of underground workings that are not open are currently inaccessible due to safety concerns. Virtually no inter-level mining has been surveyed.[51]

B. CONCESSION 14833

144. On February 6, 1992, the Ministry of Mines and Energy issued Resolution 5-0050, by which it granted Reina de Oro Exploration License 14833.[52] In accordance with the legal changes to the Mining Code introduced by Law 685, the exploration license was converted into a concession contract, and thus INGEOMINAS and Reina de Oro signed Concession 14833 on June 21, 2006, pursuant to which INGEOMINAS granted Reina de Oro exploration and exploitation rights of the minerals on the surface and subsoil of the covered area.[53]

[50] **Exhibit C-052**, RPA Technical Report on the Vetas Gold Project, Department of Santander, Colombia, NI 43-101 Report, November 6, 2013, p. 4-1 and Figure 4-2; Hinchcliffe Statement, ¶ 37.

[51] Cl. Memorial, ¶ 59.

[52] The Parties did not submit in this record a copy of the original License 14833.

[53] **Exhibit C-057**, Concession Contract No. 14833; Cl. Memorial, ¶ 49.

145. On February 18, 2002, the CDMB issued Resolution 000127 approving an Environmental Management Plan for Concession 14833[54] which, under Colombian law, functions as an environmental license to mine. Then, on August 11, 2006, the CDMB accepted a change to the Environmental Management Plan proposed by Reina de Oro, by which the frequency of environmental reports required under the Environmental Management Plan was changed from every three months to every six months.[55]

146. Claimant asserts that in July 2003, Reina de Oro prepared and presented to Minercol, the mining authority at that time, the Mining Plan and Program corresponding to Concession 14833 as required by Article 84 of Law 685.

147. Claimant further contends that on March 29, 2007, Concession 14833 was registered in the Mining Registry and, as a result, Reina de Oro became the owner of the mining rights for the exploration and exploitation of gold and silver ores in the Mining Area from April 1, 1992 until March 28, 2031. [56]

148. Respondent does not challenge the process of issuance of License 14833, nor its conversion to Concession 14833 in 2006 upon enactment of Law 685.

149. In 2007, the IAVH published the *Atlas de Páramos de Colombia* with maps of 34 Colombian *páramos* at a 1:250,000 scale.[57] The 2007 IAVH *Páramo* Atlas showed that 100% of Concession 14833 overlapped with the Jurisdicciones Santurbán *Páramo*.[58] Nevertheless, on December 22, 2014, the Ministry of Environment and Sustainable Development published Resolution 2090 which delimited the *páramos*,[59] covering only 78.2% of the area assigned to Concession 14833.[60]

C. CLAIMANT'S INVESTMENTS AND ACTIVITIES

150. Claimant asserts that when it "*became aware of the geological structure of Colombia and the reforms to Colombian mining legislation, it decided to study the possibility of investing*

[54] **Exhibit C-115**, Resolución 127 de la Corporación Autónoma Regional para la Defensa de la Meseta de Reina del Oro, February 18, 2002, Environmental License.

[55] Cl. Memorial, ¶ 50.

[56] Cl. Memorial, ¶ 53.

[57] C-Memorial on Liability, ¶¶ 73-76.

[58] C-Memorial on Liability, ¶ 77.

[59] Cl. Memorial, ¶ 209.

[60] *See* **Exhibit R-114**; ANM, Map showing the overlap between Concession No. 14833, the 2007 IAVH *Páramo* Atlas, the Santurbán Park and the Resolution 2090 delimitation, 24 November 2020.

in Colombia." The two main topics that it analyzed were "… *the legislation in place and the political situation in Colombia*."[61]

151. According to Claimant, a key inducement to making its investment was the introduction of a provision to "stabilize" legislation applicable to the concession contract in force at the time of the date of execution. Article 46 of the 2001 Mining Code recognizes the general rule in Colombia that during the time of their execution and the subsequent extension periods, all civil contracts relating to mining concession contracts are governed by the laws in place and in effect at the time of registration, without exceptions. Furthermore, to provide for stabilization and transition in the case of amendments or legal reforms, any new or amended legislation would only apply to the concessionaire insofar as they broaden, confirm or improve the concessionaire's entitlements.[62] Claimant stresses that this was a significant commitment as "… *it ensured that any mining legislation adopted after the execution of a concession contract would apply only insofar as the provisions of such legislation were more favorable to the concessionaire.*" This resulted in "*certainty to concessionaires that the legal framework for their concessions could not be subsequently altered to their detriment and allowed them to plan their investments based on a stable, reliable, and fixed legal framework.*"[63]

152. Claimant further contends that its investment objectives were to identify and seek to acquire mineral exploration and mining projects that were undervalued by the market but had significant unrealized potential to increase value.[64]

153. As a Canadian enterprise, Galway Resources Ltd. understood then that its investments in Colombia would be governed in whole or in part by the terms of the FTA once it was in effect. For the Claimant, the FTA conferred specific rights and obligations on Galway Resources Ltd. as a Canadian investor in Colombia. The Treaty, Claimant adds, provided a clear framework for Claimant's rights and the processes by which it could enforce them or seek remedies in the event of their infringement. It understood that it could expect to be treated fairly and equitably by Colombia, and that it would be entitled to certain protections in the event that Colombia expropriated its investment. [65] Claimant also contends that the main political consideration that motivated its investment in Colombia was "… *the implementation of Plan Colombia under the Pastrana government which continued under the Uribe government, and the clear message it conveyed that Colombia would protect*

[61] Cl. Memorial, ¶ 85.

[62] **Exhibit C-047**, 2001 Mining Code, Art. 46.

[63] Cl. Memorial, ¶ 104.

[64] Cl. Memorial, ¶ 116.

[65] Cl. Memorial, ¶ 119, *citing* Hinchcliffe Statement, ¶ 102.

foreign investments, provide security from the circumstances of the armed conflict, and maintain public order and the rule of law," which commitment was reflected specifically in Article 46 of the Mining Code, which provided a "*stable and predictable legislative framework for Claimant's investment*."[66]

154. To that end, Galway Resources Ltd. established GRH, a Canadian wholly owned subsidiary, and its Colombian branch, GRC. Their first investment was in a coal project in 2006.[67]

155. Claimant narrates that in April 2009, Galway Resources Ltd. then acquired the "California Gold Project" and began drilling and doing exploration work. The California Project, along with 10% of the "Vetas Gold Project property", was eventually sold to AUX Canada 2, which by then had already acquired Ventana Gold Corp. in 2011.[68]

D. GALWAY RESOURCES LTD. INVESTMENT IN VETAS GOLD PROJECT

156. Claimant further describes how, after its initial investment in the California Vetas Mining District, Galway Resources Ltd. set its sights on the Vetas Gold Project property, which was identified as attractive because it had been the site of active gold mining for over 400 years and had a currently operating mine. It had very high grade of gold in the ore, an existing efficient milling process with high level recovery, and a simple and coherent geological structure. It included the Reina de Oro and Coloro[69] concessions; the first included the El Volcán Mine. [70]

157. The Vetas Gold Project was close to the California Gold Project property which had been purchased in 2009, and Claimant contends that it featured: (a) a good stacking of structurally-controlled vein sets which would likely lead to a wide zone and the discovery of more veins with the use of modern exploration techniques; (b) narrow veins but on very strong fault lines; and (c) potential for economical narrow long-hole mining.[71]

158. Claimant then describes how, after having "… *assessed the various geological, operational, regulatory and political risks based on the existing legal and regulatory*

[66] Cl. Memorial, ¶ 130.

[67] The GALCA Coal Project, an exploration venture with PRODECO. *See* Cl. Memorial, ¶ 122.

[68] Cl. Memorial, ¶ 125.

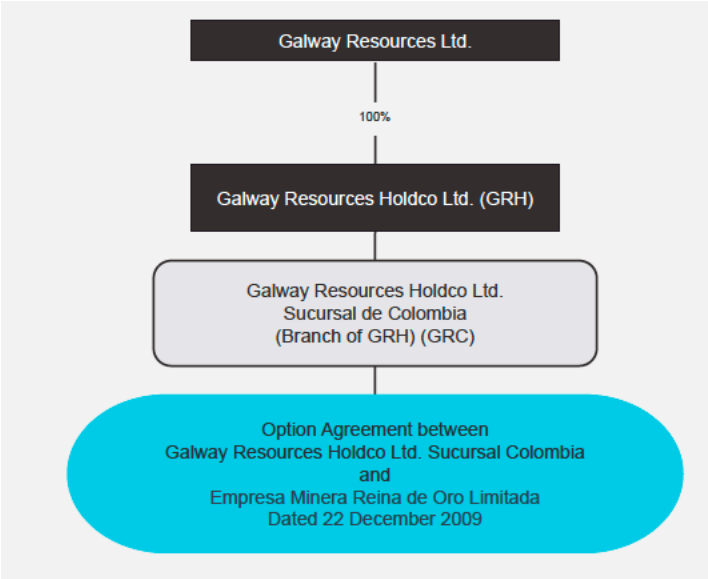
[69] Although the Option Agreement included the Coloro concession, on July 19, 2013, Claimant announced that it had terminated the option agreement pertaining to the Coloro concession, since it had conducted extensive surface sampling and geophysical surveys and a drill program, which did not identify any significant results on the Coloro concession.

[70] Cl. Memorial, ¶¶ 127-128.

[71] Cl. Memorial, ¶ 129.

framework, including the 2001 Mining Code" and that it "… *relied on fully and legally defined and protected exploration and mining titles, and mineral exploration and exploitation rights, existing environmental requirements and regulations, and the express legal stabilization regime that guaranteed the stability, permanence and inviolability of all rights and expectations based on Concession 14833 and the related mining legislation and regulatory regime*", on December 22, 2009, GRH (through its Colombian branch, GRC) and Reina de Oro entered into an Option Agreement relating to Concession 14833, and all mineral exploration and exploitation rights thereunder.[72]

159. The following corporate chart is useful in understanding the ownership at the time:[73]



160. A few weeks later, on January 26, 2010, Galway Resources Ltd. issued a press release announcing the entering into the Option Agreement along with a description of the property.[74]

161. Pursuant to the terms of the Option Agreement, if the option was exercised, GRH – through its branch GRC – could acquire the exploration and exploitation mining rights granted to Reina de Oro under Concession 14833.[75] Further, should the option be exercised, a series

[72] Cl. Memorial, ¶¶ 131-132.

[73] **Exhibit C-201**, Corporate Chart.

[74] *See* **Exhibit C-051**, Galway Resources Ltd. Press Release, January 26, 2010.

[75] Cl. Memorial, ¶¶ 137, 140.

of steps were contemplated as required to give effect to the transfer under Article 22 of the 2001 Mining Code.

162. Claimant asserts that it paid in full the amounts payable to Reina de Oro under the Option Agreement. Although the parties to that agreement had established that upon exercise of the option to purchase, the buyer would be required to pay a price that was to be determined based on production of gold and spot price, together with sums of money in Colombian pesos and Galway Resources Ltd. shares (or cash, at Galway Resources Ltd.'s choice), the parties to the Option Agreement subsequently modified the terms eliminating payment in shares and replacing that with cash.[76]

E. EXPLORATION WORKS

163. Claimant mentions that, starting in January 2010, along with Galway Resources Ltd., it conducted an extensive *exploration* program on the Vetas Gold Project site pursuant to the Option Agreement and Concession 14833.[77]

164. Claimant adds that, along with Galway Resources Ltd., it carried out during the period comprised between August 20, 2010 and October 11, 2012, extensive *environmental reporting and compliance* relating to the exploration work and results, and has presented in its Memorial a chronology and summary of the follow-up.[78]

165. Claimant explains that it was incorporated in New Brunswick, Canada as a consequence of a court-approved spin-off from Galway Resources Ltd.[79]

166. Then, commencing in December 2012, both Galway Resources Ltd. and Claimant issued a series of press releases and other public disclosure relating to the Vetas Gold Project, indicating that the exploration work that was completed, and the results of that exploration work.

167. Claimant asserts that it commissioned RPA Inc. to prepare a technical report on the Vetas Gold Project in compliance with the standards implemented by the Ontario Securities

[76] Cl. Memorial, ¶¶ 138-146.

[77] Cl. Memorial, ¶ 147. The description of the work is found in the RPA Report, attached as **Exhibit C-052**, and Mr. Alfonso Gómez Rengifo's witness statement, ¶¶ 49-80.

[78] Cl. Memorial, ¶ 151.

[79] Cl. Memorial, ¶ 24. As Claimant explains, Mr. Robert Hinchcliffe founded Galway Resources Ltd. in 2005. In December 2012, AUX Canada 2 acquired all of the shares of Galway Resources Ltd., and as part of that transaction, two new wholly owned subsidiaries were created, and then spun-off by a Court-approved plan of arrangement: Claimant and Galway Metals. Claimant held the Vetas Gold Project.

Commission, and RPA Inc. produced an NI 43-101 report dated November 6, 2013 ("**RPA Report**"), identifying mineral resource estimates for the Vetas Gold Project.[80]

168. Claimant states to have prepared additional technical reports and presentations for investors describing the Vetas Gold Project, its extensive program of exploration work, and the results, analysis, and interpretation of that exploration work.[81]

F. EXERCISE OF THE OPTION

169. GRC – the Colombian branch which held the contractual rights to the Option Agreement – on December 6, 2012, assigned all its rights under the Option Agreement to GRVC, the Colombian branch of GRVH, and notice thereof was given to Reina de Oro.[82]

170. Then, on December 11, 2013, GRVC exercised the option to acquire exploration and exploitation rights under Concession 14833 in accordance with the provisions of the Option Agreement.[83] Since payment of the price for the purchase of the concession rights contemplated a component based on the spot price of gold and silver equivalent ounces, the calculation was made on a mineral resource estimate in the RPA Report.

171. The following corporate chart is useful in understanding the ownership on December 11, 2013, when the option under the Option Agreement was exercised:[84]

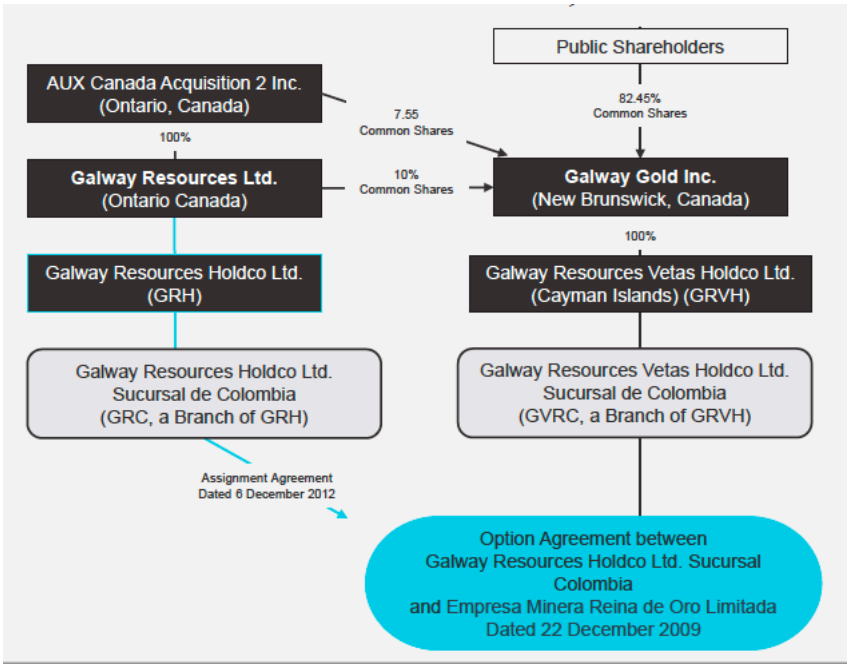
[80] Cl. Memorial, ¶ 154.

[81] Cl. Memorial, ¶ 158; The following are the technical reports and presentation for investors referred by Claimant: October 2009 – Galway Resources' California Gold Project Santander State, Colombia (**Exhibit C-081**); February 25, 2010, Schafer Perkins (**Exhibit C-082**); March 29, 2012, Northern Securities Analysis Report (**Exhibit C-083**); December 7, 2012, California and Vetas Gold-Silver Projects and Victorio Molybdenum – Tungsten Project (**Exhibit C-084**); and June 19, 2015, GG's Vetas Project Santander State, Colombia (**Exhibit C-085**).

[82] Cl. Memorial, ¶¶ 160-161. *See* **Exhibit C-087**, Letter from Galway Vetas to Reina de Oro exercising the option positively on December 13, 2012.

[83] **Exhibit C-087**, Letter from Galway Vetas to Reina de Oro exercising the option positively, December 13, 2012.

[84] **Exhibit C-201**, Corporate Chart.



G. ACTIONS AFTER EXERCISE OF THE OPTION

172. Claimant narrates that Reina de Oro challenged the exercise of the Option Agreement[85] for various reasons, including an alleged breach by GRVC of the Option Agreement. GRVC stated its disagreement,[86] triggering the dispute resolution clause as per the terms of the Option Agreement.[87] Claimant issued a press release on January 10, 2014, stating that it had exercised the option; that Reina de Oro had rejected such exercise; and that Claimant had elected to pursue arbitration to enforce its rights.[88]

173. The arbitration was administered by the Arbitration, Conciliation, and Friendly Composition Center of the Bucaramanga Chamber of Commerce.[89] As Claimant describes, the key issues before the arbitral tribunal were: (a) whether there had been a breach of the Option Agreement by either of the parties, or both, *and* (b) whether GRH – through GRC, and GRVH – through GRVC, had fulfilled the conditions required to exercise the option.[90]

[85] **Exhibit C-088**, Letter from Reina de Oro to Galway Resources Vetas Holdco, December 18, 2013.
[86] **Exhibit C-089**, Letter from Galway Resources Vetas Holdco to Reina de Oro, December 23, 2013.
[87] Cl. Memorial, ¶¶ 167-169.
[88] *See* **Exhibit C-037.17**, Disclosure Brief - Galway Gold Inc. Press Release, January 10, 2014.
[89] *Centro de Conciliación, Arbitraje y Amigable Composición de la Cámara de Comercio de Bucaramanga.*
[90] Cl. Memorial, ¶ 171.

174. Claimant further describes that it retained an expert to provide evidence relating to Concession 14833 and the execution of the Option Agreement, and to determine whether the exploration work carried out by Claimant could be considered completed within the parameters established in the Option Agreement.[91] After his analysis and site visit to the Mining Area, the expert concluded that the RPA Report was accurate, and that GRVC had fulfilled all of its obligations relating to exploration activities under Concession 14833 and applicable rules.

175. The final award in the arbitration was issued in February 2015 and concluded, *inter alia,* that:

(i) Reina de Oro breached its obligations under the Option Agreement by refusing or failing to sign the 14833 Assignment and issue a notice of the 14833 Assignment on December 18, 2013 – and was therefore ordered to sign the assignment;

(ii) GRVC was ordered to pay the price corresponding to the exercise of the option, on the day following the registration of the 14833 Assignment at the Mining Registry; and

(iii) Reina de Oro was ordered to surrender the Mining Area encompassed by Concession 14833 upon the signing and registration of the 14833 Assignment at the Mining Registry.[92]

176. As Claimant further explains, however, Reina de Oro refused to fully comply with the Reina de Oro Award, and GRVC was required to take various enforcement actions before Colombian courts to compel Reina de Oro to do so. Although Reina de Oro attempted various challenges before Colombian courts, Claimant was successful in having the validity of Claimant's rights in relation to Concession 14833 recognized.[93]

177. Reina de Oro finally agreed to file the Notice of Assignment with the NMA, but Claimant argues that the NMA (*i.e.*, Respondent) then refused to complete the registration, justifying its refusal by asserting that the prohibition on mining activities in the *páramo* area rendered the assignment impossible.[94]

[91] Claimant engaged Mr. Marco Antonio Nieto Patarroyo, counsel in Colombia. *See* Cl. Memorial, ¶¶ 173-176.

[92] Cl. Memorial, ¶ 184.

[93] Cl. Memorial, ¶¶ 186-188.

[94] C-Memorial on Jurisdiction, ¶¶ 58-62.

178. Claimant has acknowledged that final payment to Reina de Oro has not been paid, because the assignment of Concession 14833 has not been recorded at the Mining Registry. According to Claimant, such payment to Reina de Oro is not yet due or owing.[95]

179. In its Post-Hearing Brief, Claimant confirmed that it complied with all of its obligations under the Option Agreement, including exploration, extensive environmental reporting and compliance associated with the exploration work and its results, and that the non-payment of the final amount provided for under the Option Agreement has no legal effect on the rights assigned to Claimant in respect of Concession 14833. Claimant clarifies that it did not "*fail to pay*" such amount, but rather it is not yet due and payable until the assignment is registered in the Mining Registry. This was contractually agreed, as the arbitral tribunal that reviewed and resolved the dispute in Colombia confirmed.[96]

180. Respondent challenges Claimant's acquisition of Concession 14833 and contends that Claimant's exercise of its option for the assignment of Concession 14833 gave rise to a private dispute in Colombia with Reina de Oro which culminated in a domestic arbitral award that confirmed the validity of Claimant's exercise of the option and ordered Reina de Oro to sign an assignment agreement to transfer Concession 14833 to Claimant, and if Claimant ultimately failed to secure Reina de Oro's assignment of Concession 14833, this was for reasons unrelated to Colombia.[97]

V. CANADA'S NON-DISPUTING PARTY SUBMISSION

181. As indicated in the section on procedural background, Canada made a submission pursuant to Article 827(2) of the FTA. As per its own statement, the submission was "… *not intended to address all interpretative issues that may arise in this proceeding. To the extent that certain issues raised by the disputing parties or the Tribunal have not been addressed, no inference should be drawn from Canada's silence. Canada does not, through this submission, take a position on issues of fact or on the application of these submissions to the facts of this dispute.*"[98]

[95] Cl. Memorial, ¶ 249.

[96] Claimant's PH Brief, ¶¶ 96-103, 105-106.; Claimant indicates that under the Option Agreement it made the following payments to Reina De Oro in full: (a) USD 100,000 and 400,000 Galway Resources Shares payable on December 21, 2009; (b) USD 100,000 and 50,000 Galway Resources Shares payable on December 21, 2010; and (c) USD 100,000 and 50,000 Galway Resources Shares payable on December 21, 2011.

[97] C-Memorial on Liability, ¶ 188.

[98] Canada's NDP Submission, ¶ 2.

182. Canada's submission addressed specifically six provisions of the FTA, three of which deal with jurisdiction issues, and the rest with substantive obligations in question in this arbitration applicable to the parties to the FTA:

a). The concept of "Investor" and "Covered Investment" under Article 838 of the FTA
b). The "limitation period" under Article 821(2)(e)(i) of the FTA
c). Denial of Benefits under Article 814 of the FTA
d). Expropriation under Article 811 of the FTA
e). Minimum Standard of Treatment under Article 805 of the FTA
f). Environmental Exception under Article 2201 of the FTA

183. Canada's position in respect to each of the issues is dealt below in this Award in each of the claims relating to jurisdiction or merits, as the case may be.

VI. DISPUTED MEASURES

184. The following description is taken from the Parties' respective submissions, and not necessarily a neutral description made by the Tribunal. The Tribunal has nonetheless attempted to identify the position of both Claimant and Respondent.

A. CLAIMANT'S POSITION IN RESPECT TO THE DISPUTED MEASURES

185. Claimant contends that no restrictions on mining in *páramo* ecosystems existed in the Colombian Constitution or Colombian law, nor were there any delimited *páramo* ecosystems protected by law at the time Reina de Oro obtained License 14833 through Resolution 5-0050 of 1992, the environmental license through Resolution 000127 issued by the CDMB in 2002, or Concession 14833 in 2006 (which, Claimant alleges, was stabilized under the 2001 Mining Code).

186. Indeed, according to Claimant, at the time it was granted Concession 14833 in 2006, Colombia did not consider that mining activity presented any particular threat or risk to *páramo* ecosystems.[99]

187. Claimant states that the mining policies and objectives underlying the 2001 Mining Code continued under President Alvaro Uribe who governed Colombia from 2002 until 2010, and "*actively encouraged, invited, and promoted foreign investment in the mining sector and promoted the negotiation of investment protection treaties, including the FTA with Canada.*"[100]

[99] Cl. Memorial, ¶ 107.
[100] Cl. Memorial, ¶ 114.

188. The Ministry of the Environment had adopted Resolution 769[101] on August 5, 2002, defining the terms "*páramo*" and "*páramo* lands" and included a set of regulations containing specific protections for *páramo* lands requiring regional corporations to monitor the state of the *páramo*s. Resolution 769 applied to *páramo*s located in the Eastern Cordillera of the Andes, where the Vetas Gold Project is located, and did not delimit the Santurbán *Páramo*, regulate the activities that could take place in *páramo* ecosystems, and did not affect any mining rights under Concession 14833.[102]

189. Claimant adds that Article 5 of Resolution 769 required that any activity carried out in *páramo* lands be in accordance with and permitted by an environmental management plan to be established by regional corporations,[103] but it did not regulate the activities that could take place in *páramo* ecosystems and did not affect any mining rights under Concession 14833.[104]

190. Claimant contends that, when GRH – through its Colombian branch GRC – entered into the Option Agreement in 2009, there were no restrictions on mining in *páramo* ecosystems in Colombia and no delimited *páramo* ecosystems protected by the Constitution or the law. Therefore, Claimant reasonably understood that there were no legal limitations on mineral exploration and mining activities in the Mining Area and no regulatory restrictions based on environmental concerns that would have any adverse impact on pre-existing contracts for mineral exploration and mining rights.[105]

191. Claimant adds that – starting in 2010 – Colombia "*took measures to establish and implement an arbitrary, non-transparent, and inconsistent regulation of páramo ecosystems that deprived it of all of its rights under Concession 14833, and destroyed the value of Claimant's investment.*" The Colombian Government publicly and privately supported Claimant's Vetas Project over the course of many years – even in the face of inconsistent and unclear environmental regulations purportedly aimed at protecting páramo ecosystems at both the regional and national level.[106]

192. Claimant adds that Law 99 did indeed mention the *páramos* as areas subject to special protection but did not indicate that mining in these areas was in any way prohibited or that

[101] **Exhibit C-068**, Resolution 769 of the Ministry of the Environment, August 5, 2005.

[102] Claimant's PH Brief, ¶ 137, *citing* **Exhibit C-068**, Resolution 769 of the Ministry of the Environment, August 5, 2005.

[103] **Exhibit C-068**, Resolution 769 of the Ministry of the Environment of August 5, 2005, Art. 5.

[104] Cl. Memorial, ¶¶ 112-113.

[105] Cl. Memorial, ¶ 108.

[106] Cl. Memorial, ¶ 190.

such a prohibition was even foreseeable, and the Colombian Government granted several concession contracts in the Santurbán area after 1993.[107]

193. Claimant also responds to Respondent's assertion that it should have known, when Resolution 769 was passed in 2002, that such Resolution "*heralded the beginning of a gradual and steady effort*" by Colombia to further protect the *páramos* and yet, in 2006, four years after Resolution 769 was adopted, INGEOMINAS signed Concession 14833 with Reina de Oro.[108]

194. Further, Claimant challenges Respondent's argument that Claimant should have known, upon learning of the *páramo* delineation found in the 2007 *Páramo* Atlas published by the IAVH, that its investment would "[…] *run counter to Colombia's policy for the protection of the* páramo" and contends that the 2007 *Páramo* Atlas, like Law 99 and Resolution 769, did *not* prohibit mining in *páramo* areas. Besides, Claimant asserts that the document is only a map and is not of any normative or binding nature, nor does it invalidate, restrict, or limit any existing rights, or create any legal obligations. Additionally, Claimant points to the fact that, after the 2007 *Páramo* Atlas was published in May 2007, Reina de Oro presented in November 2007 a study for the modification of its environmental plan, and the CDMB found five years later that Reina de Oro was in full compliance with its commitments after a visit from the environmental authority.[109]

195. Claimant asserts that it conducted business and mining operations under assurance, both through legislation and resolutions expressly carving out its operations from restrictions on mining in *páramos* (*i.e.*, Laws 1382, 1450, and 1753 as well as Resolution 2090), and through specific licenses, permits, and approvals from local authorities permitting mining in Concession 14833.[110]

(1) Law 1382

196. This law was enacted on February 9, 2010, 18 years after Reina de Oro had acquired License 14833; four years after License 14833 was converted into Concession 14833; and months after Reina de Oro and GRC entered into the Option Agreement. This legislation amended the 2001 Mining Code and prohibited exploration and exploitation works in areas declared and delimited as *páramos.* Claimant contends that this was the first time that any

[107] Reply, ¶ 64.

[108] Reply, ¶ 65.

[109] Reply, ¶ 66, *citing* **Exhibit C-114**, Resolution 381, Regional Autonomous Corporation for the Defense of the Bucaramanga Plateau, May 16, 2016.

[110] Reply, ¶ 14. These laws and court decisions are examined in the sections below.

such prohibition was incorporated in Colombian law,[111] and was recognized by the Council of State, which expressly held in a 2014 decision that the mining restriction in *páramo* areas only came into effect with Law 1382 in 2010.[112]

197. Claimant further contends that Article 3 of the Law 1382 "grandfathered" holders of "*consolidated legal rights*", provided that, prior to February 9, 2010: (i) they had a valid mining title, (ii) they were in the construction or exploitation stage; (iii) they had all required environmental licenses and permits, and (iv) the areas subject of mining activity had not been previously excluded by law.

198. Thus, according to Claimant, existing concession contracts could be performed for the full duration of their term, but without any *right to extend* the term.[113] Claimant asserts for these purposes that Concession 14833 had been entered into prior to February 9, 2010, and that the environmental authorization had also been granted prior to that date.

199. Indeed, according to Claimant, the impact of Law 1382 on Concession 14833 was limited by the grandfathering regime provided for in Article 34, which said: "[…] [i]*n the event that, upon entry into force of this law, construction, mounting or mining exploitation were to commence with mining title and environmental license or their equivalent, in areas previously that were not* [previously] *excluded, such activities shall be respected through their expiration, although these titles shall not have any right to extend*"[114] [Tribunal's English translation]. Also, the transition regime allowed both Reina de Oro and Claimant to continue mining activities on Concession 14833.[115]

200. On December 13, 2010, the CDMB confirmed in writing to Reina de Oro[116] that the Mining Area encompassed by Concession 14833 was not within the limits being proposed for the demarcation of the Santurbán *Páramo.*[117] Although Respondent contends that Claimant's reliance on the CDMB December 13, 2010 letter to argue that Concession 14833 did not overlap with the *páramo* is a *non sequitur*, Claimant argues that it is important to note that it relies on this letter *in addition* to multiple other actions by the Colombian State allowing

[111] Reply, ¶ 62; Claimant's PH Brief, ¶ 139.

[112] Reply, ¶ 62.

[113] Cl. Memorial, ¶¶ 194-195.

[114] **Exhibit C-048**, Law 1382 of 2010, Art. 34.

[115] Reply, ¶¶ 70-71.

[116] **Exhibit C-105**, Letter from the Autonomous Corporation of the Plateau of Bucaramanga, Re: "Socialization Regional Natural Park Mooreland of Santurbán", December 13, 2010.

[117] Cl. Memorial, ¶ 199.

to continue to carry out both exploration and exploitation activities after Law 1382 came into force.[118]

201. Claimant adds that, at such point in time, no prohibition applied to Reina de Oro's exploitation activities either, and several State agents continued to act in a way that indicated that no prohibition existed, and cites different actions taken between November 2010 to April 2012.[119]

(2) Judgment C-366 of the Constitutional Court

202. However, in May 2011, Law 1382 was declared unconstitutional by the Constitutional Court of Colombia pursuant to Judgment C-366.[120] The Constitutional Court held that the communities affected by the Law 1382 should have been asked or at least been involved in the discussions before mining activities in their territories were banned, given it had direct impact on their livelihoods. Many indigenous communities in Colombia depend on mining, including in *páramos.*[121] The Court allowed the legislation to remain in force for two years to give time to Congress to enact replacement legislation.[122]

(3) Law 1450 - June 2011

203. Then, on June 16, 2011, the Colombian Congress enacted Law 1450,[123] establishing a new prohibition on all mining activity within *páramo* ecosystems as well as certain agricultural activities. It also prescribed a regime for the delimitation of *páramo* ecosystems and wetlands by the specific authorities in charge of that task under Colombian law. According to Claimant, this new law provided that no mining activities would be permitted in limited *páramo* ecosystems.[124]

204. Claimant adds that, since Article 46 of the 2001 Mining Code provided that the new restrictions could affect only mining titles granted after Law 1382 (*i.e.,* after February 9, 2010), and only *after* a *páramo* ecosystem had been formally delimited, or defined or delineated by the Ministry of Environment, changes to the mining regulatory framework

[118] Reply, ¶ 72.

[119] Reply, ¶ 75.

[120] *See* **Exhibit C-103**, Judgment C-366/11 of the Constitutional Court, May 11, 2011.

[121] Cl. Memorial, ¶ 202.

[122] Cl. Memorial, ¶ 200.

[123] *See* **Exhibit C-049**, Law 1450 of 2011.

[124] Cl. Memorial, ¶ 205.

should have had no effect on any concession contract signed and registered prior to the date that Law 1450 entered into force.[125]

(4) Resolution 2090 of December 2014

205. On December 22, 2014, the Ministry of Environment and Sustainable Development published Resolution 2090 – dated December 19, 2014 – which "*finally delimited*" the Santurbán-Berlin *Páramos*.[126] It was the first binding piece of legislation that adopted the delimitation of the Santurbán *Páramo* set out by the IAVH in the 2007 *Páramo* Atlas,[127] and provided retroactively (as from February 9, 2010, when Law 1382 was enacted) that no new mining concession contracts could be concluded and no environmental licenses for mining projects could be issued in areas delineated as *páramo* ecosystems. Claimant argues, however, that it protected the continuity of mining titles, including mineral exploration and mining rights, that had been given environmental authorization prior to February 9, 2010.[128]

206. The delimitation of the Santurbán *Páramo* area prepared by the IAVH overlapped almost entirely with the area covered by Concession 14833.

207. In light of the above, Claimant contends that Resolution 2090 "…*sought to adhere to the stabilization requirements set out in the 2001 Mining Code by respecting rights acquired to* [sic] *prior to the adoption of Law 1382 in February 2010. Mining projects that had an existing concession contract and an associated environmental license or equivalent environmental management and control instrument issued prior to 9 February 2010 could continue operating until completion, subject to strict environmental supervision*."[129] Therefore, Claimant asserts that the Vetas Gold Project was exempt from the application of Resolution 2090 because Concession 14833 had an Environmental Management Plan approved in 2002 (at the time it was an exploration license) which continued to be valid upon its conversion into a concession contract in accordance with the legal changes to the Mining Code introduced by Law 685.[130]

[125] Cl. Memorial, ¶ 206.

[126] Cl. Memorial, ¶ 209.

[127] Reply, ¶ 80.

[128] Cl. Memorial, ¶ 210; Reply, ¶ 79; **Exhibit C-107**, Resolution 2090 of 2014, Ministry of the Environment and Sustainable Development, December 19, 2014, Art. 5.

[129] Cl. Memorial, ¶ 213.

[130] On August 11, 2006, the CDMB accepted a change to the Environmental Management Plan proposed by Reina de Oro, by which the frequency of environmental reports required under the Environmental Management Plan was changed from every three months to every six months.

208. Claimant further asserts that, after Resolution 2090 came into force on December 22, 2014, environmental and mining agencies in Colombia continued to allow and monitor mining activities in the Mining Area, including the ongoing mineral extraction and the exploration activities.[131]

209. Claimant describes that there were nonetheless certain changes that modified pre-existing rights. These included: (i) allowance for environmental authorities to amend and adjust existing environmental management plans for grandfathered mining projects if, in their view, environmental management measures should be stricter; (ii) a depth limit was established since it was unclear whether the ban on mining activities within the *páramos* applied only to surface mining or also to the underground beneath the *páramos*; and (iii) mining activities could be developed in *páramo* "*restoration areas*" located in "*traditional mining municipalities of Vetas, California and Suratá*" – where the Vetas Gold Project is located. However, a restriction was imposed on developing a mining project if mining activities could be carried out *solely* in restoration areas (and not in preservation areas also).[132]

(5) Law 1753 - June 2015

210. Finally, Claimant describes Law 1753 of June 9, 2015, enacted by the Colombian Congress, which implemented a new four-year national development plan for 2014-2018 and derogated various articles of Law 1450. This new law established the parameters for delimiting *páramo* ecosystems, and recognized that the environmental benefits of *páramo* ecosystems include regulation of water cycles and utility as a system of carbon capture.[133] Similar to the express carve-out in Law 1382, Article 173, paragraph 1, of Law 1753 specifically addressed those mining concession contracts entered into before February 9, 2010, and provided that they would remain fully valid and all permitted exploration and mining work could be completed during the full 30-year fixed term (albeit without any renewal rights) if certain requirements were satisfied before February 9, 2010, *i.e.:* (i) they had a valid mining title; (ii) they were in the exploration stage or exploitation stage; and (iii) they had a valid environmental license or an equivalent environmental management and control instrument.[134]

211. Although Law 1753 provided that such "grandfathered" concessions could be operated until completion, they could not be extended beyond their initial term and mining activities

[131] Reply, ¶ 84.

[132] Cl. Memorial, ¶ 214(e); **Exhibit C-107**, Resolution 2090 of 2014, Ministry of the Environment and Sustainable Development, December 19, 2014, Art. 9.

[133] Cl. Memorial, ¶¶ 215-217.

[134] **Exhibit R-158**, Law 1753 of 2015, Art. 173, ¶ 1, subclause 1.

would not be permitted if environmental damage to the *páramo* ecosystem could not be avoided.[135]

212. After the enactment of Law 1753, the ANM lifted the prior suspension on mining activities in *páramo* areas.[136]

213. Claimant asserts that, once again, the Colombian Government provided a transition regime to allow activities in concessions granted prior to February 9, 2010 to continue. This allowed mining activity in the Mining Area to continue as it had continuously to that point under Laws 1382 and 1450.[137]

(6) Constitutional Court Judgment C-035

214. Resolution 2090, Law 1450 and Law 1753 were challenged in 2015 before the Constitutional Court of Colombia for failing to sufficiently protect *páramos* by allowing mining activities to be carried out in *páramo* ecosystems where concession contracts had been entered into prior to February 2010 and the concessionaire was in compliance with environmental and other applicable regulations. Law 1753 was also separately challenged on the basis that it was adopted without taking into account the views of certain civil society groups and local stakeholders, including municipalities.

215. Claimant states that, during the proceedings before the Constitutional Court examining the constitutionality of Article 173 of Law 1753 (on the basis of the rights to water, to the environment and to public heritage), the Attorney General of Colombia provided a legal opinion, while the Ministry of the Environment and Sustainable Development, the NMA and the National Planning Department made independent submissions to the Court.[138]

216. The Attorney General requested that the Court declare Article 173 "*conditionally constitutional*" requiring that the article include a precise determination of the term within which the public agency can suspend projects, and that the text include fossil fuel activities as well as mining activities, since excluding the fossil fuel activities without justification would unduly harm the environment.[139]

[135] **Exhibit R-158**, Law 1753 of 2015, Art. 173, ¶ 1, third sub-paragraph.

[136] Cl. Memorial, ¶ 221.

[137] Reply, ¶ 89.

[138] Cl. Memorial, ¶ 238.

[139] Cl. Memorial, ¶¶ 239-240.

217. The Ministry of the Environment asked the Constitutional Court to declare Article 173 constitutionally valid since the aim of this provision was merely to maintain the prohibition and protection regime under Law 1382 of 2010 and Law 1450 of 2011.

218. The NMA asked the Court to dismiss the challenge since environmental rights were not violated. The NMA rejected the applicants' position that all mining affects the alleged rights because, among others, all mining projects had been required to meet several environmental requirements even before this provision was enacted, including obtaining an environmental license. Furthermore, the NMA requested the Court to declare the challenged provisions valid because the exclusion of zones from the general concession regime is the State's prerogative since the State is the titleholder of the subsoil and non-renewable resources.[140]

219. The National Planning Department also asked the Court to dismiss the challenge and argued that the provision merely aimed to protect ecosystems that were not protected under the 2001 Mining Code and allow the Government to review administrative orders issued before Law 1382 came into force to reconcile private rights with the public interest.[141]

220. Then, on February 8, 2016 the Colombian Constitutional Court issued a press release announcing a pending judgment declaring parts of Law 1753 unconstitutional, specifically Article 173 for failing to confer adequate environmental protection to *páramo* ecosystems by exempting existing projects from the prohibition on mining in *páramo* ecosystems and enabling Government environmental authorities to deviate from the mapping of *páramo* ecosystems undertaken by the IAVH without requiring scientific justification of those deviations in order to demarcate *páramo* areas on the basis of technical, environmental, social and economic criteria.

221. On February 18, 2016, the Constitutional Court published Judgment C-035,[142] whereby it held that the fragility of *páramo* ecosystems and the lack of adequate legal protections rendered Article 173 unconstitutional. The Court held that *páramo* ecosystems are subject to special protection under the Colombian Constitution due to their strategic value and particular vulnerability, thus allowing the Court to favor the protection of those ecosystems over the particular interest of the concessionaries. The power of the Ministry of the Environment to determine *páramo* areas was deemed constitutional on the condition that it would be interpreted to mean that if said Ministry decides not to follow the reference

[140] Cl. Memorial, ¶¶ 244-245.

[141] Cl. Memorial, ¶ 246.

[142] **Exhibit C-104**, Judgment C-035/16 of the Constitutional Court, February 8, 2016.

areas issued by the IAVH, the Ministry must provide reasons based on scientific criteria that provides a greater degree of protection to *páramo* ecosystems.[143]

222. Claimant contends that Judgment C-035 implied that the "grandfathered projects" exempted under Law 1753 were now within and subject to the general prohibition on mining in *páramo* ecosystems.[144]

223. According to Claimant, Judgment C-035 eliminated any possibility for Claimant to "[…] *continue its mineral exploration and exploitation activities permitted by Concession 14833 because the surviving portion of Law 1753 prohibited any mining activities in the areas demarcated as páramo ecosystems by the environmental authority*."[145] For the first time, Claimant asserts, Concession 14833 was affected by the prohibition on mining in the Santurbán Páramo.[146]

224. After the press release of the Constitutional Court advising of the pending judgment, the Ministry of the Environment of Colombia requested the Court to clarify certain aspects dealing with, *inter alia*, the required "*scientific criteria*" to justify any deviation from the *páramo* boundaries, and whether a new demarcation to provide a "*higher degree of protection to páramos*", allowed for measures in *páramo* areas even if those areas were smaller or required that the *páramo* area suggested by the IAVH be enlarged. Claimant alleges that the Court refused to provide the requested clarifications.[147]

(7) Request by the NMA for Clarification of Judgment C-035

225. Claimant describes that on February 24, 2016, the NMA requested the Constitutional Court to clarify certain aspects of Judgment C-035, indicating that, by imposing a complete ban on mining activities in *páramos* declared to be protected areas, Judgment C-035 constituted "[…] *an absolute interference with contractual rights and affects, from a mining point of view, contracts and investments executed, and investments made, under the legislation in force at the time, which could potentially cause unlawful damages to those who, on the basis of the contract, and legitimate expectations* [confianza legitima]*, carried out investments which could be deemed to have been indirectly expropriated, as consequence*

[143] Cl. Memorial, ¶ 226. Claimant points out to dissenting opinions of two Justices of the Constitutional Court, who described the legal consequences of the majority judgment, including international liability for breaching Colombia's obligations under specific treaties, and could even be regarded as an indirect expropriation.

[144] Cl. Memorial, ¶ 225.

[145] Cl. Memorial, ¶ 228.

[146] Reply, ¶ 92.

[147] Cl. Memorial, ¶ 229. *See*, **Exhibit C-109**, Colombian Constitutional Court, Order 097/16, March 2, 2016.

of the unconstitutionality Judgment. Evidently, this situation raises national and international concerns in light of investment protection treaties…".[148]

226. The NMA requested clarification of, *inter alia*, (i) whether mining concession contracts create the right to explore and exploit resources; (ii) whether existing rights and concession contracts remain valid or were nullified as a result of Judgment C-035; (iii) whether mining concessions were rendered null and void or whether they were or were not enforceable; (iv) whether the holders of affected mining rights should be compensated and, if yes, which mining rights qualify for compensation; (v) whether the Judgment C-035 applied only prospectively, or whether was it retroactive in effect; and (vi) how the NMA should treat concession contracts for areas that only partially fell within *páramo* areas.[149]

227. Claimant adds that the Court failed to provide the clarification requested by the NMA on the grounds that it could not intervene on the interpretation of the Judgment C-035 made by public officials or private individuals, and that it was not within their jurisdiction to act as a reference body outside of a specific judicial proceeding.[150]

(8) CDMB Resolution 381

228. On May 16, 2016, the CDMB adopted Resolution 381 "*in compliance with Judgment C-035*", whereby it modified the Environmental Management Plan for Concession 14833 approved by Resolution 127 of February 18, 2002, by excluding the areas overlapping with the *páramo*. Claimant contends that this was the first time a prohibition to mine under Concession 14833 materialized and was communicated, implemented, and enforced by the State.[151]

229. Claimant mentions that Judgment C-035 and Resolution 381 "*came as a surprise*", because Claimant had made the investment in the Vetas Gold Project with the understanding that the mining rights were stabilized and protected, and it continued to invest capital in the exploration and development because those mining rights were "grandfathered" and continuously stabilized and protected from any subsequent legislative change or intervention.[152]

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[148] Cl. Memorial, ¶ 232. *See*, **Exhibit C-110**, Letter of the National Mining Agency about the application of court decision C-035/16, June 11, 2016.

[149] **Exhibit C-110**, Letter of the National Mining Agency about the application of court decision C-035/16, June 11, 2016.

[150] **Exhibit C-112**, Colombian Constitutional Court, Order 138/16, re: Clarification request of decision C-035/16, April 6, 2016.

[151] Cl. Memorial, ¶ 250; Reply, ¶ 99.

[152] Cl. Memorial, ¶ 252.

(9) Judgment T-361

230. Then, on May 30, 2017, the Constitutional Court issued Judgment T-361 declaring Resolution 2090 to be unconstitutional. The Court determined that any new delineation by any environmental authority was required to be more stringent than the demarcation drawn under Resolution 2090, and the Ministry of the Environment was given a one-year period within which to issue a new resolution to replace Resolution 2090 that would delineate the Santurbán-Berlin *Páramo* ecosystem in accordance with law.[153]

231. However, such new resolution has not yet been issued. The Ministry of the Environment has requested several extensions to carry out the new demarcation, but the demarcation has not taken place.[154]

(10) Additional Developments after Judgment C-035 and Resolution 381

232. After the issuance of Judgment C-035, Claimant notes that the NMA issued several "legal memos" (*opinión legal*) detailing the effects of the judgment.[155]

(a). At the request for clarification of the legal effects of said Judgment by Claimant's counsel, the NMA issued a legal memo on June 11, 2016,[156] addressing several issues presented by Claimant:

(i) As to the legal consequences of Judgment C-035 for concession contracts already signed; registered in the Mining Registry; and approved by the relevant environmental authority over areas that intersect with *páramos*, the NMA responded that Judgment C-035 invalidated the exception under Article 173.1 of Law 1753 which had grandfathered those mining concessions existing prior to February 9, 2010, and indicated that, although it does not explicitly exclude mining concession contracts for *páramo* areas from the legal universe, it does result in the impossibility of carrying out of such activities and therefore turns the object of the contract unenforceable;

(ii) As to the prohibition to continue mining activities by titleholders of concession contracts in areas determined as *páramos,* the NMA stated that it was not possible to continue mining activities in areas demarked as *páramos,* even in cases where the relevant mining and environmental authorizations have been issued;

[153] Cl. Memorial, ¶¶ 235-236. *See*, **Exhibit C-111**, Constitutional Court, Decision T-361/17, May 30, 2017.

[154] Cl. Memorial, ¶ 251.

[155] Cl. Memorial, ¶ 253.

[156] **Exhibit C-064**, *Opinión legal de la Agencia Nacional de Minería* No. 20165510098602, June 6, 2016.

(iii) As to the recordation of Judgment C-035 in the Mining Registry, the NMA confirmed that according to Article 332 of Law 685 it was not required to be registered;

(iv) As to early termination of concession contracts due to impossibility to perform the contracts, the NMA indicated that they were not subject to early termination, but it agreed with the clarification letter from Claimant's counsel that the Judgment made it impossible to perform the objective of the contracts when the contracted area overlaps with *páramo* areas, and that the absolute exclusion of mining activities in *páramo* areas occurred automatically as a consequence of Judgment C-035 and therefore no other action or administrative order needed to take place for this purpose;

(v) Regarding the assignment contracts for mining concessions within *páramo* areas, the NMA indicated that there is no strict indication prohibiting the assignment of concession contracts, but clarified that, in this instance, the roman law principle stating that "*no one can transfer more rights than the ones they have*" would apply. Zones within *páramo* ecosystems would still be excluded from mining activities and, as a result, the evaluation phase for an assignment request shall determine the feasibility of such an assignment;

(vi) On the effects of the Judgment C-035 on mining titles subject to seizure, the NMA indicated that said zones were still excluded from mining activities due to the existence of *páramo* areas, and the NMA would inform the relevant judge of the impossibility and the way in which this affects the seized title;

(vii) Regarding the consequences of continuing mining activities in *páramo* areas after the Judgment, the NMA stated that pursuant to Article 112(h) of Law 685 the violation of rules on exclusion and restricted zones is a cause of forfeiture of the concession contract, and if activities were continued, the concession contract would be terminated; and

(vii) As to criminal consequences of continuing mining activities in *páramo* areas after Judgment C-035, the NMA indicated that these would be considered illegal mining and regarded as a crime according to Article 159 of the 2001 Mining Code and Article 338 of the Colombian Penal Code.

(b). In response to a letter from the Mayor of the San Juanito municipality, enquiring regarding the parameters for mining processes, including the process to obtain an exploitation license in light of Judgment C-035, the NMA issued another legal memo on December 27, 2016,[157] concluding that the Court clearly ordered that mining activities cannot be carried out in zones that overlap with *páramo* areas, and that, despite the fact that it did not exclude those mining concession contracts from the legal universe, the NMA found that Judgment C-035 makes it automatically

[157] **Exhibit C-117***, Opinión legal de la Agencia Nacional de Minería* No. 20161200420551, December 27, 2016.

impossible to carry out mining activities, even when the mining and environmental permits have been issued.[158]

(c). In a third legal memo described by Claimant,[159] the NMA responded on June 16, 2016 to a third party that, although Judgment C-035 does not have the prerogative to make the mining concession contracts in areas defined as *páramos* disappear, there is an impossibility of developing activities of this type within such areas, and that by virtue of Article 36 of the 2001 Mining Code, Judgment C-035 implied that those areas that overlap with demarcated *páramo* areas are considered to be excluded from mining without the need for a declaration. Further, the NMA concluded that unilateral revocation is not found in the 2001 Mining Code as a cause for termination of the mining concession, and neither is the possibility given to the mining authority, meaning that a judicial procedure would need to be followed. As to whether there should be compensation to titleholders of concession contracts affected, the NMA stated that it is the judiciary which shall determine whether there is responsibility that justifies the payment of compensation for losses incurred and to be incurred in the future.[160]

(11) Law 1930

233. Finally, Claimant points out to Law 1930 which was enacted by the Colombian Congress on July 27, 2018, intending to consolidate all regulatory measures required to be taken by various Colombian authorities to protect *páramo* ecosystems. Article 3 defines *páramos,* while Article 5 (1) enshrines the general prohibition to execute exploration and exploitation mining activities within those ecosystems.

234. Claimant adds that no transition regime was included for the holders of mining concessions and environmental permits within in the *páramos* at all, including for concessionaires who had entered into concession contracts prior to the enactment in 2010 of Law 1382, whose contracts were subject to the stabilization provision in Article 46 of Law 685.[161]

(12) Resolution 341

235. Claimant further contends that, after the Reina de Oro Arbitration, Reina de Oro submitted on February 24, 2015, written Notice of Assignment to the NMA.

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[158] Cl. Memorial, ¶¶ 265-267.

[159] **Exhibit C-119**, *Opinión legal de la Agencia Nacional de Minería* No. 20161200220381, June 16, 2016.

[160] Cl. Memorial, ¶¶ 269-272.

[161] Cl. Memorial, ¶ 237.

236. Claimant explains that under Article 22 of the 2001 Mining Code, the assignment of rights contained in a concession, requires previous written notice to the granting entity. If, after receiving notice, the entity does not respond through a motivated resolution within 45 days, it will be presumed that the entity has no objections to the assignment and the negotiation document will be registered in the Mining Registry.[162]

237. However, Claimant notes that on April 9, 2018 – three years after having submitted the NMA Notice of Assignment – the NMA issued Resolution 341[163] rejecting the assignment of Concession 14833 on the following grounds:

(a) Reina de Oro was not authorized to assign the exploration and exploitation rights under Concession 14833, since these rights were under an attachment or embargo as a result of a judicial order in favor of GRVC at the time;

(b) That, after a review of the area subject to Concession 14833 carried out on April 3, 2018 by the Group for the Evaluation of Modifications to Mining Titles of the Vice Presidency of Contracting and Titling, it was concluded that there is partial overlap with a *páramo* area and partial overlap with a mining restriction area corresponding to the Santurbán *Páramo* National Park; and

(c) Resolution 381 of the CDMB,[164] issued on May 6, 2016, made it impossible to carry out mining activities in the area since it unilaterally modified the Environmental Management Plan for Concession 14833 due to overlap with a *páramo* area and partial overlap with a mining restriction area corresponding to the Santurbán *Páramo* National Park.[165]

238. Claimant contends that Resolution 341 argued that Resolution 381 of May 6, 2016, unilaterally modified the Environmental Management Plan approved by Resolution 127 (issued on February 18, 2002) and established greater areas as exclusion zones. As a result, the NMA took the position that Resolution 381 ordered Reina de Oro to suspend all mining activities in the zone demarcated as *páramo* overlapping with the Mining Area.

239. Claimant contends that the exclusion of mining activities by Resolution 381 in the area was made according to the demarcations found in Resolution 2090 of 2014, which was declared unconstitutional by the Constitutional Court in its Judgment T-361 and, although the Constitutional Court allowed for a suspension of one year while the new demarcation was

[162] Cl. Memorial, ¶ 247.

[163] **Exhibit C-113**, *Agencia Nacional de Minería* Resolution 341, April 9, 2018.

[164] **Exhibit C-114**, Resolution 381, Regional Autonomous Corporation for the Defense of the Bucaramanga Plateau, May 16, 2016.

[165] Cl. Memorial, ¶ 248.

made, this had not occurred despite several extensions requested by the Ministry of the Environment.[166]

240. The measures adopted by Colombia between 2010 and 2018 described above are collectively referred to herein as the "**Disputed Measures**".

B. RESPONDENT'S POSITION IN RESPECT TO THE DISPUTED MEASURES

241. Respondent addresses the Disputed Measures alleged by Claimant under three topics:

(1) Protection of the *Páramos*;

(2) The measures did not impair any of Claimant's alleged rights; and

(3) Alleged mischaracterizations of Colombian law.

(1) Protection of *Páramos*

242. Colombia contends that it has conferred special protection upon the *páramos* and has taken a series of steps to strengthen the protection of the *páramos* over time, all in accordance with the precautionary principle.[167] It cites, for example:

(a). The Colombian legislature's decision to introduce a general ban on mining in the *páramos* through Laws 1382, 1450 and 1753 with immediate effect, in accordance with the most recent existing scientific delineations, to prevent harm from occurring while Colombia's authorities continued their work to map the *páramos* with greater precision;

(b) Similarly, the Constitutional Court's decision to defer the effects of Judgment C- 366 of 2011 (which struck down Law 1382), in order to allow sufficient time for the Colombian legislature to reinstate the mining ban. With this measure, Colombia sought to avoid a regulatory vacuum that would otherwise have allowed the development of mining activities in these fragile ecosystems; and

(c). The Constitutional Court's Decision in Judgment C-035 and Judgment T-361 to maintain the Resolution 2090 delineation in force until a new delimitation is completed was necessary to maintain the protection of the Santurbán *Páramo*, pending the definitive delimitation. Again, the precautionary principle precluded Colombia from allowing the development of mining activities in the Santurbán *Páramo* in the absence of a final delimitation.

243. Respondent states that Claimant should have known that Law 99 imposed substantial restrictions on mining in *páramo* ecosystems since 1993. A mining project located in a

[166] Cl. Memorial, ¶ 251.

[167] C-Memorial on Liability, ¶ 52.

páramo – whether expressly delimited or not – required an environmental license as a *sine qua non* condition to progress past the exploration stage. In addition, in accordance with the precautionary principle enshrined under international law and in Law 99, the relevant environmental authority was under a legal obligation to deny an environmental license to any project that could not establish with absolute scientific certainty that it would not have adverse effects on the *páramo*.[168]

244. Respondent mentions that in the early 2000s, the Ministry of Environment embarked on an ambitious program for the restoration and sustainable management of high mountain ecosystems (called the *Páramo* Program), and in 2010 created the National System of Protected Areas (*Sistema Nacional de Áreas Protegidas).* Soon after the publication of the final report of the *Páramo* Program, the Ministry of Environment and Sustainable Development issued Resolution 769 of August 5, 2002, adopting a variety of measures for the protection, conservation, sustainable use, and restoration of the *páramos.* Resolution 769 directed the CARs and other authorities to prepare a study of the then-current condition of the *páramos* located within their respective jurisdictions, and Environmental Management Plans based on the results of the studies.[169]

245. Respondent rejects Claimant's argument to the effect that Resolution 769 did not "*regulate*" the activities that could take place in *páramo* ecosystems, as stated by Claimant,[170] and affirms that Resolution 769 provided the legal definition of *páramo* ecosystems that remains in force to this day and was the first of a series of regional and national measures strengthening the protection of the *páramos*. Although Respondent does acknowledge that Resolution 769 did not itself prohibit mining in *páramo* ecosystems (which Laws 1382 and 1450 later did), it should have been clear to Claimant that Resolution 769 "*heralded the beginning of a gradual and steady effort by Colombia to further protect the páramos.*"[171]

246. Respondent indicates that, starting in 2002, the regional environmental authorities with jurisdiction over the Santurbán *Páramo* area, the CDMB and CORPONOR – the Regional Autonomous Corporation for the Defense of the Bucaramanga Plateau and the Regional Autonomous Corporation of the North-Eastern Border (*Corporación Autónoma Regional de la Frontera Nororiental*) – engaged in significant efforts to protect the Santurbán *Páramo* Biogeographic Unit, which served as the foundation for the formal delimitation of the *páramo*, as they helped to evaluate the conditions of the *páramo* and define its particular

[168] C-Memorial on Liability, ¶ 48.

[169] C-Memorial on Liability, ¶¶ 62-63.

[170] C-Memorial on Liability, ¶ 69, *citing* Cl. Memorial, ¶ 113.

[171] C-Memorial on Liability, ¶ 69.

characteristics such as climate, altitude range, and socioeconomic conditions. In 2004, CORPONOR created a Regional System of Protected Areas that included, among other things, all the *páramos*, *subpáramos*, water springs and aquifer recharging areas of the Norte de Santander *Departamento*; then in 2008, CORPONOR and the CDMB created the Integrated Management District *(Distrito de Manejo Integrado)* of the Berlin *Páramo*, a dry *páramo* located within the greater Santurbán *Páramo*. In 2009 CORPONOR prepared and published a study on the current condition and an PMA of the Norte de Santander portion of the Santurbán *Páramo*; and in 2011, CORPONOR created the Santurbán-Sisavita Natural Regional Park (*Parque Natural Regional Santurbán-Sisavita*).[172]

247. According to Respondent, in parallel, the Ministry of Environment began implementing strategies to raise public awareness of the *páramos* and to support their protection at the national level, and in May 2007 the IAVH published the *Atlas de Páramos de Colombia* with maps of 34 Colombian *páramos* at a 1:250,000 scale.[173] The 2007 IAVH *Páramo* Atlas showed that the town of Vetas and certain other populated areas were located within the *páramo* complex. It also showed that 100% of Reina de Oro's Concession 14833 overlapped with the Jurisdicciones Santurbán *Páramo*.[174]

248. The 2007 IAVH *Páramo* Atlas was widely accepted as a reliable source of information on the characteristics and condition of the *páramos*. This was acknowledged in 2011, when the Colombian legislature enacted Law 1450 of June 16, 2011, and directed the Ministry of Environment to use the 2007 IAVH *Páramo* Atlas as a "*minimum reference*" for the boundaries of the *páramos*, until a delimitation at 1:25,000 scale became available.

249. Thus, Respondent contends that when Claimant received in October 2012 the Option Agreement for Reina de Oro's Concession 14833: (i) the 2007 IAVH *Páramo* Atlas had been published for more than five years, (ii) the 2007 IAVH *Páramo* Atlas had been used as a minimum reference to delimit Colombia's *páramo* ecosystems by the Ministry of Environment since May 2011, and (iii) the 2007 IAVH *Páramo* Atlas explicitly designated the minimum reference area in which mining was banned in Law 1450 of June 2011.[175]

250. Respondent further contends that, despite Claimant's currently pretending that there was no ban in effect prior to the delimitation of Resolution 2090 of 2014, Claimant, through GRH's legal counsel, confirmed Claimant's actual understanding that the 2007 IAVH *Páramo* Atlas had already delimited in 2007 the *páramo*. Respondent makes reference to

[172] C-Memorial on Liability, ¶¶ 70-72.

[173] C-Memorial on Liability, ¶¶ 73-76.

[174] C-Memorial on Liability, ¶ 77.

[175] C-Memorial on Liability, ¶ 78.

a specific letter dated 22 April 2016,[176] whereby GRC – the Colombian branch of GRH – notified the mining authority that it had decided to voluntarily reduce the area of contract FCC-814 (a different title), which was located in Claimant's planned mining project in California, by excluding the areas overlapping with the Santurbán *Páramo* as delimited by Resolution 2090, the Santurbán Park, *and* the 2007 IAVH *Páramo* Atlas.[177]

251. Respondent also contends that Claimant ought to have known at the time it received the Option Agreement that, in July 2007, the Ministry of Mines of Colombia had submitted a bill to amend the 2001 Mining Code, and the fact that the bill contained a provision amending Article 34 to prohibit mining operations in *páramo* ecosystems. Then, on February 9, 2010, the Colombian Congress approved Law 1382 of 2010, amending Article 34 of the 2001 Mining Code to explicitly prohibit mining activities in *páramo* ecosystems.[178] Law 1382 provided that the excluded zones were to be geographically delimited by the competent environmental authority, *i.e.,* the Ministry of Environment.

252. Respondent states that Article 3 of Law 1382 contained a transitional regime for *existing* mining activities located in areas subject to the ban, but only with respect to mining projects which had *already* begun construction and assembly or exploitation activities, and only where such activities were authorized by an environmental license or an equivalent. This means that while Law 1382 banned mining in *páramo* ecosystems with immediate effect, it included a transitional regime (also at times referred to as a "grandfathering" provision) which allowed *existing mining activities* to continue. As of February 9, 2010, these included: (i) those which were at the construction or exploitation phase, and (ii) were authorized by an environmental license or "*their equivalent.*"[179] Respondent argues that this did not mean, as Claimant attempts to argue, that existing mining concessions "*had the absolute and unconditional right to continue their mining operations.*"[180]

253. Further, Respondent contends that Claimant was not covered by the transitional regime under Law 1382. This was so, because: (i) the Vetas Gold Project remained at the *exploration* phase *after* the enactment of the law, (ii) Claimant had never applied for, let alone obtained, an environmental license for the *construction and exploitation* activities

[176] **Exhibit R-067**, Letter from Galway Resources Holdco Ltd Sucursal Colombia to the ANM, April 22, 2016.

[177] C-Memorial on Liability, ¶ 79.

[178] C-Memorial on Liability, ¶¶ 82-85.

[179] C-Memorial on Liability, ¶¶ 87-88, *citing* **Exhibit C-048**, Law 1382 of 2010, Art. 3: "*If on the effective date of this law, any construction and assembly or exploitation activities are being undertaken subject to a mining title and an environmental licence or their equivalent in areas which were not previously excluded, such activities shall be allowed until their expiration, but no extensions shall be granted with regard to such titles.*"

[180] C-Memorial on Liability, ¶ 89.

that it would have had to carry out as part of its large-scale Vetas Gold Project, and its existing permit had been obtained for certain "*small-scale*" mining activities.[181]

254. Respondent adds that Claimant is wrong in stating that the PMA that Claimant had obtained for a small scale project using "*small scale tracked/manual methods*" was sufficient to deem to have been covered by the transitional regime.[182] Not only would existing mining activities (*i.e.,* existing construction, assembly and exploitation activities) that are covered by an existing environmental license need to be perfected, but the license would have required a detailed specific analysis of the potential environmental impact of the proposed activities.

255. Although Respondent acknowledges that the Constitutional Court ruled through Judgment C-366 that Law 1382 was unconstitutional because it had been enacted without conducting consultations with indigenous and afro-descendant people, as required by the Constitution,[183] Respondent contends that the Court suspended the effects of its decision for two years to allow the Colombian Government to conduct the necessary consultations and enact replacement legislation while the mining ban remained in full force and effect.[184]

256. Another reason Claimant ought to have been aware of the evolution of the regulations is the fact that Colombian environmental authorities rejected an application for an environmental license for the Angostura project, a large-scale mining project located near Reina de Oro's concession. Contrary to Claimant's assertion that the Eco Oro's Angostura project was "*publicly and privately supported*", Respondent mentions that the Colombian environmental authority determined in April 2010 that the environmental proposal submitted by Eco Oro was "*incompatible with the high degree of sensitivity and environmental importance of said páramo ecosystem in relation to the possible introduction of the exogenous agents identified in the environmental impact study submitted for approval*", and invited Eco Oro to submit a new EIA that fully took into account that the "*Páramo de Santurbán ecosystem* [was] *an area excluded from mining activities.*"[185] [Tribunal's Translation]. In May 2011, the Ministry of Environment rejected Eco Oro's environmental license request and "*made it crystal clear that a large-scale mining project in a páramo could not be granted an environmental license*."[186]

[181] C-Memorial on Liability, ¶ 91.

[182] C-Memorial on Liability, ¶ 92.

[183] *See* **Exhibit C-103**, Judgment C-366/11 of the Constitutional Court, May 11, 2011.

[184] C-Memorial on Liability, ¶ 98.

[185] **Exhibit R-045**, Ministry of Environment, Order No. 1241, April 20, 2010, pp. 44-45.

[186] C-Memorial on Liability, ¶ 102.

257. Then, on May 25, 2011, the Ministry of Environment issued Resolution 937 through which it adopted the 2007 IAVH *Páramo* Atlas as the applicable cartographic information to identify and delineate the Colombian *páramos* for the purposes of Law 1382. Respondent asserts that Resolution 937 clarified that the ban on mining in *páramo* ecosystems applied immediately to the areas identified as such by the 2007 IAVH Páramo Atlas.[187]

258. In connection with the enactment of Law 1450 in 2011, Respondent clarifies that the ban on mining activities in *páramo* ecosystems differed from Law 1382 in certain respects: (i) it banned with immediate effect exploration and exploitation of hydrocarbons, the construction of hydrocarbon refineries, and agricultural activities in *páramo* ecosystems;[188] (ii) it designated the 2007 IAVH *Páramo* Atlas as the "*minimum reference*" to identify the boundaries of the *páramo* ecosystems covered by the ban until more detailed cartographic information became available; and (iii) it did not include an explicit transitional regime for construction or exploitation activities authorized by an existing environmental license or equivalent instrument.[189]

(2) Colombia's Measures did not Impair any of Claimant's Alleged Rights

259. Respondent also contends that the measures taken did not impair Claimant's alleged rights, and addresses its position under the following premises:

(a). Colombia adopted and followed an appropriate scientific process to delimit the Santurbán *Páramo*;[190]

(b). Resolution 2090 did not curtail any of Claimant's alleged rights under Concession 14833;[191]

(c). Law 1753 of 2015 ratified the mining ban and did not grandfather Claimant's Vetas Gold Project in Concession 14833;[192]

(d). Judgment C-035 of 2016 had no impact on Claimant's alleged rights to develop the Vetas Gold Project;[193]

[187] C-Memorial on Liability, ¶¶ 107-108. Respondent indicates that Resolution 937, and the designation of the 2007 IAVH *Páramo* Atlas as the relevant provisional delineation, were never challenged before the Colombian Courts. Accordingly, the 2007 IAVH *Páramo* Atlas delineation was and remained fully effective until December 2014, when the Ministry of Environment issued Resolution 2090.

[188] **Exhibit C-049**, Law 1450 of 2011, June 16, 2011, Art. 202.

[189] C-Memorial on Liability, ¶¶ 111-117.

[190] C-Memorial on Liability, ¶¶ 238-242.

[191] C-Memorial on Liability, ¶¶ 243-266.

[192] C-Memorial on Liability, ¶¶ 267-273.

[193] C-Memorial on Liability, ¶¶ 274-295.

(e). Judgment T-361 of 2017 did not have any effect on the Vetas Gold Project;[194]

(f). The ANM's refusal to approve the assignment of Concession 14833 was lawful and unrelated to Judgment C-035 or the ban on mining in *páramo* ecosystem;[195]

(g). The modification of Minera Reina de Oro's PMA did not impact Claimant's ability to develop the Vetas Gold Project;[196] and

(h). The ANM's interpretation of the effects of Judgment C-035 had no impact on Claimant's ability to develop the Vetas Gold Project.[197]

260. Delimitation of the Santurbán *Páramo*. Respondent describes how, following the enactment of Laws 1382 and 1450, the Ministry of Environment began preparing the delimitations of Colombia's *páramos* together with the IAVH – a research institute created by Law 99 of 1993, in charge of scientific and applied research of biotic and hydro biotic resources in continental Colombia. The IAVH delimited the Santurbán *Páramo* closely following the guide of criteria for the delimitation of *páramo* ecosystems (*Guía divulgativa de criterios para la delimitación de páramos de Colombia*) of 2011, and the specific methodology used is set out in the IAVH's 2014 Report titled "*Aportes a la delimitación del páramo*." Respondent recalls that the IAVH had previous experience in the delimitation of Colombia's *páramos* in the 2007 IAVH *Páramo* Atlas, and through the 2013 IAVH *Páramo* Atlas.[198]

261. Resolution 2090. Through Laws 1382 and 1450, Colombia enacted a ban on mining in the area delineated by the 2007 IAVH *Páramo* Atlas with immediate effect. Consequently, Claimant knew or should have known, that Reina de Oro's Concession 14833 overlapped by 100% with the 2007 IAVH *Páramo* Atlas. A final re-delineation of the *páramo* through Resolution 2090 of 2014[199] – following three years of study undertaken by the Ministry of Environment – did no more than confirm the overlap that already existed between Concession 14833 and the 2007 IAVH *Páramo* Atlas.[200] Both the 2007 IAVH *Páramo* Atlas and the 2090 Delimitation overlapped with 100% of Concession 14833.[201]

[194] C-Memorial on Liability, ¶¶ 296-299.

[195] C-Memorial on Liability, ¶¶ 300-308.

[196] C-Memorial on Liability, ¶¶ 309-315.

[197] C-Memorial on Liability, ¶¶ 316-324.

[198] C-Memorial on Liability, ¶¶ 238-242.

[199] **Exhibit C-107**, Resolution 2090 of 2014, Ministry of the Environment and Sustainable Development, December 19, 2014.

[200] C-Memorial on Liability, ¶¶ 244-249.

[201] C-Memorial on Liability, ¶ 249. Figure 9. Shows the overlap between Concession 14833, the 2007 IAVH Páramo Atlas, the Santurbán Park and the Resolution 2090 delimitation.

262. Respondent rejects the allegation of Claimant to the effect that the CDMB issued a letter of December 13, 2010, regarding the Santurbán Park to argue that Concession 14833 did not overlap with the Santurbán *Páramo*, and states that CDMB's creation of a natural regional park was an entirely different exercise from the Ministry of Environment's delimitation of Colombia's *páramos* pursuant to Laws 1382, 1450 and 1753.[202]

263. Alleged grandfathering. Respondent also rejects Claimant's assertion that Concession 14833 was "grandfathered" under Resolution 2090. Although Respondent accepts that the Ministry of Environment included a limited "grandfathering" provision in light of a recent advisory opinion of the Colombia *Consejo de Estado* – Colombia's highest court of administrative justice –[203] which found that the mining ban did not create any significant issues for projects at the *exploration* stage and environmental license issued prior to February 9, 2010. These did not benefit from any transitional regime. This is why, Respondent contends, the Ministry of Environment included in Article 5 of Resolution 2090 a grandfathering provision for pre-existing mining activities only:

> *As of 9 February 2010, concluding mining concession contracts, granting new mining titles in páramo ecosystems or issuing new environmental licenses to authorize the development of mining activities in these ecosystems is forbidden by law.*
>
> ***Mining activities that have concession contracts or mining titles, as well as an environmental license or the equivalent environmental control and management instrument, duly granted before February 9, 2010, that are located within the area identified in the attached map as "Area of the Páramo Jurisdicciones–Santurbán–Berlín", may continue to operate until completion****, without the possibility of an extension, subject to strict control on behalf of the mining and environmental authorities and the local entities(…).*[204] [Tribunal's Translation] [Emphasis added by Respondent]

264. This meant that under the transitional regime of Resolution 2090, *mining activities* located in the Santurbán *Páramo* with (i) a concession contract or a mining title, and (ii) with an environmental license or equivalent environmental management control instrument, issued prior to February 9, 2010, could continue operating in the *páramo* subject to enhanced environmental controls.[205]

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[202] C-Memorial on Liability, ¶ 251.

[203] **Exhibit R-111**, Consejo de Estado, Sala de Consulta y Servicio Civil, Advisory Opinion No. 2233, December 11, 2014.

[204] **Exhibit C-107**, Resolution 2090 of 2014, Ministry of the Environment and Sustainable Development, December 19, 2014, Art. 5.

[205] C-Memorial on Liability, ¶ 262.

265. Even though Claimant argues that Resolution 2090 generated uncertainty because Resolution 2090 (i) ordered the CDMB to issue detailed environmental guidelines and environmental management plans, and (ii) allowed the regional environmental authorities to amend and adjust the environmental management plans of Concession 14833, Respondent asserts that these allegations are premised on the "*misconceived*" theory that Claimant's Vetas Gold Project benefitted from the transitional regime – which it did not, as Respondent expressed above.[206] Further, in connection with the allegation by Claimant that Resolution 2090 did not specify whether the mining restriction applied to the surface only, Respondent asserts that it was clear that the prohibition on mining applied both at surface level and below, since the limitation was directed at a specific area, and in the case of Concession 14833, the entire area was located within the Santurbán *Páramo*.[207]

266. Respondent indicates that Law 1753 of 2015 further confirmed the prohibition on mining in *páramo* ecosystems, going even further than Law 1450, by banning not only the exploration and exploitation of mineral resources in *páramo* areas, but also the extraction of all other non-renewable natural resources.[208]

267. According to Respondent, although Claimant argues that Law 1753 broadened the scope of the grandfathering provision initially introduced by Law 1382 because, under Law 1753 "*the contracts could be either in the exploration or in the exploitation stages*", Concession 14833 predated February 9, 2010 and had an "*environmental license*" issued by the CDMB in 2002, Respondent insists that Article 173 grandfathered mining "*activities*" at the exploration or exploitation stages, with an environmental license or an equivalent environmental instrument issued prior to February 9, 2010, but Claimant's proposed activities, *i.e.,* the large-scale mining activities associated with the Vetas Gold Project were never the subject of an environmental management and control instrument (whether an environmental license or a PMA).[209]

268. Judgment C-035. Respondent asserts that Judgment C-035 arose from a constitutional challenge against certain provisions of Law 1753, including Article 173, filed by a group of citizens in July 2015, one month after Law 1753's enactment, who contended that the transitional regime violated their constitutional rights to a healthy environment and drinkable water because the exploitation of minerals in the *páramos* – which continued to be allowed for "grandfathered" projects – posed significant risks to the vegetation, wildlife and water aquifers of these ecosystems. Judgment C-035 did not prevent Claimant to

[206] C-Memorial on Liability, ¶ 266.

[207] C-Memorial on Liability, ¶ 266.

[208] C-Memorial on Liability, ¶¶ 267-268.

[209] C-Memorial on Liability, ¶¶ 269-270.

proceed with its Vetas Gold Project, as it alleges, because the Court overturned the transitional regime that allegedly applied to its project. The Constitutional Court issued Judgment C-035 of 2016, holding that the transitional regime in Article 173 of Law 1753 was unconstitutional. While the Court praised the ban on the extraction of non-renewable resources as a step in the right direction for the protection of the *páramos*,[402] the Court held that the transitional regime by allowing pre-existing exploitation projects to continue – did not fully protect the *páramos* from the harmful effects of the extraction of non-renewable natural resources, and made clear that it was particularly concerned that the "grandfathering" provision of paragraph 1 of Article 173 would allow the exploitation of minerals and hydrocarbons in *páramo* ecosystems.[210]

269. However, according to Respondent, Judgment C-035 did not ban mining activities in *páramo* ecosystems for the first time because a ban had been in force in Colombia since February 9, 2010. Judgment C-035 simply struck down the grandfathering provision of Law 1753. The decision did not affect Claimant, adds Respondent, because the Vetas Gold Project was not and never had been covered by the transitional regime in Law 1753 or Resolution 2090 since the project had not secured a mining title or an environmental license prior to that date.[211]

270. Respondent further contends that the request for clarification of Judgment C-035 submitted by the ANM and the Ministry of the Environment *does not* suggest, as Claimant attempts to indicate, that banning all mining activities in the *páramos* without compensation was "*grossly unjust and unfair*",[212] because the judgment was silent on whether compensation should be paid to the title holders affected by the elimination of the transitional regime of Law 1735, and in no way indicates that the Court decided whether compensation was owed at all. The Court simply did not address this question because it was not part of the plaintiffs' demands in such case.[213]

271. Among other reasons outlined by Respondent of the mischaracterization made by Claimant of the request for clarification, Respondent indicates the fact that the ANM and the Court may have held different views on whether the transitional regime of Law 1753 was constitutional cannot be construed as evidence of inconsistencies between the administrative and judicial branches of Government, derives from the role of the judiciary

[210] C-Memorial on Liability, ¶¶ 275-277.

[211] C-Memorial on Liability, ¶ 279.

[212] Cl. Memorial, ¶ 456.

[213] C-Memorial on Liability, ¶ 290.

(and the Constitutional Court in particular) who acts as a counterbalance to the actions of the legislative and executive branches.[214]

272. Judgment T-361. As to Judgment T-361 of 2017, Respondent equally rejects that it had any effect over the Vetas Gold Project, as Claimant contends. As background of the Judgment, Respondent describes that in July 2015, a group of citizens representing the communities of the Santurbán *Páramo* filed a *tutela* application against the Ministry of Environment arguing that Resolution 2090 was unconstitutional because the process through which it was issued failed to take meaningful consideration of the views of the communities affected by the delimitation. The courts that heard the *tutela* challenge held that the application was inadmissible because the plaintiffs had failed to exhaust available remedies under Colombian law, but the Constitutional Court subsequently granted review of the *tutela* application and joined the holders of mining titles overlapping with the Santurbán *Páramo* to the proceedings. Reina de Oro intervened in the *tutela* proceeding in its capacity as the holder of Concession 14833, also in support of Resolution 2090. Thereafter, the Constitutional Court issued Judgment T-361, overturning the *tutela* decisions of first instance and holding that the Ministry of Environment had completed the delimitation of the Santurbán *Páramo* without conducting an adequate and effective public consultation process.[215] Although the Court directed the Ministry of Environment to cure the issue by holding an appropriate consultation process, it held that Resolution 2090 should remain in force until the Ministry of Environment cured the deficiencies of the public consultation process.

273. Respondent contends that the Constitutional Court did not raise concerns whatsoever with the method for delimitation of the Santurbán *Páramo* itself, but rather expressly instructed the Ministry of the Environment to follow this same method as part of its curing exercise of the delimitation. Thus, according to Respondent, Judgment T-361 created no uncertainty for the Vetas Gold Project. By confirming that the Ministry of Environment should not depart from the delimitation proposal prepared by the IAVH, the consultation process to be conducted pursuant to Judgment T-361 has no bearing on the Vetas Gold Project.[216]

274. Alleged refusal by ANM to approve the assignment of Concession 14833. Respondent also rejects Claimant's claim that Colombia, through Resolution 341 of 2018, refused to "*register*" Reina de Oro's assignment of Concession 14833 as a consequence of the Court's decision in Judgment C-035. Respondent contends that, although Reina de Oro signed the NMA Notice of Assignment, it never executed an assignment agreement of Concession

[214] C-Memorial on Liability, ¶¶ 294-295.

[215] C-Memorial on Liability, ¶¶ 296-297; **Exhibit C-017**, Constitutional Court, Judgment T-361, May 30, 2017.

[216] C-Memorial on Liability, ¶¶ 298-299.

14833. When Claimant sought enforcement of the Reina de Oro Award (which mandated execution of such an assignment agreement) it did so with respect to damages only and obtained a judicial attachment of Concession 14833. The ANM rejected Reina de Oro's NMA Notice of Assignment simply because Concession 14833 was subject to an attachment order issued by the courts of Bucaramanga in connection with an enforcement action filed against Reina de Oro to enforce the pecuniary award. Respondent contends that, even if Concession 14833 was not subject to the attachment, the registration would have been equally denied because Reina de Oro failed to provide any evidence of the assignment for which approval was sought.[217] In addition, even if registration was granted, it would have been contingent on Reina de Oro's compliance with its obligations under Concession 14833 as it was in breach of them at the time.[218]

275. Respondent adds that: (i) Resolution 341 includes no reference to Judgment C-035 or the ban on mining in *páramo* ecosystems as a reason to deny the assignment of Concession 14833, and (ii) Resolution 341 did not eliminate "*any and all assignable rights associated with this concession*", as Claimant alleges, because mining is still allowed in the 21.8% of Concession 14833 that does not overlap with the preservation area of the *páramo.*[219]

276. Modification of Minera Reina de Oro's PMA. In connection with the modification by the CDMB of the PMA that authorized Reina de Oro's traditional, small-scale mining activities through Resolution 381, Respondent recalls that Resolution 381 banned Reina de Oro from conducting any further mining activities in the portion of Concession 14833 overlapping with the Preservation Area of the Santurbán *Páramo*, as delimited by Resolution 2090. Contrary to Claimant's assertion, Respondent contends that the 2001 Mining Code never conferred "*stabilisation rights*" to Concession 14833 or the Vetas Gold Project, nor was it covered by the transitional regime of Law 1753 or Resolution 2090, because it lacked a mining title, or an environmental management or control instrument issued prior to February 9, 2010.[220] Thus, Resolution 381 should not have come as any form of surprise to Claimant, which ought to have known from the very beginning of its investment that the Vetas Gold Project was subject to the ban on mining in *páramo* ecosystems enacted in 2010 and 2011.

[217] According to Respondent, on October 27, 2017, through Order 228, the ANM gave Reina de Oro the opportunity to cure the deficiencies of its notice of assignment. Specifically, the ANM requested Reina de Oro to provide a copy of the assignment agreement and a certificate of existence and representation of the assignee. Claimant never provided such information requested.

[218] C-Memorial on Liability, ¶¶ 300-302.

[219] C-Memorial on Liability, ¶ 306.

[220] C-Memorial on Liability, ¶¶ 312-313.

277. The ANM's interpretation of the effects of Judgment C-035. Respondent contends that the ANM's interpretation of the effects of Judgment C-035 had no impact on Claimant's ability to develop the Vetas Gold Project. It asserts that the response given by the ANM to different communications did not consider the specific circumstances of Concession 14833 or the Vetas Gold Project. Although Claimant refers to them as "*legal memoranda*", Respondent refers to them as responses to the petitions made by Claimant, and their contents only confirm the text of Judgment C-035, or of the 2001 Mining Code.[221]

(3) Alleged mischaracterizations of Colombian Law

278. Respondent contends that Claimant's claims remain premised on fundamental mischaracterizations of Colombian Law, namely: (a) that Concession 14833 was "*stabilized*"; (b) the notion of "*acquired rights*" under Colombian law; and (c) that an "*acquired right*" exists to develop the Vetas Gold Project under Concession 14833. These are examined below.[222]

a) Concession 14833 was not "*stabilized*"

279. Respondent contends that Article 46 of Law 1450 did not "grandfather" all concessions granted prior to February 9, 2010, and Claimant's assertion in this respect is "*baseless*",[223] since Article 46 merely confirms the principle of non-retroactivity with regard to mining laws *in force* at the time the contract is perfected. But it made clear that the 2007 IAVH *Páramo* Atlas delineation already served as an immediately effective minimum delineation.[224]

280. Respondent asserts that Article 46 is not a stabilization provision because (i) it covers mining laws only, and not environmental or other laws and (ii) it merely restates the ordinary principle of non-retroactivity of the law, which applies to all contracts under Colombian law. Further, Respondent has shown that (iii) pursuant to Article 196 of the 2001 Mining Code, environmental laws are expressly exempted from any possible "*stabilization*" and (iv) the *travaux préparatoires* of the 2001 Mining Code confirm that Article 46 does not prevent the application of subsequent environmental laws.[225]

281. In this connection, Respondent affirms that, contrary to Claimant's allegation, the 2001 Mining Code did not provide any guarantees as to the "*stabilization*" of the environmental

[221] Memorial on Liability, ¶¶ 316-324.
[222] Rejoinder, ¶¶ 135-177.
[223] C-Memorial on Liability, ¶ 116.
[224] C-Memorial on Liability, ¶ 117.
[225] Rejoinder, ¶ 136.

regulations applicable to Concession 14833, and that Article 46 contains no "*stabilization*" undertaking at all. It merely confirms that concession contracts are governed by the laws in force at the time of their execution; it "*simply enshrines the basic, general principle of non-retroactivity of the law*"[226] and should not be interpreted to mean, as Claimant suggests,[227] that Concession 14833 was immune from changes in the environmental laws and regulations applicable to it.

282. Respondent further contends that Claimant's interpretation of Article 46 as somehow precluding any changes to the area within which mining activities can be conducted is inconsistent with Articles 34 and 36 of the 2001 Mining Code, which establish the authority of environmental authorities to create "*areas excluded from mining activities*" in order to protect environmentally sensitive areas such as the *páramos.*

283. Respondent mentions Judgment C-339 ought to have made clear to Claimant – before negotiating the acquisition of Concession 14833 – that mining could be excluded in areas beyond those specifically listed in Article 34 of the 2001 Mining Code, including *páramo* areas. The Constitutional Court specifically noted that *páramos* are ecosystems in which mining exclusion zones could be created.[228]

284. Respondent adds that its expert on Colombian law, Professor De Vivero, has explained that Article 46 of the 2001 Mining Code is not a stabilization provision. Rather, it simply mirrors Article 38 of Law 153 of 1887 – an amendment to the Colombian Civil Code – which provides that "*in all contracts the laws in force at the time of execution are deemed to have been incorporated*."[229] The text of Article 46 "*clearly*" provides that the principle of non-retroactivity is limited to the mining laws in force at the time the contract is perfected. Accordingly, laws concerning the protection of the environment do not fall within the purview of Article 46. This is clear from the text of Article 196 of the 2001 Mining Code, which confirms that all environmental provisions apply to concession contracts without exception.[230]

285. Respondent adds further that the *travaux préparatoires* of Article 46 – which Respondent alleges are ignored altogether by Galway – are "*unequivocal*" in that Article 46 does not

[226] C-Memorial on Liability, ¶¶ 149-151.

[227] Cl. Memorial, ¶¶ 103-104.

[228] C-Memorial on Liability, ¶ 161, *citing* **Exhibit R-110**, Constitutional Court, Judgment C-339, May 7, 2002, pp. 8-11.

[229] Rejoinder, ¶ 138.

[230] Rejoinder, ¶ 139.

"*stabilize*" applicable environmental laws, and that rules enacted after the entry into a concession contract apply.

> *One of the criteria that is probably the cornerstone of legal stability, is to provide sufficient security and applicability to the commitments of the State with private parties regarding new norms of any order. In this sense, the Project,* ***acknowledging that there can be rules following the concession contract, that must necessarily be applied to the concessionaire, e.g., technical and environmental laws and regulations,*** *recognizes that there are other subsequent norms that modify or derogate terms, conditions and concessionaire obligations, that should not be applied in order to respect the integrity of the contract during its validity and extensions.* [Emphasis added by Respondent].[231]

286. In addition, Respondent asserts that Claimant's contention in this arbitration is inconsistent with GRC – GRH's Colombian branch – express acknowledgement, under the Option Agreement, that changes to the applicable mining or environmental legislation could prevent GRVC from conducting exploration activities. This, because Respondent states that GRVC and Reina de Oro agreed that in the event that the mineable area was to be reduced as a result of any changes in "*mining, environmental or any other type of legislation*," a reduction in price would be in order.[232]

287. Article 46 of the 2001 Mining Code does not preclude the application of Articles 34 and 36 to pre-existing mining concessions. Respondent contends that Galway, in its Reply, disputes that Article 36 of the 2001 Mining Code applies to contracts executed before the creation of a mining exclusion zone because, according to Galway, Article 36 "*must be read within the context of the entire 2001 Mining Code, including specifically Article 46.*" In Galway's view, in instances when the concession contract predates the mining exclusion area, the exclusion of the area does not apply by operation of the law. However, according to Respondent the language of Article 36 is clear that it applies to mining exclusion zones created before *and after* the execution of a mining concession for at least four reasons:[233]

a) *First*, Article 36 does not distinguish between concession contracts executed before a mining exclusion zone is designated from those executed after such a designation;

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[231] **Exhibit R-022**, Draft Bill No. 269 for Senate debate, April 14, 2000, p. 25; *see also* De Vivero Expert Report, ¶ 59.

[232] Rejoinder, ¶ 142, *citing* the second paragraph of the Option Agreement, which reads as follows: "*SECOND PARAGRAPH:* ***In the event that changes in mining,environmental or other legislation restrict any part of the area for exploration,*** *the payment for the easement will be madein proportion to the area that is available for exploration*." [Emphasis added by Respondent]

[233] Rejoinder, ¶¶ 146-147.

b) *Second*, Article 36 provides that the creation of a mining exclusion zone does not require the "*proponente*" (applicant for a concession) or "*concesionario*" (concessionaire) to renounce the areas designated as mining exclusion zones;

c) *Third*, Article 36 expressly states that the concessionaire shall be removed from the area designated as a mining exclusion zone "*sin pago, compensación o indemnización alguna*" (without payment, compensation or indemnification); and

d) *Fourth*, Article 36 provides that the exclusion zones need not "*expressly be referenced in acts and contracts*" to apply.

288. Respondent states that Claimant's position is premised on the "*mistaken notion that the rights under a mining title are immune from measures taken to protect the environment*."[234] However, as explained by Professor De Vivero, Article 46 does not protect against changes in environmental regulations. Accordingly, assuming that the creation of mining restriction or exclusion zones is the product of subsequent environmental laws – which it is not – there is in any event, simply no guarantee under Colombian law that environmental regulations restricting the possibility to conduct mining activities will not apply to a pre-existing mining concession.[235]

b) Claimant continues to mischaracterize the notion of "*acquired rights*" under Colombian law

289. According to Respondent, Claimant's position that Articles 36 and 34 of the 2001 Mining Code cannot deprive a title holder from its "*acquired rights*" without payment of compensation is based on the false premise that the mere execution of a concession contract grants "*acquired rights*" to conduct mining exploitation activities. However, as explained by Professor De Vivero in his report,[236] any acquired rights to exploit minerals in a concession are strictly defined and limited by the terms of the PTO and environmental license. In the absence of these authorizations, there are simply no "*acquired rights*" to mine to speak of.[237]

290. Further, Respondent contends that Article 58 of the Colombian Constitution protects "*acquired rights*" from "*leyes posteriores*" (subsequent laws) only. However, Articles 34 and 36 the 2001 Mining Code are not "*leyes posteriores,*" as these two provisions have been part of the 2001 Mining Code since its inception, more than two decades before Galway received the Option Agreement.[238] Articles 34 and 36 have never been challenged

[234] *See* De Vivero Expert Report, ¶ 61.

[235] Rejoinder, ¶ 149.

[236] De Vivero Expert Report, ¶ 61.

[237] Rejoinder, ¶ 150.

[238] Rejoinder, ¶ 151.

or deemed unconstitutional by the Constitutional Court for the reasons advanced by Claimant in this arbitration or in other fora. There is nothing new or controversial about these provisions. They have long been part of the legal framework for the development of mining activities in Colombia.[239]

291. Respondent challenges Claimant's position in its Reply, in the sense that Concession 14833 granted "*vested*" rights to explore and exploit minerals, and that Claimant maintains that rights under concession contracts are acquired at the time of execution. According to Respondent, Claimant's arguments are misconceived as a matter of Colombian law.

292. A mining concession contract governed by the 2001 Mining Code is acquired on the date it is registered in the assignee's name, but this is a completely distinct issue from the question of the date on which *exploitation* rights arising from those mining titles might become "*acquired rights*", if ever. Respondent asserts that, even assuming Claimant were a party to Concession 14833 – *quod non* – Claimant would not have obtained any "*acquired*" rights to exploit the Vetas Gold Project merely because the assignment of Concession 14833 fulfilled the requirements for the transfer of the title under Colombian law.[240]

293. Respondent alleges that Claimant and its expert, Ms. Ricaurte, fail to distinguish the notion of ownership of contractual rights from ownership of acquired rights, because "*clearly*" not all contractual rights are "*acquired*" rights.[241] Expert De Vivero contends that, based on the jurisprudence of the Colombian Constitutional Court, a right is an "*acquired right*" only if it has been "*perfected*", that is, that no conditions or requirements remain to be fulfilled for the right to be exercisable.[269] Accordingly, contractual rights subject to "*condiciones suspensivas*" (conditions precedent) can only qualify as "acquired rights" once these conditions have been met,[242] adding that as a matter of Colombian contract law, rights subject to a suspensive condition do not exist until the condition in question has been fulfilled.[243]

294. In dealing with mining exploitation activities, Respondent contends, the concessionaire must secure the approval of its PTO and obtain an environmental license. Accordingly, the

[239] Rejoinder, ¶ 153.

[240] Rejoinder, ¶ 162.

[241] Rejoinder, ¶ 163.

[242] De Vivero Expert Report, ¶ 94; *See also*, C-Memorial on Liability, Section IV.D.

[243] Rejoinder, ¶ 164.

right to exploit may only qualify as an "*acquired right*" when the concessionaire has an approved PTO and an environmental license for its mining project.[244]

295. The fact that the rights to explore and exploit can be transferred to third parties through option or assignment agreements, does not make them "*acquired*" rights as Claimant alleges, because even though the 2001 Mining Code permits the transfer of the "*rights arising from a concession contract*," that does not imply that such rights are "*acquired*."[245] In addition, even though Claimant argues that the Decision issued by the *Consejo de Estado* in 2017[246] held that rights acquired under concession contracts cannot be ignored, even in the face of subsequent environmental laws, Respondent asserts that such Decision did not concern measures adopted for environmental protection reasons.[247] Further, Respondent addresses Claimant's allegation that the Ministry of Mines admitted in Opinion 2012026198 of 14 May 2012[248] that rights under concession contracts are acquired at the time of execution, stating that such Opinion is a non-binding opinion in any event – and does not state that the right to *exploit* becomes an "*acquired right*" by the mere registration of the mining title – but merely clarified that no "*acquired*" right can be claimed where a concession contract does not even exist.[249]

c) No "*acquired right*" to Develop the Vetas Gold Project under Concession 14833 exists

296. Respondent challenges Claimant's position that it had "*acquired rights*" to explore and exploit, as well as "*a presumptive right to apply for the modification of the same licence*,"[250] and argues that there is no such thing as an "*acquired right*" to exploit minerals in the abstract, but rather rights only under Concession 14833 that were circumscribed by the terms of Reina de Oro's PTO, which authorized the development of "*artisanal activities*" with a production output of 106 kg of gold and 127 kg of silver per year (8.8 kg of gold and 10.6k g of silver per month).[251] Respondent further contends that by Claimant's

[244] Rejoinder, ¶ 166.

[245] Rejoinder, ¶ 167, *citing* **Exhibit C-047**, 2001 Mining Code, Art. 22.

[246] **Exhibit C-126**, Consejo de Estado, Sala de lo Contencioso Administrativo, Sección Tercera, Sentencia 38338, July 6, 2017, Danilo Rojas Betancourth.

[247] Rejoinder, ¶ 167(b).

[248] **Exhibit C-135**, Ministerio de Minas y Energía, Concepto 2012026198, May 14, 2012.

[249] Rejoinder, ¶ 167(c).

[250] Rejoinder, ¶ 169.

[251] Rejoinder, ¶ 170. Pursuant to Art. 2.2.5.1.5.5 of the Ministry of Mines, Decree No. 1666 of October 21, 2016, Reina de Oro's activities in Concession 14833 are classified as small-scale mining projects ("*proyectos de pequeña minería*") because their productionoutput does not exceed 15.000 tonnes per year. *See* **Exhibit R-161**, Ministry of Mines, Decree No. 1666, October 21, 2016.

own representations,[252] the Vetas Gold Project would likely have been classified as "*medium-scale*" (between 15,000 and up to 30.000 tonnes per year) or maybe even a "*large-scale*" mining project (above 30,000 tonnes per year), although the project never progressed to the stage of defining the scope of the exploitation activities that would form part of the Vetas Gold Project that would have required additional exploration and the preparing of mining feasibility and other engineering studies that were never completed.[253]

297. Further, Respondent contends that Claimant makes no attempt whatsoever to demonstrate that Reina de Oro's PTO would somehow have allowed the development of the large-scale mining activities envisaged in the Vetas Gold Project, adding that Claimant's internal documents reveal that Claimant "*understood fully well*" that the existing PTO concerned small-scale exploitation activities involving artisanal mining and processing of the ore through a small mill, which Claimant did not even purchase from Reina de Oro.[254]

298. Third, Claimant failed to provide evidence showing that a modification of Reina de Oro's PTO to allow the development of the Vetas Gold Project would have been approved by the ANM.[255]

299. Respondent recalls that Reina de Oro's PMA does not authorize the development of an industrial medium or large-scale mining project within Concession 14833 and that, in February 2002, the CDMB approved a PMA for the development of certain mining activities under License 14833 specifically tailored to manage and control the environmental impact of the "*artisanal, small-scale*" mining activities conducted by Reina de Oro within the mining title. Respondent further recalls that this PMA has been the environmental authorization under which Reina de Oro has conducted its mining exploitation activities since 2002.[256] Respondent challenges Claimant's assertion that, under Concession 14833, the concessionaire had a "*right to apply to modify the approved mining plan under the environmental license for larger scale exploitation activities*" adding that a concessionaire has no "right" to modify a PMA, and that, given the increased environmental impact resulting from larger, industrial mining operations and Concession 14833's overlap with the Santurbán *Páramo*, "*it is very unlikely that the relevant environmental authorities would approve a mere modification of the PMA*."[257]

[252] Reply, ¶ 165.
[253] Rejoinder, ¶ 171.
[254] Rejoinder, ¶ 172.
[255] Rejoinder, ¶ 173.
[256] Rejoinder, ¶ 175.
[257] Rejoinder, ¶ 176, *citing* Reply, ¶ 167(b).

300. In any event, even if Claimant could have been successful in modifying the PMA to include a completely different scope of activities, or could have obtained an environmental license, Respondent contends that this would not have allowed the new activities to be grandfathered because such activities were not activities authorized prior to February 9, 2010.[258]

C. PARTIES' CLAIMS AND REQUESTS FOR RELIEF

301. Claimant asks the Tribunal to:[259]

(a). declare that it has jurisdiction to adjudicate this dispute;

(b). declare that Colombia has breached the FTA and international law; and

(c). order Colombia to pay to Claimant compensation for all losses incurred in the form of damages, legal and other costs and expenses incurred in this arbitration, and interest, in amounts to be determined.

302. Respondent, in turn, has asked the Tribunal to:[260]

(a). dismiss Galway's claims in their entirety and declare that the Tribunal lacks jurisdiction over such claims. In the alternative:

(b). dismiss Galway's claims in their entirety and declare that there is no basis of liability accruing to Colombia under the FTA, including but not limited as a result of:

(i) Any claim or violation by Colombia of Article 811 of the FTA;
(ii) Any claim or violation by Colombia of Article 805 of the FTA; and
(iii) Any claim that Galway suffered losses for which the Republic of Colombia could be liable.

(c). order that Galway pay 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

(d). grant such relief that the Tribunal may deem just and appropriate.

303. The Parties' positions are summarized in the various sections below. The Tribunal has considered the entirety of the Parties' positions and arguments, irrespective of whether an argument is mentioned in the summaries of the Parties' positions included in this Award.

[258] Rejoinder, ¶ 177.

[259] Cl. Memorial, ¶ 486.

[260] Memorial on Jurisdiction, ¶ 100; C-Memorial on Liability, ¶ 484; Rejoinder, ¶ 314.

VII. JURISDICTION

304. Although Claimant contends in its Request for Arbitration and in its Memorial that the Tribunal has jurisdiction to hear the case since it meets the requirements under the FTA, and specifically addresses those relating to jurisdiction *ratione personae, ratione materiae* and *ratione temporis*, Respondent has challenged the jurisdiction of the Tribunal, alleging that there are "*serious flaws*" in Claimant's case.[261]

305. Respondent has challenged the jurisdiction of this Tribunal on six grounds, alleging:

(A). *First,* that Claimant has not made a covered investment in Colombia (*ratione materiae)*;

(B). *Second,* that Claimant is not a protected investor under the FTA (*ratione personae);*

(C). *Third,* that Claimant's claims fall outside of the temporal jurisdiction of the Tribunal (*ratione temporis)*;

(D). *Fourth,* that Claimant has failed to comply with two of the FTA's mandatory conditions precedent: to submit its claims within the mandatory limitation period, and to submit a valid notice of intent prior to submitting its claims to arbitration;

(E). *Fifth*, that Colombia has denied the benefits of Chapter Eight of the FTA to Claimant in accordance with Article 814(2) of the FTA; and

(F). *Sixth*, that Claimant's claims fall outside of the Tribunal's jurisdiction *ratione materiae* because Respondent has not consented to arbitrate claims arising out of measures that are expressly excluded from the scope of the FTA.

306. Respondent contends that the burden of proving that a claim satisfies all the jurisdictional elements of the case lies with Claimant, who has addressed these "*in a perfunctory manner*," simply making conclusory statements that the requirements under the FTA are satisfied but has failed to substantiate numerous jurisdictional elements required to meet its burden of proof.[262]

307. In response to Respondent's allegation that the burden of proof is on Claimant, Claimant draws support from the tribunal in *Phillip Morris Asia Limited v. Australia*,[263] where it was stated that "… *it is for the Claimant to allege and prove facts establishing the conditions for jurisdiction under the Treaty; for the Respondent to allege and prove the facts on which its objections are based; and, to the extent that the Respondent has established a* prima

[261] Memorial on Jurisdiction, ¶ 8.

[262] Memorial on Jurisdiction, ¶¶ 2, 10-12.

[263] **Exhibit CL-100**, *Phillip Morris Asia Limited v. Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, December 17, 2015, ¶ 495.

facie *case, for the Claimant to rebut this evidence*,"[264] and indicates that other tribunals have followed this approach, making reference to *Caratube International Oil Company LLP v. Kazakhstan* and *Apotex v. United States*. [265]

308. This Tribunal agrees. Both Parties bear the burden to prove their respective positions on the subject of jurisdiction.

309. The Tribunal proceeds to examine and decide the jurisdictional objections of Respondent.

A. GALWAY HAS NOT MADE A COVERED INVESTMENT IN COLOMBIA (*RATIONE MATERIAE*)

I. The Parties' Positions

a) Respondent's Position

310. Respondent contends that under Articles 801, 805 and 811 of the FTA, substantive protections and consent to arbitration exists only with respect to "covered investment[s]", and that Claimant must therefore establish, as a threshold matter, that it has made such a "covered investment" within the meaning of the FTA and held such an investment at the time of the alleged violations of the FTA.[266] Respondent argues that Claimant never held any rights of ownership or control over Concession 14833, and that the Option Agreement does not constitute a covered investment under the FTA.[267]

311. According to Respondent, the FTA only protects "*investment*[s] *of an investor of a Party*", and Article 838 of the FTA defines an "*investment of an investor of a Party*" as "*an investment owned or controlled directly or indirectly by an investor of such Party.*" Claimant never did own or control Concession 14833 as it never was the concessionaire named as the party to Concession 14833 registered by the ANM in Colombia's Mining Registry.[268]

312. Respondent further argues that nor did Claimant control Concession 14833 because, while the Option Agreement conferred upon Claimant an option to be assigned Concession 14833 in the future upon the satisfaction of certain conditions, the Option Agreement provides no

[264] C-Memorial on Jurisdiction, ¶¶ 24-30.

[265] **Exhibit CL-087**, *Caratube International Oil Company LLP v. Kazakhstan*, ICSID Case No. ARB/13/13, Award, September 27, 2017, ¶ 314; **Exhibit CL-088**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, August 25, 2014, Section 8.8.

[266] Memorial on Jurisdiction, ¶ 13.

[267] Memorial on Jurisdiction, ¶ 15.

[268] Memorial on Jurisdiction, ¶¶ 15-16.

rights of control over the concession until an assignment has been concluded. Respondent contends that control over Concession 14833 at all times remained with Reina de Oro, adding that "*it is well established that a claimed right does not qualify as an investment if it is contingent or dependent on the satisfaction of legal requirements or conditions*", and that to be protected as an investment, a proprietary right must have vested specifically in a claimant before the date of the alleged breach. Thus, Respondent concludes, Concession 14833 cannot be deemed to be a "covered investment."[269]

313. Respondent further contends that the Option Agreement is not a "covered investment" and describes the definition of "Investment" under the FTA, which includes a list of "investments" that is exhaustive, and the Option Agreement is not one of those kinds of interest set out therein. Respondent alleges that, even though Claimant attempts to fit the Option Agreement under sections (a) "*an enterprise*", (g)(i) "*interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions*", and (h)(i) "*any other tangible or intangible property, moveable or immovable property, and related property rights acquired in the expectation or used for the purpose of economic benefit or other business purposes*", it is clear that the first is inapplicable and the remaining two deal with property rights – rights *in rem* – and Claimant's cannot be considered as having such rights. Perhaps *in personam*, adds Respondent, but not *in rem*.[270]

314. In its Post-Hearing Brief, Respondent further contends that Claimant's rights under the Option Agreement do not qualify as an "investment" because under the Option Agreement, Claimant had no right to exploit, and no right to explore after December 20, 2013 – its termination date. Such limited *in personam* rights do not meet the definition of a protected investment under the FTA or the ICSID Convention.[271]

315. Such rights of Claimant under the Option Agreement were not modified or expanded as a consequence of the exercise of the option, and Claimant did not pay the amounts due to Reina de Oro to acquire Concession 14833. This was, according to Respondent a "*conscious business decision not to acquire title to the Concession nearly a year before the issuance of Judgment C-35.*"[272] In this connection, although Respondent acknowledges Claimant's effort to pursue enforcement of the exercise of the option, and the different steps taken by Claimant in seeking a decision from an arbitral tribunal and the enforcement

[269] Memorial on Jurisdiction, ¶¶ 17-20.

[270] Memorial on Jurisdiction, ¶¶ 21-25.

[271] Respondent's PH Brief, ¶ 30.

[272] Respondent's PH Brief, ¶ 36.

actions thereafter, Respondent contends that Claimant "… *should have waited for Reina de Oro's obligation to sign the assignment agreement to become enforceable …*".[273]

316. Respondent asserts that, during the Hearing, Claimant "… *offered new, vague and inconsistent formulations*." For example, Galway asserted that its "*investment was the entering into the Option Agreement, combined with the expenditure of the money required to maintain the right to exercise, combined with the right to exercise*"; or that its investment was "*the rights acquired by* [Galway] *when it entered into the Option Agreement and the rights* [Galway] *acquire*[d] *the moment it exercised its option, which are the rights to explore and exploit under Concession Contract 14833*."[274]

317. Claimant cannot rely on Concession 14833 as its "investment", or the rights conferred under that concession, asserts Respondent, because Claimant never became the owner of it. Reina de Oro was and remains the sole party registered as the owner of Concession 14833, and is therefore the owner.[275]

318. Respondent contends that the fact that Claimant and Reina de Oro never executed a signed contract for the assignment of a concession is not, as Claimant suggests, a mere administrative formality. As a matter of Colombian law, a written document recording the assignment, together with its subsequent registration, is a substantive and mandatory requirement for an assignment. But even if it existed, Claimant would not be the title holder because it was never registered in the Mining Registry, as was confirmed by Prof. De Vivero's expert report and testimony at the Hearing.[276]

319. Respondent argues that Claimant not only did not own Concession Contract 14833; Claimant never controlled it either.[277] *First,* because the Option Agreement was a private contract by which Reina de Oro allowed Claimant to conduct subcontracted exploration activities in the area of Concession 14833 for a fixed term, and gave Claimant an optional right to acquire Concession 14833 subject to the satisfaction of certain conditions, and in consideration for payment of certain sums of money. *Second*, Claimant's exercise of the Option Agreement did not give it control over Concession 14833 either because the parties never consummated the transfer of Concession 14833 by signing an assignment agreement and registering that agreement with the ANM. *Third*, the attachment over Concession

[273] Respondent's PH Brief, ¶ 36.

[274] Respondent's PH Brief, ¶ 13, *citing* Tr. Day 1, 102:9-15.

[275] Respondent's PH Brief, ¶¶ 15-17.

[276] Respondent's PH Brief, ¶¶ 19-20.

[277] Respondent's PH Brief, ¶ 24.

14833 did not give Claimant control over Concession 14833 either. Rather, the attachment simply prevented Reina de Oro from disposing of Concession 14833.[278]

320. According to Respondent, the fact that Claimant never acquired title to Concession 14833 is dispositive of Claimant's claims as a jurisdictional matter because Claimant cannot show that it owned or controlled a qualifying investment under the FTA.[279]

321. Respondent also contends that Claimant's limited rights under the Option Agreement do not qualify for protection under the FTA's narrow definition of an "investment", and that the list under Article 838 of the FTA sets out an exhaustive list of nine types of interests that may constitute an "investment" – as Canada confirmed that the list is exhaustive, not illustrative –[280] and that Claimant has failed to prove that it held a qualifying investment under the FTA.

322. Respondent also argued in its Post-Hearing Brief that Claimant has failed to "*discharge its burden of proving that this dispute arises directly out of an investment within the meaning of Article 25(1) of the ICSID Convention*,"[281] which it adds is a separate requirement from the FTA. A pre-investment expenditure which does not secure the rights to an investment, and which fails to mature into an investment does not amount to a protected investment, Respondent draws support from *Salini v. Morocco*, where the tribunal held that in order to qualify as an investment, a claimant must establish: (a) a contribution and commitment of capital, (b) a certain duration over which the project is implemented, (c) sharing of the operational risks, and (d) a contribution to the host State's development, which Respondent examines in turn: [282]

a). Claimant did not make any contribution or commitment of capital to invest in Concession 14833. Respondent recalls that Claimant's counsel admitted at the Hearing, that Claimant has not paid the amounts due under the Option Agreement in order to acquire the concession, nor has it incurred any expenses to acquire the Option Agreement, since this was a transfer from its parent company, nor has it expended any sums towards exploration activities in Colombia;[283]

[278] Respondent's PH Brief, ¶¶ 24-27.

[279] Rejoinder, ¶ 4.

[280] Respondent's PH Brief, ¶ 41, *citing* Canada's NDP Submission, ¶ 5.

[281] Respondent's PH Brief, ¶ 43.

[282] Respondent's PH Brief, ¶ 41, *citing* **Exhibit RL-171**, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, July 23, 2001, ¶ 52.

[283] Respondent's PH Brief, ¶¶ 47-51.

b). The duration of Claimant's activities in Colombia was exceedingly limited. Even though it claims to have carried out exploration activities from 2010 to September 2013, Claimant itself could only have carried out any such activities from December 2012 onwards, since it was formed in May 2012;[284]

c). Claimant did not share in any risk associated with Concession 14833. Respondent alleges that the risks attached to the concession were taken by Reina de Oro, as the party that owned and controlled the Concession 14833, which actually carried out a mining exploitation project within it;[285] and

d). Claimant has failed to show that it made any contribution to Colombia's economic development, whether in the form of creation of know-how, employment opportunities, payment of taxes, or other positive contribution.[286]

b) Claimant's Position

323. Claimant indicates that under Article 838 of the FTA, a "covered investment" means an investment made within a Party's territory "*existing on the date of entry into force of this Agreement, as well as investments made or acquired thereafter.*"

324. In turn, "investment" is broadly defined under said provision, and includes those "*owned or controlled directly or indirectly by an investor of such party*." It is irrelevant, Claimant adds, whether an investment is held through intermediary corporate entities.[287]

325. By operation of the Option Agreement (dated December 22, 2009) and the subsequent Assignment Agreement (executed on December 6, 2012), Claimant contends that its investment in Concession 14833 and the rights and entitlements provided thereunder, fall squarely within the definition of "covered investments" in the FTA, and is entitled to the protections associated therewith.[288] The NMA's belated refusal to register the Assignment Agreement in 2018 cannot impede the treatment, especially if such refusal "*forms part of the impugned conduct at issue in this claim.*"[289] What matters, Claimant argues, is the

[284] Respondent's PH Brief, ¶¶ 54-55.

[285] Respondent's PH Brief, ¶¶ 56-57.

[286] Respondent's PH Brief, ¶¶ 58-59.

[287] Cl. Memorial, ¶ 281.

[288] Cl. Memorial, ¶ 282; **Exhibit CL-016**, Free Trade Agreement between Canada and Colombia, Article 838(g) includes among "investments" those "*interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under: (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions*; …", while 838(i) includes "*any other tangible or intangible property, moveable or immovable property, and related property rights acquired in the expectation or used for the purpose of economic benefit or other business purposes.*"

[289] Cl. Memorial, ¶ 283.

status of the investment at the time it was made and at the time of the impugned State conduct, and draws support on this point from *Mondev v. United States.*[290]

326. Claimant also asserts for the first time in its Post-Hearing Brief that GRVC (the Colombian branch of GRVH) is a "covered investment" under the FTA, because it is an enterprise within the definition of "enterprise" in Article 106 of the FTA. Further that GRVC's assets include the Option Agreement and by extension, the rights under Concession 14833. By establishing and funding a Colombian branch, Claimant "*has an interest in an enterprise that entitles it to a share in income or profits of the enterprise*" and "*to share in the assets of that enterprise on dissolution*."[291]

327. Claimant contends that the Option Agreement, and the rights it conveys to Claimant, are an interest arising from the commitment of capital or other resources to economic activity in Colombia, such as under a concession (pursuant to Article 838(g)(i) of the FTA), and that it has deployed "*at least USD$20 million*" in capital in Colombia in pursuing the Vetas Gold Project, including the exploration and other development work done.[292]

328. Claimant also contends that the Option Agreement is confirmed as an investment under Article 838 "… *because it does not fall into any of the categories in the definition of 'investment' in Art. 838 that are expressly excluded from FTA protection at subparagraphs (j)-(k)*."[293]

329. Claimant rejects Respondent's argument to the effect that Galway is not an "investor" within the meaning of the FTA as it is not a party "*that seeks to make, is making or has made an investment*" alleging that because GRH was a Cayman Islands corporation, Claimant was never a party to the Option Agreement or to the rights conferred thereby. Claimant contends that when it was incorporated in New Brunswick in 2012, GRH was a wholly owned subsidiary of Claimant. Because of its corporate structure, Claimant was a party to the Option Agreement through its subsidiary GRH and in turn its branch GRC. Claimant assumed all rights and obligations relating to the assets and liabilities of the Vetas Gold Project (including under the Option Agreement) in 2012.[294]

330. Further, Claimant states that during the years 2009, 2010, 2011, and 2012, until December 13, 2012, the monies for the expenses incurred by GRC and GRVC related to the execution

[290] **Exhibit CL-018**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, ¶ 91.

[291] Claimant's PH Brief, ¶¶ 34-40.

[292] Claimant's PH Brief, ¶ 7.

[293] Claimant's PH Brief, ¶ 12.

[294] C-Memorial on Jurisdiction, ¶¶ 34-35.

of the Option Agreement for the exploration of the mining area of Concession 14833 were made through transfers from Canada made by Galway Resources Ltd. which, at that time owned Claimant's branch GRC.[295] After the assignment of the Option Agreement, and during the years 2012, 2013, 2014, 2015, 2016, 2017, 2018 and 2019, the monies for the expenses incurred by GRC and GRVC related to the Option Agreement and the activities in the mining area of Concession 14833 were made through transfers from Canada by Claimant, on behalf of GRVC.[296] It adds that the foreign investment was registered before Banco de La República, the Central Bank of Colombia, in accordance with the legislation, and all mandates and requirements.[297]

331. Claimant then objects to Respondent's argument on the lack of registration of the assignment of Concession 14833, arguing that Respondent had no reason to refuse registration and such refusal cannot constitute a basis to object the jurisdiction nor have any legal effect. It explains how the NMA issued Resolution 341 on April 8, 2018, rejecting the assignment of the totality of its rights and interests under Concession 14833 to Claimant, which assignment had been requested by Reina de Oro three years earlier.[298]

332. Claimant contends that if Respondent had allowed and registered the assignment, Claimant would have acquired both the exploitation license as well as the environmental license under Concession 14833, and narrates how, more than three years after Reina de Oro had delivered it to the NMA, it was until April 2018 (just days after the Request for Arbitration in this proceeding had been submitted), that the NMA issued Resolution 341 responding to the NMA Notice of Assignment of Concession 14833, rejecting the assignment.[299] Although Respondent claims that the NMA rejected Reina de Oro's NMA Notice of Assignment simply because Concession 14833 was subject to an attachment order, and denies that the refusal to approve the assignment of Concession 14833 was triggered by Judgment C-035, or was the result of a sudden change in the interpretation of the applicable legal framework, Claimant argues that this argument is "*entirely non-sensical and circular*" because the attachment order and the assignment were both in favor of Claimant.[300]

[295] Reply, ¶ 120. Claimant points that the investment was registered before Banco de La República, the central bank of Colombia inaccordance with the legislation, mandates and requirements.

[296] Reply, ¶ 121.

[297] C-Memorial on Jurisdiction, ¶¶ 36-37.

[298] C-Memorial on Jurisdiction, ¶¶ 40-49.

[299] Reply, ¶ 125.

[300] Reply, ¶ 128.

333. The fact that Claimant's rights under the Option Agreement were not formally recorded in the Mining Registry, or that the underlying project had not yet proceeded to its fully intended scope of exploitation, does not diminish its status as an investor or the value of its rights, nor does it preclude a finding that Claimant had a covered investment under the FTA. It adds that Claimant's expert witness testified at the Hearing that the administrative act of registering the transfer of title, merely recognizes a prior existing right, and does not create any new rights.[301]

334. In its Post-Hearing Brief, Claimant addresses a question from the Tribunal regarding the impact of Reina de Oro being the party to file the Assignment Notice and its subsequent failure to execute the Assignment Agreement on Claimant's status as an "investor", and contends that the fact that Reina de Oro filed the Assignment Notice, and failed to sign the Assignment Agreement, has no effect on Claimant's status as an "investor" and its rights as a "covered investment."[302]

335. In this connection, it responds to Colombia's reliance on "*a fatally circular and factually unsupportable argument that Claimant never 'held' or 'possessed' the underlying property rights obtained from Reina de Oro*", and asserts that ownership is not required, since Article 838 expressly protects an investment that is either "owned or controlled directly or indirectly" by an investor, *i.e.*, it provides that both rights of ownership and rights of control are subject to the same FTA protections, and give rise to the same remedies.[303] It is irrelevant whether an investment is owned or is not owned, and whether the investment is held through intermediary corporate entities.[304]

336. Citing its legal Expert, Claimant contends also that concession contracts "… *provide defined contractual obligations that are stable and equivalent as between the State and a private party. This is an important characteristic supporting the fundamental purpose of the creation of concession contracts in Colombia, which was to serve as a tool to attract investment*."[305] Claimant adds that, under concession contracts, rights to undertake exploration and exploitation works are acquired rights that cannot be ignored because they become part of the property of the concession holders and are protected by legislation, even in the face of environmental regulation.[306]

[301] Questions for Dr. Margarita Ricaurte from the Tribunal. Tr. Day 1, 375:1-377:9

[302] Claimant's PH Brief, ¶ 13.

[303] Claimant's PH Brief, ¶ 14.

[304] Claimant's PH Brief, ¶ 21.

[305] Questions for Dr. Margarita Ricaurte from the Tribunal. Tr. Day 1, 257:13-258:3.

[306] Claimant's PH Brief, ¶ 23.

337. Claimant also comments further on a question presented by the Tribunal during the Hearing in respect to the length of time that elapsed between (a) the exercise of the option and (b) seeking registration of the transfer of title to Concession 14833 and/or seeking regulatory approval for increased mining exploitation activities, and asserts, *first*, that "*it is an uncontested fact*" that the existing environmental license expressly authorized and permitted mineral exploitation activities on the entire mining area encompassed by Concession 14833 and, *second*, that Claimant "*relentlessly pursued*" Reina de Oro to compel it to perform its contractual obligations and complete the assignment of Concession 14833, describing the different steps it took to that effect.[307]

338. In support of its position, Claimant cites the tribunal of the *Eco Oro* case, which determined that a future right to exploit (even one that could only be exercised upon obtaining future approvals) or to extend the term of a concession constituted a "vested right."[308] Consistent with this ruling, Galway's rights under the Option Agreement are sufficiently certain and constitute vested rights deserving of protection under the FTA. The Option Agreement therefore forms a property right acquired for a business purpose.[309]

339. Claimant describes how, in June 2015, as a result of the enforcement proceedings of the Reina de Oro Award initiated by Claimant, the Eighth Civil Court of the Circuit of Bucaramanga ordered a lien (or attachment) on the rights of exploration and exploitation of Concession 14833 against Reina de Oro. The assignment was rejected because the attachment on Concession 14833 – ordered as a result of the enforcement proceedings – did not allow the Government of Colombia to approve the assignment. However, the attachment was in favor of Claimant itself, the very party to which Concession 14833 would be assigned. While it is true that an attachment freezes assets, as Claimant acknowledges, it is also true that it was issued in its favor.

340. But even pending the registration of the assignment of Concession 14833, Claimant contends that its significant capital contributions under the Option Agreement and Assignment Agreement, including the ongoing exploration and exploitation activities within Concession 14833 and Claimant's litigation spending to arbitrate and enforce its rights and interests therein as against Reina de Oro, constitute an investment conferring jurisdiction under Article 838 of the FTA and Article 25(1) of the ICSID Convention to the Tribunal.[310]

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[307] Claimant's PH Brief, ¶¶ 24-30.

[308] **Exhibit CL-112**, *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, ¶¶ 440, 623.

[309] Claimant's PH Brief, ¶ 8.

[310] C-Memorial on Jurisdiction, ¶ 71.

341. Claimant contends that Resolution 341 "*stripped*" it of any future right to realize the Assignment Agreement – or any of its rights and interests in Concession 14833. Despite Respondent's attempt to "*resile from, and escape the consequences of, the carefully selected words of its own administrative instrument*", Resolution 341 was unequivocally clear that one of the bases for the refusal was the then current status of mining prohibitions, which were circumstances entirely under Respondent's control and incurable by Claimant.[311]

342. In its Reply, Claimant rejects the allegation of Respondent that (i) Concession 14833 either never had, or could never have secured, mining exploitation rights that could have been impacted by any legislative changes after 2010; and that (ii) Claimant never acquired any rights or interest in Concession 14833. Claimant contends that the rights under Concession 14833, both for exploration and exploitation, were *acquired* rights. Colombia itself, through the Ministry of Mines and Energy, has accepted that rights under concession contracts are acquired at the time of execution.[312]

343. To this end, Claimant asserts that on February 18, 2002, the CDMB issued Resolution 000127 to Reina de Oro approving an Environmental Management Plan for Concession 14833. Then, in July 2003, Reina de Oro prepared and presented the Mining Plan and Program corresponding to Concession 14833 to Minercol, as required by Article 84 of Law 685.[313]

344. To continue to challenge the assertion by Respondent that Claimant never acquired rights to Concession 14833, in its Reply Claimant confirms the process for the investment through the subscription of the Option Agreement, the arbitration that followed after Reina de Oro attempted to block the exercise of the option and the judicial proceedings which "*repeatedly confirmed and endorsed the validity*" of Claimant's rights to Concession 14833.[314]

345. In response to Respondent's argument that Claimant never acquired title to the Mining area because Claimant did not even exist before 2012, Claimant asserts that Galway Resources Ltd. has been present in Colombia since 2006, and it was this entity that established GRH and its Colombian branch, GRC, to carry out its activities in the country. GRH was a wholly owned subsidiary of Galway Resources Ltd. in 2012 when Claimant was incorporated in

[311] Reply, ¶¶ 140-141.

[312] Reply, ¶¶ 105-107, *citing* Expert Report of Dr. Margarita Ricaurte, p. 21.

[313] Reply, ¶¶ 108-109. Despite the assertion of Claimant that these plans and programs corresponded to Concession 14833, the Tribunal notes that the Exploration License was in effect until June of 2006 when it was converted into Concession 14833 as a consequence of the new Mining Code.

[314] Reply, ¶¶ 110-115.

New Brunswick, Canada as a consequence of a court-approved spin-off[315], and therefore Claimant "*was a party to the Option Agreement through its subsidiary GRH and in turn its subsidiary GRC.*"[316] Claimant thus assumed all rights and obligations to the assets and liabilities of the Vetas Gold Project (including the Option Agreement) in 2012.[317]

346. In response to a question from the Tribunal,[318] Claimant states that the court-approved plan of arrangement which established Claimant in 2012 (and its subsidiary branch GRVC), initially capitalized Claimant with USD 18 million in working capital, which was transferred from Claimant's predecessor company, Galway Resources Ltd.,[319] adding that Galway Resources Ltd., in turn, had predominantly raised those funds from investors by way of a private placement which was brokered on January 13, 2011, and which raised CAD 25.7 million.

347. On the question of whether Claimant had acquired control over Concession 14833, Claimant points to the cross-examination of Mr. Felipe De Vivero, Colombian law expert, whose report was submitted by Respondent, where he admitted that: (i) a private arbitral award is recognized under Colombian law as having the same binding force of an order of a Colombian court; (ii) control of a concession can be in the hands of a party that does not legally own it; (iii) as the creditor that sought and obtained the *embargo* order in relation to the concession, Claimant had the right, but not the obligation, to consent to any sale, assignment, transfer or encumbrance of any right under concession; (iv) as a result of the *embargo* in favor of Claimant, no registration of any assignment requested by Reina de Oro could be inscribed or approved unless Claimant or a judicial authority approved it; and (v) as a result of the attachment in favor of Claimant, Claimant has control over the Option Agreement and all rights contained therein.[320]

II. The Tribunal's Analysis

348. Respondent first contends that under the FTA, specifically Articles 801(1) and 838, the protection is granted to "covered investments", which concept in turn refers to an "*investment of an investor of a Party*", which is then defined as "*an investment owned or controlled directly or indirectly by an investor of such party.*" Respondent gathers support from Canada's NDP Submission to the effect that "[a]*n investor cannot establish a breach*

[315] Cl. Memorial, ¶¶ 24, 38, *citing* Hinchcliffe Statement, ¶ 18.

[316] Reply, ¶¶ 116-118.

[317] Reply, ¶ 119.

[318] The question presented after the Hearing was: How were GRVC's activities after December 6th, 2012, financed?

[319] Rengifo Statement, ¶ 79.

[320] Claimant's PH Brief, ¶¶ 50-53, Tr. Day 2, pp. 457-459, 463, 466, 470.

of Chapter Eight unless it was owed an obligation at the time of the alleged breach, and an investor cannot be owed an obligation under Chapter Eight with respect to an investment unless it owned or controlled that investment at the time of the alleged breach."[321]

349. Indeed, Canada states that in order to qualify as an investor under the FTA, a national or enterprise of a Party must therefore seek to make, be making or have made an "investment" within the meaning of Article 838 of the FTA adding that the list of what constitutes an "investment" is exhaustive and not illustrative. Only the legal interests listed under Article 838 are entitled to the protections set out in Chapter Eight.[322]

350. Canada further contends that to bring a claim under Article 819, an investor must establish that it owned or controlled an investment – as that term is defined in Article 838 – at the time of the alleged breach, and that this reflects the customary international law principle, codified in ILC Articles on Responsibility of States for Internationally Wrongful Acts, that "[a]*n 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 the act occurs*."[323]

351. The initial issue to be addressed by the Tribunal is to determine what is the investment which Claimant argues is protected, since Claimant has contended that it is Concession 14833 in instances, while in others it argues that it is the rights under the Option Agreement. This matter certainly needs clarification, as indicated by Respondent:

> *In the written phase of the proceedings, Galway had not offered any coherent statement of what 'investment' Galway claimed to have owned or controlled. Galway's written pleadings identified its alleged "investment" variously as the Option Agreement, the Concession, or the 'rights' deriving from the Concession. Despite being asked specifically to clarify its position at the hearing, Galway still failed to give any clear answer.* [324]

352. In order to clarify the crucial issue of what is the protected investment, it might be appropriate to take as a reference one of the last descriptions by Claimant of its investments:

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[321] Canada's NDP Submission, ¶¶ 5-7.

[322] Canada's NDP Submission, ¶¶ 5-6.

[323] Canada's NDP Submission, ¶ 7; *citing* ILC Articles on Responsibility for States for Internationally Wrongful Acts, 2001, Article 13, *J. Crawford,* "*The International Law Commission's Articles on State Responsibility*", (2002), Part I, Chapter III, p. 132: "*A requirement that arbitrators apply the rules of international law in force at the time when the alleged wrongful acts took place is a common stipulation in arbitration agreements, and undoubtedly is made by way of explicit confirmation of a generally recognized principle.*"

[324] Respondent's PH Brief, ¶ 13.

> *… (1) the Option Agreement is a covered investment, (2) GG's rights in relation to Concession Contract 14833 is a covered investment; and (3) GG's ownership of GRVC, its Colombian operational entity, is a covered investment.*[325]

353. In other words, in this paragraph of Claimant's Post-Hearing Brief, Galway stated that its covered investments under the FTA should be the following:

1. The Option Agreement: Claimant maintains that the Option Agreement is a covered investment according with Article 838 (g)(i) and Article 838 (i).
2. The acquired rights in relation to Concession Contract 14833: Claimant alleges that it possessed all the rights that Reina de Oro had in Concession 14833.
3. The ownership of GRVC: Claimant asserts that GRVC – its Colombian branch – qualifies as a covered investment under the FTA pursuant to Article 838(e). In this regard, Claimant explains that the establishment of its Colombian branch entitles it to share in its profits. It is noteworthy that Claimant raised this argument for the first time in its Post-Hearing Brief.

354. The Tribunal will examine successively these alleged investments, starting by (2) and then looking at (1) and (3). In other words, the following issues will be addressed by the Tribunal, namely:

a) Whether Concession 14833 is a covered investment.
b) Whether the Option Agreement is a covered investment.
c) Whether GRVC is a covered investment.

355. The *first issue* is whether Galway has a protected investment in the form of acquired rights under the Concession 14833, in other words, whether it is the owner of Concession 14833. This is relevant because the Concession 14833 is currently registered in the name of Reina de Oro, and Respondent has contended that Claimant failed to acquire Concession 14833.

356. To examine this, it is relevant to recall certain basic facts of the case. As the record shows, and is addressed in the Section IV above:[326]

(i) on December 22, 2009, Galway Resources Holdco Ltd. ("**GRH**") – through its Colombian branch ("**GRC**") – and Reina de Oro entered into the Option Agreement;

[325] Claimant's PH Brief, ¶ 6.

[326] Section IV. Factual Background.

(ii) on December 6, 2012, (when Law 1450 was in force), GRC assigned all of its rights under the Option Agreement to Galway Resources Vetas Holdco Ltd. ("**GRVC**"), Colombian branch ("**GRVH**"); [327]

(iii) on December 11, 2013, GRVC exercised the option to acquire exploration and exploitation rights under Concession 14833;

(iv) after Reina de Oro challenged the exercise of the Option Agreement, GRVC and Reina de Oro submitted their controversy to arbitration, and on February 13, 2015, the arbitral tribunal in the Reina de Oro Arbitration issued its final award, which concluded that Reina de Oro breached its obligation under the Option Agreement by refusing to sign the 14833 Assignment. Thus, the tribunal ordered Reina de Oro to sign both: (i) the notice of assignment and (ii) the assignment agreement. The arbitral tribunal also ruled that GRVC should pay the price corresponding to the exercise of the option, on the day following the registration of the 14833 Assignment in the Mining Registry;

(v) on February 24, 2015, Reina de Oro only delivered the Notice of Assignment to the NMA;

(vi) on March 5, 2015, GRVC commenced enforcement proceedings against Reina de Oro to collect the damages awarded by the Reina de Oro Arbitration tribunal; and

(vii) as a consequence of this action, on May 5, 2015, GRVC obtained an attachment order (*embargo*) on Concession 14833, which prevented Reina de Oro from transferring the Concession to any third parties, but did not confer property rights to GRVC.

357. *First*, Respondent contends that Claimant has failed to prove that it owned or controlled Concession 14833. In this respect, Respondent contends that Concession 14833 continues to date to be registered in the name of Reina del Oro,[328] because Claimant has yet to complete registration of the assignment of the Option Agreement and, citing Articles 14 and 50 of the 2001 Mining Code, concludes that to be deemed an owner of a concession under Colombian laws, the formalities need to be completed.

358. *Second*, Respondent argues that even if Reina del Oro submitted the NMA Notice of Assignment, Claimant (and Reina del Oro) failed to submit in accordance with Article 22 of the 2001 Mining Code the executed assignment agreement as required not only by said code, but also under Clause Six of the Option Agreement, which provides that a notice of assignment to the Mining Registry shall need to be "*accompanied by the ASSIGNMENT*

[327] **Exhibit C-086**, Assignment Agreement of the Irrevocable Rights and Operation Assignment Contract between Galway Resources Holdco Ltd. Sucursal Colombia and Galway Resources Vetas Holdco Ltd. Sucursal Colombia, December 6, 2012.

[328] **Exhibit R-016**, *Agencia Nacional de Minería*, National Mining Registry Certificate, Concession 14833, November 17, 2020.

CONTRACT."[329] In this connection, Respondent states that, even though the Reina de Oro Award rendered in the Bucaramanga Arbitration ordered Reina de Oro to execute the assignment agreement of the rights to Concession 14833 and give the NMA Notice of Assignment, when Claimant sought to enforce such award (through its Colombian branch GRVC) it sought to enforce its right to damages –and this is the reason Claimant was granted an *embargo* of the rights to the Concession 14833.[330]

359. The evidence on record shows that such agreement (assignment contract) was never executed nor filed before the NMA. Even though the award rendered in the Reina de Oro Arbitration ordered Reina de Oro to execute the Assignment Agreement and give the NMA Notice of Assignment, GRVC did not seek to judicially compel Reina de Oro to execute the Assignment Agreement.[331]

360. As recognized by Dr. Ricaurte in her Expert Report, the 2001 Mining Code did not specify the moment in which an assignment agreement had to be submitted, a situation which was interpreted in the NMA's practice as requiring that it be filed before the notice's acceptance. Hence, the agency's practice was to issue a single resolution accepting the notice and registering the assignment agreement.[332]

361. In conclusion, regarding the "*acquired rights in relation to Concession Contract 14833*," it is clear to this Tribunal that Claimant (through GRVH) did not become the owner of Concession 14833. Therefore, these rights cannot be considered a protected investment under the FTA, and the Tribunal finds on the first issue that Claimant did not own or control Concession 14833.

362. Consequently, although "concessions" expressly qualify as "investments" under Article 838(g)(i) of the FTA, the Concession 14833 cannot be deemed to be a "covered investment" of Claimant.

363. The foregoing notwithstanding, the Tribunal is also clear that Claimant wanted to acquire Concession 14833. This was Claimant's objective. Considering that Claimant did not acquire Concession 14833, the Tribunal needs to add a *caveat*, however, and deems that Concession 14833 was nonetheless a *potential* investment of Claimant. In that connection, it has therefore to be determine whether Claimant has been deprived of its interest in this

[329] **Exhibit C-007**, Option Agreement, Clause Six (ii). Confirmed also by Prof. De Vivero Arciniegas (De Vivero Expert Report, ¶¶ 13-14) and Mr. Amaya Lacouture (Lacouture Statement, ¶ 7(ii)).

[330] **Exhibit C-091**, Order of Payment of Damages to GRVC, March 25, 2015. Respondent cites Article 434 of the General Procedural Code as the basis for the demand.

[331] **Exhibit C-091**, Order of Payment of Damages to GRVC, March 25, 2015.

[332] Expert Report of Dr. Margarita Ricaurte, pp. 39-40.

potential investment by an action of Colombia, a question that should be dealt with as part of the merits analysis, if necessary.

364. The *second issue* is whether the Option Agreement is a protected investment. The Parties disagreed on whether or not a contractual right can be a protected investment.

365. According to Respondent, where an investment is claimed to arise out of a contract, it must be shown that the contract gives rise to *property rights* – rights *in rem*. According to Respondent, contractual rights cannot automatically be equated with property rights.

366. Claimant's position is different. During the Hearing, Arbitrator Bullard precisely posed the question to Claimant's counsel on whether the investment was the Concession 14833 or the rights under the Option Agreement.[333] Mr. Lawrence Thacker responded that "… *it will be our submission that we acquired –our investment was the entering into the Option Agreement, combined with the expenditure of the money required to maintain the right to exercise, combined with the right to exercise, and then, upon exercise, acquisition of the rights that exist under Concession 14833.*" He added that it "*... is not required that the ... assignment be inscribed on the registry in order for us to have those rights.*"[334]

367. Subsequently, Claimant's counsel indicated that the investment protected under the FTA is a "contractual right", indicating that "[c]*ontractual rights are protected under the FTA. They are certainly protected under subparagraph (i), any other property, tangible or intangible, moveable or immovable. It's an intangible property. But it's also an enterprise, I would say.*"[335]

368. For the Tribunal to address the question, it is appropriate to start with notions of ownership and control in FTA Article 838's definition of investment:

> ***investment*** *means:*
>
> *(a) an enterprise;*
>
> *(b) shares, stocks and other forms of equity participation in an enterprise;*
>
> *(c) bonds, debentures and other debt instruments of an enterprise, but does not include a debt instrument of a state enterprise;*
>
> *(d) a loan to an enterprise, but does not include a loan to a state enterprise;*

[333] Tr. Day 1, 101:11–102:4.

[334] Tr. Day 1, 102:9–103:1.

[335] Tr. Day 1, 105:9–105:14.

(e) an interest in an enterprise that entitles the owner to a share in income or profits of the enterprise;

(f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution;

(g) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under

(i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or

(ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;

(h) intellectual property rights; and

(i) any other tangible or intangible property, moveable or immovable property, and related property rights acquired in the expectation or used for the purpose of economic benefit or other business purposes;

but ***investment does not mean***

(j) claims to money arising solely from

(i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to a national or an enterprise in the territory of the other Party, or

(ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or

(k) any other claims to money,

that do not involve the kinds of interests set out in subparagraphs (a) to (i);

investment of an investor of a Party *means an investment owned or controlled directly or indirectly by an investor of such Party*[.]

369. Respondent has pointed out that subsection Article 838(g)(i) of the FTA refers to those rights or interests arising from contracts involving "*the presence of an investor's property in the territory of the Party*." To the extent that Claimant did not own Concession 14833, Respondent contends that the Option Agreement would not qualify as an investment under the FTA.

370. Article 838(g) of the FTA does not appear to have a restriction to contracts involving the existence of rights *in rem*. While that is the assumption of Article 838(g)(i), it is merely for illustrative purposes, as the heading of Article 838 states "such as". If items (i) and (ii) of Article 838 (g) were an exhaustive list, there would be no point in including such a heading (they could have been included directly in the main list) and the expression "such as" would

be left meaningless. Moreover, Article 838(g) covers other "*interests arising from the commitment of capital or other resources in the territory of a party to carry on an economic activity in that territory*", not limited to the examples in (i) and (ii) included thereafter.

371. The Tribunal finds that the contractual rights included in the Option Agreement may indeed constitute an "investment" under the FTA under the definition of the term in Article 838(g) FTA, specifically section (i) which provides:

> [A]*ny other tangible or intangible property, moveable or immovable property, and related property rights acquired in the expectation or used for the purpose of economic benefit or other business purposes.*

372. In other words, the Tribunal agrees with Claimant. It is common ground that contractual rights can be considered as an investment, as much as rights *in rem*.

373. Now, even though Claimant exercised the Option, this does not mean that Claimant's right has been extinguished. Resolution 341 did not restrict Claimant's right to acquire ownership of Concession 14833, and Claimant can still apply for registration to the NMA. Indeed, the Tribunal finds that Resolution 341, despite having refused to register the change of ownership of the Concession 14833, said action did not affect Claimant's rights to submit a new application to register the assignment of the Concession. Thus, from the evidence in the file, it is not disputed that Claimant could still file a new application to the NMA.

374. Claimant has the right to lodge a new application for the assignment of the Concession. Indeed, from the evidence in the file, it is not disputed that Claimant could still file a new application to the NMA:

a. During the opening statements of Respondent, its Counsel reiterated the point. "MR. MANTILLA SERRANO (Colombia): *To be clear, this Resolution does not prevent GRVC from applying to become the Owner again. I mean, this was not disposable. They could have filed again. It was just rejecting the original filing. This filing could have been made again by Galway.*"[336]

b. In its Counter-Memorial on Liability, Respondent argued that "[A]*s Mr. Amaya Lacouture explains, Reina de Oro can still complete the transfer of Concession 14833 to Galway. All Reina de Oro needs to do is to deliver a new notice of assignment to the ANM, followed by a signed copy of the assignment contract and the required information on Galway's legal capacity and term of duration. In addition, Galway must withdraw its attachment request with respect to Concession 14833.*"[337]

[336] Tr. Day 1, 183:2-7.

[337] C-Memorial on Liability, ¶ 304.

c. Finally, Mr. Amaya Lacouture indicated in his first witness statement that "*Galway could (and even could still today) obtain the assignment of Concession 14833 if Reina de Oro submits a new notice of assignment that meets all the requirements of the 2001 Mining Code. This includes, of course, the negotiation document of the mining title between the two companies.*"[338]

375. Therefore, it seems clear to the Tribunal that Resolution 341 did not restrict Claimant's right under the Option Agreement to acquire ownership of the Concession.

376. Another issue before the Tribunal, is the argument that the Option Agreement was not signed by Claimant and belongs to GRVC (the Colombian branch of GRVH).[339] It was GRVC who exercised the Option,[340] not Claimant.

377. This means that, despite that finding by the Tribunal that the Option Agreement, as such, can be considered as an investment for purposes of the FTA, it is nonetheless a "*right to acquire a right*." The next question raised is whom does such right belong to, an issue on which the Parties disagree.

378. Respondent insists on the fact that the Option Agreement does not belong to Claimant, as indicated, for example, in its Counter-Memorial:[341]

> *193. As a result, Galway Resources, and not Galway, was the entity that was involved in the acquisition of the Vetas Gold Project:*
>
> *– Galway Resources Holdco's Colombian subsidiary signed the Option Agreement with Reina de Oro on 22 December 2009. At the time, Galway Gold did neither exist nor had it received the Vetas Gold Project.*
>
> *– Galway Resources Colombia transferred the Option Agreement to Galway Resources Vetas Holdco Ltd. Sucursal Colombia ("GRVC") on 6 December 2012. This transfer was part of the Assignment Agreement by which Galway Gold received the Vetas Gold Project from Galway Resources Holdco.*
>
> *194. Accordingly, Galway did not enter into the Option Agreement. Rather, on 22 December 2009, Galway Resources Holdco's Colombian subsidiary entered into the Contrato de opción (Option Agreement) with Reina de Oro in relation to Concession 14833.*

[338] Lacouture Statement, ¶ 21.

[339] **Exhibit C-070**, Option Agreement with Irrevocable Rights Assignment and Operation between Reina de Oro and Galway Resources, December 22, 2009.

[340] **Exhibit C-087**, Letter from Galway Vetas to Reina de Oro exercising the option positively on December 13, 2012.

[341] C-Memorial on Liability, ¶¶ 193-194.

379. Claimant challenges the position of Respondent and asserts that the fact that the Option Agreement was executed by GRVC (the Colombian branch of GRVH) is irrelevant, since GRVH was a wholly owned subsidiary of Galway Resources Ltd. in 2012 when Claimant was incorporated as a consequence of the court-approved spin-off, and consequently assumed all rights and obligations to the Option Agreement.[342]

380. To decide whether the Option Agreement can be analyzed as an investment of Claimant, the Tribunal considers that it has to deal with the third alleged investment, as presented by Claimant. The *third issue* is indeed whether ownership of GRVC can be considered as a protected investment of Claimant and, consequently, whether the Option Agreement – being one of the assets of that entity – is also a protected investment of Claimant.

381. The Tribunal is conscious that, at first glance, it might seem that Claimant has raised this argument for the first time in its Post-Hearing Brief and, for that reason, it should be considered inadmissible in accordance with Rule 41 of the Arbitration Rules. Nevertheless, the Tribunal is of the opinion that, in essence, this argument is not a new one as it has been implicit in the claim submitted by Claimant, and the description it has made throughout the process regarding how its investment was structured.[343] Therefore, more than being a new argument that was first alleged in Claimant's Post-Hearing Brief, it only constitutes an explanation of the facts already alleged by Claimant in previous instances. Hence, the Tribunal will proceed to examine this issue.

382. Numerous investment tribunals have clearly indicated that a foreign investor having shares in a local company has no rights to the concessions granted to or the contracts entered into by the local company. Some of the cases concern only indirectly owned or controlled shares, which can benefit from an international protection, while others discuss the question of indirectly owned or controlled assets of the company in which the foreign shareholder has shares, for which it cannot claim directly, but only for the indirect reflective loss on its shares.[344]

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[342] As described in Section IV, Factual Background *supra*, Claimant was incorporated in New Brunswick, Canada as a consequence of a court-approved spin-off or plan of arrangement from Galway Resources Ltd. As a consequence, Claimant held the Vetas Gold Project.

[343] Section IV, Factual Background *supra* examines the structure. In particular, paragraphs under the heading "Galway Resources Ltd. Investment in Vetas Gold Project" and "Exercise of the Option".

[344] **Exhibit CL-017**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, August 3, 2004, ¶¶ 136-138; **Exhibit CL-049**, *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, July 17, 2003, ¶¶ 66-67; *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, April 28, 2011, ¶ 202; *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award, September 12, 2010, ¶ 608; **Exhibit CL-061**, *El Paso Energy International Company*

383. In the present case, the definition of investment refers not only to shares but also to an *enterprise* owned or controlled directly or indirectly by an investor. The ordinary meaning of the terms "owns … the enterprise" as applied to a corporation encompasses a situation where an investor owns all of the corporation's shares. A holder of 51% of a company's shares may be said to control the company, but it does not by itself own the company; all shareholders do. In turn, "control of an enterprise" implies more than controlling a block of the company's shares or having some influence on the company's decision-making.

384. According to the corporate structure presented by Claimant, it is evident to a majority of the Tribunal that on the date of the acquisition of the Option Agreement, as well as on the date of the exercise of the Option, Claimant owned GRVC and its assets. Since the only asset of GRVC was the Option Agreement, a majority of the Tribunal considers that the investment at stake in this case is the Option Agreement. It therefore becomes necessary to understand what the rights of Claimant under the Option Agreement are.

385. Arbitrator Stern has always been of the view endorsed by the ICJ in the *Barcelona Traction* case that "[s]*o long as the company is in existence the shareholder has no right to the corporate assets*."[345] This position has been endorsed by numerous investment arbitration tribunals. One of the well written and well explained examples is the decision to that effect of the *Pausok* tribunal:[346]

> *In the present instance, Claimants' investment are the shares of GEM, a company incorporated under Mongolian law … as required by and, through ownership of those shares, Claimants are entitled to make claims concerning alleged Treaty breaches resulting from actions affecting the assets of GEM, including its rights to mine gold deposits or its contractual rights and thereby affecting the value of their shares.*

v. The Argentine Republic, ICSID Case No. ARB/03/15, Award, October 31, 2011, ¶¶ 189, 204-205, 214; *Urbaser S.A. & Ors. v. The Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, December 19, 2012, ¶ 254; *ST-AD GmbH v. Republic of Bulgaria*, UNCITRAL, PCA Case No. 2011-06, Award on Jurisdiction, July 18, 2013, ¶¶ 278 and 282; *Poštová Banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, April 9, 2015, ¶¶ 228-229, 245.

[345] *Barcelona Traction, Light and Power Co., Ltd. (New application) (Belgium v. Spain)*, Merits, Second Phase, Judgment, 5 February 1970, I.C.J. Reports, 1970, ¶ 41.

[346] *Sergei Pausok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, ¶ 202.

386. In the same manner, in summarizing its conclusion regarding the definition of a protected investment for the purpose of the tribunal's jurisdiction, the *El Paso v. Argentina* tribunal stated that "*what is protected are 'the shares, all the shares, but only the shares.'*"[347]

387. The fact that the FTA refers to an enterprise as an investment does not change the analysis. This encompasses the situation of a BIT referring only to shares and not to an enterprise, as in case an investor owns all the shares of a company it owns that enterprise.[348]

388. In sum, Arbitrator Stern does not consider that the Option Agreement as such is the investment of Galway Gold, the value of which it could claim. Galway Gold's investment is its subsidiary GRVH of which it owns 100 % of the shares. Therefore, the Tribunal has jurisdiction to determine whether a violation of the Option Agreement by the Colombian authorities has taken place, which would entitle Claimant to claim for his reflective loss on the value of its shares in GRVH (and not in GRVC which being a branch is not a separate legal entity and has no shareholders).

389. Respondent contends that the rights of Claimant under the Option Agreement cannot be deemed to be a "covered investment" under the FTA because Article 838 list is exhaustive and includes only those interests listed in subparagraphs (a) to (i), and the Option Agreement is none of those listed. Respondent points that, even subparagraph (i) – on which Claimant relies– only covers property rights.

390. In any event, Respondent asserts, Claimant did not *make* an investment as contemplated under Article 838 which defines an "*investor of a Party*" as an enterprise or a national of a Party who: "… *seeks to make, is making or has made an investment*", and Claimant did not make the investment, since the Option Agreement was executed by GRC, the Colombian branch of GRH.

391. Claimant contends that the rights to the Concession 14833 or under the Option Agreement are expressly protected under the FTA, and may be found under either Article 838 (g)(i) of ("… *interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under: … contracts involving the presence of an investor's property in the territory of the Party*") or under the more generic description in 838(i): ("*any other tangible or intangible property, moveable or immovable*

[347] **Exhibit CL-061**, *El Paso Energy International Company v. The Argentine Republic*, Award ICSID Case No. ARB/03/15, 31 October 2011. *See also*, *ST-AD GmbH v. Republic of Bulgaria*, PCA Case No. 2011-06, ¶ 214. Award on Jurisdiction of 18 July 2013, ¶ 278, in which the tribunal held that "*an investor has no enforceable right in arbitration over the assets and contracts belonging to the company in which it owns shares.*"

[348] It can be noted that this was precisely the situation in *Pausok*, as claimants, directly or indirectly, owned 100% of the outstanding shares of KOO Golden East-Mongolia.

property, and related property rights acquired in the expectation or used for the purpose of economic benefit or other business purposes.")

392. The Tribunal notes that the record in this arbitration shows the following facts which have not been challenged by Respondent:

a) GRH (through GRC) and Reina de Oro executed the Option Agreement on December 22, 2009,[349] pursuant to which Reina de Oro agreed to transfer 100% of the rights to explore and exploit gold under the Concession 14833 in exchange for economic consideration contemplated in Clause III thereof, consisting of cash payments and shares of GRH,[350] plus a percentage of the gold equivalent resources in the Mining Area (as such term was defined in the Option Agreement);

b) Upon a court-approved plan of arrangement in 2012, two new subsidiaries of GRH were created upon a spin-off, one of which was Claimant. Thereafter, on December 6, 2012, GRH (through GRC) entered into an assignment agreement for the transfer to Claimant (through GRVH and its Colombian branch GRVC) of all rights under the Option Agreement. As a consequence of the assignment of the rights to the Option Agreement, Claimant acquired and became the holder of the rights to exercise the option under the Option Agreement;

c) On December 13, 2013, GRVC (the Colombian branch of GRVH – the wholly-owned subsidiary of Claimant) elected to exercise the option to acquire the rights contemplated under the Option Agreement, and notified Reina de Oro accordingly;[351]

d) After Reina de Oro disputed the exercise of the option, in February 2015, Claimant (through GRVH and its Colombian branch GRVC) initiated the Reina de Oro Arbitration, which resulted in the Reina de Oro Award[352] that, *inter alia,* confirmed the valid assignment to Claimant of the exploration and exploitation rights under Concession 14833, as well as the breach by Reina de Oro of its obligations under the Option Agreement to sign the relevant assignment agreement and give notice to the Mining Registry. The Reina de Oro Arbitration tribunal ordered Reina de Oro to comply with such obligations; and

[349] **Exhibit C-063**, Translation of Irrevocable Option Contract for Assignment of Rights and Operation, December 22, 2009.

[350] The consideration consisted of three payments of USD 100,000, plus 50,000 shares of GRH, on each of the date of execution of the Option Agreement and on the first and second anniversary thereof.

[351] **Exhibit C-052**, RPA Technical Report on the Vetas Gold Project, Department of Santander, Colombia, NI 43-101 Report, November 6, 2013.

[352] **Exhibit C-038**, Arbitral Award, February 13, 2015.

e) Reina de Oro provided the NMA Notice of Assignment to the Mining Registry on February 24, 2015.[353]

393. From the above facts, it is clear that (i) Claimant entered into the Option Agreement (through GRC), (ii) that Claimant (also through GRH and its Colombian branch GRC) made payment of the initial economic consideration stipulated in Clause 3.2 of the Option Agreement prior to the exercise of the option and, therefore, that (iii) Claimant (through GRVH and its Colombian branch GRVC) had an interest in the Option Agreement.

394. Likewise, it is clear to the Tribunal that according to the terms of the Option Agreement, once the option was exercised, it was the expectation that Claimant (through its Colombian branch GRC) would continue to explore and exploit Concession 14833. It was, in the terms of the definition of "investment" under the FTA "… *acquired in the expectation or used for the purpose of economic benefit or other business purposes*."

395. An additional element contemplated under the FTA is that the "covered investment" exists "*... on the date of entry into force of this Agreement, as well as investments made or acquired thereafter.*"[354] Since the FTA entered into force on August 15, 2011, it is evident that Claimant held the rights to the Option Agreement on such date.

396. The fact that there was an attachment to Concession 14833 is irrelevant, and the justification by the NMA that the NMA Notice of Assignment was submitted while an attachment was in force, cannot withstand scrutiny. Mr. Vivero Arciniegas admitted that if the NMA had considered the NMA Notice of Assignment at any time *before* the attachment order was issued, the rationale for rejecting the Assignment provided in Resolution 341 would not have existed.[355]

397. In sum, given the foregoing, the Tribunal concludes that Concession 14833 can be considered *in abstracto* as a potential investment and a majority of the Tribunal considers that the Option Agreement constitutes an "investment" of Claimant of the nature protected under the FTA and, thus, has jurisdiction *ratione materiae.* Arbitrator Stern also considers that the Tribunal has jurisdiction *ratione materiae,* as Claimant has made an investment – through its possession of 100 % of the shares of its subsidiary.

398. On a final note, it is worth mentioning that, in its Post-Hearing Brief, Respondent developed for the first time a *ratione materiae* jurisdictional objection relying on the so-

[353] **Exhibit C-090**, Prior Notice of Assignment of Concession Contract No. 14833 from Reina de Oro to the National Mining Agency, February 24, 2015.

[354] **Exhibit C-001**, Free Trade Agreement between Canada and Colombia, Art. 838 (definition of "covered investment").

[355] Tr. Day 2, 549:7 – 550:16.

called "Salini test", *i.e.,* that a pre-investment expenditure which does not secure the rights to an investment, and which fails to mature into an investment, does not amount to a protected investment. However, since Rule 41 of the Arbitration Rules requires that all jurisdictional objections be raised as late as the submission of the counter-memorial, Respondent's "Salini" objection cannot be considered by the Tribunal without affecting Claimant's right to a due process.

B. GALWAY IS NOT A PROTECTED INVESTOR UNDER THE FTA

I. The Parties' Positions

a) Respondent's Position

399. Respondent contends that Claimant does not qualify as an "investor of a Party" under the FTA, and accordingly the Tribunal lacks jurisdiction *ratione personae*.[356]

400. The FTA defines an "investor of a Party" under Article 838 (Definitions) as "*a Party or State enterprise thereof, or an enterprise or national of a Party, that seeks to make, is making or has made an investment*" and Footnote 12 specifies "*for greater certainty*" that it is understood that an investor seeks to make an investment "*only when the investor has taken concrete steps necessary to make said investment, such as when the investor has duly filed an application for a permit or license required to make an investment and has obtained the financing providing it with the funds to set up the investment*."[357]

401. According to Respondent, the FTA thus ties the definition of "investor" to the existence of an "investment", and since Claimant never owned or controlled Concession 14833, and the Option Agreement is not a covered "investment" under the FTA, Claimant is therefore not a protected "investor" under the FTA.[358]

402. In this connection, Respondent recalls that Claimant could have filed a *proceso ejecutivo* (enforcement action) before the Colombian courts to force Reina de Oro to sign the assignment agreement, and that such a procedure would have allowed it to complete the assignment of Concession 14833. In addition, Respondent asserts that Claimant did not "make" an investment by entering into the Option Agreement because the Option Agreement is not an investment and, in any event, Claimant simply passively "received"

[356] Respondent's PH Brief, ¶ 66.

[357] Respondent's PH Brief, ¶¶ 60-62.

[358] Memorial on Jurisdiction, ¶ 26.

its indirect interest in the Option Agreement through a transaction in which it did not make any contribution, payment or investment.[359]

403. Respondent adds that, even assuming, *arguendo*, that Claimant had made a protected investment under the FTA, Claimant would still fail to meet the jurisdictional requirements for qualifying as a protected "investor" because the FTA requires that to qualify as an "investor", that the relevant person must be a party "*that seeks to make, is making or has made an investment*", and Claimant would still need to prove that it has *made* the investment by acquiring an interest in Concession 14833 or entering into the Option Agreement, and it has failed to do so. Since Claimant has admitted that it simply received its indirect interest in the Option Agreement through GRVH – a Cayman Islands corporation – pursuant to an "*arrangement*", Respondent asserts that this does not constitute the "*making*" of an investment.[360] In this regard, Respondent draws support from *Clorox Spain v. Venezuela*[361] in arguing that a claimant must actively make an investment on its own behalf, and cannot rely on an ownership or control interest acquired through the contributions of others.

b) Claimant's Position

404. Claimant contends that the FTA protects "investor[s] of a Party" against conduct by the other State Party that violates the FTA. Article 838 defines not only "investor of a Party" but also "enterprise of a Party" as "*an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there.*"[362] In that respect, Claimant indicates that it should be deemed to be "national of another Contracting State Party" pursuant to Article 25(2)(b) of the ICSID Convention because it is a Canadian company, incorporated on May 9, 2012, pursuant to the laws of the Canadian Province of New Brunswick under the New Brunswick *Business Corporations Act*[363] and continued in the Province of Ontario on August 11, 2012. Claimant adds that its head office is located in the City of Toronto, in the Province of Ontario, Canada. As such, Claimant is a protected investor under the FTA.

405. Claimant rejects the allegation made by Respondent to the effect that it never "held" or "possessed" the underlying property rights obtained from Reina de Oro, utilizing an

[359] Respondent's PH Brief, ¶¶ 64-65.

[360] Memorial on Jurisdiction, ¶¶ 27-28.

[361] **Exhibit RL-100**, *Clorox Spain S.L. v. La República Bolivariana de Venezuela*, PCA Case No. 2015-30, Award, May 20, 2019, ¶¶ 816, 834-835.

[362] Cl. Memorial, ¶ 277.

[363] **Exhibit C-056**, Galway Gold Inc. Form 2B Listing Application in respect of the Common Shares of Galway Gold Inc., December 27, 2012, p. 11.

artificially narrow concept of "property rights" that is not supported by the definition of "investment" under Article 838 (g) of the FTA: "*interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concession, or* …" and argues that it is irrelevant whether an investment is held through intermediary corporate entities. This same broad definition of the investment is taken, Claimant adds, by Article 25(1) of the ICSID Convention.[364]

406. Claimant further contends that in 2013, it elected – through its wholly-owned entity GVRC – to exercise the option to acquire the exploration and exploitation rights under Concession 14833 in accordance with the provisions of the Option Agreement.

407. Drawing support from *Mondev*,[365] Claimant states that the law precludes Colombia's reliance on the failed status of Claimant's assignment, for which Colombia is responsible, as a basis to object to this Tribunal's jurisdiction.

408. Claimant further adds that Resolution 341 expressly states that one of the reasons for refusing the assignment registration was the protected status of the overlapping *páramo* areas and resulting prohibitions on mining activity as of the NMA's review on April 3, 2018, and that the Tribunal should reject Respondent's witness Mr. Amaya Lacouture suggestion to the contrary. It is clear that Resolution 341 includes under its "Background" heading a reference to the overlap with the *páramo* as part of its "Reasons for Decision".[366]

II. The Tribunal's Analysis

409. The essence of this objection to the jurisdiction of the Tribunal is that, according to Respondent, the FTA ties the definition of "investor" to the existence of an "investment", and since Claimant has not evidenced in this arbitration that it "made" the investment, Claimant cannot therefore qualify as an investor. Respondent contends that Claimant never owned or controlled the Concession 14833, and since the Option Agreement is not a covered "investment" under the FTA, Claimant cannot therefore be deemed to be a protected "investor" under the FTA.

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[364] C-Memorial on Jurisdiction, ¶¶ 51-55. The Tribunal notes, however, that, although Article 25 of the ICSID Convention does make reference to "*The jurisdiction. Of the Centre shall extend to any legal dispute arising directly out of an investment*" it does not define what is to be deemed as an "investment".

[365] **Exhibit CL-018**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, ¶ 91.

[366] C-Memorial on Jurisdiction, ¶¶ 67-70.

410. Claimant challenges Respondent's position and contends that it is a Canadian entity, incorporated pursuant to the laws of Canada, which validly acquired the rights to the Option Agreement and significant capital contributions were made under the Option Agreement, including the ongoing exploration and exploitation activities within Concession 14833 and Claimant's litigation spending to arbitrate and enforce its rights and interests therein in the Reina de Oro Arbitration, all of which constitute an investment.

411. The Tribunal recalls the definition of "investor of a Party" under Article 838 of the FTA, relevant for the Tribunal's jurisdiction *ratione personae:*[367]

> **investor of a Party** means a Party or state enterprise thereof, or an enterprise or national of a Party, that seeks to make, is making or has made an investment....

412. Considering *such* definition and the evidence on the record, the Tribunal finds that *Claimant* is an "investor" within the definition under the FTA, since Claimant has submitted sufficient evidence to confirm that: (i) Claimant is indeed an entity established under the laws of Canada, with its principal place of business therein, (ii) it has made an investment under Article 838(g) of the FTA in the Option Agreement, and has a potential investment in Concession 14833, as results from the nature and scope of such investments examined in the preceding objection to jurisdiction *ratione materiae,* and (iii) the investment existed upon entry into force of the FTA and/or was made thereafter.

413. For a majority of the Tribunal, this investment is the Option Agreement belonging to the Colombian branch of the Colombian subsidiary of Claimant, GRVH, and a potential investment in Concession 14833, as results from the nature and scope of such investments examined in the preceding objection to jurisdiction *ratione materiae.* As a logical consequence of her analysis of the existence of an investment of Claimant, Arbitrator Stern considers that the Tribunal has jurisdiction *ratione materiae*, because Claimant owns all shares of GRVH.

414. Respondent has contended – relying on *Clorox Spain v. Venezuela*, that the act of "making" an investment implies that an entity "*cannot rely on an ownership or control interest acquired through contributions of others*". But as the tribunal in *Clorox Spain v. Venezuela* recognized, the active conduct of "making" an investment can take place either by committing resources at the time of acquiring the investment or afterwards.[368] The fact that

[367] **Exhibit C-001**, Free Trade Agreement between Canada and Colombia, Art. 838 (definition of "investor of a Party").

[368] **Exhibit C-038**, Arbitral Award, February 13, 2015, p. 87.

Claimant acquired its interest in the Option Agreement without cost, as part of the 2012 spin-off, does not rule out that Claimant committed resources to the investment afterwards.

415. Further, the preponderant evidence on the record shows that resources were committed by Claimant to the Option Agreement after acquiring its interest in 2012. This is shown by the Reina de Oro Award, issued in the Reina de Oro Arbitration,[369] and by RPA Report[370], which refer to the exploration activities that were carried out at least through 2013, after Claimant had acquired indirect interest in the Option Agreement. Further, as stated by Mr. Gómez Rengifo in his sworn testimony, such activities were financed with resources provided by Claimant on behalf of GRVC.[371]

416. The Tribunal finds that it is indeed irrelevant, as Claimant contends, that all or part of the investment was not made directly by Claimant but by other intermediary corporate entities, since Article 838 FTA expressly contemplates direct or indirect investment when it defines "investment of an investor of a Party" to mean "*an investment owned or controlled directly or indirectly by an investor of such Party*". Hence, the fact that Claimant financed the exploration activities "*on behalf*" of GRVC, who was the vehicle directly involved in the Option Agreement, does not change that it committed resources to the Option Agreement after having acquired it.

C. CLAIMANT'S CLAIMS FALL OUTSIDE OF THE TEMPORAL JURISDICTION OF THE TRIBUNAL

I. The Parties' Positions

a) Respondent's Position

417. According to Respondent, the Tribunal lacks jurisdiction because the actions and facts on which Claimant bases its claims either: (a) occurred before the FTA entered into force on August 15, 2011, or (b) concern the mere continuation of measures adopted prior to that date and, as a consequence, they fall outside of the Tribunal's jurisdiction because Article 801(2) of the FTA expressly provides that "*the provisions of this Chapter* [Eight] *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*."[372]

[369] **Exhibit C-052**, RPA Technical Report on the Vetas Gold Project, Department of Santander, Colombia. NI 43-101 Report, November 6, 2013, p. 46.

[370] **Exhibit RL-100**, *Clorox Spain S.L. v. La República Bolivariana de Venezuela*, PCA Case No. 2015-30, Award, May 20, 2019, ¶ 824.

[371] Statement Rengifo, ¶¶ 78-79.

[372] Memorial on Jurisdiction, ¶ 32.

418. Respondent contends that the "*conflict of legal views and interests*" between Claimant and Colombia arose on February 9, 2010, when, following a legislative process that began in 2007, Colombia adopted Law 1382 of 2010 protecting the *páramo* through a strict *de jure* mining prohibition, and adds that as a matter of objective determination, the disputed measures arose on that date. Since the same prohibition on mining in *páramo* areas has remained in force ever since February 9, 2010, the same dispute has continued, and no new dispute has arisen since the FTA entered into force.[373] Respondent adds that subsequent application of Law 1382 of 2010 to prohibit mining in *páramo* areas, and its application to Concession 14833 after the FTA's entry into force, does not bring this dispute within the Tribunal's jurisdiction.[374]

419. Further, Respondent argues that the measures taken after August 15, 2011, do not constitute a "new" prohibition, as they do not give rise to a new dispute or otherwise provide a basis for independent claims. These measures concern the same policy and legal prohibition, and derive from the same facts and considerations, surrounding the dispute.[375] The Tribunal should examine the "*real causes of the dispute*" and whether these occurred prior to the FTA's entry into force, as the tribunals did in *Lucchetti v. Peru*[376] and *EuroGas v. Slovak Republic.*[377]

b) Claimant's Position

420. Claimant does not dispute the clear language or purpose of Article 801(2) of the FTA, nor that the FTA entered into force on August 15, 2011, and similarly agrees with Respondent's characterization of the law and international jurisprudence on the interpretation of similar FTA entry into force provisions. Most importantly, it adds, Claimant agrees with Respondent that determining the point in time when a dispute arises is a question of "*substance, not of form.*"[378]

421. In this respect, Claimant states that under the FTA, a "covered investment" means an investment made within a Party's territory "*existing on the date of entry into force of this Agreement, as well as investments made or acquired thereafter*", and hence, by operation of the Option Agreement (dated December 22, 2009) and the subsequent Assignment

[373] Memorial on Jurisdiction, ¶¶ 33-35.

[374] Memorial on Jurisdiction, ¶¶ 37-41.

[375] Memorial on Jurisdiction, ¶¶ 35-36.

[376] **Exhibit RL-050**, *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4, Award, February 7, 2005, ¶¶ 53, 59.

[377] **Exhibit RL-097**, *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Award, August 18, 2017, ¶¶ 459-460.

[378] C-Memorial on Jurisdiction, ¶ 76, *citing* Respondent's Memorial on Jurisdiction, ¶ 32.

Agreement (executed on December 6, 2012), its investment, and the rights and entitlements provided thereunder, "*fall squarely*" within the definition of "covered investments" in the FTA and are entitled to the protections associated therewith.[379]

422. Claimant further contends that the substance of its dispute involves a "*series of discrete and significant actions taken by Colombia after the FTA's entry into force,*"[380] and that international tribunals have recognized that State conduct falling within the scrutiny of FTAs is often piecemeal and cumulative, citing *Feldman v. Mexico,*[381] *Telsim Mobil v. Khazakstan*[382] and *Siemens v. Argentina*[383] as examples where tribunals have considered incremental or creeping conduct.

423. In this regard, Claimant indicates that while Respondent recognized the special character of *páramos* in 1993, it did not prohibit mining in the *páramo* areas until 2010, and even at that time – from 2010 to 2016 – a transition regime was specifically established to allow individuals who had obtained concessions and environmental licenses prior to February 9, 2010 to continue to carry out mining activities.[384] In response to Respondent's suggestion that the "*conflict of legal views and interests*" as between Galway and Colombia arose fully formed with the adoption of Law 1382 of 2010 – and never changed, Claimant contends that Respondent continued to knowingly permit (and audit) Claimant's ongoing activities both before and after 2010.[385]

424. In its Reply, Claimant argues that Respondent's position is predicated on the incorrect assumption that no part of the rights under Concession 14833 were protected by the transitional or "grandfathering" regime that continued in force until Judgment C-035, but in fact Concession 14833 was granted and registered with the NMA before the February 9, 2010, cut-off date and already had an environmental license for mineral exploitation.[386]

[379] C-Memorial on Jurisdiction, ¶ 77.

[380] C-Memorial on Jurisdiction, ¶ 79.

[381] **Exhibit CL-032**, *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002, ¶ 101.

[382] **Exhibit CL-033**, *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, ¶ 737

[383] **Exhibit CL-017**, *Siemens A. G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, February 6, 2007.

[384] *See* Reply, PART IV – The Evolution of Colombia's Legal Regime Governing Concession 14833.

[385] C-Memorial on Jurisdiction, ¶¶ 86-88.

[386] Reply, ¶¶ 155-156.

II. The Tribunal's Analysis

425. Respondent objects to the jurisdiction of this Tribunal under the argument that the measures that constitute the basis of Claimant claims either: (a) occurred before the FTA entered into force on August 15, 2011, or (b) concern the mere continuation of measures adopted prior to that date. After Colombia adopted Law 1382 of 2010 establishing mining exclusion zones, specifically including *páramo* ecosystems as part of those zones, and banning mining therein,[387] it alleges that all subsequent measures – whether legislative, judicial or administrative – were a continuation of such prohibition.

426. Claimant disagrees and contends that, even though Law 1382 of 2010 was indeed enacted prior to the entry into force of the FTA, and said law did prohibit mining in the *páramo* areas, a transition regime was specifically established to allow persons who had obtained concessions and environmental licenses prior to February 9, 2010 to continue to carry out mining activities. It was those measures that were adopted afterwards – Law 1450, Resolution 2090 of 2014 and Law 1753, along with Judgments C-366 and C-035 – that should be taken in *cumulative* as part of the breach.

427. The Tribunal notes that Article 801(2) of the FTA provides that "… *the provisions of this Chapter* [Eight] *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*." Hence, any dispute arising out of any act or facts that occurred prior to the FTA's entry into force on August 15, 2011, would fall outside of the Tribunal's jurisdiction. Conversely, actions adopted after such date are within the jurisdiction of the Tribunal.

428. To address the timing, the Tribunal agrees with Claimant that the measures adopted by Respondent should be viewed in a cumulative manner. Even though it is true that Colombia started recognizing the relevance of *páramo* ecosystems as early as in 1993, and Law 1382 of 2010 indeed did establish a ban on mining activities within "exclusion zones", those exclusion zones were yet to be determined. Article 47 of the 2001 Mining Code provides that the exclusion zones would be prospectively determined.

429. Despite the ban of mining activities, however, Article 3 of Law 1382 amended Article 34 of the 2001 Mining Code and "grandfathered" those holders of a concession contract and

[387] **Exhibit C-048**, Law 1382 of 2010, Art. 47.

allowed them to continue with mining activities within *páramo* areas. This was subject to the holder showing it:[388]

a) had a valid mining title (*e.g.,* a mining license or concession contract);

b) was in the construction or exploitation stage of mining activity;

c) had all required licenses and permits; and

d) the relevant mining area had not been previously excluded by law.

430. Whether or not Claimant met those conditions needs not be addressed at this point. Suffice to indicate that, even though Law 1382 was thereafter declared unconstitutional (*inexequible)* by the Constitutional Court of Colombia as per Judgment C-366 of May 13, 2011,[389] Law 1382 was only the first of several measures adopted by Colombia restricting the mining activities within *páramo* ecosystems, as Respondent has acknowledged, with a policy that continued for several years.

431. Law 1450 of 2011[390] was thereafter enacted on June 16, 2011, and again banned all mining activity within *páramo* ecosystems, but required delimitation of such systems at a much greater detail scale of 1:25,000 based on "*technical, environmental and economic criteria*." Naturally, more detailed than the 2007 IAVH *Páramo* Atlas.[391]

432. Nonetheless, it is clear to the Tribunal that several additional measures were thereafter adopted by Colombia after the FTA came into force [on] [*after*] August 15, 2011, that are relevant to this Arbitration, including:

a) Resolution 2090 of December 22, 2014, which delimited the Santurbán *Páramo*, which overlapped almost entirely with the area covered by Concession 14833;

b) Law 1753 of 2015, which included a transition regime for the prohibition of mining in *páramos*, confirming the ban on mining in paramo ecosystems, but maintained the exception for concession contracts granted before February 9, 2010 –which would remain valid for a 30-year term, provided they met with similar conditions as provided by Article 3 of Law 1382: (i) they had a valid mining title; (ii) they

[388] **Exhibit C-048**, Law 1382 of 2010, Art. 3, first paragraph reads: "*If at the time of this law's entry into force, mining activities related to construction, installation or exploitation were being carried out with a valid mining title and with the corresponding environmental permit or its equivalent, in areas not previously excluded, such activities will be allowed until their expiry, and the titles will not be subject to extensions*." [Tribunal's English translation]

[389] The Judgment established a deferment of the effects of its decision for a period of two years.

[390] **Exhibit C-049**, Law 1450 of 2011.

[391] **Exhibit C-126**, Consejo de Estado, Sala de lo Contencioso Administrativo, Sección Tercera, Sentencia 38338, 6 de julio de 2017, Danilo Rojas Betancourth.

were at the exploration or exploitation stage, and (iii) they had a valid environmental license or an equivalent management and control instrument;

c) Constitutional Court Judgment C-035 of February 18, 2016, which declared Article 173 of Law 1753 unconstitutional (*inexequible)*, and eliminated the "grandfathering" provision on the ban to mining in *páramo* ecosystem to those persons meeting the conditions; and

d) Constitutional Court Judgment T-361/17 of May 30, 2017, which declared Resolution 2090 of 2014 unconstitutional (*inexequible)*, with the consequence that delimitation of the Santurbán *Páramo* was uncertain.

433. All these actions taken by Colombia need to be examined within context and in a cumulative manner as they contributed to the situation which Claimant argues affected its investment.

434. As to the actions that preceded the FTA, although they cannot constitute breaches thereof, the Tribunal can still take them into consideration as part of the factual background of the case. As established by the tribunal in *Chevron v. Ecuador:*[392]

> *The Tribunal accepts that, according to Article 13 of the ILC Draft Articles, acts or facts prior to the entry into force of the BIT cannot on their own constitute breaches of the BIT, given that the norms of conduct prescribed by the BIT were not in effect prior to its date of entry into force. […]*
>
> *However, as the Claimants have argued, this does not mean that a breach must be based solely on acts occurring after the entrance into force of the BIT. The meaning attributed to the acts or facts post-dating the entry into force may be informed by acts or facts pre-dating the BIT; that conduct may be considered in determining whether a violation of BIT standards has occurred after the date of entry into force.*

435. Considering the above, the Tribunal rejects Respondent's *ratione temporis* objection since the evidence dictates that the dispute in this case "*arose*" after the FTA's entry into force.

[392] **Exhibit CL-021**, *Chevron Corp and Texaco Petroleum Corp. v. Republic of Ecuador*, UNCITRAL, PCA Case no 34877, Interim Award, December 1, 2008, ¶¶ 282-283. *See also:* **Exhibit RL-134**, *Société Générale v. The Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, September 19, 2008, ¶ 92; **Exhibit RL-132**, *Víctor Pey Casado y Fundación Presidente Allende v. La República de Chile*, ICSID Case No. ARB/98/2, Award, May 8, 2008, ¶ 618; **Exhibit CL-018**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, ¶ 70.

D. CLAIMANT HAS FAILED TO COMPLY WITH TWO OF THE FTA'S MANDATORY CONDITIONS PRECEDENT

I. The Parties' Positions

a) Respondent's Position

436. Respondent contends that Claimant has failed to comply with the FTA's mandatory conditions precedent to arbitration, adding that under Article 821 of the FTA, Colombia and Canada as contracting States set out certain mandatory preconditions to its respective consent to arbitrate disputes with investors: (a) submitting any claims within the 39-month limitation period and (b) providing a valid notice of intent prior to submitting any claims.[393]

437. Respondent argues that consent is the cornerstone of arbitration, and is a *sine qua non* requirement to jurisdiction, and that any limitations on consent contained in the FTA must constitute limitations on the scope of the Tribunal's jurisdiction.[394]

438. Since Article 821(2)(e)(i) of the FTA precludes the submission of a claim if more than 39 months have passed from the date on which a disputing investor knew, or should have known, of the breaches and resulting loss or damage, and Claimant had knowledge of the prohibition on mining in *páramo* ecosystems, and any damage associated with such prohibition *before* that date, Respondent contends that this Tribunal therefore lacks jurisdiction. The mandatory cut-off date in this case, states Respondent, is December 21, 2014. Since this claim is deemed to have been submitted to arbitration when ICSID's Secretary General received Claimant's Request for Arbitration on March 21, 2018,[395] in Respondent's view Claimant is therefore precluded from claiming with respect to any alleged breaches occurring prior to December 21, 2014 – the cut-off date.[396]

439. In this connection, Respondent relates instances evidencing that Claimant had, or should have had, knowledge of the prohibition on mining in *páramo* areas since February 9, 2010, including the enactment by the Colombian legislature on February 9, 2010 of Law 1382; the declaration of said Law 1382 as unconstitutional (*inexequible)* on May 11, 2011 Judgment by the Constitutional Court, but with a deferment of the effects of its decision for a period of two years; Resolution 937 of May 25, 2011 of the Ministry of Environment,

[393] Memorial on Jurisdiction, ¶¶ 42-44.

[394] Memorial on Jurisdiction, ¶ 42.

[395] **Exhibit C-001**, Free Trade Agreement between Canada and Colombia, Art. 822(4)(a) provides that 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*."

[396] Memorial on Jurisdiction, ¶¶ 50-53.

adopting the IAVH *Páramo* Atlas as the minimum benchmark for the enforcement of the ban in practice until a definitive delimitation was completed; and the passing by the Colombian legislature of Law 1450 on June 16, 2011 which confirmed that, pending a definitive delimitation, the mining ban would be enforced immediately with the *Páramo* Atlas mentioned above. Further, according to Respondent, Colombian mining authorities noted through multiple auditing reports and site visits, as early as 2001, that Concession 14833 overlapped with the Santurbán *Páramo*, and, finally, Resolution 2090 issued on December 19, 2014 – noting that this was *two days prior* to the December 21, 2014 mandatory cut-off date for claims, whereby the Ministry of Environment formally delimited the Santurbán *Páramo*, and confirmed that mining activities could not be carried out in the area of Concession 14833 overlapping with the Santurbán *Páramo*.[397]

440. Respondent argues, on the other hand, that measures taken after December 21, 2014, do not give rise to a distinct and independent cause of action, since they continued the prohibition on mining in *páramo* ecosystems (including the Santurbán *Páramo*) first adopted by the Colombian legislature on February 9, 2010, and later confirmed through Resolution 2090 of December 19, 2014, delineating the *páramo.*[398]

441. Besides, according to Respondent, Claimant disregarded the FTA's Notice of Intent requirement under Article 821(2)(c)(iii) which must specify "*the legal and the factual basis for the claim, including the measures at issue*", because Claimant failed to specify such information. It adds that the Notice of Intent is the means by which a State is apprised of the existence of a controversy, and also serves to trigger the running of the applicable "cooling-off" period.[399]

442. Respondent contends that, although Claimant identified in its Notice of Intent two measures,[400] in its Request for Arbitration it alleged a broader array of measures.[401]

443. As a result of Claimant's failure to comply with the Notice of Intent requirements of Article 821(2)(c)(ii) and (iii), Respondent's consent to submit the dispute to arbitration has not been perfected. The Tribunal therefore lacks jurisdiction over Claimant's claims or, at the

[397] Memorial on Jurisdiction, ¶¶ 55-56.

[398] Memorial on Jurisdiction, ¶ 62.

[399] Memorial on Jurisdiction, ¶ 65.

[400] **Exhibit C-107**, Resolution 2090 of 2014, Ministry of the Environment and Sustainable Development, December 19, 2014.

[401] It added Law 1753 of June 9, 2015, Resolution 381 of May 16, 2016, by the *Corporación Autónoma Regional para la Defensa de la Meseta de Bucaramanga*, the National Mining Agency's Resolution VSC 381 issued on June 11, 2016, and Judgment T-361 of the Constitutional Court, issued on May 30, 2017.

very least, over Claimant's claims arising out of all the measures and investments that were not included in its Notice of Intent.[402]

b) Claimant's Position

444. Claimant recalls that both Canada and Colombia are signatories to the ICSID Convention, and that the FTA expressly permits investors to submit their claims through the ICSID Rules.[403] Specifically, that pursuant to Article 822 of the FTA, Canada and Colombia have consented to having investment disputes under the treaty adjudicated through the ICSID regime. Further, that under Article 823 the parties to the Treaty are deemed to consent to ICSID's jurisdiction where the procedural requirements for bringing such a claim under the FTA are met.[404]

445. Although Claimant does not dispute that Article 821 of the FTA establishes the conditions precedent to submitting a claim to arbitration, Claimant contends that it has fulfilled said conditions, listing a series of actions it took in compliance of the provision.[405]

446. Claimant rejects the allegation of Colombia that Claimant failed to initiate this proceeding within the prescribed 39-month limitation period, because according to Claimant the prohibition on mining did not affect the mining area in Concession 14833 until 2016 when, through Resolution 381, Colombia began to enforce the absolute prohibition of mining activities that first arose from the Constitutional Court's Judgment C-035, nor were Claimant's rights specifically affected until Colombia refused to grant the assignment (which Reina de Oro had been ordered to complete in the Reina de Oro Arbitration and which was endorsed by domestic courts), through Resolution 341 in 2018. Resolution 341, Claimant adds, came three years after Notice of the Assignment had been made to the NMA and the period of administrative silence had expired. It was issued after Claimant initiated this Arbitration.[406]

447. Claimant argues that the basis for its claim could not have crystallized before Resolution 381 was issued and Colombia's mining authority duly notified Decision PARB No. 1036 which suspended all exploitation works. Colombia's objection regarding the limitations period presumes as fact its position that no State conduct after 2010 (or at the latest, 2011) matters, which is incorrect. According to Claimant, the fact is that even after Claimant had commenced this Arbitration, Respondent continued to engage in conduct in violation of

[402] Memorial on Jurisdiction, ¶¶ 68-73.

[403] **Exhibit C-001**, Free Trade Agreement between Canada and Colombia, Art. 822(1)(a).

[404] Cl. Memorial, ¶¶ 286-289; C-Memorial on Jurisdiction, ¶¶ 93-95.

[405] C-Memorial on Jurisdiction, ¶ 146.

[406] C-Memorial on Jurisdiction, ¶¶ 100-105.

the FTA, because it was not until April 9, 2018, less than one month after Claimant had filed this claim, that Colombia issued Resolution 381 refusing to register the assignment.[407]

448. Claimant further contends that it was not enough for Colombia to issue Resolution 381 and Decision 1036, but the impact of Resolution 341 was to further prejudice its rights and interest by indefinitely denying the finalization of the assignment of the rights to Concession 14833, and pre-emptively establishing an artificial factual foundation for Colombia to deny Claimant's rights to even seek redress under the FTA for Colombia's infringements.[408]

449. Claimant asserts that Resolution 2090 was adopted by the Ministry of Environment on December 19, 2014, and that Article 15 thereof provides that it would be in force as of the date of its publication in the Official Registry, which occurred on December 22, 2014. If the cut-off date corresponds to the date of Resolution 2090 delineated the *páramo*, then the Tribunal must do so on the basis of the date on which that law *came into force*, which was on December 22, 2014, making the 39-month limitation date March 22, 2018. If this is the case, then Claimant's Request for Arbitration of March 21, 2018, was within the 39-month limitation period.[409]

450. Claimant also challenges the second argument of Respondent in respect to the failure to comply with the requirement that a claimant provide written notice of its intent to submit a claim to arbitration at least six months prior to the claim in accordance with Article 821(2)(c) of the FTA.[410] Claimant contends that there is no dispute that Claimant provided Colombia with written notice of its intended claim on September 13, 2017,[411] more than six months before commencing arbitration on March 21, 2018, and that the Parties engaged in consultation discussions that were unsuccessful in resolving the claim. The Notice of Intent established references to and relied on Articles 805 and 811 of the FTA dealing with Colombia's failure to provide fair and equitable treatment in accordance with the minimum standard of treatment and expropriation, respectively.[412] Further, according to Claimant, Respondent wrongly alleges that the Notice of Intent fails to state the legal and the factual basis, which Claimant contends must be construed in light of the object and purpose of

[407] C-Memorial on Jurisdiction, ¶¶ 110-113.

[408] C-Memorial on Jurisdiction, ¶ 114.

[409] C-Memorial on Jurisdiction, ¶ 119.

[410] C-Memorial on Jurisdiction, ¶¶ 120-121.

[411] The Notice of Intent to Submit a Claim to Arbitration was attached as **Exhibit C-018.1**.

[412] **Exhibit C-018.1**, Notice of Intent to Submit a Claim to Arbitration, ¶ 24.

Article 821 of the FTA, namely, to provide sufficient detail to permit a consultation process through which a claim might be redressed without resort to arbitration.[413]

451. Drawing support from *Casinos Austria v. Argentina*[414] and *Supervisión y Control S.A. v. Costa Rica*[415] – a case Respondent also relies on – Claimant argues that preconditions should be interpreted in a less formalistic manner in the context of investor-State arbitration unless the conditions are formulated clearly and unmistakably to require a formalistic approach. The reasonableness of a description of a claim should be interpreted in light of the purpose of notice preconditions generally (*i.e.*, whether the notice provides a sufficient description of the claim to allow the State an opportunity to attempt to redress it). Claimant adds that it would be inconsistent with the purpose underlying notice requirements such as those in Article 821 and the general structure of the investor-State dispute resolution process enshrined in the FTA to require, in essence, a complete preview of the evidence and arguments an investor will ultimately make in a subsequent arbitration, should that become necessary. In particular, such an interpretation would render the requirement of a request for arbitration and the memorial process largely nugatory.[416] The facts in *Guaracachi v. Bolivia*[417] are different because claims relating to regulatory changes to electricity spot prices and power and capacity payments predating and unrelated to the nationalization, as well as in relation to the expropriation of equipment were not included in the original notice, and therefore the tribunal in such case decided these were "*distinct and separate*" from the main claim.

452. Further, to the extent that Claimant has raised any "new" claims in the Arbitration – which it alleges it has not, they are directly related to the claim expressly provided in the Notice of Intent to Colombia.[418]

453. In conclusion to this point,[419] Claimant recounts how all conditions precedent were fulfilled:

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[413] C-Memorial on Jurisdiction, ¶¶ 122-128.

[414] **Exhibit CL-091**, *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic,* ICSID Case No. ARB/14/32, Decision on Jurisdiction, June 29, 2018, ¶¶ 271-276.

[415] **Exhibit CL-092**, *Supervisión y Control S.A. v. Costa Rica*, ICSID Case No. ARB/12/4, Award, January 18, 2017, ¶ 345.

[416] C-Memorial on Jurisdiction, ¶¶ 129-131.

[417] **Exhibit CL-094**, *Guaracachi America Inc and Rurelec PLC v. Bolivia*, PCA Case No. 2011-17, Award, January 31, 2014, ¶ 396.

[418] C-Memorial on Jurisdiction, ¶ 136.

[419] C-Memorial on Jurisdiction, ¶ 146.

(a) On September 13, 2017, more than six months after the events giving rise to the claim, Claimant delivered its Notice of Intent for arbitration, which indicated: (i) notified Colombia of its intent to submit to arbitration its claim under the FTA as a Canadian investor; (ii) validly authorized the issuance of the Request for Arbitration; and (iii) validly authorized the submission of the Request for Arbitration to ICSID, in order to commence arbitration proceedings against Colombia pursuant to the ICSID Convention and the FTA;

(b) The Parties held consultations regarding the claims within 30 days of the submission of the Notice of Intent;[420]

(c) Less than 39 months elapsed since Claimant had full knowledge of the alleged breaches of the FTA – which involved several instances of sequential action and inaction, the cumulative impact of which could not have been known until the last among them, and then the issuance of the Request for Arbitration;[421]

(d) Claimant has not alleged any breaches of the FTA before either Colombian courts or tribunals; and

(e) On March 6, 2018, Claimant signed and delivered the Consent and Waiver of Other Remedies form, whereby it: (i) consented to arbitration under ICSID Rules and procedures; and (ii) waived its rights to initiate or continue proceedings relating to the impugned legislative measures before any administrative tribunal or court in Colombia.[422]

II. The Tribunal's Analysis

454. Article 821 of the FTA contemplates conditions precedent to submitting a claim to arbitration. Article 821(1) requires the Party intending to bring the claim to first hold consultations and negotiations with the State in an attempt to settle the claim amicably before a disputing investor may submit a claim to arbitration. Thereafter, Article 821(2) provides that a disputing investor who brings a claim on its own behalf (*i.e.*, Article 819 claims) may submit a claim to arbitration *only if* the investor meets certain conditions that include the following:

> *(a) the disputing investor […] consent[s] to arbitration […];*
>
> *(b) at least six months have elapsed since the events giving rise to the claim;*

[420] Cl. Memorial, ¶ 289, *citing* Hinchcliffe Statement, ¶ 242.

[421] Cl. Memorial, ¶ 289, *citing* Hinchcliffe Statement, ¶ 242.

[422] **Exhibit C-018.1**, Notice of Intent to Submit a Claim to Arbitration.

(c) the disputing investor has delivered to the disputing [State] a written notice of its intent to submit a claim to arbitration (Notice of Intent) at least six months prior to submitting the claim. The Notice of Intent shall specify:

(i) the name and address of the disputing investor and, where a claim is made under Article 820, the name and address of the enterprise,

(ii) the provisions of this Agreement alleged to have been breached and any other relevant provisions

(iii) the legal and the factual basis for the claim, including the measures at issue, and

(iv) the relief sought and the approximate amount of damages claimed;

(d) the disputing investor has delivered evidence establishing that it is an investor of the other Party with its Notice of Intent;

(e) in the case of a claim submitted under Article 819:

(i) not more than 39 months have elapsed from the date on which the disputing investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the disputing investor has incurred loss or damage thereby, and

(ii) the disputing investor and, where the claim is for loss or damage to an interest in an enterprise of the other Party that is a juridical person that the disputing investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 819, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the applicable law of the disputing Party, provided that the action is brought for the sole purpose of preserving the disputing investor's or the enterprise's rights and interests during the pendency of the arbitration;[423]

[…]

[423] **Exhibit C-001**, Free Trade Agreement between Canada and Colombia, Art. 821(2).

455. The Tribunal takes note that this claim is deemed to have been submitted to arbitration when ICSID's Secretary General received Claimant's Request for Arbitration on March 21, 2018.[424]

456. In its NDP Submission, Canada recalls that Article 821(2)(e)(i) of the FTA sets out a strict limitation period for a claimant to submit a claim to arbitration on its own behalf, which provides that the limitation period may commence from two possible points in time: (i) the moment when an investor "*first acquired*" knowledge of the alleged breach and loss, or (ii) the moment when an investor "*should have first acquired*" knowledge of the alleged breach and loss, adding that knowledge of the alleged breach arises from the knowledge of the contravention of the international obligation, that is "*when an act of th*[e] *State is not in conformity with what is required of it by that obligation*"[425] *i.e.*, once a claimant has *first* acquired either actual knowledge or constructive knowledge of the alleged breach and loss, and not from subsequent, or repeated acquisition of such knowledge arising from continued non-conformity.[426]

457. Canada also states that the Parties to the FTA made a "*deliberate drafting choice*" when negotiating the agreement, intended to mark the beginning of the time when knowledge of breach and loss occurs, and not the middle or end of a continuous event or series of events.[427] The fact that a measure may have a continuing effect on an investor, or that it may be applied more than once to that same investor over a period of time, is irrelevant for the purposes of the provision. Where the dispute arises out of a series of related measures, some of which occur prior to the time limitation period and others after, a tribunal will only have jurisdiction over a measure that falls within the time limitation period if such a measure constitutes a distinct or separate actionable breach.[428] Further, Canada contends that measures of a Party occurring before the implementation of a treaty, cannot violate the treaty, as obligations owed to investors under the treaty did not exist at this time, since the existence of a breach of an international obligation must be determined based on the international law applicable contemporaneous with the breach.[429]

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[424] *See supra*, ¶ 5.

[425] Canada's NDP Submission, ¶ 8, *citing* Art. 12 of the *ILC Articles on Responsibility for States for Internationally Wrongful Acts,* 2001.

[426] Canada's NDP Submission, ¶ 8.

[427] Canada's NDP Submission, ¶ 9.

[428] Canada's NDP Submission, ¶ 9.

[429] Canada's NDP Submission, ¶ 9, *citing* Art. 801(2) of the Agreement provides that "*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*."

458. Respondent contends that Claimant is precluded from claiming any alleged breaches occurring prior to December 21, 2014 – which it deems is the "cut-off date" – 39 months from the date on which a disputing investor *knew, or should have known*, of the breaches and resulting loss or damage, since Claimant had knowledge of the prohibition on mining in *páramo* ecosystems on December 19, 2014 – date on which Resolution 2090 was enacted, whereby the Ministry of Environment formally delimited the Santurbán *Páramo*, and confirmed that mining activities could not be carried out in the delineated area of Concession 14833 overlapping with the Santurbán *Páramo*. Respondent contends that Claimant's Request for Arbitration was filed on March 21, 2018, which is a couple of days after the 39-month period established under the FTA.

459. Although Claimant has argued that the actions that affected the mining area in Concession 14833 did not come into effect until 2016 when the Constitutional Court issued Judgment C-035, and Colombia began to enforce the absolute prohibition of mining activities through Resolution 381. Claimant also contends that, even if the "*cut-off*" date specified by Respondent was to be followed to determine whether it was timely submitted, then this Tribunal must take into account the actual date on which Resolution 2090 came into force.

460. The Tribunal identifies that Resolution 2090 was indeed adopted by the Ministry of the Environment on December 19, 2014, but it actually came into force three days later, because Article 15 of the resolution provides that it would become effective on its date of publication in the Official Gazette, and it was published on December 22, 2014.[430]

461. Since Resolution 2090 became effective on December 22, 2014, date on which it was published in the Official Gazette, this makes the 39-month limitation date March 22, 2018. The Tribunal takes note that it is not disputed among the Parties that this claim is deemed to have been submitted to arbitration when ICSID's Secretary General received Claimant's Request for Arbitration on March 21, 2018. This being the case, it is clear that it was filed just barely within the 39-month limitation period provided under Article 821(2)(e)(i).[431]

462. Even though such consideration should be sufficient to deem that the Request for Arbitration submitted by Claimant was timely because it was filed on March 21, 2018 – just barely within the 39-month limitation period, the record nonetheless shows that there

[430] **Exhibit C-107**, Resolution 2090 of 2014, Ministry of the Environment and Sustainable Development, December 19, 2014, Art. 15, which provides: "PUBLICATION AND EFFECTIVENESS. This resolution shall be effective as from the date of its publication in the Official Gazette". The published text can be found in **Exhibit C-199**, Official Gazette 49.373 of December 22 of 2014, pp. 4-7.

[431] **Exhibit C-001**, Free Trade Agreement between Canada and Colombia, Art. 822(4)(a), which provides that a claim is submitted to arbitration when "*the request for arbitration under paragraph 1 of Article 36 of the ICSID Convention is received by the Secretary-General*."

were several additional cumulative actions taken by Colombia through 2016 when Colombia began to enforce the ban of mining activities that arose from the Judgment C- 035. However, there is no need for the Tribunal to examine those, as the deadline is met considering only the date of effectiveness of Resolution 2090. Undoubtedly, the 39-month period would be satisfied.

463. Lastly, as to whether the facts and claims included in the Request of Arbitration submitted were more in number and detail that those expressed in the Notice of Intent, the Tribunal deems that it is not relevant, since the claims arose from the same facts, and the claims were, in any case, related. It would be unjustified for a notice of intent submitted to specify in detail all the legal and factual elements that comprise its claim.

464. Indeed, the requirement under Article 821(2)(c) of the FTA is for the Notice of Intent to specify "*the legal and the factual basis for the claim, including the measures at issue.*" Both Parties acknowledge that the intent of the provision is for the State to be apprised of the existence of a controversy, and for the "cooling-off" period to commence allowing for the relevant investor and State to hold negotiations with the objective of resolving or attempting to resolve the claim.

465. The purpose of the "notice of intent" should be interpreted in accordance with Article 31 of the Vienna Convention on the Law of Treaties ("**VCLT**") "… *in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.*" This leads the Tribunal to conclude that the "object and purpose" of such a "notice of intent" is to provide the State with basic information relating to the possible claim, that includes the legal and factual basis for the potential claim. It would be unnecessary for both the investor and the State to need to develop in detail the facts and claims. It suffices that the facts and legal basis for the claims are reflected in terms that are clear. Should the investor subsequently submit a request for arbitration in terms that are comprehensive, this should not be deemed to contravene the object and purpose of Article 821(2) of the FTA, provided that if there are additional facts and claims in the "request for arbitration", these are connected to the facts and legal basis of the claims submitted in the "notice of intent."

466. The Tribunal does not find that the Notice of Intent was improperly submitted by Claimant, nor that the subsequent Request of Arbitration covers other claims that are not connected to those specified in the former.

467. Therefore, the Tribunal rejects this objection to jurisdiction as well.

E. COLOMBIA HAS DENIED THE BENEFITS OF CHAPTER EIGHT OF THE FTA TO GALWAY IN ACCORDANCE WITH ARTICLE 814(2) OF THE FTA

I. The Parties' Positions

a) Respondent's Position

468. Respondent argues that the Tribunal should dismiss Claimant's claims because Colombia has validly exercised its right to deny Claimant the benefits of the FTA under Article 814(2).[432]

469. Respondent states that by letter dated April 19, 2018,[433] Colombia exercised its right to deny Claimant the benefits of the FTA on the grounds that: (a) Claimant was owned or controlled by nationals of non-Parties (*i.e.*, non-Canadians); and (b) Galway had no substantial business activities in the territory of Canada. Respondent makes reference to the decision on jurisdiction issued in *Pac Rim v. El Salvador,*[434] where the tribunal indicated that this type of provisions in a treaty serve "*to safeguard against the potential problem of 'free-rider' investors, i.e. third party entities that may only as a matter of formality be entitled to the benefits of a particular agreement*", denying access to companies with no substantial business in their State of incorporation that are owned or controlled by nationals of third States.[435]

470. Thus, since the benefits denied by Colombia included Claimant's right to arbitrate disputes arising under the FTA, the Tribunal should decline jurisdiction over the present dispute.

471. Respondent claims that it only needs to evidence that, on the date Claimant sought to invoke the benefits of Chapter Eight, *i.e.,* March 21, 2018, either: (i) non-Canadian nationals *owned* Claimant, or (ii) Claimant was *controlled* by non-Canadian nationals, since "ownership" and "control" are alternative requirements under Article 814(2), and adds that these requirements must be assessed by reference to ultimate ownership and control of Claimant, and not its nominal ownership or most immediate ownership within the corporate chain.[436]

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[432] Memorial on Jurisdiction, ¶ 74.

[433] **Exhibit R-071**, Letter from the National Agency for the Legal Defense of the State (ANDJE) (Mr. Vélez Cabrera) to Galway Gold Inc. (Mr. Hinchcliffe), April 19, 2018.

[434] **Exhibit RL-077**, *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, June 1, 2012, ¶ 4.55.

[435] Memorial on Jurisdiction, ¶ 75.

[436] Memorial on Jurisdiction, ¶¶ 77-78.

472. Referring to evidence on the record it has submitted,[437] Respondent argues that Claimant was both owned and controlled by nationals of a non-party as of March 21, 2018.

473. As regards *ownership*, Respondent argues that publicly available sources consulted confirm that, on or around March 21, 2018:[438]

(a). Claimant's largest shareholder was AAV Ltd. with a 17% interest in the company. AAV Ltd was a company incorporated in the Cayman Islands and an indirect wholly owned subsidiary of Mubadala Development Company PJSC, owned by the Government of Abu Dhabi.

(b). Institutional shareholders held 30% of Claimant's shares, including funds from the United States (Wexford Capital LP72 and Front Street Capital), and Switzerland-based funds (Earth Resource Investments AG (ERI) and EOP & Compagnie SA).

(c). Management, family and friends owned 15% of Claimant's shares, and on the basis of publicly available information, four out of the five senior managers and directors appear to be non-Canadian.

474. As regards to *control*, Respondent contends that even if more than 50% of Claimant's shares were owned by Canadian persons (which is rejected by Respondent), 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. Since the Government of Abu-Dhabi, together with institutional shareholders from the United States of America, controlled shares well above the 20% threshold, Respondent concludes that Claimant was ultimately controlled by non-Canadian parties as of March 21, 2018.[439]

475. Further, Respondent asserts that Claimant does not have, and has never had any substantial business activities in Canada, and its sole business activities are those associated with its alleged interest in Reina de Oro's Concession 14833 in Colombia. To this end, it makes reference to Claimant's statements in its management discussion publication for the first quarter of 2018 that: "[t]*he Reina de Oro property is Galway's only mining property*" and its admission in its Claimant's Memorial that "[t]*he principal business of GG is the investigation, acquisition, exploration, development and operation of the Vetas Gold Project and other mineral properties, with a primary focus on precious metals.*"[440]

[437] *See*, footnotes to paragraphs 79 and 80 of the Memorial on Jurisdiction.

[438] Memorial on Jurisdiction, ¶ 79.

[439] Memorial on Jurisdiction, ¶¶ 79-81.

[440] Memorial on Jurisdiction, ¶ 82, *citing* **Exhibit R-020**, Galway Gold Inc. Management`s Discussion and Analysis for the Three Months Ended March 31, 2018, May 30, 2018, p. 3; Cl. Memorial, ¶ 36.

476. The fact that Claimant is incorporated in Canada and has shares listed on the Toronto Stock Exchange, cannot amount to the "*substantial business activities*" requirement, and Colombia was entitled to deny Claimant the benefits of the FTA.[441]

477. Respondent states that on April 19, 2018, Colombia exercised its right to deny the benefits of Chapter Eight of the FTA to Galway, which notification was issued promptly upon Claimant's invocation of the protections of the FTA, soon after Respondent's receipt of Claimant's Request for Arbitration after it analyzed whether the requirements under Article 814(2) of the FTA were met.[442]

b) Claimant's Position

478. Claimant contends that Colombia has no right to deny benefits under the FTA under Article 814(2), and the purported denial of benefits is invalid because it was not issued *before* Claimant's Request for Arbitration. *First*, it argues that international law precludes a State from unilaterally revoking its consent to arbitration under the guise of a denial of benefits once a proceeding has already been commenced,[443] and that Respondent cannot unilaterally withdraw consent following the commencement of a proceeding, which is expressly prohibited by Article 25 of the ICSID Convention. *Second*, Colombia cannot meet the test to deny the benefits, since Article 814(2) of the FTA requires that Colombia show *both* that: (i) Claimant was not owned or controlled by Canadian nationals, *and* (ii) that Claimant has no substantial business activity in Canada. Claimant adds that it has substantial business activity in Canada, and Respondent has completely misunderstood or misrepresented Canadian law as it relates to the ownership and control of public companies.[444]

479. Claimant argues that these are the same arguments Respondent made and that were rejected by the tribunal in *Gran Colombia Gold Corp. v. Colombia*,[445] which, like this case, involved a claim by a Canadian mining company seeking to have Colombia adhere to its obligations under the FTA, and asserts that the fact that Colombia elected to omit reference to such case is "*improper and reflects the weakness of its position*."[446] Arguing that

[441] Memorial on Jurisdiction, ¶¶ 83-84.

[442] Memorial on Jurisdiction, ¶¶ 53-87

[443] **Exhibit RL-089**, *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction, February 1, 2016, ¶¶ 167-173, where the tribunal stated that there "*cannot be an embedded conditionality in the Treaty which could be triggered after the submission of the dispute to arbitration*."

[444] C-Memorial on Jurisdiction, ¶¶ 147-148.

[445] **Exhibit CL-096**, *Gran Colombia Gold Corp. v. Republic of Colombia,* ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Issue, November 23, 2020.

[446] C-Memorial on Jurisdiction, ¶ 150.

essentially the same arguments were made by Colombia in the *Gran Colombia* case, Claimant notes how that tribunal concluded that the claimant had substantial business activities in Canada,[447] adding that the tribunal in said case concluded that the activities undertaken satisfied the relevant criteria in Article 814(2) of the FTA.

480. Nonetheless, Claimant recounts how it has substantial business activities and therefore meets the requisite standard by, *inter alia*, operating in Canada, paying taxes, being a reporting securities issuer, performance of its equity and debt transactions exclusively in Canada, its key officers are Canadian, its home office is located in such jurisdiction, it engages employees and consultants in the country, has bank accounts there, and its audit and other accounting services are provided by Canadian accountants who reside and work in Toronto, Canada.[448]

481. Since Colombia is the party purporting to deny the benefit of the FTA on the basis of Article 814(2), then Respondent bears the burden – according to Claimant – of proving that the preconditions for its denial of benefits are met.[449]

482. On the subject of the alleged control by non-Canadians, Claimant asserts that the FTA does not define "ownership" or "control". Therefore, pursuant to Article 31 of the VCLT, it requests this Tribunal to interpret these terms in accordance with their ordinary meaning and in the light of Article 814(2)'s object and purpose. To that end, Claimant submits that "ownership" relates to direct legal title (not indirect or ultimate beneficial ownership) over an enterprise or over all or substantially all of its equity shares, while "control*"* concerns direct or indirect authority over the enterprise. It adds that this is consistent with both the definition of "investor of a Party" and "investment of an investor of a Party," in Article 838 of the FTA, and the interpretation of other tribunals. For example, in *B-Mex, LLC et al v. Mexico*,[450] the tribunal held: "[c]*ontextual analysis therefore suggests that by 'ownership' of an enterprise, the NAFTA Parties contemplated ownership of all the outstanding shares of that enterprise*."[451] Hence, for Colombia to prove that a non-Canadian investor 'owns' Claimant, Respondent must therefore show that the alleged

[447] C-Memorial on Jurisdiction, ¶ 165, *citing* **Exhibit CL-096**, *Gran Colombia Gold Corp. v. Republic of Colombia,* ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Issue, November 23, 2020, ¶¶ 74-79.

[448] C-Memorial on Jurisdiction, ¶ 166.

[449] C-Memorial on Jurisdiction, ¶ 29.

[450] **Exhibit CL-098**, *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, July 19, 2019, ¶ 203.

[451] C-Memorial on Jurisdiction, ¶¶ 170-171, *citing* **Exhibit CL-098**, *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, July 19, 2019, ¶¶ 200-203.

investor owned all or substantially all of Claimant's outstanding shares as of March 21, 2018.

483. Alternatively, Claimant contends that, at the very least, "ownership" implies holding title to more than 50% of Claimant's shares. Otherwise, no useful purpose would be served by the FTA including two separate and distinct terms: "control" and "ownership". Rather, each of these two terms must be interpreted to address different circumstances and convey separate concepts. A shareholder who "beneficially owns" shares does not in fact "own" them at all. Rather, and more accurately, the shareholder has the indirect right to *control* those shares and the powers and prerogatives that attach to them. Again, it would render the deliberate use of two different and distinct terms in the FTA – ownership and control – superfluous to interpret ownership as including beneficial ownership. Conversely, an investor may exercise "control" through either the capacity to control the enterprise (*i.e.,* beneficial ownership) or *de facto* control. [452]

484. As to *ownership*, Claimant states that it's Shareholder Register reflects that CDS & Co. (a Canadian company based in Toronto, which is the Canadian Depository for Securities or "**CDS**") was the owner of substantially all of Claimant's shares as of March 21, 2018.[453] Specifically, CDS owned 132,964,940 of the company's 166,511,932 outstanding shares, or 79.8%. Canadian nationals or companies accounted for another 1,506,214 shares, or 0.9%. Accordingly, over 80% of Claimant's shares were owned by Canadians as of March 21, 2018. To this end, Claimant identifies that the Supplementary Witness Statement of Robert Hinchcliffe includes its actual ownership as of March 21, 2021, as set out in its Shareholder Register attached to the Witness Statement.

485. Claimant challenges the assertions made by Respondent[454] regarding the ownership of Claimant's shares as of March 21, 2018, ostensibly based on "*publicly available sources*" which it deems to be "*mere speculation, and argument unsupported by evidence*."[455] It alleges that Respondent has failed to prove that Claimant was not "*owned*" by non-Canadian nationals as of March 21, 2018.

[452] C-Memorial on Jurisdiction, ¶¶ 174-176.

[453] Claimant has indicated that the identity of any beneficial owners of the shares owned by CDS is not ascertainable, except for a limited class of beneficial owners who have provided permission for their identities to be disclosed (so-called Non-Objecting Beneficial Owners).

[454] Memorial on Jurisdiction, ¶ 79.

[455] C-Memorial on Jurisdiction, ¶ 166.

486. In connection with *control*, Claimant asserts that it was *not controlled* by non-Canadians as of March 21, 2018.[456]

487. In response to Respondent's assertion that Claimant[457] was controlled by non-Canadian nationals because the British Columbia *Securities Act* presumes that a combination of persons holding more than 20% of the voting rights of a company materially affects the company's control (and Claimant clarifies it is not a British Columbia company and is not governed by British Columbia Securities Act, but acknowledges similar rules apply in Ontario, where it is registered), Claimant argues that a person who owns (legally or beneficially) more than 20% of a company shares does not control the company or is even deemed to control the company. Rather, it adds that, as is apparent on the plain language of the provision, the person is deemed to be able to "*affect materially*" the control of the company, which is a very different question than the one before the Tribunal, namely whether non-Canadians controlled in fact Claimant as of March 21, 2018.[458]

488. Further, according to Claimant, the difficulty with using the 20% threshold that Colombia relies on is also apparent when one considers that, on Colombia's framing, multiple different shareholders or groups of shareholders – some nationals of Canada, others not – could simultaneously "control" Claimant for the purposes of Article 814(2), and it would be "*logically inconsistent for the Tribunal to hold that Colombia can deny the benefits of the FTA because* [Claimant] *is controlled by non-Canadian nationals when it finds that Canadian nationals also control the company*."[459] In any case, if over 80% of Claimant's shares were owned by Canadian nationals as of March 21, 2018 – and the largest of these shareholders was CDS – it is mathematically impossible on the evidence for a non-Canadian to have controlled more than 20% of Claimant's outstanding shares.[460]

489. Claimant accepts that AAV Ltd., a Cayman Islands company owned 17% of its outstanding shares but disagrees with Respondent which alleges that institutional shareholders held 30% of Claimant's shares, including funds from the United States of America and Switzerland. Also, Claimant criticizes Respondent's assertion that management, family, and friends owned 15% of Claimant's shares, and that four of its five senior managers and directors appear to be non-Canadian, stating that it is inconsistent with Claimant's Shareholder Register and appears to be based on an outdated slide deck from 2015, adding

[456] C-Memorial on Jurisdiction, ¶ 186.

[457] Memorial on Jurisdiction, ¶ 80.

[458] C-Memorial on Jurisdiction, ¶¶ 192-195.

[459] C-Memorial on Jurisdiction, ¶ 196.

[460] C-Memorial on Jurisdiction, ¶ 197.

that Colombia does not even assert what percentage of the 15% of Claimant's shares were held by non-nationals.[461]

490. Claimant lastly asserts that the absence of a controlling beneficial owner of a public Canadian company is not unusual, nor is it evidence of non-Canadian control of Claimant.[462]

II. The Tribunal's Analysis

491. Article 814(2) of the FTA, on which Respondent supports its right to deny treaty benefits to Claimant, provides:

> *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.*

492. As the record in this Arbitration shows, on April 19, 2018, Respondent sent a communication to Claimant[463] notifying the denial of benefits under Chapter of the FTA to any alleged investments purported to be held by Claimant in Colombia, on the basis that: "[b]*ased on the available information, those who hold the ownership or control of Galway are not Canadian nationals, nor has Galway substantial activities in the territory of Canada*."[464] [Tribunal's English translation]

493. There are two issues to be addressed by the Tribunal:

a). Whether Respondent was allowed to deny the FTA benefits *after* Claimant's Request for Arbitration was filed on March 21, 2018; and

b). Whether Respondent has submitted evidence to the effect that, on the date Claimant submitted its Request for Arbitration, Claimant: (i) was not owned or controlled by Canadian nationals, and (ii) had no substantial business activity in Canada.

[461] C-Memorial on Jurisdiction, ¶ 198.

[462] C-Memorial on Jurisdiction, ¶ 200.

[463] **Exhibit R-071**, Letter from the National Agency for the Legal Defense of the State (ANDJE) (Mr. Vélez Cabrera) to Galway Gold Inc. (Mr. Hinchcliffe), April 19, 2018.

[464] **Exhibit R-071**, Letter from the National Agency for the Legal Defense of the State (ANDJE) (Mr. Vélez Cabrera) to Galway Gold Inc. (Mr. Hinchcliffe), April 19, 2018, p. 2.

494. As to when this denial of benefits can be made, Canada, in its NDP Submission, cites the *Guaracachi v. Bolivia*[465] tribunal, to contend that a potential denial of benefits is activated at the time the treaty's protections are invoked by an investor, not before.[466]

495. Canada contends that Article 814(2) allows a State Party to deny the benefits of the FTA to investors that are enterprises that have no real economic link or ties with the country in which they are constituted or organized. This so-called Denial of Benefits ("**DoB**") provision imposes two cumulative requirements: *first*, the enterprise must be owned or controlled by investors of a non-Party or of the denying Party (*i.e.*, not by investors of the Party in which it is incorporated), and *second*, it must have no substantial business activities in the territory of the Party under whose law it is incorporated. This ensures that enterprises with a real economic link to the Party in which they are constituted or organized are granted treaty protection while preventing enterprises of investors of non-Parties or of the denying Party from accessing the benefits of the Agreement merely through incorporation in the territory of a Party to the Agreement.[467]

496. According to Canada, a Claimant has the burden of proof to demonstrate that it meets the definition of "investor of a Party" and of "investment of an investor of a Party" under Article 838 of the FTA. Once a claimant meets its burden of establishing this jurisdictional requirement, the burden then moves to the Party wishing to invoke the DoB provision to establish that the two requirements for denying benefits under Article 814(2) of the FTA are met.[468]

497. Canada also argues that Article 814 of the FTA does not impose a requirement with respect to *when* a Party may invoke the DoB provision, and that neither this Article nor any other provision of the FTA preclude a Party from invoking the DoB provision after a claim has been submitted to arbitration.[469]

498. Canada further adds that, although some tribunals have given a different interpretation to the DoB provision, these cases should be differentiated since they deal mostly with the Energy Charter Treaty, and Article 814 of the FTA applies to all benefits conferred upon

[465] **Exhibit CL-094**, *Guaracachi America Inc and Rurelec PLC v. Bolivia*, PCA Case No. 2011-17, Award, January 31, 2014, ¶ 376.

[466] Canada's NDP Submission, ¶ 20.

[467] Canada's NDP Submission, ¶¶ 11-14.

[468] Canada's NDP Submission, ¶¶ 15-16.

[469] Canada's NDP Submission, ¶¶ 17-18, *citing* **Exhibit CL-096**, *Gran Colombia Gold Corp. v. Republic of Colombia,* ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Issue, November 23, 2020, ¶ 127.

an investor under Chapter Eight (Investment), including both Section A on "Investment" and Section B on "Settlement of Disputes between an Investor and the Host Party."[470]

499. In connection with the "ownership" or "control" elements under Article 814(2) of the FTA, Canada states that said provision requires establishing that the investor is an enterprise, that is owned *or* controlled by an investor of a non-Party or of the denying Party, and that if one of these conditions is established by the denying Party – either "owned" or "controlled"– then that is sufficient to establish the first requirement that must be met before the DoB provision can be invoked. The terms "ownership" and "control" should be interpreted under the customary rule of treaty interpretation codified in Article 31 of the VCLT requiring an interpretation of a treaty "*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*", which would involve reference to their meaning in domestic corporate law. Control of an enterprise is a fact-based inquiry to be undertaken on a case-by-case basis, which may extend beyond consideration of share ownership.

500. Finally, in connection with the DoB provision, Canada sustains that if an investor has substantial business activities in the territory of the other Party, it will be considered to have sufficient economic links with the other Party and it will be entitled to the benefits of the Agreement, but that shell or sham companies may be denied treaty protection, adding that the existence of substantial business activities is a fact-based analysis that involves factors that may include: the nature of the activities of that enterprise in the home State; whether it is the location of the enterprise's principal place of business, central administration or of its decision-making; the existence of the enterprise and of its business activities in the home State over a continued period of time; and if it pays taxes, has permanent employees and bank accounts in the home State.[471]

501. Although Claimant argues that Respondent cannot unilaterally withdraw consent following the commencement of a proceeding, which is expressly prohibited by Article 25(1) of the ICSID Convention and cites the *Ampal-American Israel Corp. v. Egypt* case, this Tribunal believes that this requirement needs to be interpreted also in accordance with Article 31 of the VCLT "… *in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.*" The Tribunal believes that the treaty provision can only be understood in the context of affording a State the right to deny benefits to an unqualified investor, but once the identity of the investor is known.

[470] Canada's NDP Submission, ¶¶ 21-22.

[471] Canada's NDP Submission, ¶¶ 28-30.

502. The Tribunal is aware of the terms of Article 25(1) of the ICSID Convention that provides that "*no Party may withdraw its consent unilaterally*" and understands the rationale behind its terms. If the jurisdiction of the Centre is to be assessed at the time the jurisdiction is invoked, it would be unfair to a claimant and to the investor-State dispute settlement system at ICSID itself if a State was given the opportunity to withdraw its consent. How can a claimant be expected to prepare and continue with an arbitration proceeding if a respondent State could be permitted to withdraw its consent at any time?

503. When is jurisdiction invoked? At the time the Notice of Intent is delivered, or at the time the request for arbitration is registered?

504. A Notice of Intent is merely that; an expression of interest in pursuing a claim through the means established in a treaty. There is no claim yet formally submitted. It is – analogous to contract terms, to a letter of intent, with a view of executing a contract. Unless the parties incorporate binding provisions to the letter of intent, no obligations arise. Similarly, the Notice of Intent in the context of the FTA simply anticipates the information to the State that the investor is considering bringing a claim.

505. In this case, when Claimant submitted the Notice of Intent on September 13, 2017, it expressed that "… *if no amicable agreement is reached,* [Claimant] *intends to submit the dispute with the Republic of Colombia to arbitration* …."[472] It was, without doubt, a statement expressing an intention to submit a claim if settlement was not reached.

506. On the other hand, the Tribunal keeps in mind that a respondent State should not be expected to be in a position to deny benefits to an investor who has not yet filed a claim, with only the identification of its name and other relevant information that allegedly grants it protection under the FTA. An investor who brings a claim under the FTA is required under Article 821(2) of the FTA to identify, among other information, "… *the name and address of the disputing investor and, where a claim is made under Article 820, the name and address of the enterprise* …."

507. It is until such time that a respondent State Party to the FTA will have information that will allow it to verify whether the investor qualifies or not for protection.

508. It could be argued that, since the investor needs to specify its name and address at the time it files a Notice of Intent to the State, this is sufficient. However, this information may not be sufficient for a State to determine whether or not the disputing investor meets the requirements. Besides, it is during the "cooling-off" period that the State may desire to start

[472] **Exhibit C-018.1**, Notice of Intent to Submit a Claim to Arbitration, ¶ 1: "… *en el evento de no llegar a un arreglo amistoso, pretende someter a arbitraje la controversia que mantiene con la República de Colombia* …".

negotiations to attempt to reach an agreement with the investor to prevent the subsequent claim. As such, the burden should not be placed on the State to define during this cooling-off period whether or not to deny benefits to an investor. Specially, if the context of the cooling-off period is conducive to negotiations.

509. The Tribunal believes that it is more appropriate for this burden to be placed upon the State after it has received the Request of Arbitration, and the investor has justified its right to bring the claim under the FTA and provided sufficient information allowing the State to react thereto. Including whether or not to deny treaty benefits.

510. Naturally, once the identity of the investor has been disclosed at the time the request for arbitration has been filed, including the details that allow determination of its nationality and control, the decision to deny benefits must be swift to avoid the perils of unfairness.

511. In this case, Colombia swiftly responded to Claimant's Request for Arbitration and purportedly identified that Claimant did not meet the criteria set in Article 821(2) of the FTA, and exercised its rights thereunder.

512. The response was swift; four weeks after receipt of the Request for Arbitration. Considering the various factors to be weighed in at the time such a Request for Arbitration is submitted, along with the burdens of other cases that Colombia had at the time, and the time to prepare its submission for denial, the Tribunal finds that four weeks was not an unreasonable period to express its denial of benefits.

513. In light of the above, the Tribunal concludes that Colombia was not restricted from exercising its right to deny benefits, simply because it did so shortly after having been notified of the Request for Arbitration.

514. A separate issue is whether Respondent had justification to deny the benefits to Claimant. Here the Tribunal finds that it did not, because Article 814(2) of the FTA requires that Colombia show *both* that: (i) Claimant is not owned or controlled by Canadian nationals, *and* (ii) that Claimant has no substantial business activity in Canada. The Tribunal finds that Respondent failed to meet the requirements.

515. This Tribunal shares the view of the *Gran Colombia* tribunal case which examined whether the claimant had substantial business activities in Canada and concluded that: "… *while the company must have some real, material business activities in its home State, the Treaty contains no limitations on the nature of that business. It certainly does not require that the activities at home be of the same nature as those the company conducts in other jurisdictions. Nothing in the Treaty suggests, for example, that a company engaged overseas in natural resource exploration and development must conduct similar resource*

exploration or development at home, in order to satisfy the requirement of having substantial business activities there" adding that "*… It is entirely consistent with the Treaty text for such a company to locate coordinating or support functions in its home State, or to use its home State as a hub for investment and financing activities that make possible the operational activities in other places.*"[473]

516. On the basis of the evidence submitted by Claimant for purposes of being qualified as a Canadian investor and be afforded protection under the FTA, the Tribunal concludes that Claimant has substantial business activities in Canada.

517. *First*, because Claimant's core corporate functions took place in Canada. Claimant was incorporated and operates under the laws of Canada;[474] is regulated by the Ontario's Securities Commission;[475] paid corporate income taxes in Canada;[476] and held bank accounts in the BRC Royal Bank and RBC Dominion Securities.[477]

518. *Second*, because Claimant had offices in Canada. As declared by Mr. Hinchcliffe in his sworn statement, Claimant has always had its head office in Toronto, currently at 82 Richmond St. East, which required expenditures of approximately USD 65,500 per year between 2011 and 2020.[478]

519. *Third*, because Claimant's key directors and officer were Canadian or resided in Canada, including senior mining executive Mr. Larry Strauss, exploration geologist Mr. Michael Sutton and the company's CFO, Mr. Robert Suttie.[479]

520. *Fourth*, because Claimant engaged various employees and consultants in Canada to carry its business activities. Namely, its corporate legal counsel Peterson McVicar LLP and Ogletree, Deakins, Nash, Smoak & Stewart, P.C.'s offices in Toronto and Montreal,[480] its financial advisors from National Bank Financial,[481] its auditor Clearhouse LLP,[482] and its

[473] C-Memorial on Jurisdiction, ¶ 165, *citing* **Exhibit CL-096**, *Gran Colombia Gold Corp. v. Republic of Colombia,* ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Issue, November 23, 2020, ¶ 138.

[474] **Exhibit C-056**, Galway Gold Inc. Form 2B Listing Application in respect of the Common Shares of Galway Gold Inc., December 27, 2012, p. 11; *see also* Supplementary Statement Hinchcliffe, ¶ 9.

[475] Supplementary Statement Hinchcliffe, ¶ 12.

[476] Supplementary Statement Hinchcliffe, ¶ 11.

[477] Supplementary Statement Hinchcliffe, ¶ 21.

[478] Supplementary Statement Hinchcliffe, ¶ 19.

[479] Supplementary Statement Hinchcliffe, ¶ 14.

[480] Supplementary Statement Hinchcliffe, ¶ 22.

[481] Supplementary Statement Hinchcliffe, ¶ 23.

[482] Supplementary Statement Hinchcliffe, ¶ 24.

technical consultants, such as Roscoe Postle Associates Inc.,[483] who authored the RPA Report.[484]

521. Thus, taking into account that under Article 814(2) of the FTA there are two conditions to be met, the fact that substantial activities are being undertaken means that the Tribunal needs not address that of ownership or control.

522. Therefore, the Tribunal rejects this objection to jurisdiction as well.

F. GALWAY'S CLAIMS FALL OUTSIDE OF THE TRIBUNAL'S JURISDICTION *RATIONE MATERIAE* BECAUSE RESPONDENT HAS NOT CONSENTED TO ARBITRATE CLAIMS ARISING OUT OF MEASURES THAT ARE EXPRESSLY EXCLUDED FROM THE SCOPE OF THE FTA

I. The Parties' Positions

a) Respondent's Position

523. The final objection to the jurisdiction of the Tribunal deals with the argument that Respondent has not consented to arbitrate claims arising out of measures that are expressly excluded from the scope of the FTA.

524. Respondent states that the 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, and that at the time of entering into the FTA, it was neither the State's intention that measures adopted to protect the environment would be capable of giving rise to investor-State claims. For this reason, Article 2201(3) of the FTA provides that nothing in the FTA is to be read as restricting the Contracting Parties' ability to adopt measures "*necessary* [t]*o protect human, animal or plant life or health*" and "[f]*or the conservation of living or non- living exhaustible natural resources.*"[485]

525. Thus, Respondent affirms that neither Contracting State to the FTA has consented to resolve through arbitration claims concerning measures falling outside the scope of Chapter Eight and contends that this is clear from the language of Article 820 of the FTA, in which

[483] Supplementary Statement Hinchcliffe, ¶ 26.

[484] **Exhibit C-052**, RPA Technical Report on the Vetas Gold Project, Department of Santander, Colombia. NI 43-101 Report, November 6, 2013.

[485] Memorial on Jurisdiction, ¶¶ 88-89.

the State Parties agreed to submit to arbitration "[c]*laim*[s] *by an investor of a Party* […] *that the other Party has breached: (a) an obligation under Section A* […]."[486]

526. In the view of Respondent, the measures that give rise to Claimant's claims are all measures falling within the environmental carve-out of the FTA because they were necessary for the protection of human, plant and animal life (*e.g.,* the life of those humans, plants and animals living within and around the *páramo* ecosystem), and for the conservation of non-living exhaustible natural resources (*e.g.,* water), and it alleges that the prohibition enacted by Colombia has not been applied "*in a manner that constitute*[s] *arbitrary or unjustifiable discrimination between investment or between investors*." It applies to all holders of mining rights located in the areas overlapping with the Santurbán *Páramo*.[487]

b) Claimant's Position

527. Claimant finds it "*curious*"[488] that Respondent suggests that the *primary* objective of the FTA, titled the Canada-Colombia *Free Trade* Agreement, is in fact to enhance and enforce environmental protection, and that any protections for investment or trade are either subsidiary to or in service to that first environmental purpose, even though Claimant acknowledges that the core economic objectives are of course balanced, but not supplanted by the Preamble's complementary commitments to promoting workers' rights and labor regulation, socially responsible economic development, as well as environmental protection. [489]

528. Claimant recalls that the potential application of the FTA's General Exception provisions requires not only a consideration of the object and purpose of a given State act or measure, but further engages legal questions of necessity, arbitrariness, unjustifiable discrimination, and "*disguised restrictions on international trade*" in order to determine as a matter of law under the FTA whether an exception restricts an otherwise valid claim.[490] Tribunals must evaluate these criteria based on the facts and circumstances of each case or claim in order to determine whether or to what extent an exception applies.

529. Claimant contends that by challenging the Tribunal's jurisdiction to even consider these questions, Colombia seeks "… *to treat their own domestic interpretation of these considerations as determinative, contrary to the provisions of the VCLT and the ILC*

[486] Memorial on Jurisdiction, ¶ 93.
[487] Memorial on Jurisdiction, ¶¶ 95-97.
[488] C-Memorial on Jurisdiction, ¶ 205.
[489] C-Memorial on Jurisdiction, ¶ 205.
[490] C-Memorial on Jurisdiction, ¶ 207.

Articles providing expressly that States cannot rely on their own characterization of domestic law to avoid international obligations."[491]

530. Claimant cites the UNCITRAL tribunal in *Occidental v. Ecuador*[492] which dismissed what Claimant refers to a "*similar jurisdictional objection*" with respect to a general exception for "*matters of taxation*" contained in the bilateral investment treaty between the United States of America and the Republic of Ecuador.[493]

531. Claimant challenges reliance by Respondent on a section of Opinion 1/17 of the Court of Justice of the European Union, dismissing it as inapplicable to the interpretation of the FTA since the aforementioned Court's concern was to avoid conflicting international jurisprudence between different tribunals.

532. Lastly, Claimant asserts that Article 2201 of the FTA does not automatically preclude this Tribunal's jurisdiction to adjudicate its claims, and the question of whether or to what extent any exception may apply to Claimant's rights in these circumstances are discrete legal issues to be considered by this Tribunal under the FTA and in accordance with applicable international principles and law.[494]

II. The Tribunal's Analysis

533. This objection to jurisdiction deals with two arguments: (a) that Colombia has not consented to arbitrate claims arising out of measures that are expressly excluded from the scope of the FTA, and (b) that Claimant's claims "*fall squarely*" within the environmental exception of the FTA.

534. In connection with the first, Respondent bases its objection on Article 2201(3) of the FTA, which provides:

> *Chapter Twenty-Two: Exceptions*
>
> *Article 2201: General Exceptions*
>
> *...*
>
> *3. For the purposes of Chapter Eight (Investment), subject to the requirement that such measures are not applied in a manner that constitute arbitrary or unjustifiable discrimination between investment or between*

[491] C-Memorial on Jurisdiction, ¶ 209.

[492] **Exhibit CL-031**, *Occidental Exploration and Production Company v. Republic of Ecuador*, UNCITRAL, LCIA Case No. UN3467, Final Award, July 1, 2004, ¶¶ 68-75.

[493] C-Memorial on Jurisdiction, ¶ 210.

[494] C-Memorial on Jurisdiction, ¶ 215.

> *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.*

535. The issue for the Tribunal to resolve is whether the exception found under Article 2201 of the FTA precludes the Tribunal from assuming jurisdiction in respect to a claim brought by Claimant because the claim deals with measures adopted by Colombia involving mining in territory that has been found to be protected as a *páramo* ecosystem.

536. The answer is that it does not, because the argument of Respondent in the sense that it has not consented to arbitrate claims arising out of measures that are expressly excluded from the scope of the FTA requires the Tribunal to interpret the provisions of the FTA and the alleged measures breaching the treaty. Thus, clearly the Tribunal requires jurisdiction to examine and decide on the merits of the claims. As pointed out in Canada's NDP Submission: "[i]*n the context of investment obligations, the exception in Article 2201(3) only applies once there has been a determination that there is a breach of a primary obligation in Chapter Eight.*"[495]

537. The Tribunal notes that Respondent itself has dedicated substantial arguments in its Counter Memorial on Liability[496] to address the significance of Article 2201(3) of the FTA (General Exceptions) in its defense on the merits of this case.

538. The contention of Respondent to the effect that when the FTA was executed, "… [t*]he stated objective of the FTA* [was] *to '[e]nhance and enforce environmental laws and regulations' and to ensure a predictable commercial framework for business planning and investment 'in a manner that is consistent with environmental protection and conservation*'" appear not to be the primary objective. It is one of the objectives among a long list that also includes the creation of "…*an expanded and secure market for the goods and services produced in their territories, as well as new employment opportunities and improved working conditions and living standards in their respective territories*", and

[495] Canada's NDP Submission, ¶ 50.

[496] Section VII.D of C-Memorial on Liability.

ensuring "… *a predictable commercial framework for business planning and investment*."[497]

539. It is true that under Article 2201 the State parties clearly acknowledged that "*nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures*" such as those that have been expressed in this Award, but at the same time the State parties assumed other obligations in respect to the investors of the counterparties, such as those under Chapter Eight (Investment).

540. The Tribunal believes that the Parties to the FTA sought a balance, and did not seek to have one objective have precedence over the other. There is no hierarchy in objectives. Each of the chapters needs to be examined in light of its purpose.

541. Just as the *Occidental v. Ecuador* tribunal stated,[498] the claims in question squarely engaged the parties' rights and obligations under the treaty, and the tribunal was thus empowered to adjudicate the same without prejudice to the possibility that an exception provision may apply in whole or in part to the claims.

542. This requires an examination by the Tribunal of the Parties' rights and obligations under the FTA.

543. For the above reasons, the Tribunal rejects this objection to jurisdiction as well, and will deal with the environmental exception as a question of merits.

VIII. APPLICABLE LAW

I. The Parties' Positions

a) Claimant's Position

544. Claimant contends that Article 42 of the ICSID Convention requires that the Tribunal apply the rules of law "*as may be agreed by the parties*", and that under Article 832(1) of the FTA, the parties to the treaty have agreed that disputes brought under the FTA shall be governed by the provisions of the FTA itself, as well as the rules of international law where necessary.[499]

[497] **Exhibit C-001**, Free Trade Agreement between Canada and Colombia, Recitals.

[498] **Exhibit CL-031**, *Occidental Exploration and Production Company v. Republic of Ecuador*, UNCITRAL, LCIA Case No. UN3467, Final Award, July 1, 2004, ¶¶ 68-75.

[499] Cl. Memorial, ¶ 300.

545. Claimant adds that, similarly, the VCLT, to which both State Parties are signatories, provides that since treaties are themselves governed by international law, they must be interpreted in light of "*any relevant rules of international law*."[500] Claimant draws support from *Middle East Cement Shipping v. Egypt*[501] and *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. The Argentine Republic*[502] and argues that this relationship between the FTA provisions and the relevant rules of international law has been characterized to deem the FTA as the *lex specialis*, to which primacy is afforded, while the rules of international law may be relied on to supplement the FTA where necessary.

546. Further, Claimant asserts that, to the extent the Tribunal is required under the FTA to consider any applicable domestic law in determining whether there has been a breach of the FTA, it does not have jurisdiction to consider the legality of these domestic laws or measures under the State's own laws, which is consistent with the VCLT's codification of the primacy of international law over domestic law: "[a] *party may not invoke provisions of its internal law as justification for its failure to perform a treaty*."[503]

547. Finally, Claimant notes the following principles of treaty interpretation under the VCLT:

(a). treaties must be performed in good faith;[504]

(b). treaties shall be interpreted in good faith "*in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose*;"[505]

(c). the "context" of a treaty shall include consideration of other agreements between the parties or instruments made and agreed to in relation to the Treaty;[506] and

(d). treaties shall also be interpreted in light of any subsequent agreements between the Parties regarding that Treaty's application, as well as subsequent State practice of the Parties.[507]

[500] Cl. Memorial, ¶ 300.

[501] **Exhibit CL-026**, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, April 12, 2002, ¶¶ 85-87.

[502] **Exhibit CL-027**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/97/3, Award, August 20, 2007, ¶ 8.2.2.

[503] Cl. Memorial, ¶ 302.

[504] VCLT, Art. 26.

[505] VCLT, Art. 31(1).

[506] VCLT, Art. 31(2).

[507] VCLT, Art. 31(3).

b) Respondent's Position

548. Respondent has not challenged the position of Claimant in respect to applicable law and confirms that, in accordance with Article 832(1) of the FTA, a tribunal "*shall decide the issues in dispute inaccordance with this Agreement and applicable rules of international law*."

II. Tribunal's Analysis

549. Galway's claims must therefore be assessed by reference to the FTA and applicable rules of international law, including the rules of interpretation of international treaties as embodied in the VCLT. [508]

IX. ALLEGED LIABILITY

550. Claimant alleges two breaches by Colombia to the FTA, which the Tribunal shall examine separately below:

A). That Colombia's legislative measures, judicial rulings, and administrative restrictions and actions constitute unlawful expropriation under the FTA and international law;[509] and

B). That Colombia has breached Article 805 of the FTA by failing to treat Claimant "*fairly and equitably through its erratic, arbitrary, and unreasonable regulation of Concession 14833* ".[510]

A. ALLEGED UNLAWFUL EXPROPRIATION UNDER THE FTA AND INTERNATIONAL LAW

I. The Parties' Positions

a) Claimant's Position

(i) El Volcán Mine has Operated Continuously since 2002 with a Mining License and Environmental License

551. Claimant asserts that during the term of the Option Agreement, Reina de Oro maintained the right to continue exploitation activities in the concession area. The extracted minerals would remain the exclusive property of Reina de Oro until: (i) Claimant positively

[508] C-Memorial on Liability, ¶¶ 328-329.

[509] Cl. Memorial, ¶ 303.

[510] Cl. Memorial, ¶ 364.

exercised the option to assign the rights and obligations of Concession 14833; and (ii) the Assignment of Concession 14833 in the name of Claimant was registered in the National Mining Registry.[511]

552. According to Claimant, upon exercise of the option provided under the Option Agreement, Claimant acquired all the rights previously held by Reina de Oro under Concession 14833; specifically, the right to explore and exploit the gold and silver deposits found in the entire 123 hectares that form Concession 14833. These rights arise from the moment of the execution of the contract in which they are contained. [512]

553. Claimant contends that even though the transfer of the mining title and the environmental license are two separate procedures before two independent authorities, the transfer of the mining title assignment necessarily mandates the transfer of the environmental license.[513] The exploitation right is not conditional upon any environmental approvals or licenses; while the right requires Claimant to comply with its environmental obligations, it is not a conditional or contingent right.[514]

554. Claimant contends that the El Volcán Mine was in continuous operation from 2002 until at least May 2016. From that time onward, active mineral exploitation activities have been ongoing and uninterrupted. From the time Claimant entered into the Option Agreement on December 22, 2009, Claimant has made regular public statements in its public disclosure describing these mineral exploitation activities.[515]

555. In response to one of the questions posed by the Tribunal to the Parties after the Hearing, relating to the impact of the conversion of the Exploration and Exploitation License 14833 into Concession 14833,[516] Claimant contends that Clause 21 of Concession 14833 recognized the application of all laws in force including all regulations in Law 685 of 2001, which created new additional rights, adding that the new regime empowered concession rights holders to explore for new mineral exploitation discoveries after the development of the Works and Works Program (PTO) and consequently to be able to increase the volume

[511] Claimant's PH Brief, ¶ 70.

[512] Claimant's PH Brief, ¶¶ 65-66.

[513] Claimant's PH Brief, ¶ 67.

[514] Claimant's PH Brief, ¶ 72.

[515] Claimant's PH Brief, ¶ 75.

[516] The questions presented are: *What were the implications of the conversion of Exploration and Exploitation License 14833 of February 6, 1992 into a Concession 14833 in 2006? Did the change into a concession contract modify (or failed to modify) the terms of the scope of exploration and exploitation rights as a small-scale / medium-scale mining project? What were the standards to determine whether the License 14833 or the Concession 14833 should be deemed to be a small-scale or medium-scale mine*?

of mineral extraction without any major requirements to the modification of the PTO and if necessary the modification of the existing Environmental Management Plan.[517]

556. Claimant states that exploratory activities carried out were developed with the knowledge of both the mining and environmental regulators, who were informed of the scope and details of the exploration campaign carried out in the development and execution of the Option Agreement, and that both the NMA and the CDMB monitored the activities in the additional exploration carried out by Claimant during the years 2010 to 2014.[518]

557. According to Claimant,[519] there was a process followed to modify the Environmental Management Plan that began on July 21, 2006 after the signing of Concession 14833 and its registration in the National Mining Registry, and it has listed the different steps, that include, among others:

a). Confirmation by the CDMB to Reina de Oro that it reviewed the environmental guidelines for the modification of the Environmental Management Plan submitted, finding them pertinent and adjusted to the activity that it develops and the dimensions of the mining project;
b). Claimant's submission on November 7, 2007 of the study required for the modification of the Environmental Management Plan;
c). Request by the CDMB on December 11, 2007, for Reina de Oro to submit information on the total costs of the project, including investments in equipment, machinery, land and annual operation, and an evaluation of compliance with the previous Environmental Management Plan approved by Resolution 0127 of February 18, 2002;
d). Filing by Reina de Oro on May 26, 2012, of the requested information and documents, including the creation of the Department of Environmental Management (DGA) and the filing of studies to obtain discharge permits; and
e). On November 22, 2006, Reina de Oro requested to review the environmental guidelines, arguing that the processes of exploitation and benefit of the minerals will not have modifications. [520]

558. Claimant describes that the assignment of the Option Agreement occurred "… *in the middle of a drill hole program which GG had begun on the property on 4 April 2011, and which continued until April 2013*" and that after this drill program was completed Claimant kept the drill rigs on site "… *so that drilling could recommence at will*." Claimant adds that the

[517] Claimant's PH Brief, ¶¶ 79-81.

[518] Claimant's PH Brief, ¶ 86.

[519] Claimant's PH Brief, ¶ 89, *citing* **Exhibit C-114**, Resolution 381, Regional Autonomous Corporation for the Defense of the Bucaramanga Plateau, May 16, 2016, p. 4.

[520] Claimant's PH Brief, ¶ 89, *citing* **Exhibit C-114**, Resolution 381, Regional Autonomous Corporation for the Defense of the Bucaramanga Plateau, May 16, 2016, p. 3.

exploration work after the assignment was particularly significant, with eight new underground drill holes that identified eight new veins, doubling the number of veins identified at the site and significantly expanding the total estimated mineralization of the site.

559. Claimant states that the total exploration expenses incurred in 2013 were USD 3.68 million, of which USD 1.62 million were expenses specifically for completion of the drilling program, while exploration expenses in 2014 amounted to USD 875,736; USD 448,620 in 2015; and USD 377,725 in 2016. Beginning in 2017, it accounted for the project costs as "Project Support Costs", and incurred USD 293,416 in 2017, USD 304,284 in 2018, USD 282,416 in 2019; and USD 289,635 in 2020.[521]

(ii) Colombia's Actions Constitute Unlawful Expropriation under the FTA

560. Claimant contends that Colombia's legislative measures, judicial rulings, and administrative restrictions and actions constitute an unlawful, indirect expropriation of the Vetas Gold Project because they result in a complete loss of the economic benefit thereof, including the complete destruction of its commercial utility and value, and the fact that Colombia has not paid or even offered the compensation required by Article 811 of the FTA violates the FTA and international law.

561. Claimant cites Article 811 of the FTA which, in its view, protects Claimant's investment in the Vetas Gold Project by prohibiting Colombia from nationalizing or expropriating protected investments unless a set of cumulative conditions are met. Said provision provides that "[n]*either 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*." Further, it requires that "compensation" shall be "… *equivalent to the fair market value of the expropriated investment immediately before the expropriation took place* …" and that it "… *shall be paid without delay and shall be fully realizable and freely transferable, […] 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*."[522]

562. In its Reply, Claimant refers to Colombia's argument that there cannot be an expropriation here since Claimant never acquired any rights *in rem* under Colombian law to Concession

[521] Claimant's PH Brief, ¶ 94.

[522] Cl. Memorial, ¶ 305.

14833 and contends that said argument is entirely contingent on the NMA's belated refusal to approve the assignment, which took place after Claimant had initiated this Arbitration. Claimant argues that, aside from the question of how expansive those rights under Concession 14833 were at the time, Respondent's rejection of the assignment itself constitutes an indirect "taking" of Claimant's right to finalize and secure the assignment it had spent years investing in and litigating over.[523] Claimant adds that its expert, Dr. Ricaurte, has explained that, under Colombian Law, not only did Concession 14833 (along with its suite of existing permits, licenses, and regulatory approvals) include acquired rights for both exploration *and* exploitation, but it also contained a presumptive right to apply for modification under the same license.[524]

563. According to Claimant, it was the total prohibition on mining activity – which became applicable to Concession 14833 following Judgment C-035 and Resolution 381 – that meets the requisite threshold for "substantial deprivation" of an investment's use or value to the point of being "effectively neutralized."[525]

(iii) Colombia Expropriated Claimant's Vetas Gold Project by Expropriating all Exploration and Mining Rights Granted by Concession 14833

564. Claimant indicates that Colombia expropriated its Vetas Gold Project by expropriating all exploration and mining rights granted by Concession 14833. These are "contractual rights", and it is "well-settled law" that protection against expropriation encompasses not only physical assets and other tangible property, but also other rights that are economically significant to the investor. Claimant draws support from the *Phillips v. Iran* case,[526] where the Iran-US Claims Tribunal considered rights arising from a concession agreement and determined those rights to be protected against expropriation, and the *Tecmed v. Mexico*[527] case where the tribunal similarly concluded that "*under international law, the owner is also deprived of property where the use or enjoyment of benefits related thereto is exacted or interfered with to a similar extent, even where legal ownership over the assets in question is not affected, and so long as the deprivation is not temporary.*"

[523] Reply, ¶¶ 148-150.

[524] Reply, ¶ 151, *citing* Expert Report of Dr. Margarita Ricaurte, pp. 19-33.

[525] Reply, ¶ 159.

[526] **Exhibit CL-085**, *Phillips Petroleum Company Iran v. Islamic Republic of Iran, Iran-U.S. Claims Tribunal,* Case No. 39, Chamber 2, Award No. 425-39-2, June 29, 1989, ¶ 105.

[527] **Exhibit CL-030**, *Técnicas Medioambientales, TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, ¶ 116.

565. Claimant argues that expropriation can occur through interference by the State in the use, benefit or enjoyment of property, because, ultimately, it is the *effect* or *consequence* of the State measures that determines whether State interference constitutes an expropriation, not the State's intention.[528] In this case, it adds, Colombia's conduct amounts to an expropriation of its investment because the effect of such actions is the "*complete destruction or termination*" of rights under Concession 14833. Colombia's legislative measures permanently deprived Claimant of its ability to own and operate its lawfully acquired mining concession.

566. By failing to preserve and protect Concession 14833 through its creeping changes to its long-standing legislative and administrative regime governing its mining sector, and by suddenly adopting a strict interpretation of those measures as the basis for refusing to register Reina de Oro's assignment of Concession 14833 to Claimant,[529] according to Claimant, this amounts to *indirect expropriation* of Claimant's investment for which Respondent is obligated to pay compensation, independently of whether such conduct was undertaken for a valid public purpose, was non-discriminatory, and/or was undertaken with due process of law.[530]

567. Claimant recalls the terms of the FTA in respect of "expropriation" and "indirect expropriation" under Annex 811. In the case of indirect expropriation, the cited provision acknowledges that it "… *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.*" Claimant also recalls the definition of expropriation involving State interference to a significant degree with the enjoyment of use or other benefits of the investment established in the *Metalclad v. Mexico*,[531] and cites similar decisions in the *CME v. The Czech Republic*[532] and the *Tecmed v. Mexico* cases,[533] the latter emphasizing that neither the legality of the measures at issue under domestic law, nor the laudable public purpose

[528] Cl. Memorial, ¶ 314.

[529] Cl. Memorial, ¶ 315

[530] Cl. Memorial, ¶ 315.

[531] **Exhibit CL-029**, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, August 30, 2000.

[532] **Exhibit CL-074**, *CME Czech Republic BV v. Czech Republic*, UNCITRAL, Final Award, March 14, 2003, ¶¶ 604-605.

[533] Cl. Memorial, ¶ 318, *citing* **Exhibit CL-029**, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, August 30, 2000; **Exhibit CL-074**, *CME Czech Republic BV v. Czech Republic*, UNCITRAL, Final Award, March 14, 2003, ¶¶ 604-605; **Exhibit CL-030**, *Técnicas Medioambientales, TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, ¶¶114-116.

or intent of such measures displaces the fundamental focus on the effects of the measures when determining whether an expropriation or "taking" has occurred.[534]

568. It adds that the characterization of indirect expropriation at international law as taking many forms and being driven by effects rather than intentions is reflected in the text of Annex 811 of the FTA and is consistent with international law's recognition of "creeping" expropriation as a compensable form of indirect taking.[535]

(iv) Respondent's Conduct Amounts to an Indirect Expropriation

569. Claimant further contends that the Tribunal's determination of whether an expropriation has taken place "… *must be driven by a good faith, fact-driven, and case-specific analysis of the factors elaborated in Article 811 and Annex 811 of the FTA*."[536] To this end, Claimant examines three points:

(a). The economic impact of Colombia's actions;

(b). Whether Colombia's actions infringed Claimant's reasonable expectations; and

(c). Whether Colombia's actions were "creeping" and without due process.

(a). The Economic Impact of Colombia's Actions

570. In respect to the *first* point, Claimant indicates that the most critical factor in determining whether an indirect expropriation has taken place is the extent of the economic impact on the claimant. The degree of loss or deprivation required to establish an expropriation is not limited to actual loss of title, ownership, or control. International courts and arbitral tribunals have long recognized, Claimant adds, that indirect expropriations are not just procedurally different but also substantively distinct from direct expropriations and can occur "*even where legal title to the property is not affected, as long as the deprivation is not temporary.*"[537] The degree of deprivation or destruction of rights required has been consistently defined as requiring that the State's measures necessarily have the effect of substantially depriving the investor of a significant part of its investment or its reasonable

[534] Cl. Memorial, ¶ 323.

[535] Cl. Memorial, ¶ 325.

[536] Cl. Memorial, ¶ 326.

[537] Cl. Memorial, ¶ 326, *citing* **Exhibit CL-030**, *Técnicas Medioambientales, TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, ¶ 116.

use thereof.[538] The deprivation of value must be assessed from the perspective of the investor and at the time that the investment was made.[539]

571. According to Claimant, in a case involving concession contracts like this, tribunals have held that where a claimant's sole business within the State is its investment in the concession (*i.e.*, the concession is the investor's *raison d'être* in the State), then State measures that prohibit any future development or profit from that concession render it "*virtually worthless*" and amount to a sufficient deprivation of rights to constitute an indirect expropriation.[540]

572. Claimant contends that its investment was made exclusively for the purpose of carrying out the exploration, exploitation, and ultimately the commercialization of gold mining within the area, and that by failing to preserve any of the previously recognized protections for these associated rights under older concessions, Colombia's implementation of Judgment C-035 in the most restrictive manner possible unequivocally dissolves the entire suite of rights under Concession 14833. This explicit and total elimination of rights was compelled and enforced by the threat of criminal sanction and rendered Claimant's investment effectively worthless.[541] Even if certain residual rights had persisted under Concession 14833, which would be *de minimus* in any event, these too were then administratively stripped from Claimant by Colombia's retroactive refusal to approve the registration of the Assignment Agreement.[542]

573. In its Reply, Claimant insists that it was not only deprived of the full value of any residual rights in Concession 14833 following the NMA's refusal but was also deprived of any opportunity to apply to modify those rights.

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[538] Claimant cites in this regard, *e.g.,* **Exhibit CL-031**, *Occidental Exploration and Production Company v. Ecuador*, UNCITRAL, LCIA Case No. UN3467, Final Award, July 1, 2004, ¶ 88, *citing* **Exhibit CL-029**, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, August 30, 2000; **Exhibit CL-074**, *CME Czech Republic BV v. Czech Republic*, UNCITRAL, Final Award, March 14, 2003; **Exhibit CL-036**, *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, September 16, 2015, ¶ 238; **Exhibit CL-027**, *Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/97/3, Award, August 20, 2007, ¶ 7.5.24.

[539] **Exhibit CL-030**, *Técnicas Medioambientales, TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, ¶ 186.

[540] Cl. Memorial, ¶ 330, *citing*, among others, **Exhibit CL-036**, *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, September 16, 2015, ¶ 239; **Exhibit CL-037**, *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, November 30, 2017, ¶¶ 342, 375.

[541] Cl. Memorial, ¶ 331.

[542] Cl. Memorial, ¶ 333.

574. In connection with the suggestion by Respondent that there has been no economic impact on Claimant's investment since 2010 or 2011, as by that time, Laws 1382 and 1450 had already imposed a total prohibition on mining applicable to Concession 14833, Claimant asserts that this position is predicated on Colombia's assumption, which is incorrect both as a matter of fact and law, that no part of the rights under Concession 14833 were protected by the transitional or "grandfathering" regime that continued in force until Judgment C-035. Claimant asserts that Dr. Ricaurte indicated that Concession 14833 "*was clearly included in the transitional regime*" since it was granted and registered with the NMA before the February 9, 2010 – cut-off date – and already had an environmental license for mineral *exploitation*.[543]

575. Claimant further contends that the El Volcán Mine remained a fully licensed and continuously operating mine engaged in exploitation activities with all the required environmental permits, and this was widely publicized by Claimant in its public disclosures for the years after 2010. In addition, Colombia's mining and environmental regulators at all times remained "*fully aware*" of the mineral exploitation activities taking place, as reflected in the NMA's files relating to such mine.[544]

576. As to the allegation of Respondent that a finding on expropriation cannot be made since Claimant has not yet adduced evidence to "*prove*" its losses, Claimant states that is not required, at this stage, to *prove* the quantum of its damages in economic terms to establish liability. Nonetheless, it argues that the actions of Respondent resulted in the "*total and complete elimination of its ability to use or generate revenue from its investment*" of more than USD 20,000,000 in Concession 14833, which was carried out exclusively for the purpose of exploration, exploitation, and ultimately commercialization of gold mining in the Mining Area.[545]

577. Claimant addresses the alternative argument by Respondent who suggests that, since 21.9% of the total Mining Area is not covered by the *páramo* delimitation in Resolution 2090, Claimant has retained sufficient economic use and viability to its investment in Concession 14833 and that Respondent cannot therefore be liable for expropriation. In that respect, Claimant points first to a contradiction between Respondent's initial suggestion that the claim must fail both for lack of jurisdiction and on the merits because Claimant never acquired *any* rights as an investor under the FTA, while at the same time asserting that Claimant's expropriation claim must fail since Claimant acquired and continues to own 21.9% of those very same rights. But even if Respondent's position was that mineral

[543] Reply, ¶¶ 155-156.
[544] Reply, ¶ 157.
[545] Reply, ¶ 158.

exploration and extraction and other related mining activities could be carried out in the non-restricted 21.9% of the Mining Area – which would be in breach of the terms set in Resolution 381 of the CDMB, which establishes that the only mining activities allowed in restricted zones are those conducive to the protection and conservation of the *páramo* ecosystem – Claimant contends that the residual 21.9% of the Mining Area that could undergo reduced mining exploitation would remain economically non-viable. The value and use of the investment would remain "*effectively neutralized*."[546]

578. Claimant further argues that its investment in the Vetas Gold Project was predicated upon and presumed a minimum operational scale required to begin generating *any* commercial returns, rather than a mere reduction in profitability, which is the case in the precedents submitted by Respondent. This, because the project included a fully operating mineral mine when the Option Agreement was entered into, and being restricted entirely or in the alternative, to only 21.9% of the Mining Area could not meet this threshold. [547]

(b). Whether Colombia's actions infringed Claimant's Reasonable Expectations

579. The *second* factor to determine if indirect expropriation has occurred is whether the State measures infringed on a claimant's reasonable, investment-backed expectations. Gathering support from *Azurix v. Argentina,*[548] Claimant contends that tribunals must consider the claimant's perspective on its "*use or reasonably-to-be-expected economic benefit of its investment*", the State conduct and representations that informed those expectations, and whether those expectations were at odds with the ultimate deprivation or destruction of the claimant's rights.[549]

580. According to Claimant, one can find clear cases of infringement of an investor's reasonable legitimate expectations where a State provides approvals, assurances, or other representations to the claimant regarding the entitlement to exercise certain investment rights, the State has ongoing knowledge of the claimant's intention and actual exercise of those investment rights, and the State nonetheless then repudiates its approvals or assurances or refuses to take the requisite steps to enable the claimant to continue

[546] Reply, ¶¶ 161-163.

[547] Reply, ¶¶ 164-165.

[548] **Exhibit CL-038**, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, July 14, 2006, ¶ 316.

[549] Cl. Memorial, ¶ 334.

exercising its rights.[550] As investors, Claimant adds, it is reasonable for them to have relied on the State approvals, guarantees, assurances, and representations regarding their present and future entitlement to these rights when making the decision to invest in the first place.[551]

581. According to Claimant, the doctrine of reasonable expectations echoes the general principle of dealing in good faith and estoppel, whereby a party cannot rely on or hide behind a recanting or reneging on their prior representations or commitments. This principle is recognized by both Canada and Colombia, and international law.[552]

582. Claimant expresses that its "reasonable expectations" on the viability of exercising its rights under Concession 14833 were valid because these were "*heavily informed by Colombia's (initially) consistent, continuous, and unequivocal representations that these rights would be exercisable*",[553] and details multiple instances involving the FTA, the reforms to the Mining Code through Law 685 in 2001, as well as the fact that Claimant had a "*valid and binding claim*" to Concession Contract 14833 because:

(i) Concession 14833 was validly granted to Reina de Oro as an exploration and exploitation license by the Colombian MME on February 6, 1992;

(ii) Concession 14833 was granted an environmental license by the CDMB through Resolution 127 on February 18, 2002;

(iii) Concession 14833 was granted further rights of exploitation of gold and silver by INGEOMINAS on June 21, 2006;

(iv) Concession 14833 was recorded at the Mining Registry to begin exploration on March 29, 2007;

(v) GRH, through its Colombian branch (GRC), entered into the Option Agreement with Reina de Oro for the rights to Concession 14833 on December 22, 2009;

(vi) GRC assigned its rights under the Option Agreement in favor of GRVC on December 6, 2012;

[550] Claimant cites as examples, **Exhibit CL-029**, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, August 30, 2000; **Exhibit CL-038**, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, July 14, 2006; **Exhibit CL-037**, *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, November 30, 2017.

[551] Cl. Memorial, ¶ 335.

[552] Cl. Memorial, ¶ 337.

[553] Cl. Memorial, ¶ 338.

(vii) GRVC exercised its rights under the Option Agreement on December 11, 2013;

(viii) Claimant was successful in the Reina de Oro Arbitration which disputed the validity of GRC and GRVC's exercise of rights under the Option Agreement, resulting in an award dated 13 February 2015, ordering the assignment of Concession 14833 to Claimant;

(ix) On February 24, 2015, Reina de Oro issued its notice of assignment of Concession 14833 to GRVC to the NMA, as required under the 2001 Mining Code, and the NMA never contested nor challenged Claimant's right to Concession 14833 until 2018; and

(x) On March 5, 2015, GRVC filed a claim before the 8th Civil Circuit Court of Bucaramanga against Reina de Oro to recognize and enforce the Reina de Oro Arbitration award, which resulted in the Court issuing a mandatory order against Reina de Oro for the same.

583. Further, Claimant contends that between 2010 and 2012, while it was engaged in its exploration work under the Option Agreement, Colombia was actively monitoring and assisting with regulatory compliance measures applicable to these exploration activities under Concession 14833 and its environmental license, citing different actions taken to that effect. In addition, prior to Resolution 381 (issued by the CDMB on May 16, 2016), the rights under Concession 14833 had been consistently and expressly recognized and protected throughout Colombia's piecemeal implementation of environmental changes for the protection of the *páramo* systems. [554]

584. Taken together, all those facts establish a clear and reasonable expectation on the part of Claimant that Concession 14833 would not be rendered "*virtually worthless*" through Colombia's implementation of its new environmental and mining regulations relating to the *páramo* systems. [555]

585. Also, Claimant alleges that pursuant to Article 811(c) of the FTA, it held reasonable expectation that, as a qualifying investor from a State Party making a protected investment such as it did with Concession 14833, any such destruction of its fundamental rights therein would only be made if followed by "*prompt, adequate, and effective compensation*", and

[554] Cl. Memorial, ¶ 338(d) and (e).

[555] Cl. Memorial, ¶ 339.

since Colombia has refused to pay for these measures, this expectation has been infringed.[556]

586. In response to Respondent's position that there has been no infringement of reasonable expectations because it never made any express or contractual "promise" to Claimant that "*measures would not be taken to protect the páramo within that area*",[557] Claimant asserts in its Reply that its expectations were grounded precisely in the following type of direct representations of Respondent:

- the terms of Concession 14833 itself and the rights granted and conferred therein;
- the suite of accompanying permits, licenses, and approvals issued for mining exploration and exploitation activities under Concession 14833;
- express (and multiple) legislative carve-outs providing designated exemptions to the terms and rights of Concession 14833;
- Colombia's consistent regulatory and administrative knowledge and approval of the ongoing exercise of rights under Concession 14833 throughout the multiple years of legislative evolution; and
- the rights and obligations of the FTA as binding upon Colombia with respect to Canadian investors.[558]

587. In its Reply, Claimant insists that Respondent's conduct, in particular: (a) the issuance of Resolution 381, (b) the refusal to approve the assignment via Resolution 341, and (c) Respondent's decision not to pay compensation, were all contrary to Claimant's reasonable expectations as a qualifying investor under Concession 14833.

588. Claimant further relies on the Expert Report of Dr. Margarita Ricaurte regarding the status and impact of the applicable domestic law and Colombia's conduct as informing investors' reasonable expectations, namely: (i) the express incentivizing and stabilizing objectives of the 2001 Mining Code, specifically as reflected in Articles 34, 36, and 46; (ii) the express terms and rights included in Concession 14833, which formed the contractual backbone to Claimant's reasonable expectations on the viability of its investment, which included mining exploitation as an acquired right by virtue of its underlying permits, regulatory decrees, and environmental and mining licenses and approvals for both exploration *and* exploitation; (iii) the repeatedly maintained transitional regime or "grandfathering"

[556] Cl. Memorial, ¶ 341.
[557] Reply, ¶ 168, *citing* C-Memorial on Liability, ¶¶ 372, 376.
[558] Reply, ¶ 169.

provisions carried out through under Law 1382, Law 1450, and Resolution 2090, which "*clearly included*" and applied to Concession 14833; (iv) Respondent's administrative and regulatory conduct following Law 1382 which continued to consistently indicate and tacitly approve Claimant's ongoing mining activities, including exploitation, in this Mining Area; and (v) the fact that, in its request for clarification following Judgment C-035, the NMA directly raised the concern that the Court's premature curtailing of prior concessionaire's rights could require compensation by virtue of Colombia's contractual and treaty obligations.[559]

(c). Whether Colombia's actions were "creeping" and without due process

589. The *third* factor to assist in the determination if indirect expropriation has occurred is whether the actions taken lack the due process owed to investors under the FTA. Claimant would have expected that any changes to conditions applicable to Concession 14833 would be made with appropriate consultation and participation by the affected parties and would reflect clear and intelligible changes so as to ensure certainty and fairness on the status of the affected rights. But Claimant asserts that these were infringed by Colombia's strict and unilateral implementation of Judgment C-035, and without its participation in subsequent Resolutions of the NMA; particularly Resolution 341, which retroactively refused to register the 14833 Assignment. It was "… *conveniently issued less than a month after* [Claimant] *had launched this arbitration claim, came after an inexcusable 3-year-long administrative delay* ..." even though pursuant to Article 22 of Law 685 under the 2001 Mining Code, Claimant had the legal right to presume that the NMA had no objections to the registration of the Assignment Agreement after 45 days had passed from the date of Reina de Oro's written notice of the assignment on February 24, 2015.[560]

(v) The "Character" of Colombia's Measures Cannot Independently Absolve Colombia of the Breaches of its Obligations under the FTA

590. Claimant challenges Respondent's misrepresentation of the statement in *Tecmed v. Mexico*[561] affirming that such tribunal stated that it is "*undisputed*", as a matter of international law, that a State's exercise of its sovereign powers *may* cause economic damage without giving rise to any entitlement to compensation, and Claimant draws

[559] Reply, ¶ 167.

[560] Cl. Memorial, ¶ 345.

[561] **Exhibit CL-030**, *Técnicas Medioambientales, TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003.

support from the tribunals in *Azurix v. Argentina*[562] and in *Vivendi v. Argentina*[563] to challenge the idea that "public purpose" categorically precludes liability under international law for otherwise expropriatory conduct.[564]

591. While Claimant does not dispute the basic proposition that States are generally not liable at international law for *bona fide* regulatory activity, this statement is of limited utility to this case, since the Tribunal is tasked with interpreting the FTA in the factual circumstances of the case. Claimant contends that *Tecmed* made clear that this general principle does not displace the specific text of the applicable treaty instrument and how its elaborated provisions should be applied to the specific facts and circumstances.[565] This means that the question of whether Respondent's specific measures affecting Concession 14833 are shielded from liability by virtue of their environmental character must be driven squarely by the FTA's Annex 811(2)(b) and General Exception provisions (Article 2201), which codify as *lex specialis* precisely in what circumstances, and to what extent, measures relating to the environment can be afforded special treatment.

(vi) "Rare Circumstances" Under the FTA

592. In its Reply, Claimant contends that Respondent's conduct constitutes "rare circumstances" under Annex 811(2)(b), adding that, while Respondent's policy "*never changed*", this fails to engage with the specific implementing State conduct at issue, focusing instead on the over-arching objective of protecting the *páramos* (which it is not disputed by Claimant who accepts that they did remain the same). Indeed, Claimant contends that, while Colombia's policy objectives may have remained consistent, its conduct drastically changed in ways that had a significant impact on Concession 14833.[566]

593. Claimant further asserts that Respondent engaged in arbitrary and discriminatory conduct when it belatedly refused to record the transfer of Concession 14833 to Claimant in the Mining Registry, and that in such respect "*circumstantial evidence surrounding NMA's conduc*t" supports the inference that the NMA rejected the assignment "*in bad faith and for tactical reasons*."[567] The NMA denied the assignment knowing that mining operations on Concession 14833 were no longer viable "*to furnish Colombia with the same legal*

[562] **Exhibit CL-038**, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, July 14, 2006.

[563] **Exhibit CL-027**, *Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/97/3, Award, August 20, 2007.

[564] Reply, ¶¶ 171-174.

[565] Reply, ¶ 175.

[566] Reply, ¶¶ 177-178.

[567] Claimant's PH Brief, ¶ 111.

defences it now advances before this Tribunal",[568] adding that the refusal was targeted at Claimant, and "*not to protect any legitimate public welfare objectives but cynically to disadvantage GG in the assertion of its legitimate and legal rights in relation to Concession 14833 after the pronouncement of Judgment C-35*".[569]

594. Claimant examines Article 2(a) of Annex 811 of the FTA which provides the case specific framework to identify *indirect* expropriation and argues that the "rare circumstances" under which an *indirect* expropriation will occur under the terms of such provision does not change the criteria nor does it establish an elevated threshold above that recognized under international law.[570]

595. The analysis to determine whether expropriation exists must be driven by the case-specific framework under Article 2(a), and the conduct and, according to Claimant, actions taken by Colombia amount to a "rare" and inexcusable reversal of its position regarding rights and obligations due to its investors. Claimant describes the actions taken, and the result of a creeping and total erosion of Claimant's investment. Rather than an ordinary, consistent, consultative, and validly implemented revision of its mining regime, Colombia reversed course through an iterative and destabilizing series of legislative measures, court challenges, and administrative actions culminating in the unilateral decisions to completely erode and strip away all mining rights previously held by Claimant through its investment in Concession 14833.[571]

(vii) Colombia's Expropriation was Unlawful and in Breach of the FTA

596. Claimant concludes that once expropriation is found under Article 811 of the FTA, it will be deemed lawful only if it undertaken: (i) for a public purpose, (ii) in a non-discriminatory manner, (iii) in accordance with due process of law, *and* (iv) is followed by prompt, adequate, and effective compensation. Colombia has failed, however, to make payment of such compensation. This should result in a determination that the expropriation was unlawful under the FTA, without it being necessary that the Tribunal examine whether it was discriminatory, for a public purpose, or in accordance with due process of law to find that it is unlawful under the FTA.[572]

597. Claimant's contention with respect to Judgment C-035 is that it deprived Galway of "acquired rights" in relation to the Vetas Gold Project because Judgment C-035 did not

[568] Claimant's PH Brief, ¶¶ 109-111.
[569] Claimant's PH Brief, ¶ 112.
[570] Cl. Memorial, ¶¶ 346-350.
[571] Cl. Memorial, ¶¶ 351-354.
[572] Cl. Memorial, ¶¶ 355-362.

allow the mining activities of the Vetas Gold Project to be carried out in the *páramo*.[573] For purposes of Colombian law, Claimant has stated that Judgment C-035 is *res judicata* as against the entire universe of natural and legal persons (*i.e.,* it has an *erga omnes* effect), even for those who did not participate in the procedure before the Constitutional Court.[574]

b) Respondent's Position

598. Throughout its pleadings, Respondent has contended that it has not expropriated any of Claimant's "*alleged*" investments because:

a). Claimant never acquired the right to mine in the Vetas Gold Project;

b). Claimant was never exempt from the ban on mining in the paramo, and never met the strict mining and environmental requirements to develop the Vetas Gold Project;

c). Even if Claimant had acquired rights in the concession, Colombia did not indirectly expropriate Claimant's alleged investment; and

d). Claimant cannot show that a "rare circumstances" exception under Article 811(2)(b) does apply.

599. Respondent's position is divided into two: (i) that the rights to Concession 14833 were not vested in Galway at the time of Colombia's measures; and (ii) that in any event, Concession 14833 did not confer any vested rights to carry out the Vetas Gold Project.

600. In Respondent's view, to succeed in its claim, Claimant must show that: (1) the rights alleged to have been expropriated were covered investments under the FTA and were vested in Galway at the time of Colombia's measures; and (2) the "*fact-based inquiry*" to be conducted pursuant to Annex 811(2)(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 interfere with distinct, reasonable investment-backed expectations; and (iii) the character of the measures.

(i) Claimant never acquired the right to mine in the Vetas Gold Project

601. Recalling that the Option Agreement in relation to Concession 14833 was executed on December 22, 2009, among GRH (through its Colombian branch GRC) and Reina de Oro, Respondent notes that Galway was not even in existence at this time, since it was

[573] Rejoinder, ¶ 130, *citing* Reply, ¶ 167(e).

[574] Claimant's PH Brief, ¶¶ 59-63.

incorporated on May 9, 2012.[575] Thus, Respondent asserts, it was GRH, and not Claimant, that was involved in the acquisition of the Vetas Gold Project. It was only on December 6, 2012, that GRH (through its Colombian branch GRC) transferred the Option Agreement to GRVC – the Colombian branch of Galway Resources Vetas Holdco Ltd. (GRVH).[576]

602. Pursuant to the Option Agreement, GRH had the right to carry out geological exploration work in the mining titles to assess their mining potential. Upon completion of that work, subject to satisfactory results, GRH had the right to exercise the option and, as a result, the parties were to sign an *aviso de cesión* (notice of assignment) and a *contrato de cesión* (an assignment agreement). Respondent states that Reina de Oro's PMA (*i.e.,* the environmental management plan earlier issued) was not part of the Option Agreement.[577]

603. Respondent contends that, contrary to what Claimant asserts in its Memorial,[578] Reina de Oro never signed an agreement to assign its rights to the Concession Contract 14833 to Claimant, and no such assignment was ever effectuated as a matter of Colombian law. Nonetheless, Respondent argues that GRVC's exercise of its option for the assignment of Concession 14833 gave rise to a private dispute with Reina de Oro which culminated in a domestic arbitral award that confirmed the validity of GRVC's exercise of the option and ordered Reina de Oro to sign an assignment agreement to transfer Concession 14833 to GRVC, but also contends that Claimant ultimately failed to secure Reina de Oro's assignment of Concession 14833 for reasons unrelated to Colombia.[579]

604. Under the Option Agreement, Reina de Oro simply granted GRC (and later GRVC) the right to conduct exploration work in Concession 14833, at the end of which GRC (and later GRVC) could exercise an option to acquire Concession 14833 from Reina de Oro. In exchange for the right to conduct exploration activities in Concession 14833, GRC (and later GRVC) agreed to pay Reina de Oro a total of USD 300,000 together with 500,000 shares in Galway Resources Ltd.[580]

605. However, Respondent points out that the Reina de Oro Award did not find that the Option Agreement had *de facto* transferred title of Concession 14833 to GRVC, nor that the award

[575] As a consequence of the execution of an Arrangement Agreement dated October 19, 2012, between AUX Acquisitions 2, 2346407 Ontario Inc., Galway Resources Ltd., 663755 N.B. Inc., and 663757 N.B. Inc., pursuant to which 2346407 Ontario Inc. acquired all the issued and outstanding shares of Galway Resources.

[576] C-Memorial on Liability, ¶¶ 189-193.

[577] C-Memorial on Liability, ¶¶ 194-195.

[578] Cl. Memorial, ¶ 5.

[579] C-Memorial on Liability, ¶¶ 196-203; Rejoinder, ¶¶ 4, 18.

[580] Rejoinder, ¶ 22; **Exhibit C-007**, Option Agreement between Reina de Oro and GRC, December 22, 2009, Clauses 2 and 3.2.

itself effectuated any such transfer. Rather, in the Reina de Oro Award, the tribunal confirmed that the Option Agreement simply committed Reina de Oro to carry out the steps necessary to effectuate such transfer, including the execution of a contract of assignment.[581]

606. Respondent asserts that the orders in the Reina de Oro Award are "*noteworthy*" for three reasons. *First*, the orders confirm that, contrary to Galway's assertions in this arbitration, as a matter of Colombian law, the transfer of Concession 14833 required the delivery to the ANM of both the notice of assignment *and* the executed assignment agreement. *Second*, by requiring Reina de Oro to sign the assignment agreement within 45 days of the ANM's receipt of the assignment notice, the orders also show that it was entirely predictable for the ANM not to respond to a simple notice of assignment (*i.e.*, not accompanied by an assignment agreement) and that such lack of response would not entitle Reina de Oro to refuse to sign the assignment agreement. *Third*, the Reina de Oro Award also confirms that a signed assignment agreement was necessary for GRVC to rely on the doctrine of *silencio administrativo positivo*.[582]

607. Respondent contends that, contrary to Claimant's assertion that the NMA Notice of Assignment was sufficient to effectuate the assignment of Concession 14833, neither Reina de Oro nor Claimant fulfilled the steps required to complete the assignment of mining titles under the 2001 Mining Code, and submitted the expert witness testimony of Mr. Eduardo Amaya Lacouture, a lawyer at the *Consejo de Estado* and a former Vice-president of the Contracts and Titles Division of the ANM.[583] In his testimony, Mr. Amaya Lacouture explains that Reina de Oro delivered an incomplete notice of assignment to the ANM because it was not followed by an assignment agreement and information on GRVC's legal capacity, and therefore the approval under the principle of *silencio administrativo positivo* (positive administrative silence), if the ANM does not issue a decision within a statutory 45-day period established in Article 22 of the 2001 Mining Code, did not occur.[584]

608. According to Respondent, Claimant was well aware that Reina de Oro needed to execute the assignment agreement in order to transfer Concession 14833. On February 25, 2015, that is, a day after Reina de Oro delivered the NMA Notice of Assignment to the ANM, Galway wrote to Reina de Oro expressing its concern regarding Reina de Oro's apparent refusal to execute the assignment agreement, and reminded Reina de Oro of its obligation

[581] C-Memorial on Liability, ¶¶ 206-207; Rejoinder, ¶¶ 24-25, *citing* **Exhibit C-038**, Arbitral Award, February 13, 2015, p. 60.

[582] Rejoinder, ¶ 26.

[583] Lacouture Statement, ¶¶ 6-7.

[584] C-Memorial on Liability, ¶¶ 210-211; Rejoinder, ¶ 19.

under the Reina de Oro Award to execute the assignment agreement 45 days after the ANM's receipt of the assignment notice at the latest.[585]

609. Respondent states that the fact that Galway never acquired title to Concession 14833 is fatal to the merits of Galway's claims because Colombia cannot have expropriated or accorded any unfair or inequitable treatment to an investment that was not Galway's at the time of the measures (or ever).[586]

610. Respondent insists that GRVC failed to compel Reina de Oro to execute the assignment agreement despite having effective legal remedies available in Colombia to do so, and adds that GRVC could have sought specific performance of Reina de Oro's obligation under the Option Agreement and the Reina de Oro Award to execute the assignment agreement for Concession 14833 through a *proceso ejecutivo* (enforcement procedure).[587] To do so, Respondent indicates that it would have sufficed for GRVC to file a *demanda ejecutiva* (enforcement action) seeking specific performance of Reina de Oro's obligation to execute the assignment, accompanied by a copy of the assignment agreement. Had Reina de Oro refused to sign the document following the filing of the enforcement action, Article 434 would have allowed the judge hearing the enforcement action to sign the assignment agreement on Reina de Oro's behalf. Then, GRVC would have been in a position to deliver a signed copy of the assignment agreement to the ANM in order to complete the assignment and become the titleholder of Concession 14833.[588]

611. In connection with Claimant's contention that there were a number of "*issues with Colombia's decisions throughout the assignment process*" of Concession 14833, and that the ANM's decision-making was invalid or improper, Respondent asserts that the doctrine of positive administrative silence did not apply to the ANM's treatment of Reina de Oro's incomplete assignment request, since the 45-day positive administrative silence period only begins to run if the notice of assignment is complete and accompanied by all required documents. Reina de Oro failed to deliver a complete notice of assignment because it never provided the ANM with a copy of a signed agreement with Claimant to assign Concession 14833. But even if Reina de Oro's assignment request was complete (which Respondent does not accept) Claimant never followed the procedure provided under Colombian law to invoke any positive administrative silence against the ANM.[589]

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[585] Rejoinder, ¶ 28; **Exhibit R-153**, Letter from GRVC to Reina de Oro, February 25, 2015.

[586] Rejoinder, ¶ 4.

[587] **Exhibit R-026**, Law 1564 of 2012, General Code of Procedure, Art. 434.

[588] Rejoinder, ¶ 34.

[589] Rejoinder, ¶¶ 37-45.

612. Further, Respondent contends that Order 228 of 2017 gave Reina de Oro and GRVC an opportunity to cure the incomplete assignment request, but they both failed to do so.[590] An assignment notice is deemed complete under the 2001 Mining Code only when the full documentation required to process the assignment is presented, and the practice of the ANM at the time Order 228 of 2017 was issued was to render a single administrative decision approving both the assignment notice and declaring that the assignment had been perfected.[591]

613. Respondent further contends that Claimant "*renounced to enforce the Reina de Oro Award with respect to the assignment*". Indeed, Respondent adds that GRVC initiated legal actions in order to enforce parts of the Reina de Oro Award, but not to compel Reina de Oro to sign the assignment agreement. In particular, on March 3, 2015, GRVC filed an enforcement action before the Bucaramanga courts to collect the damages awarded to GRVC by the Reina de Oro Award.[592] Claimant secured an attachment over Concession 14833,[593] but the rights under attachment do not make Claimant owner of Concession 14833.

614. The purpose of the attachment request was to secure assets to satisfy Reina de Oro's pecuniary obligations to GRVC in a foreclosure auction within the enforcement procedure, but not to effectuate the transfer of Concession 14833 to GRVC. Therefore, according to Respondent, Claimant's assertion that the purpose of the attachment was to "*protect*" Concession 14833 is highly misleading.[594] Respondent adds that Galway only has itself to blame for failing to secure title to Concession 14833 by seeking to attach Concession 14833 as an asset to be sold in order to satisfy the damages payable by GRVC under the Reina de Oro Award in the enforcement procedure, while failing to apply for an order to compel Reina de Oro to sign the assignment agreement.

615. In its Rejoinder, Respondent rejects Claimant's contention that the ANM's refusal to approve the assignment of Concession 14833 was "*triggered*" by Judgment C-035, and this is somehow evident and unquestionable from the text of Resolution 341, Respondent, additionally, rejects the argument that the ANM could not validly reject the assignment on the grounds that Concession 14833 was subject to an attachment order because "*the attachment order and the assignment request were both in favour of GG.*" First,

[590] Rejoinder, ¶¶ 46-51.

[591] Rejoinder, ¶ 52.

[592] C-Memorial on Liability; ¶ 215; Rejoinder, ¶ 35; **Exhibit R-156**, GRVC's Attachment Request Regarding Concession 14833, March 3, 2015.

[593] *See* **Exhibit C-092**, Embargo order of the exploration and exploitation rights under Concession Contract 14833, May 11, 2015.

[594] Rejoinder, ¶ 36.

Respondent states that ANM rejected Reina de Oro's NMA Notice of Assignment of Concession 14833 because GRVC had attached the rights and obligations arising from Concession 14833 in the context of an enforcement action against Reina de Oro to collect the damages awarded by the Reina de Oro Award for its breach of the Option Agreement, and confirms four reasons for which Resolution 341 was not prompted by Judgment C-035: (i) Judgment C-035 is not even mentioned in the text of Resolution 341; (ii) the reference to CDMB Resolution 381 in Resolution 341 was part of the "Background" section of Resolution 341 and not the "*parte motiva*"; (iii) a cursory and fair reading of the text of Resolution 341 shows that the reference to the overlap of Concession 14833 was not part of the reasons justifying the rejection of Reina de Oro's assignment request, but rather part of the ANM's discussion regarding the amendment of the clerical error in Concession 14833's entry in the National Mining Registry; and (iv) the overlap had existed ever since the ban on mining in the *páramos* entered into force, in February 2010.[595]

616. The ANM did not state that exploration projects such as the Vetas Gold Project, which had no environmental license issued prior to February 9, 2010, were deprived of acquired rights and required compensation. Rather, it merely asked the Court to clarify the status of projects that were in fact grandfathered under Law 1753.[596]

617. In addition, according to Respondent ANM's Resolution 341 was not prompted by or in any way related to Claimant's Request for Arbitration. Respondent also rejects Claimant's assertion to that effect. To this end, Respondent indicates that evidence shows that the ANM carried out the analysis and preparatory work for the issuance of Resolution 341 before Galway even submitted its Notice of Intent. On October 27, 2017 (five months before the Request for Arbitration and a one month after Galway submitted its Notice of Intent), the ANM issued Order 228 of 2017, directing Reina de Oro to provide an updated copy of GRVC's corporate certificate, as well as a copy of the assignment agreement and ordering the notification of this decision to GRVC.[597]

618. Further, Respondent contends that GRVC's attachment of the rights under Concession 14833 was a valid basis for the ANM's rejection of the assignment request. GRVC and Reina de Oro never signed an assignment agreement, and GRVC obtained the attachment of Concession 14833 as an asset to be sold at auction in order to generate proceeds from which Reina de Oro could satisfy its liability in damages towards GRVC. In the absence of an assignment agreement, as well as any evidence that GRVC consented to the assignment of Concession 14833 – notwithstanding the attachment (*e.g.,* through a letter

[595] Rejoinder, ¶¶ 55-61.

[596] Rejoinder, ¶133.

[597] Rejoinder, ¶¶ 63-64.

signed by GRVC) – there was simply no basis for the ANM to assume that GRVC consented to the requested transfer.[598]

619. Respondent also claims that none of the alleged measures that Claimant alleges were taken by Respondent prevent the future assignment of Concession 14833 to GRVC. Respondent adds that the measures had no impact on Claimant's ability to pursue a project within the *páramo* area of Concession 14833 because mining in that area has been banned since February 9, 2010. For this reason, the assignment of Concession 14833 could only ever have allowed Galway to pursue a project in the areas of Concession 14833 falling outside of the *páramo.*[599]

620. Respondent adds that in Judgment C-035, the Constitutional Court fulfilled its duty of upholding the primacy of the Constitution by striking down a law that was at odds with the constitutional imperative of protecting environmentally fragile ecosystems such as the *páramos*.[204] The Court's decision in Judgment C-035 was not unexpected or unprecedented. It followed the Court's own jurisprudence, developed over several decades, regarding the protection of the environment, the fundamental right to water and the conditions for the participation of private individuals in activities relating to the extraction of non-renewable natural resources.[600]

621. In its Post-Hearing Brief, Respondent addressed several topics on the subject that were raised by Claimant during the Hearing.

a). Resolution 341 did not deprive Claimant of the right to complete the assignment of Concession 14833, because even if Resolution 341 had invalidly rejected Reina de Oro's assignment request (which Respondent insists that it did not), Resolution 341 was issued without prejudice to Claimant's right to file a new (and valid) assignment request. Further, because in accordance with Article 1521 of the Civil Code, Claimant's attachment precluded the ANM from approving Reina de Oro's assignment request, since there was no evidence that Claimant, as Reina de Oro's creditor, had consented to any such assignment notwithstanding the attachment order, nor was there any improper link between Resolution 341 and Judgment C-035, nor was the ANM under an obligation to issue Reina de Oro and Claimant a further opportunity to cure the deficiencies in the application;[601] and

[598] Rejoinder, ¶¶ 67-71.

[599] Rejoinder, ¶¶ 72-75.

[600] Rejoinder, ¶ 129.

[601] Respondent's PH Brief, ¶¶ 68-75.

b). Respondent never prevented Claimant from completing the assignment of Concession 14833, and had Claimant commenced an enforcement action to have Reina de Oro to sign the assignment, the judge hearing the enforcement action would have signed the assignment agreement on Reina de Oro's behalf.[602]

(ii) Claimant was never exempt from the ban on mining in the *páramo*, and never met the strict mining and environmental requirements to develop the Vetas Gold Project

622. According to Respondent, even if Claimant had somehow acquired title to Concession 14833, the concession did not confer any vested right for Claimant to carry out the Vetas Gold Project in the *páramo* area of Concession 14833 because Claimant never met any of the mining and environmental requirements needed to develop the Vetas Gold Project.[603]

623. Respondent recalls that Reina de Oro was granted in February 1992, Exploration License 14833 to undertake gold exploration activities in an area of 123.77 hectares. Following the enactment of the 2001 Mining Code, Reina de Oro requested the conversion of its license into a concession contract pursuant to the 2001 Mining Code which it obtained from INGEOMINAS in 2006.[604] The Concession 14833 provided, *inter alia*, that Reina de Oro was required to obtain an environmental license for the exploitation phase of the project, that the right to conduct exploitation activities was limited to the activities set out in its PTO, and that any changes to the mining infrastructure would be subject to the approval of the mining and environmental authorities.[605] INGEOMINAS ordered the registration of Concession 14833 in the National Mining Registry, and stated that Reina de Oro would not be able to conduct any mining exploitation activities until it secured an environmental license.[606] The concession was subsequently registered in the National Mining Registry in Reina de Oro's name.

624. According to Respondent, Reina de Oro conducted small-scale mining activities pursuant to a PMA that the CDMB approved in 2002. The PMA was subject to terms and conditions, including compliance with a detailed schedule of environmental obligations, which was tailored to the nature, the scope and the scale of Reina de Oro's "*artisanal*" mining activities.[607] However, according to Respondent, when Reina de Oro entered into Concession 14833 in July 2006, Reina de Oro "*knew that this change in the legal form of*

[602] Respondent's PH Brief, ¶¶ 76-78.

[603] C-Memorial on Liability, ¶ 219.

[604] **Exhibit C-005**, Concession Contract No. 14833, July 21, 2006.

[605] **Exhibit C-005**, Concession Contract No. 14833, July 21, 2006, Clauses 5 and 6.

[606] **Exhibit R-051**, Resolution 1414, INGEOMINAS, December 14, 2006.

[607] C-Memorial on Liability, ¶ 222.

its mining title required it to modify its existing environmental authorisation (or obtain a new one), depending on any changes in its mining activity." Respondent adds that, in October 2006, the CDMB requested Reina de Oro to provide information on the future activities it intended to carry out (which it refused to provide) which then prompted the CDMB to alert it that required environmental studies would be required tailored to the conditions of the activities to be undertaken. But Reina de Oro never provided the requested information.[608]

625. Respondent asserts that, as a consequence of the Option Agreement executed among Reina de Oro and GRC in December 2009, the former "*outsourced the exploration of Concession 14833 to Galway Resources Holdco*", but Claimant never requested an environmental license for its new project, nor would the CDMB have been the competent authority to approve an environmental license for a large-scale project like the Vetas Gold Project.[609]

626. Moreover, Respondent points to three reasons the ban on mining in *páramos* applied immediately upon the enactment of Law 1382 on February 9, 2010:[610]

a). Colombian environmental law granted *páramo* ecosystems special protection even before the enactment of Law 1382 of 2010;

b). Laws 1382 of 2010 and 1450 of 2011 and Resolution 937 of 2011 banned mining in *páramo* ecosystems with immediate effect and did not grandfather Claimant's Vetas Gold Project; and

c). Colombia never represented that the Vetas Gold Project would be exempt from the ban on mining in *páramo* ecosystems.

627. Respondent confirms that Law 99 made clear that "*special protection*" of *páramo* ecosystems was a general principle under Colombian environmental law, and one that ought to guide all environmental authorities in Colombia in their policy and decision-making going forward, making clear that Colombia's environmental authorities were highly unlikely to authorize any large-scale mining project in a *páramo* ecosystem.[611]

628. In its Post-Hearing Brief, Respondent contends that holding Concession 14833, in and of itself, does not allow the development of Claimant's proposed Vetas Gold Project because the right to conduct exploitation activities under a concession contract is strictly defined and limited by the terms of the approved PTO and applicable environmental authorization, adding that the only exploitation rights that existed under Concession 14833 were

[608] C-Memorial on Liability, ¶¶ 224-225.

[609] C-Memorial on Liability, ¶ 224.

[610] Rejoinder, ¶¶ 80-108.

[611] Rejoinder, ¶¶ 82-83.

circumscribed by the terms of Reina de Oro's PTO approved by the mining authority in January 2004 and modified in November 2009,[612] as well as the PMA or *Plan de Manejo Ambiental* approved by the CDMB in February 2002. Reina de Oro's PTO and PMA allowed Reina de Oro to conduct mining exploitation activities at the El Volcán Mine with a production output of 106 kg of gold and 127 kg of silver per year. Respondent asserts that under current Colombian regulations, Reina de Oro's exploitation activities in Concession 14833 are classified as small-scale mining projects, because their production output does not exceed 15.000 tonnes per year.[613]

629. But, according to Respondent, Reina de Oro and Claimant sought to pursue entirely different mining projects. As a result, the mining and environmental authorizations that Reina de Oro had obtained for its project were not applicable to Claimant's Vetas Gold Project. They were at different stages of development. Whereas Reina de Oro's project in Concession 14833 was a small-scale operation, where it initially held an exploration license and opted to convert said license into Concession 14833, following the enactment of Law 685 Claimant had the intention of advancing a modern project and take advantage of the alleged potential for a large tonnage deposit in accordance with the terms of Article 349 of said law – which did not require a construction and assembly phase.[614]

630. Respondent states that Reina de Oro operated Concession 14833 using "*small scale tracked/manual methods*" with a small gold processing metallurgical facility, and gold was processed using jigs and cyanide, producing small quantities of gold and silver, while Claimant sought to raise millions of dollars of capital on the Toronto Stock Exchange in order to develop an industrial mining project.[615] What Claimant sought was a different project than Reina de Oro's mining project contemplated in Concession 14833, the PMA secured in 2002 and the PTO obtained by Reina de Oro in 2004 for its small-scale activities.[616]

631. According to Respondent, during the Hearing it was confirmed that Claimant did not have an environmental authorization to conduct *any* kind of mining activities within Concession 14833 for the simple reason that it did not (nor had the right to) hold title to Reina de Oro's PMA, adding that in her cross-examination, Ms. Ricaurte conceded that an assignment

[612] Respondent's PH Brief, ¶ 81, *citing* **Exhibit R-133**, INGEOMINAS, Technical Report GTRB-489, November 12, 2009. *See also*, Expert Report of Dr. Margarita Ricaurte, pp. 27-28; **Exhibit C-059**, Reina de Oro's Mining Plan and Program 2003-07, July 2003.

[613] Respondent's PH Brief, ¶¶ 80-81.

[614] C-Memorial on Liability, ¶ 181.

[615] C-Memorial on Liability, ¶¶ 178-180.

[616] C-Memorial on Liability, ¶ 185.

request before the CDMB was necessary to effectuate the transfer of Reina de Oro's PMA to Claimant.[617]

632. Making reference to a question posed to the Parties after the Hearing as to whether the change of the original license into a concession modified (or failed to modify) the terms of the scope of exploration and exploitation rights,[618] Respondent answered in the negative, adding that while the conversion of license 14833 into a concession contract was governed by the 2001 Mining Code, this resulted in the relinquishment of Reina de Oro's right that its mining activities continue to be governed by the 1988 Mining Code, this did not result in either a practical reduction or expansion of its rights to carry out a small-scale mining project within the title area, because under both the 1988 and 2001 Mining Code, the scope of Reina de Oro's mining exploitation activities was circumscribed to the terms of the existing environmental authorization.[619]

633. Respondent contends that securing an environmental license is a *sine qua non* requirement to conduct mining exploitation activities. Since 1974, the National Code on Natural Renewable Resources and the Protection of the Environment (*Código Nacional de Recursos Naturales Renovables y de Protección al Medio Ambiente*) required that a party seeking to conduct activities that could pose a risk of serious environmental damage carry out environmental studies and obtain an environmental license. Such requirement to obtain an environmental license to conduct mining activities (whether exploration, construction or exploitation) was established on December 22, 1993, with the enactment of Law 99, However, Law 99 exempted mining projects at the exploration or exploitation stage prior to December 22, 1993 from the requirement of obtaining an environmental license. Instead, these projects were – on a case-by-case basis – required to submit PMAs to monitor and oversee the environmental impact of their construction and exploitation activities already underway.

634. But, according to Respondent, Claimant never obtained an environmental license (or an equivalent environmental authorization) for the Vetas Gold Project, adding that Claimant deems that the PMA issued in 2002 to Reina de Oro – approved by the CDMB through Resolution 127 – constitutes an environmental license "*permitting and enabling mining*

[617] Respondent's PH Brief, ¶ 83.

[618] List of eight questions sent to the Parties on August 8, 2022, to be addressed in the Parties' respective PH Briefs. . Tribunal Question No. 1: "*What were the implications of the conversion of Exploration and Exploitation License 14833 of February 6, 1992 into a Concession Contract 14833 in 2006? Did the change into a concession contract modify (or failed to modify) the terms of the scope of exploration and exploitation rights as a small-scale / medium-scale mining project? What were the standards to determine whether the License 14833 or the Concession Contract 14833 should be deemed to be a small-scale or medium- scale mine?*"

[619] Respondent's PH Brief, ¶ 85.

activities to proceed."[620] Respondent makes it clear, however, that a PMA is not an environmental license. Unlike an environmental license, a PMA is not a prior authorization to conduct mining activities, but simply an instrument to manage and offset the environmental impact of already existing mining activities.[621]

635. Respondent contends that Claimant equates Reina de Oro's Concession 14833 with its Vetas Gold Project, in its effort to suggest that the PMA somehow exempted Claimant's intended mining activities in the Concession Area. Respondent adds that to this end, Claimant defines the "Vetas Gold Project" as "*Gold exploration and mining project encompassed by Concession 14833i,*"[622] which is inaccurate and unrepresentative of the large-scale mining activities Claimant actually intended to pursue.[623]

636. Respondent acknowledges that the concessionaire under Concession 14833 could make changes to its mining project including (i) adding minerals other than gold and silver to the scope of the Concession Contract, subject to the approval of the mining authority and to obtaining the relevant modifications of the environmental license, and (ii) undertaking necessary activities not mentioned in the PTO, subject to obtaining prior approval of the mining and environmental authorities. But it argues, however, that Claimant never secured the assignment of Concession 14833, nor ever came close to presenting a PTO or an environmental license request for its Vetas Gold Project.[624]

(iii) Concession 14833 was not stabilized, and the Vetas Gold Project was not grandfathered

637. According to Respondent, Claimant's assertions that Concession 14833 was a "stabilized" contract - a key pillar of its case - was "*completely disproven at the hearing*" because at the time Claimant came into existence in 2012, and thus when it claims to have first invested in Colombia, there was no grandfathering regime in place whatsoever.[625]

638. In its Post Hearing Brief, Respondent contends that "*the hearing made clear*" that Claimant's proposed Vetas Gold Project was not exempted from the ban on mining on

[620] Cl. Memorial, ¶ 179. Claimant cites the tribunal in *Bear Creek v. Peru*, interpreting an identically worded Annex provision: "*It is 'rare' that a State will so blatantly and knowingly disregard its own legal framework, its international legal obligations, and all semblance of dueprocess – and that should compel the Tribunal to find that Supreme Decree 032 constitutes an indirect expropriation.*"; **Exhibit CL-037**, *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, November 30, 2017, ¶ 350.

[621] C-Memorial on Liability, ¶ 172.

[622] Cl. Memorial, Schedule A.

[623] C-Memorial on Liability, ¶ 175.

[624] C-Memorial on Liability, ¶¶ 186-187.

[625] Respondent's PH Brief, ¶ 89.

páramo ecosystems because Claimant did not hold a mining title and an environmental instrument authorizing its development prior to February 9, 2010. While Claimant "*sought to create confusion*" by arguing that Reina de Oro's mining activities from February 2010 until February 2016 were proof that the Vetas Gold Project was grandfathered, this allegation is premised on the incorrect understanding that the grandfathering regime of Resolution 2090 and Law 1753 covered mining titles, as opposed to specific mining activities, whereas Respondent asserts that the grandfathering regime of Resolution 2090 and Law 1753 protected "*mining activities*", not mining titles.[626]

639. Respondent contends that Claimant's claims are premised on fundamental mischaracterizations of Colombian law.[627] Respondent essentially asserts that: (a) Concession 14833 was not "stabilized" as alleged by Claimant; (b) Claimant's notion of "acquired rights" is wrong, and (c) there was no "acquired right" to develop the Vetas Gold Project under Concession 14833.

640. Further, according to Respondent, Claimant is wrong in stating that the rights under Concession 14833 imply vested rights to explore and exploit minerals. This, not only because Claimant is not the registered holder of the Concession; rather because, under Colombian law, the Constitutional Court has determined that, for a party to hold "acquired rights" the rights must be "perfected", *i.e.*, not be subject to conditions or requirements remaining for the right to be exercisable. For a mining concession, the right to exploit may only qualify as an "acquired right" when the concessionaire has an approved PTO and an environmental license for its mining project. And even then, the right to exploit is strictly limited by the scope of the project's PTO and environmental license.

641. In the case of Reina de Oro, Respondent contends that any "acquired rights" to exploit under Concession 14833 were circumscribed by the terms of Reina de Oro's PTO, which authorized the development of artisanal activities as a small-scale mining project ("*proyectos de pequeña minería*") because their production output did not exceed 15.000 tonnes per year.[628]

(iv) The FTA Does Not Shield Investments from Environmental Regulation

642. Respondent contends that Colombia and Canada chose to subordinate the FTA's investment protection standards to their sovereign right to regulate in order to protect the

[626] Respondent's PH Brief, ¶ 90.

[627] Rejoinder, ¶ 179.

[628] Rejoinder, ¶ 170. Those mines with an annual production output of 106 kg of gold and 127 kg of silver per year (*i.e.,* 8.8 kg of gold and 10.6 kg of silver per month).

environment. This policy choice is expressly recorded in the FTA's preamble and reflected in multiple provisions of the FTA and the Environment Agreement entered in parallel with the FTA.[629]

643. In response to Claimant's position that Respondent is presenting a primacy of environmental protection over trade and investment, Respondent states that it "… *never disputed that one of the FTA's objectives is the promotion of investment, and that Chapter Eight provides certain standards of protection to investments in pursuit of that objective. However, as Colombia showed in its Counter-Memorial, those standards, including Articles 805 and 811, were deliberately limited and carefully drafted to ensure that the FTA does not act as a fetter on the State's right to regulate in order to protect the environment*."[630]

644. Respondent further recalls that Canada, one of the Parties to the FTA, made a Non-Disputing Party Submission in the case *Eco Oro Minerals Corp. v. Republic of Colombia,*[631] explaining the relationship between the State Parties' investment obligations under the FTA and their sovereign rights and responsibilities to regulate in order to protect the environment, indicating that: "[a] *good faith interpretation of investment obligations in their context and in light of the purpose and objective of the treaty, will not be inconsistent with a State's ability to adopt environmental protection measures. In this respect, in the context of an allegation that a regulatory measure is in breach of Article 811, a proper analysis of the measure in light of the guidance provided in Annex 811.2 (and if necessary under Article 2201(3)) will not limit the State's ability to regulate in the public interest for the protection of the environment*" adding that Canada further explained in said submission that "*the minimum standard of treatment in Article 805 by its nature does not allow tribunals to second guess regulatory choices made by States.*"[632]

645. Respondent contends that Claimant entirely "*ignores*" Canada's Non-Disputing Party submission referenced in the preceding paragraph, and puts forward interpretations of Articles 805, 811 and 2201(3) of the FTA that are irreconcilable with it.[633]

[629] C-Memorial on Liability, Section VII.A; Rejoinder, ¶ 180.

[630] Rejoinder, ¶ 180.

[631] Rejoinder, ¶ 182.

[632] Rejoinder, ¶¶ 182-184, citing **Exhibit RL-105**, Canada's Non-Disputing Party Submission of Canada in *Eco Oro Minerals Corp. v. Republic of Colombia,* ICSID Case No. ARB/16/41, February 27, 2020, ¶ 25, and footnote 15.

[633] Rejoinder, ¶ 185.

(v) Claimant cannot show that a "rare circumstances" exception under Annex 811(2)(b) does not apply

646. Respondent further contends that pursuant to the FTA – if the fact-based enquiry under Annex 811(2)(a) leads the Tribunal to the *prima facie* conclusion that the measures amount to an indirect expropriation – Claimant must show that a "rare circumstances" exception *does not* apply,[634] which Claimant cannot do because:

i). Colombia's measures have not "deprived" Claimant of any vested, proprietary rights;

ii). Colombia's measures have not deprived Claimant of the value of its investment because those measures only impacted part of the Concession Area;

iii). Claimant had no reasonable investment-backed expectations that Colombia would not take further measures to protect the *páramo* falling within the Concession Area;

iv). Colombia's measures were a legitimate exercise of Colombia's sovereign police powers to protect the environment; and

v). In any event, Colombia's measures were non-discriminatory measures adopted for the protection of the environment.

i. Colombia's Measures Did Not Deprive Galway of Any Vested Rights

647. Respondent first contends that, as a threshold matter, and for the purposes of the Tribunal's analysis of whether the "*measure or series of measures of a party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure*"[635] the Tribunal must consider the scope of the rights constituting the alleged investment under their governing law to assess whether there has been a deprivation of rights.

648. A State cannot expropriate rights that do not exist, and in this respect, Respondent recalls the *Generation Ukraine v. Ukraine*[636] tribunal which stated that "*there cannot be an expropriation unless the complainant demonstrates the existence of proprietary rights in the first place*".[637] Respondent also cites Canada's Non-Disputing Party Submission in *Eco Oro Minerals Corp. v. Republic of Colombia* where it states that "*a potential property right*

[634] C-Memorial on Liability, ¶ 350.

[635] **Exhibit C-001**, Free Trade Agreement between Canada and Colombia, Annex 811.2.

[636] **Exhibit RL-047**, *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, September 16, 2003.

[637] C-Memorial on Liability, ¶ 354, *citing Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, September 16, 2003, ¶ 8.8.

or one that is conditional, in that it may or may not materialize, is not vested and is not capable of being expropriated."[638]

649. In this connection, Respondent argues that Claimant must show that it had a vested right *in rem* recognized by Colombian law before it can claim that the right has been expropriated, and the expropriation claim fails because Claimant never acquired Concession 14833 and, in any event, Concession 14833 did not confer any vested right to carry out the Vetas Gold Project.[639] Under Colombian law, in order to own Concession 14833, Claimant would need to be the concessionaire, *i.e.,* the named party to the concession registered as such by the ANM in Colombia's Mining Registry, but this never occurred. Even assuming that Claimant could show ownership, *quod non*, Claimant would have been required to secure a right to exploit the mineral resources for its Vetas Gold Project, and to that end would need to have secured an environmental license and a PTO, which it failed to secure, nor did Claimant secure "grandfathering" rights for the mining exploitation activities required by its large-scale Vetas Gold Project.[640]

650. Respondent asserts that the Vetas Gold Project was never grandfathered. Under each of Law 1382, Resolution 2090 and Law 1753, only *existing* exploitation *projects*, whose *existing* exploitation *activities* had specifically been authorized through an environmental license (or equivalent instrument) issued prior to February 9, 2010, were grandfathered. Since the Vetas Gold Project, were it to advance successfully, would have been a *new* exploitation project, consisting entirely of *new* exploitation activities, the Vetas Gold Project was not exempt from the prohibition on mining in *páramo* areas under all such laws. The Constitutional Court's revocation of the grandfathering of Law 1753 through Judgment C-035 (a decision that Respondent contends Claimant does not suggest was rendered improperly or otherwise than in accordance with Colombia's Constitution in any event) therefore made no difference whatsoever to Claimant's Vetas Gold Project.[641]

651. According to Respondent, Claimant's contention that any mining exploitation activities authorized within a concession as of February 9, 2010, of any nature, sufficed to grandfather the entire concession for any future exploitation project is wrong. This "interpretation" of the grandfathering provisions cannot be reconciled with the plain language of the provisions or Claimant's own contemporaneous understanding. The grandfathering was enacted to protect the rights of titleholders to continue carrying out

[638] C-Memorial on Liability, ¶ 355, *citing* **Exhibit RL-105,** Canada's Non-Disputing Party Submission of Canada in *Eco Oro Minerals Corp. v. Republic of Colombia,* ICSID Case No. ARB/16/41, February 27, 2020, ¶ 5.

[639] C-Memorial on Liability, ¶ 356.

[640] C-Memorial on Liability, ¶¶ 360-363.

[641] Rejoinder, ¶ 9.

existing exploitation projects, having obtained environmental licenses and PTO approvals for them. While this means Reina de Oro's artisanal El Volcán Mine was grandfathered, contrary to Claimant's assertions, the grandfathering did not give *carte blanche* to holders of a concession with a grandfathered project, involving a specific set of activities authorized before February 9, 2010, to use that as a "hook" to undertake a new and completely different exploitation project involving different exploitation activities in the *páramo* that were not authorized as of February 9, 2010.[642]

652. Respondent contends that Claimant's own witness, Alfonso Gómez Rengifo, warned in 2010 that, while Law 1382 provided an "*exception that benefits mining projects that are in the construction and assembly or exploitation stage with a mining title and environmental license or its equivalent*," it "*does not offer any alternative to projects, including large-scale mining projects that have been developed for years and are still in the exploration stage*." Having chosen to ignore Mr. Rengifo's views, Claimant only has itself to blame for its decision to continue pursuing the Vetas Gold Project notwithstanding that such a project was never grandfathered.[643]

ii. Colombia's Measures did not Deprive Galway of the Economic Value of its Alleged Investment

653. Respondent further states that the measures adopted did not deprive Claimant of the value or control of its investment, drawing support from various international tribunals to conclude that, unless a claimant can show that the State's regulation destroyed or radically diminished the economic value of its investment to such an extent that it, for all practical purposes, confiscated the property, no indirect expropriation can be found.[644]

654. Thus, the burden falls on Claimant to demonstrate that: (a) Claimant held a protected investment that had tangible economic value prior to the measures, and that (b) the measures destroyed that value. Respondent adds that Claimant failed to adduce any evidence to prove that Colombia's measures caused any loss to its alleged investment.

655. Respondent indicates that mining was already prohibited in the *páramo* area of Concession 14833 since Law 1382 of 2010 and Law 1450 of 2011, which adopted the 2007 IAVH

[642] Rejoinder, ¶ 10.

[643] Rejoinder, ¶ 11, *citing* **Exhibit R-134**, E-mail from Galway to Amber Capital, August 20, 2010, p. 7.

[644] C-Memorial on Liability, ¶¶ 365-366, *citing* **Exhibit CL-049**, *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, May 12, 2005, ¶ 262; **Exhibit RL-044**, *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, September 3, 2001, ¶ 200; **Exhibit CL-054**, *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Interim Award, June 26, 2000, ¶ 102; **Exhibit RL-049**, *GAMI Investments Inc. v. United Mexican States*, UNCITRAL, Final Award, November 15, 2004, ¶ 126; **Exhibit CL-069**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, June 8, 2009, ¶¶ 357, 360.

Páramo Atlas as the minimum provisional reference area for the immediate application of the prohibition, and because the Resolution 2090 delineation did not differ in any material respect from the 2007 delineation. Colombia's measures could not have caused Claimant any loss in value.[645] Respondent challenges, in any event, the assertion by Claimant that Colombia's measures somehow amounted to a "*total elimination*" of Claimant's alleged rights, because the area of preservation covered 78.2% of the total Concession Area, while 21.8% of the Concession Area was, on any view, unaffected by Colombia's measures.[646] Respondent subsequently asserted in its Rejoinder that the *páramo* area in the 2007 IAVH Páramo Atlas map already covered 100% of Concession 14833, as did the Resolution 2090 delimitation, having been carried out in accordance with Law 1450 and the IAVH's scientific methodology and mapping techniques.[647]

656. Respondent further contends that Claimant cannot show any substantial deprivation of the economic value of its alleged investment. It failed to adduce any economic analysis of the alleged impact of Colombia's measures on its alleged investment in both its Memorial on Jurisdiction and Liability and its Reply. According to Respondent, Claimant cannot show that the Vetas Gold Project was grandfathered, nor can Claimant point to any economic impact of Colombia's measures whatsoever. Instead, Claimant seeks to rely on the fact that it expended funds towards the exploration of part of Concession 14833, but this shows only that Claimant took the commercial risk of expending funds, at its own risk, in the hope of being able to acquire Concession 14833 and developing the Vetas Gold Project there. As such, Claimant's evidence singularly fails to engage with the FTA's "*economic impact of the measures*" factor.[648]

657. In response to Claimant's position, expressed in its Reply, that Law 1382 of 2010 enacted a mining ban in *páramo* ecosystems for the first time, Respondent contends that Law 99 of 1993 established, in its first Article, the "*special protection*" of *páramo* ecosystems as the fourth of fourteen general environmental principles to be applied as a mandatory principle by all Colombian authorities in their decision-making, and that activities that had the potential to cause a deterioration of the environment were required to obtain an environmental license. Law 99 further enshrined the precautionary principle as a general principle of Colombian environmental law.[649]

[645] C-Memorial on Liability, ¶ 370.

[646] C-Memorial on Liability, ¶ 371.

[647] Rejoinder, ¶ 8.

[648] Rejoinder, ¶ 12 a) ii.

[649] Rejoinder, ¶¶ 80-83.

658. In addition, Respondent contends that, even though Resolution 769 of 2002 did not prohibit mining in *páramo* ecosystems, it made a significant further contribution towards Colombia's regime for the protection of the *páramo.* The title of Resolution 769 itself confirms that the Resolution's "*provisions are issued to contribute to the protection, conservation and sustainability of páramo ecosystems*".[650]

659. According to Respondent, Claimant seeks to suggest that the ban did not apply immediately, because the scale of the 2007 IAVH *Páramo* Atlas map was not sufficient to allow it to ascertain whether the *páramo* covered parts of the titles, or that Concession 14833 was "stabilized" under Article 46 of the Mining Code, such that any new environmental regulation would not apply to it; Respondent asserts that none of these arguments is availing. In fact, Claimant's internal documents revealed that Claimant's managers "*knew perfectly well*" that Concession 14833 overlapped with the Santurbán *Páramo*.[651]

660. Respondent also asserts that Claimant's contention that Concession 14833 was "stabilized" and thus immune from new environmental regulation measures is unsupported by Claimant's own Colombian law expert, Dr. Ricaurte, and belied by Claimant and Reina de Oro's agreement, under the Option Agreement, to adjust the purchase price for Concession 14833 in the event of a reduction in the mineable area of the concession by reason of a change in environmental legislation.[652]

iii. Respondent did not Interfere with Claimant's Reasonable Investment-Backed Expectations

661. Respondent recalls that Annex 811.2(a)(ii) of the FTA provides that "*the extent to which the measure or series of measures interfere with distinct, reasonable investment-backed expectations*" is a relevant factor, among others, as to whether a measure or series of measures constitute an indirect expropriation, which turns on whether a State promised or assured an investor, at the time it was considering its investment, that the State would not disturb the investment through regulatory action.[653] In this respect, Respondent asserts that

[650] Rejoinder, ¶ 84.

[651] Rejoinder, ¶ 7.

[652] Rejoinder, ¶¶ 7, 85. Clause Third, Second Paragraph, of the Option Agreement provides that: "*In the event of changes to the mining, environmental or other laws a portion of the area is reduced for exploration, the payment of the easement shall be made in proportion of the area available for exploration*".

[653] **Exhibit RL-052**, *Methanex Corporation v. United States of America*, UNCITRAL, Final Award on Jurisdiction and Merits, August 3, 2005, Part IV, Chapter D, ¶ 7; **Exhibit CL-032**, *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002, ¶¶ 132-133, 143, 149. The *PSEG* tribunal applied a similarly strict standard, holding that "*legitimate expectations by definition require a promise of the administration*

Colombia never specifically assured Claimant that measures would not be taken to protect the *páramo* within that area. Nor did Colombia enter into any stabilization agreement with Claimant guaranteeing that its laws would not change.[654]

662. Respondent examines various factual allegations from Claimant and concludes that none of them, taken individually or "*together*", establish any basis for Claimant to have formed any legitimate expectations that it would be permitted to carry out the Vetas Gold Project in the *páramo* area of Concession 14833. To the contrary, according to Respondent, Claimant ought to have been clear to Claimant – had it carried out even the most basic due diligence – that mining on at least a significant portion of the area covered by Concession 14833 was or would be prohibited in light of Colombia's long-standing policy for the protection of the *páramo.*[655]

663. On the other hand, Respondent contends that tribunals have confirmed that 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. Claimant ought to have known that the laws in Colombia would evolve over time, particularly as far as environmental protection was concerned, particularly in light of the object and purpose of the FTA. One of FTA's most important and overriding objectives is to "[e]*nhance and enforce environmental laws and regulations*." This is why, according to Respondent, regulatory changes taken specifically for the purposes of enhancing and/or enforcing environmental laws and regulations cannot therefore violate the Treaty in the absence of very specific, binding undertakings to the contrary.[656] As of the date of entry into force of the FTA, in August 2011, Claimant knew that Colombia had decided to take measures to ban mining in *páramo* areas as delineated in the 2007 IAVH *Páramo* Atlas.[657]

664. In its Post-Hearing Brief, Respondent contends that when Claimant "*allegedly invested*" in Concession 14833 "… *by receiving the Option Agreement in December 2012, it ought to have known that Concession 14833 was not immune from changes in environmental regulation, and that the prohibition on mining in páramo enacted in Law 1450 would apply to Concession 14833. Law 1450 contained no grandfathering regime whatsoever,*

on which the Claimants rely to assert a right that needs to be observed." **Exhibit CL-079**, *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, ¶ 241.

[654] C-Memorial on Liability, ¶¶ 373-376.

[655] C-Memorial on Liability, ¶ 378.

[656] C-Memorial on Liability, ¶¶ 381-382.

[657] C-Memorial on Liability, ¶ 386.

[Claimant] *could not have reasonably relied on any grandfathering either in forming any distinct expectations on which Galway relied in its decision to invest*."[658]

665. In addition, Respondent addresses the cross-examination during the Hearing of Claimant's CEO, founder and major shareholder, Mr. Hinchcliffe, who – according to Respondent – conceded that he knew that Claimant's business could be impacted by changes in the Mining Code and that he had no specific knowledge of Colombian law and had in fact signed off on public disclosures representing to investors that the Mining Code had been amended by Law 1382 without any suggestion that such amendments did not apply to Concession 14833. Further, Mr. Hinchcliffe confirmed that he knew that Claimant could be adversely affected by future changes in environmental laws, and that the project could fail as a result of change in environmental regulation.[659]

666. Respondent also points to the "… *purported ignorance and lack of understanding of the erroneous basis on which* [Claimant] *instructed RPA to assume it would be lawful to mine within Concession 14833 notwithstanding the páramo delimitation tells the Tribunal all it needs to know. It confirms the lack of reasonableness of* [Claimant]*'s expectations, and the recklessness with which* [Claimant] *approached its proposed project*."[660]

iv. Colombia's Measures were a Legitimate Exercise of Sovereign Power to Protect the Environment

667. In connection with this point, Respondent contends that Annex 811 of the FTA provides that the "*character*" of a measure or series of measures is a relevant factor to a determination of whether the measures constitute indirect expropriation, and that tribunals have repeatedly held that States are not liable for takings that may result from measures that are legitimate exercises of a State's inherent sovereign power to regulate for the protection of the environment.[661]

668. Respondent argues that the measures adopted were non-discriminatory measures taken for the protection of the environment, and in accordance with Colombia's longstanding policy and established legal framework.[662]

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[658] Respondent's PH Brief, ¶ 98.

[659] Respondent's PH Brief, ¶¶ 98-101, *citing* Tr. Day 3, 681:1 – 697:4.

[660] Respondent's PH Brief, ¶ 103.

[661] C-Memorial on Liability, ¶¶ 387-390, *citing* **Exhibit CL-030**, *Técnicas Medioambientales, TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, ¶ 119; **Exhibit CL-032**, *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002, ¶ 103; and **Exhibit CL-057**, *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, March 17, 2006, ¶ 255.

[662] C-Memorial on Liability, ¶¶ 392-393.

669. Further, Respondent challenges Claimant's allegations that Colombia's measures were expropriatory in character as they were "*creeping*" and "*without due process*", simply because Claimant should not have expected to have been "*consulted*" or required to "*participate*" in the process leading to Colombia's measures.[663]

670. Finally, Respondent contends in its Post-Hearing Brief that "… *the hearing also confirmed that Resolution 2090, Law 1753 and Judgment C-035 were non-discriminatory and designed and applied to protect a legitimate public welfare objective, namely the protection of the environment. They were adopted in good faith. They were therefore a legitimate exercise by Colombia of its police powers*."[664]

v. Colombia's Measures Were Non-Discriminatory Measures Adopted for the Protection of the Environment

671. Respondent argues that even if the fact-based enquiry under Annex 811(1)(a) of the FTA were to lead the Tribunal to the *prima facie* conclusion that the measures are expropriatory, the Tribunal should reject Claimant's expropriation claim because Colombia's measures fall within the exception under Annex 811(2)(b) of the FTA to subordinate investment and trade to environmental protection. In this regard, Respondent places relevance on Canada's Non-Disputing Party Submission in the *Eco Oro Minerals v. Colombia* case with respect to this provision, "*bona fide non discriminatory regulatory measures to protect the environment even if they are based on precaution (i.e.* in dubio pro ambiente*) will ordinarily not require compensation even if they affect the value and/or viability of an investment of an investor of another Party.*"[665]

672. Respondent affirms that the measures were non-discriminatory measures designed and applied to protect the environment, a legitimate public welfare objective, in accordance with the precautionary principle. For this reason, it contends that for Claimant to avail itself of the very narrow exception to this general rule, Claimant is required under Annex 811(b) of the FTA to prove the existence of "*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.*" In this regard, Respondent adds that this provision should be interpreted in good faith pursuant to Article 31 of the VCLT, meaning that Canada and Colombia intended and agreed that non-discriminatory measures designed and applied to protect the environment would only constitute indirect expropriation in highly

[663] C-Memorial on Liability, ¶ 392, *citing* Cl. Memorial, ¶¶ 342-346.

[664] Respondent's PH Brief, ¶ 104.

[665] C-Memorial on Liability, ¶¶ 395-396. *See*, **Exhibit RL-105**, Canada's Non-Disputing Party Submission of Canada in *Eco Oro Minerals Corp. v. Republic of Colombia,* ICSID Case No. ARB/16/41, February 27, 2020, ¶ 11.

circumscribed and "rare circumstances." Respondent further contends that, while the FTA does not define "rare circumstances," in the Annex 811 of the FTA it does provide, as an example, a situation in which "*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.*"[666] Claimant has not identified any. Thus, the argument Claimant has made regarding an "*inexcusable reversal of policy*" simply cannot qualify, because Colombia's policy never changed: the policy was, remains and always has been to protect the *páramo* in accordance with the precautionary principle.[667]

673. In response to Claimant's contention that between 2010 and 2016, a transitional regime existed that allowed individuals who had obtained concessions and environmental licenses prior to February 9, 2010 to *continue* to carry out mining activities regardless of a *páramo* designation,[668] Respondent adds that such transitional regime, which was later reiterated in Resolution 2090 and Law 1753 of 2015, allowed "*existing mining activities*," which had already established their technical, economic and environmental feasibility to the satisfaction of the competent authorities, to continue, but Respondent clarifies that the existing activities were small-scale, artisanal activities carried out by Reina de Oro at its El Volcán Mine. As of February 9, 2010, Claimant's exploration activities had not even begun in earnest, and no steps were taken to apply for an environmental license for it.[669] According to Respondent, Claimant has accepted that its objective was to transform the small-scale operation into a large-scale mining project over a larger part of the Mining Area.[670]

II. The Tribunal's Analysis

674. There are several issues for the Tribunal to address in order to decide on the claims presented by Claimant and defenses from Respondent. To this end, the Tribunal shall structure the examination of said issues as follows:

a). Applicable legal framework during the period;
b). Protection of the El Volcán Mine under the transitional regime;
c). Whether Claimant became the owner of Concession 14833 and, if not, whether Respondent is responsible therefor; and
d). Whether there has been an expropriation of the rights of Claimant under the Option Agreement.

[666] C-Memorial on Liability, ¶ 400.
[667] C-Memorial on Liability, ¶¶ 401-402.
[668] *See*, Reply, ¶ 58.
[669] Rejoinder, ¶¶ 78, 98.
[670] Rejoinder, ¶¶ 78, 98.

a) Analysis of Applicable Legal Framework

675. To properly examine the allegations of the Parties, the Tribunal finds it advisable to examine key provisions of the legal framework applicable to mining concessions within the period of interest, since there are two assurances or "guarantees" that are relevant to the case and that need to be considered:

(a) an alleged stabilization provision under Article 46 of the 2001 Mining Code, which applies to all the rights arising from a concession; and

(b) the transitional regime which allegedly grandfathered existing projects (which met certain requirements, including having the applicable environmental licenses) and were therefore excluded from the prohibition of mining activities in the *páramos*.

(i) 2001 Mining Code

676. The Parties dispute whether Article 46 of the 2001 Mining Code[671] establishes a stabilization clause. Article 46 of the 2001 Mining Code states as follows:

> *Article 46. Law Applicable to the Contract. Mining laws in force at the time the concession contract was perfected shall apply during the course of its term and any extensions, without exception or qualification. If such laws were to be thereafter amended or additioned, these shall apply to concessionaire insofar as they extend, confirm or improve their prerogatives, except those that contemplate changes to the economic consideration in favor of the State or the Territorial Entities.*[672]

677. While Claimant maintains that this provision contains an express stabilization provision crystallizing and protecting, in favor of the concessionaire, the mining laws in effect at the time Concession 14833 was granted to Reina de Oro, Respondent asserts that Article 46 merely confirmed the principle of non-retroactivity regarding *mining laws* only, not providing protection against the application of changes in environmental protection laws.

678. During the Hearing, Ms. Ricaurte – Colombian law expert whose Report was submitted by Claimant – confirmed that the non-retroactivity of the Concession Contract does not prevent the application of new environmental laws.[673]

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[671] **Exhibit C-047**, 2001 Mining Code.

[672] **Exhibit C-047**, 2001 Mining Code, Art. 46.

[673] Tr. Day 1, p. 364 ("Q: *So, the non-retroactivity of the Concession Contract doesn't refer to the application of later Environmental Laws? A: It doesn't refer to that. I said that already, sir*").

679. The Tribunal agrees with Respondent that the grandfathering provision should be deemed limited to mining laws, since the 2001 Mining Code itself does not address, nor attempts to address – unless expressly covered therein – legislation or regulations that apply to other sectors, including but not limited to those dealing with the environment. Thus, it does not contain a stabilization clause in the terms proposed by Claimant.

680. *First*, because Article 196 of the 2001 Mining Code establishes that environmental measures are of general and *immediate* application for all mining works to which they are applicable.

> *Article 196. Immediate Enforcement. The legal and regulatory provisions of an environmental nature are of a general and immediate applicability for all mining works and labors to which they may apply.*[674]

681. *Second*, because Articles 34 and 36 of the 2001 Mining Code allowed Colombia to establish mining exclusion zones, as long as the delimitation procedure was complied with:

> *Article 34. Mining Exclusion Zones. No exploration and exploitation works or labors may be carried out in zones that are declared and delimited as protection and development of renewable natural resources or the environment in accordance with current legislation, and which, pursuant to legal provisions on the subject expressly exclude such works and labors.*
>
> *The mentioned exclusion zones shall be those constituted in accordance with the legal provisions in force, such as areas that comprise the system of national natural parks, regional natural parks and forest reserve areas. For such areas to produce said effects, they shall be delimited geographically by the environmental authority on the basis of technical, social and environmental studies with the collaboration of mining authority, in those areas if mining interest.…*[675]
>
> *Article 36. Effects of the Exclusion or Restriction In concession contracts, the areas, plots of land and courses where, pursuant to the above articles, mining activities are prohibited shall be deemed excluded or restricted by operation of law or conditioned by the granting of special permits or authorizations. This exclusion or restriction need not be declaredby any authority whatsoever, or be expressly stated in acts and agreements, nor may be subject to any renunciation by the bidderor concessionaire of such areas or plots of land. If such areas or plots of lands were to be* de facto *occupied by works or labors of a concessionaire, the mining authority shall order they be immediately removed and cleared, without awarding any payment, compensation or damages whatsoever for this reason,*

[674] **Exhibit C-047**, 2001 Mining Code, Art. 196.

[675] **Exhibit C-047**, 2001 Mining Code, Art. 34.

> *notwithstanding the proceedings the competent authorities may commence in each case where applicable.*[676]

682. This was recognized by Judgment C-339 of 2002,[677] which established that Article 34 allows "*subsequent laws ... to establish new zones of exclusion or restriction of mining activity, for environmental reasons and for the protection of biodiversity*." The decision states that the expression "*in accordance with the previous articles*" was unconstitutional because it strictly confines exclusion and restriction zones to the provisions of Law 685 of 2001, thereby ignoring the constitutional limit set by Articles 333 and 334 of the Constitution, by permitting unrestrained mining exploration and exploitation of areas falling out of the scope of said law. On the one hand, it disregards existing laws protecting areas other than national natural parks, regional natural parks and forest reserves; and on the other hand, it precludes the possibility of applying subsequent laws establishing new mining exclusion or restriction zones, for environmental or biodiversity protection reasons.

683. *Third*, because Advisory Opinion 2233 of Colombia's Council of State,[678] states the following:

> *Thus, and as has been previously indicated, the guarantee of legal stability and respect for legitimate trust does not imply a rule for the immobility of laws in place at the time a contract is signed, but rather the possibility of claiming financial compensation upon changes to investment conditions. In other words, article 46 of the Mining Code would not have, necessarily, the effect of inapplicability of the legislative prohibition for the protection of the páramo ecosystems.*[679]
>
> *[...]*
>
> *b. Environmental licences may not be granted to those [projects] which were at the exploration stage and did not obtain an environmental licence to start exploitation activities before the legal prohibition entered into force. It is clear that the environmental authority must apply the legislation in force at thetime of issuing the environmental licence and, if there is arequest for a licence by the time the páramo ecosystems are already excluded from mining activities, the request cannot be granted. In this regard, there would be no basis to grant an environmental licence at this*

[676] **Exhibit C-047**, 2001 Mining Code, Art. 36.

[677] **Exhibit R-110**, Constitutional Court, Judgment C-339, May 7, 2002, p. 34.

[678] **Exhibit C-130**, Consejo de Estado, Sala de Consulta y Servicio Civil, C.P. William Zambrano Cetina, Radicación No: 11001-03-06-000-2014-00248-00 (2233).

[679] **Exhibit C-130**, Consejo de Estado. Sala de Consulta y Servicio Civil, C.P. William Zambrano Cetina, Radicación No: 11001-03-06-000-2014-00248-00 (2233), pp. 55-56.

> *time, based on legislation which has been repealed since 2010 and that is contrary to current regulations.*
>
> *In addition, according to this Chamber, contracts that werebarely at an exploration stage, merely had an expectation for exploitation and had not made the investments and works necessary for that purpose.*
>
> *Therefore, regarding such expectations, the prohibition has an immediate general effect; in other words, it is retroactive.*
>
> *It is also clear that in this type of contracts the beginning of the exploitation stage or of the extraction of minerals is subject to a legal requirement, as is the obtaining of the corresponding environmental licence. If it cannot be obtained, the beginning of that second contractual phase becomes impossible.*[680]

684. This interpretation was also followed by the tribunal of *Eco Oro v. Colombia*, which determined that Article 46 was not meant to prevent laws to be applied retroactively, but to allow that "*an existing title holder may be entitled to compensation if it suffers loss of an acquired right.*"[681] The *Eco Oro* tribunal further concluded that: "*pursuant to Article 34, Colombia was permitted to designate mining exclusion zones provided that the procedure set out therein was complied with. Article 36 provides that if the area is excluded pursuant to the procedure laid down by Article 34 then it becomes immediately effective and if existing works have to be removed this is at the cost of the concessionaire. However, an existing title holder may be entitled to compensation if it suffers loss of an acquired right.*"[682]

685. Thus, Colombian law did allow the possibility of compensation to title holders in case of losses of an acquired right due to regulatory changes by the Colombian Government.

686. The issue faced by this Tribunal is whether that Article 46 grants a compensation guarantee for the title holder. In the present case, however, the title holder of Concession 14833 was and remains Reina de Oro – and not Claimant – since the procedure for the assignment of rights before the NMA was never completed as has been previously examined earlier in this Award, and will be further addressed below.

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[680] **Exhibit C-130**, Consejo de Estado. Sala de Consulta y Servicio Civil, C.P. William Zambrano Cetina, Radicación No: 11001-03-06-000-2014-00248-00 (2233), p. 61.

[681] **Exhibit CL-112**, *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, ¶ 687.

[682] **Exhibit CL-112**, *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, ¶ 476

(ii) The Transition Regime for the Mining Ban in the *páramos*

i. Law 1382 - February 9, 2010

687. Article 34 of the 2001 Mining Code was amended through Law 1382,[683] establishing that mining exploration and exploitation works in *páramo* areas would be prohibited, once such areas were delimited by the competent authority:

> *Article 34. Mining Exclusion Zones. No exploration and exploitation works or labors may be carried out in zones that are declared and delimited as protection and development of renewable natural resources or the environment. The mentioned exclusion zones shall be those constituted in accordance with the legal provisions in force, such as areas that comprise the system of national natural parks, regional natural parks, forest protection reserve zones and other forest reserve zones, paramo ecosystems, and designated wetlands as part of the list of international importance u der the Ramsar Convention. For such areas to produce said effects, they shall be delimited geographically by the environmental authority on the basis of technical, social and environmental studies.*
>
> *Páramo ecosystems shall be identified in accordance with the cartographic information provided by the Alexander Von Humboldt Investigation Institute.* […].[684] [Emphasis added]

688. As is clear from the above transcription, Article 34 of the 2001 Mining Code provides that, for a mining exclusion zone to produce legal effects, the zone should be "*geographically delineated by the Environmental Authority based on technical, social and environmental studies*." This article adds that the identification of the *páramo* ecosystems would be done according to the mapping of the Alexander Von Humboldt Institute (IAVH). Although the IAVH 2007 *Páramos* Atlas already existed, the Tribunal bears in mind that this was not the official delimitation by the competent authority – as required by the then recently amended 2001 Mining Code. Consequently, the exclusion zone did not immediately produce legal effect.

689. The Eco Oro tribunal reached the same conclusion, stating: "*what Law 1382 does is set out the conditions pursuant to which a mining exclusion zone can be created; the 2007 Atlas did not of itself comply with those conditions*."[685] In the Eco Oro decision, the tribunal stated that Colombia accepted in such proceeding that the IAVH 2007 *Páramos* Atlas "*was*

[683] **Exhibit C-048**, Law 1382 of 2010.

[684] **Exhibit C-048**, Law 1382 of 2010, Art. 34.

[685] **Exhibit C-112**, Colombian Constitutional Court, Order 138/16, re: Clarification request of decision C-035/16, April 6, 2016.

not prepared on the basis of technical, social and environmental studies as such, having been created as part of MinAmbiente's 2002 paramo programme."[686]

690. Law 1382 contained a transitional regime for "*construction, assembly or mining exploitation activities with mining title and environmental license in areas not previously excluded*," establishing that such activities should be respected until expiration, although in such cases the mining titles would not have an option to be extended.[687] Even though Claimant argues that this regime protected the development of the Vetas Gold Project, it is clear to this Tribunal that the only project with an environmental license was Reina de Oro's small-scale exploitation.

ii. Judgment C-366 – May 11, 2011

691. In June of 2011, Judgment C-366 issued by Colombia's Constitutional Court declared Law 1382 to be unconstitutional on procedural grounds, as the affected indigenous peoples' right to consultation was not respected. Nonetheless, the Constitutional Court decided to defer the effects of its judgment for a two-year period. Among the reasons outlined by the Constitutional Court, it stated that not having Law 1382's new environmental protection rules in force would create a "*more unconstitutional situation*" than having them in place until a new law was enacted:[688]

> *In the belief of the Court, the existence of an environmental legal void regarding mining activities, produces a serious and unacceptable risk of constitutional rights previously examined. This circumstance implies the need to defer the effects of unconstitutionality of Law 1382/10, given that its contents provide for environmental protection clauses that are deemed fundamental for the guarantee of the rights mentioned in this paragraph.*

692. It is worth noting that, in a partial dissenting opinion, Judge Vargas Silva criticized his colleagues in the Court's majority for deferring the effects of Judgment C-366 with regards to Law 1382 as a whole (including new rules unrelated to environmental protection),

[686] **Exhibit CL-112**, *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, ¶ 482.

[687] **Exhibit C-048**, Law 1382 of 2010, Art. 34: "*Paragraph First. In the event that, upon entry into force of this law construction, assembly or mining exploitation are advanced with a mining title and environmental license or its equivalent, in areas not previously excluded, such activities shall be respected until expiration, but the [mining] titles shall not have an extension option.*"

[688] **Exhibit C-103**, Judgment C-366/11 of the Constitutional Court, May 11, 2011, ¶ 46.

instead of deferring them only with regards to the articles necessary to protect the environment:[689]

> *In the stated conditions, it is contradictory for the Court to deem, on the one hand, that environmental laws must be preserved while, on the other, it defers the effects of unconstitutionality of Law 1382 in its entirety. To validly arrive at this conclusion, the full Court should have explained why, despite the fact that the majority of the provisions that were declared unconstitutional do not deal with environmental topics, these were equally benefited by the suspension of effect of a decree of [unenforceability]. By doing this, the arguments utilized by the Court on the analyzed matter, in addition to being contradictory, is insufficient.*

693. The opinion by Judge Vargas Silva is relevant since it shows that the Constitutional Court had the chance to exclude Law 1382's transitional regime when deferring the effects of Judgment C-366 in order to protect the environment, but expressly chose not to do so. This is noteworthy, since only five years later, through Judgment C-035, the same Constitutional Court would arrive to the conclusion that a similar transitional regime, established in Law 1753, was unconstitutional because it portrayed an unacceptable risk for the *páramos*.

iii. Law 1450 –June 16, 2011

694. After Law 1382 was declared unconstitutional, Colombia enacted Law 1450,[690] establishing a new prohibition on all mining activities within *páramo* areas:

> *Article 202. Delimitation of Páramo and Wetland Ecosystems. The páramo and wetlands ecosystems shall be delimited to a 1:25.000 scale on the basis of technical, economic, social and environmental studies adopted by the Ministry of the Environment, Housing and Territorial Development, or whichever [agency] is responsible. The delimitation shall be adopted by such agency through an administrative act.*
>
> *[…]*
>
> *Paragraph 1°. No agricultural activities may be carried out, nor of exploration or exploitations for hydrocarbons or mining, nor the construction of hydrocarbon refineries within páramo ecosystems. For such purposes, the cartography provided by the Alexander Von Humboldt Investigation Institute shall be deemed as minimum reference, until such time as a cartography with a more detail is obtained.*[691]

[689] **Exhibit C-103**, Judgment C-366/11 of the Constitutional Court, May 11, 2011, pp. 103-104.

[690] **Exhibit C-049**, Law 1450 of 2011.

[691] **Exhibit C-049**, Law 1450 of 2011, Art. 202.

695. Paragraph 1 of Article 202 provided that the *páramo* areas would need to be delimited through an administrative action, "*on a scale of 1:25,000, based on technical, economic, social and environmental studies*" to be carried out by the governmental agency. It also indicated that no exploration or exploitation activities could be undertaken within the *páramo* areas established in the 2007 IAVH *Páramo* Atlas, which would be a temporary "*minimum reference*" until a more detailed scale cartography was approved.

696. Again, despite the enactment of the new legislation, the prohibition did not become effective because of a lack of delimitation. Article 202(1) did not establish a definitive prohibition, but rather only a temporary ban that was open to change until the official delimitation of the *páramos* was established. The *Eco Oro* tribunal also determined that Law 1450 did not materialize the prohibition. According to said tribunal: "*Article 202(1) can only be construed such that a temporary suspension of mining activities in the páramo ecosystems comes into effect as delineated by the 2007 Atlas, which suspension will end once the required delineation at a scale of 1:25,000 and undertaken on the basis of technical, social and environmental studies has been published.*"[692]

iv. Resolution 2090 –December 22, 2014

697. Resolution 2090[693] officially delimited the Santurbán *Páramo*, thus moving from the temporary suspension of mining activities under Law 1450 to a fully in force prohibition. This is the first regulation on the subject issued after the FTA entered in force on August 15, 2011.

698. Article 5 of Resolution 2090 established that "[a]*s of February 9, 2010, it shall be prohibited to executed mining concession contracts, grant new mining titles in páramo ecosystems or issue new environmental licenses which authorize the development of mining activities in these ecosystems.*"[694] But, just as Law 1382 had done, Resolution 2090 established a transitional regime for "*mining activities with concession contracts or mining titles, as well as environmental license or the equivalent environmental control and management instrument, duly granted before February 9, 2010.*"[695]

[692] **Exhibit CL-112**, *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, ¶ 491.

[693] **Exhibit C-107**, Resolution 2090 of 2014, Ministry of the Environment and Sustainable Development, December 19, 2014.

[694] **Exhibit C-107**, Resolution 2090 of 2014, Ministry of the Environment and Sustainable Development, December 19, 2014, Art. 5.

[695] **Exhibit C-107**, Resolution 2090 of 2014, Ministry of the Environment and Sustainable Development, December 19, 2014, Art. 5. The full text in Spanish reads as follows: "*Las actividades mineras que cuenten con contratos de*

699. The delimitation of the Santurbán *Páramo* overlapped with the area covered by Concession 14833 by almost 80%.[696]

v. Law 1753 –June 9, 2015

700. Law 1753 maintained both the prohibition of mining activities in the *páramos* and the transitional regime. It provided that mining concession contracts entered into before February 9, 2010, would remain fully valid and all permitted exploration and mining work could be completed during the full 30-year fixed term (but without any renewal rights), as long as certain requirements were satisfied. Namely: (i) they had a valid mining title; (ii) they were in the exploration stage or exploitation stage; and (iii) they had a valid environmental license or an equivalent environmental management and control instrument.

701. This new law covered activities that were being carried out by mining title holders, whether at the exploration and/or exploitation stage.

702. Reina de Oro's Concession 14833 qualified for the transitional regime under Law 1753 because: (a) it had a valid mining title, (b) it had continued with the exploration/exploitation activities in the mine, and (c) it had an environmental license or an equivalent environmental management plan that was in force (the PMA – Environmental Management Plan or *Plan de Manejo Ambiental)* that had been approved by the CDMB. The Tribunal takes note, however, that the scope of the environmental plan was limited to the activities it had been undertaking since it secured such plan in 2002. The PMA held did not cover the large-scale mining activities that were intended with the Vetas Gold Project.

vi. Constitutional Court Judgment C-035 –February 19, 2016

703. However, the following year Colombia's Constitutional Court declared through Judgment C-035 that the transitional regime established by Law 1753 (virtually unchanged from that previously established in Law 1382 and Resolution 2090) was unconstitutional, since it generated an environmental risk unacceptable under the precautionary principle. Thus, the Constitutional Court established a total ban and overturned the decision made by

concesión o títulos mineros, así como licencia ambiental o el instrumento de control y manejo ambiental equivalente, otorgados debidamente antes del 9 de febrero de 2010, que se encuentren ubicadas al interior del área identificada en el mapa anexo como "Área de Páramo Jurisdicciones - Santurbán - Berlín", podrán seguir ejecutándose hasta su terminación, sin posibilidad de prórroga, sujetas a un estricto control por parte de la autoridad minera y ambiental, así como de las entidades territoriales, y aplicando además las siguientes directrices: […]"

[696] The allegations by the Parties during the proceedings show a conflict in respect to the percentage of the Concession 14833 area that overlapped. At some points the Parties indicate this was 100%, but in others the reference is to 78.1%.

Colombia's legislature to "grandfather" previously authorized mining activities in the *páramo* areas.

704. Judgment C-035 is based on the premise that any risk for the *páramos* is unacceptable under Colombia's Constitution, despite the benefits that mining activities may have for the country's economy, and that the Court cannot allow elected officials to strike a balance favoring such "short-term" objectives over "long-term" ones:[697]

> *174. Therefore, the question that the Court must resolve is whether it is reasonable to allow in a transitional manner mining and hydrocarbon activities in areas of special protection under the Constitution, when there is a situation of legal "protection deficit", and the provision that allows such activities does not grant a true guarantee of protection.*
>
> *175. For the Court, the answer to the foregoing query should be in the negative. The sacrifice of the legal protected interests, as the quality, continuity and accessibility of water, and other environmental services that are provided by páramos are disproportionate vis a vis potential benefits arising from the extraction of non-renewable resources. In dealing with such a vulnerable, fragile, and less adaptable ecosystem such as that of the páramos, its damage tends to be in the long term, if not permanent.*
>
> *176. The long-term environmental effects, this is, the environmental sustainability of a legal provision becomes a determinant factor in the analysis of constitutionality. It is the legislative and executive branches of government who correspond addressing the immediate needs of the population, and from this viewpoint they have a special concern to guarantee that the State has sufficient resources arising from royalties and taxes applicable to extractive activities. However, in a democratic system, it is the constitutional court that corresponds to act as a balance to the emphasis to the short term placed by the other branches of government, especially those democratically elected. Hence, even though the constitutional court cannot discard short term effects, it corresponds to said court to give special consideration to the long-term effects which will allow to have a complete panorama of the constitutional issues involved and the tension among legally protected interests. In such measure, [the Court] needs to provide a special evaluation of the effects of mining and hydrocarbons over the páramo ecosystems.*

705. This conclusion appears to nonetheless contradict the Constitutional Court's previous decision to defer the effects of Judgment C-366, including the unconstitutionality of Law 1382. According to previous Judgment C-366, one of the requisites under Colombian law for the effects of a constitutionality judgment to be deferred (instead of having the Court

[697] **Exhibit C-104**, Judgment C-035/16 of the Constitutional Court, February 8, 2016, ¶¶ 174-176.

just dictate a replacement rule through in a "*sentencia integradora*") is that the law in question is not "*particularly detrimental to higher values*" and that Congress has "*multiple regulatory alternatives*" on the matter:[698]

> *In this respect, one needs to take into account that the precedent examined does not grant conclusive results over which rule to apply to determine in the instant case one needs to elect the deferred [unenforceability] or the integrating judgment. However, mention has been made that "if maintaining the constitutional provision is not particularly harmful of superior values, and the legislator holds multiple option to issue regulations on the subject, it is then preferable to grant a prudent period to Congress to correct the unconstitutional situation, since, in such event, an integrating judgment is particularly detrimental to the democratic principle (PC art. 3) because the constitutional court would be limiting the regulatory liberty of the Legislator.*[699]

b) Protection of the El Volcan Mine under the Transitional Regime

706. Since 1992, Reina de Oro operated the El Volcan Mine under Concession 14833. For the reasons stated below, the Tribunal finds that the El Volcan Mine was protected by the transitional regime established through Law 1382, Resolution 2090 and Law 1753, since the project:

(i) had a valid mining title;
(ii) was in the exploitation stage; and
(iii) had a valid environmental license, albeit for its small-scale mining activities.

707. Indeed, on February 6, 1992, the Ministry of Mines and Energy granted Reina de Oro Exploration License 14833 in the area covered by what is now known as Concession 14833.[700] The exploration license granted Reina de Oro the possibility to conduct technical exploration as well as to conduct mining exploitation activities in the areas where such activities were already taking place.

708. On October 12, 2001, following the enactment of the 2001 Mining Code, Reina de Oro requested the conversion of its license into a concession contract.[701]

709. On February 18, 2002, the environmental authority issued Resolution 000127 approving an Environmental Management Plan (the PMA) for small and medium-scale mining

[698] **Exhibit C-103**, Judgment C-366/11 of the Constitutional Court, May 11, 2011, ¶ 43.2.

[699] **Exhibit C-103**, Judgment C-366/11 of the Constitutional Court, May 11, 2011, ¶ 43.2.

[700] **Exhibit R-015**, Ministry of Mines, Resolution 5-0050, February 6, 1992.

[701] **Exhibit R-058**, Letter from Reina de Oro to Minercol, October 12, 2001.

projects.[702] In July 2003, Reina de Oro prepared and presented the Mining Works Program (the PTO) to the mining authority.[703] The project described by Reina de Oro in its PTO was a "small-scale" project.[704]

710. Then, on October 26, 2005, INGEOMINAS authorized Reina de Oro's conversion request for Exploration License 14833. INGEOMINAS noted that Reina de Oro's project would move immediately to the exploitation stage because Reina de Oro intended to use the same infrastructure already in place.[705]

711. On July 21, 2006, INGEOMINAS and Reina de Oro signed Concession 14833,[706] pursuant to which INGEOMINAS granted Reina de Oro exploration and exploitation rights of the minerals on the surface and subsoil of Concession 14833. The Tribunal notes that Clauses 6.1, 6.2 and 6.3 of Concession 14833 state that Reina de Oro's right to conduct exploitation activities was limited to the activities set out in its Mining Works Program.

712. On March 29, 2007, Concession Contract 14833 was registered in the Mining Registry. As a result, Reina de Oro became the owner of the mining rights for the exploration and exploitation of gold and silver ores in the Mining Area from April 1, 1992, until March 28, 2031.[707]

c) Whether Claimant became the owner of Concession 14833

713. This section examines whether or not Claimant became the owner of Concession 14833, and, if not, whether Respondent is responsible therefor. Whereas Claimant insists that it did become the owner – or was blocked from doing so by unlawful actions of Respondent – Respondent argues that Claimant has never had ownership rights and that Colombia had no responsibility in this situation.

714. As previously addressed in this Award,[708] after GRC assigned on December 6, 2012, all of its rights under the Option Agreement to GRVC – the Colombian branch of its affiliate GRVH – on December 11, 2013, GRVC exercised the option to acquire exploration and

[702] **Exhibit C-115**, Resolución 127 de la Corporación Autónoma Regional para la Defensa de la Meseta de Reina del Oro, February 18, 2002, Environmental License.

[703] **Exhibit C-059**, Reina de Oro's Mining Plan and Program 2003-07, July 2003.

[704] **Exhibit C-059**, Reina de Oro's Mining Plan and Program 2003-07, July 2003, Section 3, Escala y Duración de la Producción Esperada, pp. 30-32

[705] **Exhibit R-080**, INGEOMINAS, Technical Report No. GTRB-258, October 26, 2005.

[706] **Exhibit C-005**, Concession Contract No. 14833, July 21, 2006.

[707] **Exhibit C-060**, Mining Registration Certificate, June 19, 2015.

[708] *See* Section VII.A(II), ¶¶ 348-398.

exploitation rights under Concession 14833.[709] Reina de Oro challenged the exercise of the Option Agreement and, in the terms of the Option Agreement, GRVC and Reina de Oro submitted their controversy to arbitration (the Reina de Oro Arbitration). Because of the Reina de Oro Award, Reina de Oro was expressly ordered to execute the relevant assignment agreement to effectuate the assignment of Concession 14833, as follows:

(a) execute a notice of assignment within one business day after the Reina de Oro Award became final, and

(b) execute the assignment agreement within one business day after (i) the ANM responded to Reina de Oro's assignment notice and required Reina de Oro to provide a copy of the assignment agreement or; (ii) the ANM failed to respond to Reina de Oro's NMA Notice of Assignment within 45 days of its receipt.

715. Although Reina de Oro delivered on February 24, 2015, the NMA Notice of Assignment of Concession 14833 to the Mining Registry, such notice was not, as required by Article 22 of the 2001 Mining Code, followed by any signed assignment agreement. In effect, it is not disputed by the Parties that Reina de Oro and GRVC never actually even signed an assignment agreement.

716. In March 2015, GRVC commenced enforcement proceedings against Reina de Oro to enforce Reina de Oro to pay the damages awarded by the Reina de Oro Arbitration tribunal, and on May 5, GRVC obtained an attachment order on Concession 14833, which prevented Reina de Oro from transferring Concession 14833 to any third parties.

717. The record shows that on April 8, 2018, the Mining Registry issued Resolution 341 rejecting Reina de Oro's NMA Notice of Assignment. The application was rejected because: (i) the NMA Notice of Assignment was incomplete because it was not accompanied by a copy of the relevant assignment agreement, and (ii) Concession 14833 was subject to an attachment order, so the concession could not be transferred.

718. The Parties dispute the motive behind Resolution 341.

719. Claimant maintains, on the one hand, that the Mining Registry issued its Resolution 341 to disadvantage Claimant in the assertion of its legitimate and legal rights in relation to Concession 14833.[710] Claimant contends that the Mining Registry based its decision on

[709] **Exhibit C-087**, Letter from Galway Vetas to Reina de Oro exercising the option positively on December 13, 2012.
[710] Claimant's Post Hearing Brief, ¶ 112.

Judgment C-035 of the Constitutional Court, and that the decision is discriminatory, arbitrary and amounts to an expropriation act.[711]

720. Claimant asserts that the NMA Notice of Assignment did comply with the legal provisions of Colombian law. In addition, Claimant asserts that, in accordance with Article 22 of the 2001 Mining Code, if the NMA does not respond to a "notice of assignment" through a motivated resolution within 45 days, the request will be deemed approved in application of the positive administrative silence.

721. Article 22 of the Mining Code sets the requirements for the configuration of the assignment of rights of a concession, establishing that it requires "*prior written notice to the granting entity*." The Parties have interpreted this article differently. Whereas Claimant contends that that only the prior "notice of assignment" had to be submitted, without further documents, Colombia considers that it was necessary to submit not only the NMA Notice of Assignment, but also the assignment agreement itself (the "negotiation document"[712] as referred to in the 2001 Mining Code) as part of the application for registration with the NMA.

722. Colombia alleges, on the other, that the rejection issued in Resolution 341 was valid and issued after the NMA had given Reina de Oro and Galway ample opportunity to cure the defects in the application and even followed up through Order 228.[713] Respondent explains that the Mining Registry rejected Reina de Oro's NMA Notice of Assignment simply because Concession 14833 was subject to an attachment order.[714] Thus, it is not related to the measures that Claimant contends amounted to treaty violations.

723. Based on the above, and for the reasons stated below, the Tribunal finds that Resolution 341 was issued without prejudice to Reina de Oro and Claimant's rights to lodge a new application for the assignment of the Concession, and that Resolution 341 did not deprive Claimant of its right under the Option Agreement to acquire ownership of the Concession.

724. *First*, after reviewing Resolution 341, the Tribunal's reading is that the Mining Registry decided to reject Reina de Oro's NMA Notice of Assignment on the sole basis that Concession 14833 was subject to an attachment order. Indeed, in the Section titled

[711] Tr. Day 1, 72:14-21; 88:8-17.

[712] **Exhibit C-047**, 2001 Mining Code, Art. 22: "*the assignment of rights contained in a concession, requires previous written notice to the granting entity. If after receiving notice, the entity does not respond through a motivated resolution within 45 days, it will be assumed that the entity has no objections to the assignment and the negotiation document will be registered in the Mining Registry.*"

[713] Respondent's Post Hearing Brief, ¶ 5.

[714] Counter Memorial on Liability, ¶ 300.

"Reasons for the Decision" of Resolution 341, the NMA explains that, since there was an attachment of the exploration and exploitation rights of the Concession Contract, it was not authorized by law to assign the rights of said title until a court order was issued to lift said precautionary measure.[715] The text of Resolution 341 makes clear that neither Judgment C-035, nor Resolution 381 were the reason for the rejection of Reina de Oro's assignment request:

a). Resolution 341 includes no direct reference to Judgment C-035 or the ban on mining in *páramo* ecosystems as the reason to deny the assignment; and

b). Although Resolution 341 does mention Resolution 381, this reference was made with respect to a correction in the Registry regarding the area of Concession 14833. It is not related to the NMA's decision to reject the assignment.[716]

725. In addition, it must be noted that, on October 27, 2017, through Order 228, the Mining Registry gave Reina de Oro the opportunity to cure the deficiencies of its NMA Notice of Assignment. Specifically, the Mining Registry requested both Reina de Oro and GRVC to provide a copy of the assignment agreement and a certificate of existence and representation of the assignee:[717]

> *Consequently, the holder of mining title EMPRESA MINERA REINA DE ORO LTDA, legally represented by Mr. RODOLFO CONTRERAS MORENO, shall be notified, as assignor and holder of Concession Contract No. 14833, to submit within the term of (1) month, counted as from the notification of the administrative act 1) the instrument of negotiation for the assignment of Rights, the certificate of existence, and legal representation of the assignee company, under the penalty of being deemed that there has been a forfeit of the application for the* [registration of the] *assignment of rights in accordance with the terms of article 17 of y Law 1755 of 2015.*

726. However, neither Reina de Oro nor Claimant (through GRVC) ever provided the requested information to the NMA that was requested under Order No. 228. A "notice of assignment" may provide inference that an assignment of the relevant right or asset has been transferred but does not actually transfer rights and/or obligations.

727. *Second*, the Tribunal finds that the rejection by the Mining Registry was valid and issued in accordance with Colombian law, and that such rejection cannot be deemed to be an arbitrary action on the part of Colombia.

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[715] **Exhibit C-113**, *Agencia Nacional de Minería* Resolution 341, April 9, 2018, p. 5.

[716] Tr. Day 1, 191:3-13.

[717] **Exhibit R-046**, ANM, Order No. 228, October 27, 2017.

728. Claimant has argued that under Article 1521 of the Colombian Civil Code the attachment should not have been an impediment to registration. For support, Claimant relies on its legal expert Dr. Ricaurte. According to Dr. Ricaurte, Article 1521 states that trough an attachment the asset is removed from the market, and it cannot be disposed of unless there's an authorization by the creditor or the judge.[718]

> *Article 1521. Sale of Illegal Goods: There is an illegal object in the sale: 3. Of goods attached by judicial order, unless the judge shall authorize the sale or the credit consents thereto.*[719]

729. Dr. Ricaurte explains that, in this case, the attachment was registered in the Mining Registry in Claimant's favor. Hence, Claimant, as the holder of the attachment (creditor), could have given its consent to the disposition of the Concession.[720]

730. Although Claimant held an attachment over Concession 14833, it could not be said to grant "control" over it. Both Parties agree that such attachment prevented Reina de Oro from transferring Concession 14833 without Claimant's agreement.[721] However, there is no evidence on the record, under Colombian law, that the attachment vested Claimant with any other powers that would grant "control" besides such transfer restrictions (for instance, powers to "*manage, direct or oversee*" the way in which Reina de Oro exploited Concession 14833).

731. Even if Claimant's position on the attachment was to be assumed as correct, it is undisputed that the NMA Notice of Assignment was not accompanied by a copy of the assignment agreement and a certificate of existence and representation of the assignee. Moreover, neither Reina de Oro nor GRVC contemporaneously invoked that Claimant could authorize the disposition of the Concession based on Article 1521 of the 2001 Mining Code.

732. *Third*, Resolution 341 did not affect Claimant's right to submit a new application for the assignment of Concession 14833. The Tribunal is not persuaded by Claimant's argument that it could not be registered as owner of Concession 14833 because of the failure by Respondent (through the NMA) to record the assignment timely after the NMA Notice of Assignment.[722] As mentioned above, Claimant had the legal tools to both compel Reina de Oro to execute the Assignment Agreement (instead of requesting an attachment over

[718] Expert Report of Dr. Margarita Ricaurte, p. 44.

[719] **Exhibit C-200**, Law 84 of 1873, Colombian Civil Code, Art. 1521.

[720] Tr. Day 2, 457:8-11.

[721] Claimant's PH Brief, ¶¶ 49-53; Respondent's PH Brief, ¶¶ 27-29.

[722] Claimant submitted the Request for Arbitration on March 21, 2018, and Resolution 341 was issued on April 9, 2018.

Concession 14833 to collect damages awarded in the Reina de Oro Arbitration), but chose not to apply them.

733. Indeed, it is not disputed that Claimant could still fill a new application to the NMA:

a. During the opening statements of Respondent, its Counsel reiterated the point. "MR. MANTILLA SERRANO (Colombia): *To be clear, this Resolution does not prevent GRVC from applying to become the Owner again.* […]. *They could have filed again. It was just rejecting the original filing. This filing could have been made again by Galway.*"[723]

b. In its Counter-Memorial on Liability, Respondent argued that "[A]*s Mr. Amaya Lacouture explains, Reina de Oro can still complete the transfer of Concession 14833 to Galway. All Reina de Oro needs to do is to deliver a new notice of assignment to the ANM, followed by a signed copy of the assignment contract and the required information on Galway's legal capacity and term of duration. In addition, Galway must withdraw its attachment request with respect to Concession 14833.*"[724]

c. Finally, Mr. Amaya Lacouture indicated in his first witness statement that "*Galway could (and even could still today) obtain the assignment of Concession 14833 if Reina de Oro submits a new notice of assignment that meets all the requirements of the 2001 Mining Code. This includes, of course, the negotiation document of the mining title between the two companies.*"[725]

734. Therefore, it seems clear that Resolution 341 did not deprive Claimant of its right under the Option Agreement to acquire ownership of the Concession and is not disputed that Claimant can still apply for registration to the NMA.

735. Another separate argument of Claimant states that the execution of the assignment agreement became unnecessary in light of the inaction on the part of the Mining Registry. This is, that the inactivity of the Mining Registry could give rise to positive administrative silence (*silencio administrativo*) under Law 1437, which provides that a failure of response on the part of the administrative agency shall be deemed to be responded in the affirmative.[726] Although it is true that this protection exists in Colombia, both Parties accept that the effect is not immediate upon the elapse of the statutory period. An action on the part of the petitioner is required, and it is undisputed that neither Reina de Oro nor

[723] Tr. Day 1, 183:3-7.

[724] C-Memorial on Liability, ¶ 304.

[725] Lacouture Statement, ¶ 21.

[726] **Exhibit R-028**, Law No. 1437, Code of Administrative Procedure and Administrative Disputes, Art. 85; **Exhibit R-169,** Consejo de Estado, Sala de lo Contencioso Administrativo, Judgment, July 6, 2020.

GRVC followed the procedure established under Colombian law to invoke such effect, nor did they ever timely make this allegation before the mining authority.

736. The process to invoke the positive administrative silence implies that a petitioner needs to take to a Colombian Notary Public the Declaration of Lack of Response and, thereafter, take the notarial deed issued (a "*protocolización*") before the relevant agency; in this case, the Mining Registry or NMA. As established by Article 85 of Colombia's Code of Administrative Procedure, the approval of a request by positive administrative silence required a procedure of "*protocolización*" to be carried out by the interested party.[727] Absent such formality in the present case, there was no positive administrative silence and, as a consequence, no approval is deemed to have taken place.[728].

737. Despite the fact that action is necessary to give effect to the positive administrative silence, the absence of the petitioner to seek the *protocolización* immediately after the lapse of the statutory period does not mean that they cannot pursue it later. During the Hearing, Dr. Ricaurte (expert for Claimant) and Prof. De Vivero (expert for Respondent) both admitted that absent the *protocolización* the administrative authorities retained jurisdiction to issue a resolution:

> *ARBITRATOR BULLARD: If I don't submit the deed at Day 60, on Day 60, the Authority can still issue a resolution?*
> *DR. RICAURTE: Yes. Yes.*
> *ARBITRATOR BULLARD: That was my understanding. Thank you, ma'am.*
> *[…]*[729]

> *ARBITRATOR BULLARD: This is just to confirm my understanding. I understood that you and both Experts indeed agree on this, but I want to be sure that this is so. Yesterday, during the presentation of the expert put forward by the Claimant, it was indicated that administrative--license, she answered some questions that I put to her that, administrative silence was right. And I think you said the same thing just now. A guarantee. A guarantee, and that it is up to the administrative person to decide after the term has lapsed whether to request by means of protocolization or simply sits down to wait for the decision to come. What do you make of this?*
> *PROF. DE VIVERO: That's correct, and the specific part in terms of when the Administration's competence is all in the clear--that is to say, it doesn't*

[727] **Exhibit R-028**, Code of Administrative Procedure and Administrative Disputes, Art. 85.

[728] De Vivero Expert Report, ¶¶22-26; **Exhibit R-169,** Consejo de Estado, Sala de lo Contencioso Administrativo, Judgment, July 6, 2020, p. 24; **Exhibit C-166**, Judgment No. 76001-23-31-000-2009-01219-01 del Consejo de Estado, Sala de lo Contencioso Administrativo, sección 4ª, 30 de agosto de 2016, p. 3.

[729] Tr. Day 1, 374:14-18.

> *take a competence from it until there is protocolization. This in respect of positive administrative silence.*[730]

738. Thus, it is clear to the Tribunal that Article 85 of the Code of Administrative Procedure establishes that positive administrative silence shall not have any effect unless the relevant party has followed the required procedure, which Claimant did not follow.

739. The Tribunal therefore concludes that Claimant did not become the owner of Concession 14833 for the following reasons:

a). Although the Option Agreement provided for the assignment of the rights and obligations under Concession 14833, an actual assignment agreement was never executed between GRVC and Reina de Oro upon the exercise of the option;

b). At the time Claimant commenced the Reina de Oro Arbitration, GRVC expressly requested the tribunal in that proceeding to order the execution of the relevant assignment agreement, but GRVC failed to pursue this action in the enforcement proceedings that followed the Reina de Oro Award. Should Claimant have requested the application of Article 434 of the General Code of Procedure, this would have allowed the relevant judge to sign the assignment on behalf of Reina de Oro;

c). By failing to make payment of the consideration established under Clause 3.3 of the Option Agreement, Claimant knowingly elected not to enforce the execution of the relevant Assignment Agreement, and therefore did not comply with all its obligations under the Option Agreement, with the consequence that it did not acquire the relevant ownership. Enforcement would carry the obligation of Claimant to make such payment.[731]

d). The NMA requires as a matter of policy that any notice of assignment of a mining title or concession is accompanied by the relevant assignment agreement, as this is the evidence of transfer of ownership. Claimant failed to attach the document; and

e). The NMA never recorded Claimant as owner of Concession 14833, for reasons supported by the laws of Colombia.

d) Whether there has been an Expropriation of the Rights of Claimant under the Option Agreement

740. Claimant contends that, through the disputed measures, Colombia's actions amount to an *indirect* expropriation as described under Annex 811 of Article 811 of the FTA. The Tribunal has therefore to determine whether the Colombian authorities interfered with the rights of Claimant in violation of its protections under the FTA.

[730] Tr. Day 2, 572:12-573:8.

[731] Tr. Day 1, 135:20-137:4.

741. Since the Tribunal has concluded that Claimant did not own Concession 14833 but on the other hand, since the majority of the Tribunal has nonetheless acknowledged that Claimant's rights to the Option Agreement constitute an "investment" for purposes of jurisdiction, the evident question for the Tribunal becomes: what is the "investment" susceptible of protection under the FTA as alleged by Claimant?[732] For the sake of clarity, Arbitrator Stern considers that although Claimant has an interest in the Option Agreement, its investment is its 100 % shares in GRVH.

742. The Tribunal therefore needs to identify the "investment" held by Claimant and protected under the FTA, before examining the expropriation claim.

743. For purposes of jurisdiction, the majority of the Tribunal has concluded that the "investment" of Claimant is Claimant's rights under the Option Agreement since Claimant never became the owner of Concession 14833 for reasons not attributable to Respondent. Consequently, the Tribunal must analyze whether the rights arising thereof were subject to an indirect expropriation.

744. According to the majority of the Tribunal, the essential right of Claimant (through GRVC – the Colombian branch of GRVH) under the Option Agreement was the ability to acquire Concession 14833 through the exercise of the option, the execution of the relevant agreement(s) and compliance with their respective terms, and ultimately the ability to secure subsequent assignment before the NMA. These were acknowledged in the Reina de Oro Arbitration – in which GRVC was the claimant – and the tribunal in the Reina de Oro Arbitration ordered Reina de Oro to comply with such obligations.

745. Hence, to determine whether Respondent has breached the FTA, the Tribunal shall examine how the Option Agreement was affected by the measures related to both (a) *existing* mining projects, such as the small-scale mining activities of Reina de Oro, and (b) *new* mining projects, such as Vetas Gold Project that Claimant intended to pursue, since Claimant contends that the investment was made in order to acquire the chance of applying and securing the necessary authorizations to pursue the Vetas Gold Project and not simply continue the small-scale or artisanal activities. To that end, Claimant argues that it had already expended significant exploration costs. [733]

[732] In Sections VII(A) and (B) above, the Tribunal examined the definition of an "investor" and "investment" under Art. 838 of the FTA (Definitions).

[733] According to Mr. Hinchcliffe, "*In pursuing the Vetas Gold Project, including the exploration and other development work done, GG through its subsidiaries and their Colombian branches, incurred costs in excess of USD $20,000,000*". *See* Hinchcliffe Statement, ¶ 111.

746. The value of the Option Agreement lied upon the rights that would be acquired as part of Concession 14833: the right not only to continue to explore and exploit the mining activities of Reina de Oro – as these had been carried out in light of the relevant authorizations, including those of an environmental nature, but in the mind of Claimant the potential of developing the Vetas Gold Project.

747. The Tribunal is aware that, in accordance with Colombian law, the only exploitation rights that existed under Concession 14833 were circumscribed by the terms of Reina de Oro's PMA (*Plan de Manejo Ambiental*) approved in February 2002[734] and the PTO (*Programa de Trabajos y Obras*) issued in 2004.[735] The Tribunal is also aware that these licenses only allowed Reina de Oro to conduct small-scale mining exploitation activities at the El Volcán mine.

748. It is undisputed between the Parties that the mining activities were then limited to small-scale operations. The Tribunal notes that in 2013, the El Volcan mine had a production of approximately 40 tonnes per day and annual gold sales of USD 850,000 to USD 1,000,000.[736] This was within the "small-scale" mining project classification as it did not exceed the 15,000 tonnes annual mining, as was consistent with the INGEOMINAS 2019 Technical Report that identified a production output of 106 kg of gold and 127 kg of silver per year.[737]

749. However, Claimant has argued that, upon exercise of the Option Agreement and becoming the owner of Concession 14833, Claimant would acquire the right to apply to obtain the necessary authorizations to carry out and exploit the Vetas Gold Project. Even though under Article 46 of the 2001 Mining Code these rights would be subject to the mining laws existing at the time Concession 14833 was granted, others – specifically those of an environmental nature, in this case – would need to be subject to current applicable legislation.

750. To develop the Vetas Gold Project, a modification of the existing PTO would have been required, as well as a new environmental license or, at the very least, a modification of the

[734] **Exhibit C-115**, Resolución 127 de la Corporación Autónoma Regional para la Defensa de la Meseta de Reina del Oro, February 18, 2002, Environmental License.

[735] **Exhibit C-059**, Reina de Oro's Mining Plan and Program 2003-07, July 2003.

[736] **Exhibit C-052**, RPA Technical Report on the Vetas Gold Project, Department of Santander, Colombia. NI 43-101 Report, November 6, 2013, pp. 4-9.

[737] **Exhibit R-133,** INGEOMINAS, Technical Report GTRB-489, November 12, 2009.

existing PMA. Dr. Ricaurte – expert in Colombian law whose Report was submitted by Claimant – conceded this during cross-examination.[738]

751. In the cross-examination of Dr. Ricaurte, she was asked by counsel to Respondent to confirm whether the environmental permits held by Reina de Oro were limited to small-scale mining activities:

> *MR. ROMERO: And you indicate also that those activities that had an Environmental License expressly "on a scale of exploitation to find for small-scale mining." This is on Page 32 of your Report?*
> *DR. RICAURTE: Yes.*
> *MR. ROMERO: In other words, for what Reina de Oro had was for small-scale mining; right?*
> *DR. RICAURTE: Yes. As it appears in the documents that are in that administrative record that I reviewed.*
> *MR. ROMERO: In other words, the Concession was not environmentally licensed for medium and large-scale mining activities activity; correct?*
> *DR. RICAURTE: No, but that doesn't mean they couldn't be.*[739]

752. The record shows that Claimant never secured additional permits, licenses or amendments to their then exiting permits and licenses, and this follows from the fact that Claimant never became the owner of Concession 14833. Counsel to Claimant confirmed that Claimant never applied for the modification of the PMA for the construction and exploitation activities that it would have carried out as part of a large-scale Vetas Gold Project.[740] Claimant never caused Reina de Oro to apply for either.

753. As a consequence, the Vetas Gold Project, which Claimant has contended was affected by the measures adopted by Colombia cannot be protected by the 2001 Mining Code (as amended by Law 1382 of 2010), nor the transitional regime under Resolution 2090 of 2014, nor Law 1753 of 2015. Such legislation only attempted to protect the mining activities *already* being carried out by Reina de Oro, which were covered by Concession 14833 and both the PMA and the PTO.

754. Even if Claimant had made the argument, which Claimant did not, that the guarantee contained in Article 46 of the 2001 Mining Code which, as explained above, protected all concession rights from the application of new mining regulations (granting the opportunity to apply for an extension in time of the authorization to exploit the mining area) and contemplated the payment of compensation to the concession's owner in case regulations

[738] Expert Report of Dr. Margarita Ricaurte.

[739] Tr. Day 1, 305:4-306:9.

[740] Tr. Day 1, 117:18-118:8.

changed, this guarantee would not apply insofar as Claimant never became the owner of Concession 14833.

755. The Tribunal notes that Claimant was aware of this situation, as shown by the internal memorandum prepared in June 2010 by Mr. Gomez Rengifo – the general manager of GRVC – when the transitional regime first came out upon enactment of Law 1382. In a so-called "business view" report he shared with investment capital managers[741] he makes a recount of Law 1382 and the amendment to Article 34 of the 2001 Mining Code as it applies to *páramos,* and Claimant's rights under Concession 14833 that was the subject of the Option Agreement. First, Mr. Gómez Rengifo described that in his view Law 1382 would grandfather existing mining projects that are in the stage of construction, setting or exploitation, and highlighted that such mining titles would not have an option for extension in time by the mining authorities.[742] Expanding on the subject, he adds that:

> *… though the amendment contemplates a sole exemption that applies to all mining projects that are in the stage of construction and setting or exploitation with a mining title and environmental license or equivalent, which '…* [activities] *shall be respected until their expiration date, but these titles shall not have an option of extension in time'* ***it does not offer any alternative to large scale mining projects that have been in development for several years and are being carried out at an exploration stage***.[743] [Emphasis by the Tribunal]

756. Under this reasoning, it is the rights under the Option Agreement that should be considered as an investment protected by the FTA, and this would fall within the broad concept of Article 838(g) of the FTA. This, to the extent that the Option Agreement grants the holder an interest (*i.e.*, the right to exercise the option), which is derived from the fulfillment of a series of conditions that imply the commitment of capital to carry out an economic activity in Colombia (*i.e.*, payments for the exploration work in the mining area). Colombia notes that a right does not qualify as an investment if it is contingent or dependent on the satisfaction of legal requirements or conditions. In that sense, it is not sufficient that Galway had the possibility of ownership or control at a future time of Concession 14833,

[741] **Exhibit R-134**, E-mail from Galway to Amber Capital, 20 August 2010.

[742] **Exhibit R-134**, E-mail from Galway to Amber Capital, 20 August 2010, p. 3.

[743] **Exhibit R-134**, E-mail from Galway to Amber Capital, 20 August 2010, p. 7.

and cites *Apotex v. United States*,[744] *Emmis v. Hungary*,[745] *Nordzucker v. Poland*,[746] and *Joy Mining v. Egypt*[747]. Nonetheless, these cases do not apply to the Option Agreement, as it is not comparable.[748]

757. Any evaluation of Colombia's potential liabilities under the FTA would need to consider how Respondent's measures affected the Option Agreement.

758. Now, to answer the question of whether there has been an expropriation, it is necessary to refer to the applicable law.

759. Article 811 of the FTA provides, in respect to expropriation of a covered investment, that:

> *l. 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.*
>
> *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.*
>
> *Compensation shall be paid without delay and shall be fully realizable and freely transferable. Compensation shall be payable in a freely convertible*

[744] **Exhibit RL-081**, *Apotex Inc. v. The Government of the United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, June 14, 2013, ¶ 215.

[745] **Exhibit RL-085**, *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Award, April 16, 2014, ¶ 169.

[746] **Exhibit RL-063**, *Nordzucker AG v. The Republic of Poland*, UNCITRAL, Partial Award, December 10, 2008, ¶ 185.

[747] **Exhibit RL-048**, *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, August 6, 2004, ¶¶ 46-47.

[748] Memorial on Jurisdiction, ¶ 19.

> *currency and shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of payment.*

760. Annex 811 supplements Article 811 of the FTA and establishes specific parameters with respect to "indirect" expropriation:

> *The Parties confirm their shared understanding that:*
>
> *1. Paragraph 1 of Article 811 addresses two situations. The first situation is direct expropriation, where an investment is nationalized or otherwise directly expropriated as provided for under international law.*
>
> ***2. The second situation is indirect expropriation,** which results from a measure or series of measures of a Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure.*
>
> *(a) **The determination of whether a measure or series of measures of a Party constitute an indirect expropriation requires a case-by- case, fact-based inquiry that considers, among other factors**:*
>
> *(i) **the economic impact of the measure** or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred,*
>
> *(ii) **the extent to which the measure or series of measures interfere with distinct, reasonable investment-backed expectations**, and*
>
> *(iii) the character of the measure or series of measures;*
>
> *(b) **Except in rare circumstances**, such as when a measure or series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted in good faith, **non-discriminatory measures by a Party that are designed and applied to protect legitimate public welfare objectives, for example health, safety and the protection of the environment, do not constitute indirect expropriation**.* [Emphasis added]

761. Annex 811(2)(b) is an explanation of the factors relevant to determine the existence of an indirect expropriation when dealing with a measure pursuant of a legitimate public welfare purpose. The *Eco Oro* tribunal explained that the "rare circumstances" phrase seems to establish the high threshold regarding the "*character*" and "*interference with distinct, reasonable expectations*" that must be satisfied for such measures to constitute indirect expropriations (consistent with what is usually required under the police powers doctrine),

and not to be an additional independent requirement.[749] This would mean that Annex 811(2) establishes a twofold test, requiring to consider the economic impact and whether there was a legitimate exercise of the State's regulatory functions.

762. The Tribunal shall examine whether the disputes measures adopted by Respondent constitute the alleged "indirect" expropriation, and to that end, will address:

i) The economic impact of the measures;
ii) Whether the measures interfered with expectations of Claimant; and
iii) The legitimate exercise of Respondent's police powers.

(i) Economic Impact of the Measures

763. The Tribunal notes that in its NDP Submission, Canada argues that Article 811 of the FTA reflects and incorporates the customary international law standards with respect to expropriation, which requires as a first step the identification of a property right capable of being expropriated. Thus, to bring a claim of expropriation: (i) a claimant must establish the existence of a vested property right, and (ii) a property right must have been taken.[750]

764. Canada further asserts that this determination requires a *renvoi* to the domestic law of the host State, which will determine the existence, nature, and scope of the "property right" at issue including any applicable limitation, adding that international tribunals have generally recognized that domestic courts interpreting legal rights under domestic law should be accorded deference.[751]

765. A contractual right such as that under the Option Agreement is undoubtedly an item of intangible property, and both Colombian law and the FTA recognize this category.

766. There are several arguments with respect to the value of the investment and when Claimant might have been deprived of such value.

767. *First*, one can argue that the value of the investment made by Claimant in the Option Agreement was lost with the issuance of Resolution 2090 in 2014, since it was then that

[749] **Exhibit CL-112**, *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, ¶ 629.

[750] Canada's NDP Submission, ¶¶ 31-32.

[751] Canada's NDP Submission, ¶¶ 17-18, *citing* **Exhibit RL-085**, *Emmis International Holding, B.V. Emmis Radio Operating, B.V. Mem Magyar Electronic Media Kereskedelmi és Szolgaltato KT v.* Hungary, ICSID Case No. ARB/12/2, Award, April 16, 2014, ¶¶ 161-162; **Exhibit RL-054**, *EnCana Corporation v. Ecuador*, UNCITRAL, Award, February 3, 2006, ¶ 184; **Exhibit RL-132**, *Glamis Gold Ltd. v. United States of America,* UNCITRAL Rejoinder of Respondent, March 15, 2007, p. 11; *Lone Pine Resources Inc. v. Government of Canada,* UNCITRAL, Canada's Counter-Memorial (French), July 24, 2015, ¶¶ 419-423.

exclusion areas to mining activities were delimited. This, because Articles 34 and 36 of the 2001 Mining Code, as amended by Law 1382 of 2010, stated that the exclusion zones for developing mining activities only were *effective once they had been officially delimited*, and that the suspension established in Law 1450 in the areas of the 2007 IAVH *Páramo* Atlas was temporary.[752]

768. Under that scenario, the Option Agreement investment had value because, upon exercise of the option under the Option Agreement, Claimant could have acquired from Reina de Oro Concession 14833. However, the reality is that such concession had limited value because of its small-scale mining activities taking into account that Claimant had an expectation to develop a new large-scale mining project in the area: the Vetas Gold Project.

769. *Second*, it could be argued that the value of the right to obtain the authorizations for the Vetas Gold Project had already been lost by the time Claimant acquired its interest in the Option Agreement in December of 2010 – and then exercised it in December 2013 – since the laws establishing the mining ban in the *páramos* (*i.e.*, Law 1382 enacted in February of 2010 and then Law 1450 enacted in June 2011) already existed. However, the Tribunal has previously noted that the ban on mining in *páramos* areas did not completely deprive the Option Agreement of value until Resolution 2090 was issued in December of 2014 delimiting the Santurbán *Páramo*.

770. While one could also argue that the adverse economic effect over the Option Agreement's value could have been unfolding since the laws mentioned were passed, those measures cannot be deemed to be "*tantamount to direct expropriation*," because they only generated a risk that the project would fall within the future delimitation of the *páramos*, there is no question that such risk materialized when the Santurbán *Páramo* was officially delimited.

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[752] **Exhibit C-048**, Law 1382 of 2010, Art. 34: "*Zonas excluibles de la minería. No podrán ejecutarse trabajos y obras de exploración y explotación mineras en zonas declaradas y delimitadas conforme a la normatividad vigente como de protección y desarrollo de los recursos naturales renovables o del ambiente. Las zonas de exclusión mencionadas serán las que han sido constituidas y las que se constituyan conforme a las disposiciones vigentes, como áreas que integran el sistema de parques nacionales naturales, parques naturales de carácter regional, zonas de reserva forestal protectora y demás zonas de reserva forestal, ecosistemas de páramo y los humedales designados dentro de la lista de importancia internacional de la Convención Ramsar.* ***Estas zonas para producir estos efectos, deberán ser delimitadas geográficamente por la autoridad ambiental con base en estudios técnicos, sociales y ambientales****.*

Los ecosistemas de páramo se identificarán de conformidad con la información cartográfica proporcionada por el Instituto de Investigación Alexander Von Humboldt.

[…]

Parágrafo Primero. En caso que a la entrada en vigencia de la presente ley se adelanten ***actividades de construcción, montaje o explotación minera con título minero y licencia ambiental o su equivalente en áreas que anteriormente no estaban excluidas, se respetará tales actividades hasta su vencimiento****, pero estos títulos no tendrán opción de prórroga*." [Emphasis added].

In other words, the previous laws may have reduced the Option Agreement's value, but what crystallized its loss was the delimitation of the *páramos* through Resolution 2090.

771. Nonetheless, the Tribunal is remined that Resolution 2090 was later declared unconstitutional through Judgment T-361 of 2017, thus leaving the *páramos* undefined once again.

772. *Third*, another argument to be considered by the Tribunal is Respondent's assertion that the value was not fully eliminated by the ban because 21.8% of the Concession Area is not within the limits of the Santurbán *Páramo*. However, there appears to be no evidence on the record regarding the economic relevance of such "*excluded*" area. The only mining projects of which there is evidence of being viable or at least potentially viable are the small-scale Reina de Oro exploitation and the Vetas Gold Project, both requiring interventions in the Santurbán *Páramo* as delimited by Resolution 2090. Since there is no evidence that a project could be developed only in the 21.8% area outside de *páramo*, its economic relevance cannot be presumed.

773. Thus, even if one were to consider that the Option Agreement still had a value after the issuance Resolution 2090 in December of 2014 and the enactment of Law 1753 in June 2015 – because they continued to allow the exploitation of Reina de Oro mining activities, albeit in a small-scale scope – it is clear that once the transitional regime of Law 1753 was declared unconstitutional by Judgment C-035 of February 2016, the rights under the Option Agreement were deprived of such value because, at that point, not even the small-scale mining of Reina de Oro could take place.

774. Therefore, what is clear to the Tribunal is that: (a) the small-scale exploitation rights of Reina de Oro were lost upon the issuance of Judgment C-035; and (b) the opportunity to obtain any new authorizations for the Vetas Gold Project was lost altogether, since new projects would not be allowed within the *páramo* area delimited by Resolution 2090.

775. Although the economic value of the Option Agreement has not yet been quantified – and would only be carried out in a *quantum* stage upon a determination that there is liability on the part of Respondent due to a breach of its obligations under the FTA – whatever the value those rights under the Option Agreement, it is clear that the value was lost after the two measures in question by Respondent came into force.

(ii) Whether the measures interfered with expectations of Claimant

776. As Claimant contends, the Tribunal must find whether the disputed measures adopted by Respondent infringed on a Claimant's reasonable, investment-backed expectations.

777. As indicated above,[753] there are two assurances recognized under the laws of Colombia that are relevant for Claimant's case: (a) the expectation that mining laws would not be modified during the life of a concession, but compensation would be due if they did, which was found in Article 46 of the 2001 Mining Code, and (b) the transitional regime established under Law 1382 and Law 1753.

778. In 2012 Claimant still had the chance of developing a mining project, since the official delimitation of the *páramos* had not been established by the competent authority and there may have been uncertainty as to whether the mining exclusion zone would make the project inviable. Such chance disappeared when Resolution 2090 was issued in 2014 and the mining exclusion zone was officially delimited for the first time, covering almost 80% of the surface area of Concession 14833.

779. However, it is questionable whether this can be deemed to be a representation to Claimant that new regulations would not be applied to *new* projects, such as the Vetas Gold Project. On the one hand, Article 46 of the 2001 Mining Code established that a monetary compensation would be paid to the title holder if mining regulations changed, while on the other the transitional regime only protected projects which had obtained the applicable environmental authorizations before the mining ban was approved.

780. Claimant never received any "*clear and explicit representation*" that the *páramo* delimitation would not overlap with the Concession area. As argued by Respondent, Mr. Hinchcliffe – Claimant's CEO, founder and major shareholder – confirmed his awareness that Claimant could be adversely affected by future changes in environmental laws, and that the project could fail as a result of change in environmental regulation.[754] Thus, it cannot be argued that Resolution 2090 could not have frustrated any legitimate expectation from Galway.

781. At most, Claimant could have an expectation that it could continue with the mining operations covered by the environmental approval (PMA) secured by Reina de Oro from the CDMB in 2002, and had the legitimate expectation that the mining ban would not be applied to the small-scale mining exploitation of Reina de Oro as it was being carried out, since this exclusion had been consistently carved when the ban was first established through Law 1382. The Tribunal recalls that this was considered not to be particularly detrimental to Colombia's "*higher values*" by the Constitutional Court in Judgment C-366.

[753] *Supra*, ¶¶ 675-686.

[754] Respondent's PH Brief, ¶¶ 98-101, *citing* Tr. Day 3, 681:1 - 697:4.

782. Nevertheless, the Tribunal recalls that Claimant has argued that the legitimate expectation allegedly frustrated by Respondent was to have a "*valid and binding claim*" to Concession 14833 and develop the Vetas Gold Project[755], not to receive a compensation under Article 46. The Tribunal must decide the case based on the terms put forth by Claimant.

783. Claimant was never the title holder of Concession 14833 because the assignment of Concession 14833 was never completed. Under these conditions, Claimant cannot validly argue that it had the legitimate expectation that: (a) it would develop the Vetas Gold Project and be exonerated from the mining ban when it acquired its interest in the Option Agreement in 2012, or (b) it would receive from Colombia compensation for modifying its mining laws which affected its investment.

784. Since the legitimate expectations claimed by Galway did not exist, the Tribunal concludes that Respondent could not have violated them.

(iii) Legitimate exercise of Respondent's police powers

785. It is undisputed that the measures issued by Respondent pursued the objective of protecting the environment.

786. The Tribunal notes that Claimant has not alleged that such measures were applied in a discriminatory manner by Respondent, save for "*when* [Colombia] *belatedly refused to record the transfer of Concession 14833 to* [Claimant] *in the mining registry*."[756] In its pleadings, Claimant contended that Colombia is obligated to pay compensation on account of the "indirect expropriation" of its investment, independently of whether such conduct was undertaken for a valid public purpose, was non-discriminatory, and was undertaken with due process of law.[757] Claimant attempted to place the burden on Respondent to evidence that the specific conduct was "*necessary and non-discriminatory*",[758] but did not submit itself any allegation of discriminatory conduct by Respondent.[759]

787. Consequently, the determination of whether there was a legitimate exercise of Respondent's police powers is subject to the "rare circumstances" test established in Annex

[755] Tr. Day 3, 688:10-689:10.

[756] Claimant's PH Brief, ¶¶ 55 and 109.

[757] Cl. Memorial, ¶¶ 315 and 360.

[758] Reply, ¶¶ 290-291.

[759] Respondent confirmed this view. In its PH Brief, it asserts: "*At the hearing, and throughout these proceedings, Galway has not even attempted to dispute this. Instead, Galway focused on the allegedly expropriatory effect of Resolution 2090, Law 1753 and Judgment C-35*". Respondent's PH Brief, ¶ 105.

811(2)(b) of the FTA, which include, among others, a severeness in light of the measure's purpose that it "*cannot reasonably be viewed as having been adopted in good faith*".

788. In the present case, two measures have been argued to have affected Claimant's investment as part of the "indirect expropriation":

a). Resolution 2090 of December 19, 2014; and
b). Judgment C-035 of February 16, 2016.

a). Resolution 2090

789. Claimant alleges that Resolution 2090 materialized the destruction of the Option Agreement by delimiting for the first time a mining exclusion zone over most of Concession 14833.

790. Claimant has not argued that Resolution 2090 pursued any political objective, nor that Respondent disregarded any due process guarantees. Claimant's principal allegation is that Colombia reversed its position "*through an iterative and destabilizing series of legislative measures, court challenges, and administrative actions culminating in the unilateral decisions to completely erode and strip away all mining rights previously held by* [Galway]".[760]

791. In connection with any allegations that a State has "taken" or "expropriated" the investor's property rights through its regulatory powers, Canada states in its NDP Submission that proper consideration must be given to State's police power –a well-recognized concept at customary international law: a host State is not required to compensate an investment for any loss sustained by the imposition of a non-discriminatory, regulatory measure designed and applied to protect legitimate public welfare objectives. This principle, it adds, allows governments the necessary freedom to regulate without having to pay compensation for every effect of regulation, since governments would otherwise be "… *severely curtailed in their ability to tax, set standards, take important health or environmental measures or carry on the functions that citizens expect from governments.*"[761]

792. Mirroring the terms of the FTA, Canada adds that a non-discriminatory measure that is designed and applied to protect legitimate public welfare objectives such as health, safety and the protection of the environment, will not constitute indirect expropriation, except in rare circumstances where its impacts are so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith. Therefore, *bona*

[760] Cl. Memorial, ¶ 354.

[761] Canada's NDP Submission, ¶¶ 34-36.

fide regulatory measures to protect the environment will ordinarily not require payment of compensation even if they affect the value and/or viability of an investment of an investor of another party.[762]

793. The standard for proving that a regulation pursuant of legitimate objectives lacks good faith is a high one. For a regulation not to be *bona fide*, it is usually required that subreptitious objectives be pursued by the State. For instance, in *Bear Creek v. Peru*, the tribunal concluded that the "rare circumstances" test of the Canada-Peru FTA was met because "[Peru]*was under a duty to protect both its citizens and foreign investors in its territory. Instead, it issued Supreme Decree 032, in violation of its Constitution, without due process, for political reasons. It is "rare" that a State will so blatantly and knowingly disregard its own legal framework, its international legal obligations, and all semblance of due process – and that should compel the Tribunal to find that Supreme Decree 032 constitutes an indirect expropriation.*"[763]

794. Similarly, in *Bank Melli and Bank Saderat v. Bahrain*,[764] the tribunal concluded that measures directed to intervene in a bank "*were not genuine regulatory measures aiming at addressing Future Bank's unlawful conduct*" because: (i) there was no contemporaneous trace of the reasons that lead to the intervention, (ii) there was circumstantial evidence of political motivations behind the State's conduct, (iii) there was no evidence of warnings or expressions of concerns against the bank's management, and (iv) no less restrictive alternatives were considered.

795. Although the measure is severe in its effect, the Tribunal finds that: (a) it was not disproportionate in light of its purpose, and (b) nor so severe that only a State not acting in good faith would have approved it.

796. Resolution 2090 was only an implementation measure of the delimitation required by Law 1450, which predated both the FTA and Claimant's interest in the Option Agreement. Absent technical critiques of the delimitation established in Resolution 2090, which could prove it was arbitrarily tailored, it is difficult to conclude that it was not a *bona fide* regulation. The Tribunal has not been provided any evidence to that effect.

[762] Canada's NDP Submission, ¶ 37.

[763] **Exhibit CL-037**, *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, November 30, 2017, ¶ 350.

[764] *Bank Melli Iran and Bank Saderat Iran v. The Kingdom of Bahrain*, PCA Case No. 2017-25, November 9, 2021, ¶¶ 652-690. Although this case was not submitted as legal authority by any of the Parties, the Tribunal finds it useful in support of its analysis.

b). Judgment C-035

797. Alternatively, if Judgment C-035 was to be considered as the measure which crystallized the destruction of the Option Agreement's value, it could be argued that it is a "rare circumstance" akin to lack of good faith that the Constitutional Court changed its view over the transitional regime within a short 5-year period. Claimant has argued that this was arbitrary. The contradiction would appear to exist when it is noted that such judgment declared the transitional regime under Law 1753 as unconstitutional for violating the precautionary principle, and this is compared to Judgment C-366 issued five years earlier, where the same Constitutional Court deemed Law 1382 (including the very same transitional regime) to be one of Congress' various regulatory alternatives and not to be "*particularly detrimental to higher values*", thus deferring its unconstitutionality judgment for two years until a new law was passed.

798. Indeed, it could be argued that the Colombian Executive (through Resolution 2090, in 2014) and Congress (through Law 1753, in 2015) had already reached a balance between respect for ongoing mining projects, on the one hand, and environmental protection, on the other, and the Constitutional Court had already considered such balance not to be particularly detrimental to "*higher values*" and part of the authorities' various regulatory alternatives when it issued Judgment C-366. It would follow to deem the change of position by the Constitutional Court as arbitrary, treating the transitional regime as unacceptable under the precautionary principle, without any explanation nor based on scientific information already available in its earlier decision.

799. As has been noted above, the transitional regime provided for in Law 1382 (the unconstitutionality of which *was deferred* by the Court through Judgment C-366) was the same transitional regime provided for in Law 1753 (the unconstitutionality of which *was not deferred* by Judgment C-035). A review of the terms of each regime is appropriate:

> ***Law 1382 of 2010***
>
> *Article 34. Mining Exclusion Zones. No exploration and exploitation works or labors may be carried out in zones that are declared and delimited as protection and development of renewable natural resources or the environment. The mentioned exclusion zones shall be those constituted in accordance with the legal provisions in force, such as areas that comprise the system of national natural parks, regional natural parks, forest protection reserve zones and other forest reserve zones, paramo ecosystems, and designated wetlands as part of the list of international importance u der the Ramsar Convention. For such areas to produce said effects, they shall be delimited geographically by the environmental authority on the basis of technical, social and environmental studies.*

> *Páramo ecosystems shall be identified in accordance with the cartographic information provided by the Alexander Von Humboldt Investigation Institute.*
>
> *[…].*
>
> *Paragraph First. In the event that, upon entry into force of this law construction, assembly or mining exploitation are advanced with a mining title and environmental license or its equivalent, in areas not previously excluded, such activities shall be respected until expiration, but the [mining] titles shall not have an extension option.* [765] [Emphasis added]

> ***Law 1753 of 2015***
>
> *Article 173. Protection and Delimitation of Páramos.*
>
> *[…].*
>
> *Paragraph First. Within the area delimited as paramo, the contract activities and environmental license with the equivalent instrument for environmental control and management which may have been granted prior to February 9, 2010 for mining activities, or prior to June 16, 2011 for hydrocarbon activities, respectively, may continue to be carried out until their expiration, without the possibility of an extension. Commencing on the date this law comes into force, Environmental Authorities shall review the Environmental Licenses granted before 1st entry into force of the prohibition, in the paramo delimitation areas, and they shall be subject to control, follow-up and review by mining, hydrocarbon and environmental authorities, within the framework of their competencies, and applying the instructions defined for that purpose by the Ministry of the Environment and Sustainable Development.* [766] [Emphasis added]

800. The most important difference between the two provisions is that, at the time of issuance of the first one (Law 1382) the area established as a mining exclusion zone *had not* yet been geographically delimited by the environmental authority. This explains why this regulation does not establish a deadline on which the transitional regime applies. On the contrary, the second regulation (Law 1753) was issued *after* Resolution 2090 – which was the one that first delimited the zones excluded from mining activities – a cut-off date was established in this one, which was February 9, 2010, for mining activities.

801. In any case, what is relevant is that both provisions established, for practical purposes, the same transitional regime.

[765] **Exhibit C-048**, Law 1382 of 2010, Art. 34.

[766] **Exhibit R-158**, Law 1753 of 2015, Art. 173.

802. As previously mentioned, in the case of Judgment C-366, which declared the unconstitutionality of Law 1382, the Constitutional Court decided to defer the effects of the ruling for a period of two years. The Court explained that not having Law 1382's new environmental protection rules in force would create a "*more unconstitutional*" situation than having them in place until a new law was enacted. Nevertheless, this generated the consequence of also not declaring the immediate unconstitutionality of the transitory regime established in the law.[767]

> *46. In the belief of the Court, the existence of an environmental legal void regarding mining activities, produces a serious and unacceptable risk of constitutional rights previously examined. This circumstance implies the need to defer the effects of unconstitutionality of Law 1382/10, given that its contents provide for environmental protection clauses that are deemed fundamental for the guarantee of the rights mentioned in this paragraph.*
>
> *[…].*
>
> *Consequently, in accordance with the defense of supremacy and integrity of the Constitution, the Court deems that that, even though a contradiction with the higher norm is evidenced which imposes the exclusion of the legal provisions of Law 1382/10, it is also true that with the immediate withdrawal of the law provisions that seek to guarantee the preservation of certain zones of environmental impact and harmful consequences that mining exploration and exploitation bring along. Therefore, as indicated it is necessary to defer the effects of the judgment of unenforceability for a period of two years, such that it protects the rights of the ethnic communities to be consulted over such legislative measures, and the natural resources and the zones of special environmental protection, which are essential to mankind's survival and the surroundings, are protected.*[768] [Emphasis added]

803. It is important to consider that, in the Constitutional Court's opinion expressed in Judgment C-366, Law 1382 contained several provisions "*aimed at the satisfaction of particularly detrimental constitutional values, all of them referring to the protection of the environment*."[769]

> *As observed, these provisions* [of Law 1382] *are addressed towards the satisfaction of first line constitutional protections, all referred to the protection of the environment, especially those areas that are more sensitive, as páramos, forest reserves and wetlands. The Court notes that*

[767] **Exhibit C-103**, Judgment C-366/11 of the Constitutional Court, May 11, 2011, ¶ 46.

[768] **Exhibit C-103**, Judgment C-366/11 of the Constitutional Court, May 11, 2011, ¶ 46.

[769] **Exhibit C-103**, Judgment C-366/11 of the Constitutional Court, May 11, 2011, ¶ 45.

> *the exclusion of rules of this nature would imply the elimination of environmental conditions that are necessary to making mining activities compatible with the satisfaction of constitutional rights related to the enjoyment of a healthy environment.*[770] [Emphasis added]

804. The foregoing is highly relevant to understand the different position adopted by the Constitutional Court later, because, even though the court considered that the protection of the environment in sensitive areas such as the *páramos* was a "*constitutional value*", in the Court's opinion, this constitutional value was not affected by the existence of the transitory regime. This shows that, for the Constitutional Court, the existence of the transitory regime and the rights it sought to protect were compatible at that moment with the protection of the environment provided for in general terms by the law.

805. In fact, at the time Judgment C-366 of 2011 was issued, the Constitutional Court was fully aware that it could defer the effects of the judgment only with respect to normative provisions linked to environmental protection, excluding from such deferred effects rules that did not contribute to that interest, as would have been the case, for example, of the dispositions that established the transitional regime. Nevertheless, the court deliberately decided not to make this kind of distinction. This is demonstrated by the "dissenting in part" opinion of Judge Vargas Silva, who criticized his colleagues at the time for not making this distinction between the provisions whose effects should not be deferred from those who should.[771]

> *As expressed, there is no doubt that the only motive that the majority took into account to support the deferred unenforceability of Law 1382 of 2010 was the presence in such legislation of provisions directed towards the protection of the environment. However, that is fully in contradiction with other considerations in the same judgment, accepted by the majority, which demonstrate that the Law in comment does not have as its only purpose to protect environmental matters in the scope of mining activities, since it also contains provisions of another nature directed to modifying the manner of said exploitation, towards industrialized means of utilization of such natural resources …[…]*
>
> *In the stated conditions, it is contradictory for the Court to deem, on the one hand, that environmental laws must be preserved while, on the other, it defers the effects of unconstitutionality of Law 1382 in its entirety. To validly arrive at this conclusion, the full Court should have explained why, despite the fact that the majority of the provisions that were declared unconstitutional do not deal with environmental topics, these were equally*

[770] **Exhibit C-103**, Judgment C-366/11 of the Constitutional Court, May 11, 2011, ¶ 45.

[771] **Exhibit C-103**, Judgment C-366/11 of the Constitutional Court, May 11, 2011, pp. 103-104.

> *benefited by the suspension of effect of a decree of [unenforceability]. By doing this, the arguments utilized by the Court on the analyzed matter, in addition to being contradictory, is insufficient.*

806. However, this would change with Judgment C-035 issued on February 16, 2016. In clear contradiction with the logic adopted by Judgment C-366, issued only five years earlier, Judgment C-035 stated that the transitory regime that had previously been considered complementary to environmental protection was now incompatible with such protection. Thus, the Court issued a much more drastic ruling which overturned the decision made by Colombia's legislature to grandfather previously authorized mining activities in the *páramo* areas and established a total ban.

807. As previously stated, the premise upon which Judgment C-035 is primarily based states that any risk for the *páramos* is unacceptable under Colombia's Constitution despite of the benefits that mining activities could generate for the country's economy.[772]

> *174. Therefore, the question that the Court must resolve is whether it is reasonable to allow in a transitional manner mining and hydrocarbon activities in areas of special protection under the Constitution, when there is a situation of legal "protection deficit", and the provision that allows such activities does not grant a true guarantee of protection.*
>
> *175. For the Court, the answer to the foregoing query should be in the negative. The sacrifice of the legal protected interests, as the quality, continuity and accessibility of water, and other environmental services that are provided by páramos are disproportionate vis a vis potential benefits arising from the extraction of non-renewable resources. In dealing with such a vulnerable, fragile, and less adaptable ecosystem such as that of the páramos, its damage tends to be in the long term, if not permanent.*
>
> *176. The long term environmental effects, this is, the environmental sustainability of a legal provision becomes a determinant factor in the analysis of constitutionality. It is the legislative and executive branches of government who correspond addressing the immediate needs of the population, and from this viewpoint they have a special concern to guarantee that the State has sufficient resources arising from royalties and taxes applicable to extractive activities. However, in a democratic system, it is the constitutional court that corresponds to act as a balance to the emphasis to the short term placed by the other branches of government, especially those democratically elected. Hence, even though the constitutional court cannot discard short term effects, it corresponds to said court to give special consideration to the long term effects which will allow to have a complete panorama of the constitutional issues involved and the*

[772] **Exhibit C-104**, Judgment C-035/16 of the Constitutional Court, February 8, 2016, ¶¶ 174-176.

> *tension among legally protected interests. In such measure, [the Court] needs to provide a special evaluation of the effects of mining and hydrocarbons over the páramo ecosystems.*[773]

808. It is important to note that Judgment C-035 relied heavily on the fact that the *páramos* were an extremely fragile ecosystem and that any type of mining activity could cause irreparable damage to it.[774] To arrive at this conclusion, the Court relied on scientific information that established that the *páramos* were an extremely fragile ecosystem, but this was information that, in general terms, was also available when Judgment C-366 was issued by the same Court five years earlier.

809. The Tribunal notes that the Constitutional Court recognized in Judgment C-035 that democratically elected officials favored obtaining economic benefits from mining activities privileged by the transitional regime, and that the Constitutional Court's role was to act as a "*counterweight*" to such short-term objective:[775]

> *176. The long-term environmental effects, this is, the environmental sustainability of a legal provision becomes a determinant factor in the analysis of constitutionality. It is the legislative and executive branches of government who correspond addressing the immediate needs of the population, and from this viewpoint they have a special concern to guarantee that the State has sufficient resources arising from royalties and taxes applicable to extractive activities. However, in a democratic system, it is the constitutional court that corresponds to act as a balance to the emphasis to the short term placed by the other branches of government, especially those democratically elected. Hence, even though the constitutional court cannot discard short term effects, it corresponds to said court to give special consideration to the long-term effects which will allow to have a complete panorama of the constitutional issues involved and the tension among legally protected interests. In such measure, [the Court] needs to provide a special evaluation of the effects of mining and hydrocarbons over the páramo ecosystems.*[776] [Emphasis added]

810. It is worth noting that at the time of issuance of Judgment C-035, there was awareness of the consequences that such ruling could have by affecting investors in the mining sector who had rights protected by the transitory regime. This is evidenced in the "partially dissenting" opinion of Judges Guerrero Pérez and Linares Cantillo, who warned of the

[773] **Exhibit C-104**, Judgment C-035/16 of the Constitutional Court, February 8, 2016, ¶¶ 174-176.

[774] **Exhibit C-104**, Judgment C-035/16 of the Constitutional Court, February 8, 2016, ¶ 177.

[775] **Exhibit C-104**, Judgment C-035/16 of the Constitutional Court, February 8, 2016, ¶ 176.

[776] **Exhibit C-104**, Judgment C-035/16 of the Constitutional Court, February 8, 2016, ¶ 176.

possibility that the Judgment could qualify as a measure of indirect expropriation under certain treaties of which Colombia is party:[777]

> *5.5. On the other hand, the judgment from which we distance ourselves also abstains from mentioning the serious consequences of fact and law arising from the decision. Note how, the absolute dominance of páramo protection over other interests protected by the Carta prevented the Court form taking into account the effects of its decision.*
>
> *a). In the first place, this Tribunal should have considered that the immediate application of the prohibition, as a result of the unenforceability could, in certain instances, be construed in light of clauses incorporated into treaties executed and ratified the State of Colombia and a form of indirect expropriation that commits international liability of the State. Such risk should have been taken into consideration by this [Court] if one deems that compliance with international obligations is relevant given the terms of Article 9 of the Constitution, which provides, in foreign relations, the respect to principles of international law accepted by Colombia. This Tribunal could not disavow from its consideration the possible State liability that the challenged provisions could trigger.*
>
> *b). Secondly, the Court has taken note in adopting its decision that the immediate modification of the regime applicable to the activities being carried out under prior permits could give rise to an illegal damage that would commit State liability. In this connection, the Chamber of Consultation and Civil Service of the Council of State warned that one of the hypotheses of illegal damages covered by Article 90 of the [Constitution] consists on "the applicability of laws issued by general interest reasons that sacrifice specific private situations (without triggering an expropriation in a strict sense) and for which the legislature has not established a specific transition or reparation regime". Therefore, it stated that "the protection of the páramo ecosystems in benefit of the collectivity, and even the global environmental sustainability, must also take into account the situation that persons who inhabit or legally exploit said territories, with the purpose of avoiding, to the extent possible, that implementation of the analyzed prohibition unnecessarily generates situations of State responsibility."*
>
> *In light of the above, the majority had an obligation, at the time of deciding on the validity of article 173, of evaluating that the formula adopted by the legislator also intended, under articles 9 and 90 of the Constitution, to reduce the risks of State responsibility in the process of implementing the prohibition. The judgment from which we distance preferred to omit this analysis and discard the regulatory option that Congress had adopted, in*

[777] **Exhibit C-104**, Judgment C-035/16 of the Constitutional Court, February 8, 2016, ¶ 209.

> *detriment of the duty to seek the integrity of the [Constitution].*[778] [Emphasis added]

811. Taking into account the above, it could be argued that there was an element of arbitrariness, for the same Constitutional Court to change its position, by considering the transitory regime to be unacceptable under the precautionary principle, without any new explanation, based on scientific information already available in its first decision, and without considering the possible consequences of its decision by affecting private parties.

812. However, even though there was a change of criteria by the Constitutional Court, this Tribunal believes that such a change does not entail a "*manifest arbitrariness*", since judicial bodies across the globe are widely recognized to validly lead the way in the development of the law according to society's evolving values.

813. Indeed, the Constitutional Court should be subject to the special deference that international arbitral tribunals afford to judicial decisions in cases where expropriation by the judiciary is alleged, unless the investor's claim meets the high standard of proving denial of justice, *i.e.*, manifest arbitrariness or blatant unfairness.

814. Drawing support from the *Eli Lilly v Canada* case, Canada has argued in its NDP Submission that deference for judicial decisions in expropriation cases is usually justified on the grounds that it prevents the arbitral tribunal from turning into an appellate body for cases lost by the investor before the local judiciary, citing two quotes from the award: "[a] *NAFTA Chapter Eleven tribunal is not an appellate tier in respect of the decisions of the national judiciaries*" and "[i]*t is not the task of a NAFTA Chapter Eleven tribunal to review the findings of national courts and considerable deference is to be accorded to the conduct and decisions of such courts*."[779]

815. Deference for judicial decisions in expropriation cases is usually justified on the grounds that it prevents the arbitral tribunal from turning into an appellate body for cases lost by the investor before the local judiciary. As noted by the *Eli Lilly* tribunal:

> *First, the judiciary is an organ of the State. Judicial acts will therefore in principle be attributable to the State by reference to uncontroversial principles of attribution under the law of State responsibility. As a matter of broad proposition, therefore, it is possible to contemplate circumstances in which a judicial act (or omission) may engage questions of expropriation under NAFTA Article 1110, such as, perhaps, in circumstances in which a judicial decision crystallizes a taking alleged to be contrary to NAFTA*

[778] **Exhibit C-104**, Judgment C-035/16 of the Constitutional Court, February 8, 2016, section 5.5.

[779] *Eli Lilly and Company v. Government of Canada*, UNCITRAL, Final Award, March 16, 2017, ¶¶ 221, 224.

> *Article 1110. This said, the Tribunal emphasizes the point made below of NAFTA Article 1105(1) that a NAFTA Chapter Eleven tribunal is not an appellate tier in respect of the decisions of national judiciaries.*[780] [Emphasis added]

816. Some differences may be drawn between the unconstitutionality process before the Constitutional Court and other judicial processes, to which most of these cases relate. It could be tempting to argue that in the case of Judgment C-035 Claimant was neither plaintiff nor defendant in the relevant judicial proceedings, and therefore that it cannot be suggested that Claimant intends the Tribunal to act as an appellate body, when Claimant was not a party to the Colombian proceeding in the first place.

817. The Tribunal believes that this argument can be discarded when one identifies that any interested party could intervene in an unconstitutionality proceeding before the Constitutional Court. During the Hearing, Colombia's expert witness testified to that effect.

> *ARBITRATOR BULLARD: In an unconstitutionality action, any interested party may participate in it?*
> *PROF DE VIVERO: Yes. It is a public action because of that reason. In many of these actions, hearings are held so everyone can participate. Generally, what judges do when admitting these kinds of claims is to send notices to the universities and unions to give their opinions, and there was citizen participation in connection with C-35, as well.*
> *ABITRATOR BULLARD: So no limitations? A company? A private person?*
> *PROF. DE VIVERO: Yes, anybody can participate.*[781]

818. Also, when asked at the Hearing about the publicity of the process, Respondent's expert witness noted that these types of proceedings were published online:

> *ARBITRATOR BULLARD: And is this published somewhere?*
> *PROF. DE VIVERO: Yes. It is.*
> *ARBITRATOR BULLARD: How? How is it done?*
> *PROF. DE VIVERO: It's done online. Today justice in Colombia is really done virtually. Everything is electronic. Well, the notices are electronic in nature.* [782]

[780] *Eli Lilly and Company v. Government of Canada*, UNCITRAL, Final Award, March 16, 2017, ¶ 221.

[781] Tr. Day 2, 577:11-578:1.

[782] Tr. Day 2, 578:2-9.

819. In fact, in accordance with Article 242, paragraph 1 of the Colombian Constitution, any citizen may intervene in public actions as a challenger or defender of the norms subject to control.

> *Article 242. The proceedings that are advanced before the Constitutional Court in matters referred to in this title, shall be regulated by law pursuant to the following provisions:*
>
> *1. Any citizen may exercise the public actions contemplated in the preceding article and participate as challenger or defend the norms submitted to control in proceedings commenced by others, as well as in those in respect to which there is no public action.* [783]

820. This aspect is regulated in greater detail in Article 7 of Decree 2067 of 1991, which provides that the legal provisions accused of being unconstitutional shall be "*posted on a list*" for a period of ten days so that any citizen may challenge or defend them. [784]

821. It is therefore clear that the participation of citizens in this type of proceedings occurs only when citizens decide to participate in them, and this happens when they become aware of the initiation of these proceedings. Rather than participating as a plaintiff or defendant, the participation of citizens in this proceeding seems to be more similar to that of an *amicus curiae* who makes a statement in favor or against the constitutionality of a legal provision.

822. The foregoing reaffirms that the unconstitutionality proceeding is not an ordinary proceeding in which any individual may participate as a party, and, in general, have the same level of involvement as the one it can have in an ordinary proceeding. On the contrary, it is a special, *sui generis*, proceeding, in which the constitutionality of a norm is analyzed with *erga omnes* effects.

823. Some cases grant judicial decisions a particular deference and therefore require a higher standard to qualify a court decision as a violation of international law. But in all these cases, the decisions refer to cases in which the plaintiff's (or defendant's) right was specifically discussed, participating as a party in the procedure in which it fully exercised its right of defense.

824. In this case there are differences that must be analyzed in relation to other cases: (i) the discussion, rather than referring to a specific right of a claimant, refers to a general decision of unconstitutionality, with *erga omnes* effects, more similar to a legislative decision (repeal of a law), (ii) Claimant did not participate as a party in the judicial process nor was

[783] **Exhibit C-065**, Colombian Constitution, July 4, 1991, Art. 242(1).

[784] **Exhibit R-030**, Decree No. 2067, September 4, 1991, Art. 7.

Claimant notified in the same way as in an ordinary process, but only had the opportunity to express its opinion (similar to *amicus curiae*), (iii) therefore the concept of due process is not applied in the same way nor does it have the same effects as in a judicial proceeding in which a claimant's full participation is allowed. Therefore, considering that it is a special proceeding, one available scenario for the Tribunal's consideration is that it would be subject to a lower standard of deference than an ordinary proceeding. As mentioned, in an unconstitutionality action the specific right of Claimant has not been discussed in the process, but rather the general application of a law. Neither the concept of due process is the same, nor is the effect of the judicial decision comparable to that obtained in a judicial process in which the specific right of Claimant was discussed.

825. However, the Tribunal believes there is no reason to do so in this particular case, considering precisely the *erga omnes* effect towards Claimant, and that the case before the Constitutional Court therefore interfered with its rights just in the same way that would have been the case if Claimant had been a party to the proceeding before the Constitutional Court. The issue of protection of *páramos* should have been quite clear to Claimant during the period, and Claimant elected not to participate, just as it elected not to pursue registration of the assignment of the Concession 14833 by enforcing the execution of the assignment agreement and filing with the Mining Registry.

826. In consideration of the above, the Tribunal finds that there are no elements that could support an argument that the measures (Resolution 2090 and Judgment C-035) were adopted by Respondent in a manner other than in good faith, and in a non-discriminatory manner. They were designed and applied to protect the *páramo* ecosystems, which constitutes a legitimate public welfare objective. Thus, it cannot qualify as an indirect expropriation in the "rare circumstances" terms of Annex 811 of the FTA.

827. It is noteworthy that these conclusions do not depart from the Eco Oro tribunal, which held that "*… the Challenged Measures were adopted in good faith, are non-discriminatory and designed and applied to protect the environment such that they are a legitimate exercise of Colombia's police powers and do not constitute indirect expropriation*."[785]

[785] **Exhibit CL-112**, *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, ¶ 699. In addressing the issue, the *Eco Oro* tribunal presented the following question in ¶ 698 which it then answered: "*… the Tribunal asks itself: do these measures amount to a measure that is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted in good faith? By a majority, the Tribunal does not find that the necessary element of severity is present given the undoubted bona fide purpose of these Challenged Measures and the overall proportionality of the current boundary of the delimitation when viewed against a reasonable (albeit not unanimous) scientific conclusion as to the need to include a Transition Zone in the delimited area, the size of the resulting páramo and the need to adopt a consistent methodology for the entirety of the area delimited*".

B. ALLEGED FAILURE TO PROVIDE FAIR AND EQUITABLE TREATMENT AS REQUIRED BY ARTICLE 805 OF THE FTA

I. The Parties' Positions

a) Claimant's Position

(i) The Scope of Article 805 of the FTA

828. Claimant submits that under Article 805 of the FTA, Colombia is obliged to treat covered investors in accordance with the minimum standard of treatment in accordance with customary international law, adding that this is a well-established legal standard that creates a duty and obligation on Colombia to provide investors with Fair and Equitable Treatment ("**FET**").[786]

829. Claimant contends that Colombia has breached its obligations under the FTA because it has not treated Claimant "*fairly and equitably.*"[787]

830. In its Memorial, Claimant examines the scope of the FET standard, including: (i) the proper interpretative approach to Article 805 of the FTA; (ii) how to identify the content of the minimum standard of treatment; and (iii) the substantive content of FET.[788]

831. Claimant recalls that the FTA does not define the "international law minimum standard" or the "fair and equitable treatment", other than to expressly confirm that the principle of Minimum Standard of Treatment ("**MST**") includes the obligation to provide FET. Thus, it contends that the Tribunal should apply principles for interpreting treaties under the VCLT, of which both Canada and Colombia are parties. Pursuant to Article 31 VCLT, the concepts should be interpreted considering: (i) their ordinary meaning, and (ii) the Treaty's object and purpose.

832. To this end, Claimant first indicates that the Oxford Dictionary defines "*fair*" as "*acceptable and appropriate in a particular situation*". It defines "*equitable*" as "*fair and reasonable*" adding that terms like "fair" and "equitable" inherently invoke notions of consistency, even-handedness, and balanced conduct. Evoking *National Grid v.*

[786] Cl. Memorial, ¶ 363.
[787] Cl. Memorial, ¶ 444.
[788] Cl. Memorial, ¶¶ 365-443.

Argentina[789], *Siemens v. Argentina*,[790] *Azurix v. Argentina*,[791] *MTD Equity v. Chile*[792] and *Swisslion v. Macedonia*,[793] Claimant indicates that tribunals have consistently recognized that the ordinary meaning of "fair and equitable" is "*just, even-handed, unbiased, legitimate, reasonable*" and that the FET standard exists to "*ensure that the foreign investor is not unjustly treated, with due regard to all surrounding circumstances, and* […] *is a means to guarantee justice to foreign investors.*"[794]

833. Secondly, in respect to the object and purpose of the FTA, Claimant points to its Preamble, which includes the following purpose: "***ENSURE** a predictable commercial framework for business planning and investment* […] *the promotion and the protection of investments of investors of one Party in the territory of the other Party*," as well as the *"**ENHANCE***[MENT] *and **BETTER***[MENT] *of environmental laws and regulations.*" According to Claimant, taken collectively, these can be interpreted to balance and harmonize business activity with other considerations such as environmental regulation, not to allow either object to act as a trump card over the other.[795]

834. Citing the Eco Oro decision, Claimant indicates that the tribunal stated that "[a] *breach of the FET may arise from measures that are taken for reasons that are different from those put forward by the decision-maker or are taken in wilful [sic] disregard of due process and proper procedure*."[796]

835. Although Claimant does not dispute the right of Colombia to regulate the environment, it argues that the promotion of environmental regulation should not unilaterally trump other objectives (including certainty, fairness, and consistency), and recalls the *Bilcon* case, where the tribunal found that Canada had breached Article 1105 of NAFTA by using an

[789] **Exhibit CL-041**, *National Grid plc v. Argentine Republic*, UNCITRAL, Award, November 3, 2008, ¶ 168.

[790] **Exhibit CL-017**, *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, February 6, 2007, ¶ 290.

[791] **Exhibit CL-038**, *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, July 14, 2006, ¶ 360.

[792] **Exhibit CL-042**, *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, May 25, 2004, ¶ 113.

[793] **Exhibit CL-043**, *Swisslion DOO Skopje v. FYR Macedonia*, ICSID Case No. ARB/09/16, Award, July 6, 2012, ¶ 273.

[794] Cl. Memorial, ¶¶ 368-369; Claimant's PH Brief, ¶ 113.

[795] Cl. Memorial, ¶ 373.

[796] Claimant's PH Brief, ¶ 115, *citing* **Exhibit CL-112**, *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, ¶ 760.

environmental assessment to prohibit the investor from developing and operating a quarry.[797]

836. As to the content of the MST, Claimant contends that to interpret the standard, the Tribunal should have regard to decisions of other tribunals who have considered the MST as a standard recognized under international law, along with other sources of customary international law.[798] In this respect, Claimant adds that Article 805 of the FTA establishes a link between the international minimum standard in customary international law and the fair and equitable treatment standard. The *Waste Management II* NAFTA tribunal held that a host State violates this standard if its treatment of an investor or investment is "*arbitrary*," "*grossly unfair, unjust or idiosyncratic*" or "*discriminatory*," or it involves a lack of due process leading to an outcome which offends judicial propriety.[799] Further, Claimant indicates that such tribunal also held that "[a] *basic obligation of the State under Article 1105(1) is to act in good faith and form, and not deliberately to set out to destroy or frustrate the investment by improper means*,"[800] which principle has been recently endorsed in *Teco v. Guatemala*,[801] underscoring that "*fair and equitable treatment under customary international law*" encompasses the principle of good faith. Claimant further contends that other tribunals have decided along the same lines, and points to *Mondev,*[802] *Pope & Talbot*[803] *and CMS v. Argentina,*[804] adding that the tribunal in the latter case held that the "[t]*reaty standard of fair and equitable treatment ... is not different from the international law minimum standard and its evolution under customary law*" and that the customary international law standard of treatment mandates FET.[805]

837. Claimant notes that tribunals agree that the ordinary meaning of fair and equitable is "*just, even-handed, unbiased, legitimate, reasonable*," and that the standard ensures that "*the*

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[797] **Exhibit CL-044**, *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 on Jurisdiction and Liability, March 17, 2015, ¶ 597.

[798] Cl. Memorial, ¶ 379.

[799] **Exhibit CL-051**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, ¶¶ 98, 138.

[800] Cl. Memorial, ¶ 381.

[801] **Exhibit CL-066**, *Teco Guatemala Holdings LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, December 19, 2013, ¶¶ 454-455.

[802] **Exhibit CL-018**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, ¶¶ 119, 123.

[803] **Exhibit CL-048**, *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on Damages, May 31, 2002, ¶ 62.

[804] **Exhibit CL-049**, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, May 12, 2005, ¶ 284.

[805] Cl. Memorial, ¶ 395.

foreign investor is not unjustly treated, with due regard to all surrounding circumstances, and is a means to guarantee justice to foreign investors."[806]

838. In respect to the *substantive content* of the FET standard, Claimant observes that, despite being inherently flexible and fact-specific, the standard: (i) requires States to act in good faith; (ii) prohibits States from acting in a manner that is arbitrary, grossly unfair, unjust or idiosyncratic, discriminatory, or that involves a lack of due process leading to an outcome that offends judicial propriety; (iii) requires States to protect and honor reasonable and justifiable expectations that an investor relied upon in making and maintaining its investment; and (iv) requires States to act with transparency.[807]

839. Claimant asserts that the principle of *good faith* is recognized as a general principle of law, and as a source of international law under Article 38 of the Statute of the International Court of Justice. Therefore, States are required to perform treaty obligations in good faith.

840. Investors are required to be treated in a manner that comports with an objective notion of fairness and reasonableness, and drawing from a long line of cases under NAFTA Article 1105 including *S.D. Myers*, *Mondev*, *ADF* and *Loewen.*[808] Claimant contends further that the tribunal in *Waste Management II* held that a State breaches the MST if its treatment of an investor or investment is arbitrary, grossly unfair, unjust or idiosyncratic, discriminatory, lacking in due process, or in breach of an investor's legitimate expectations. According to Claimant, this holding has become, in many respects, the "*seminal description of the content*" of the minimum standard of treatment when it states 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* …."[809]

841. Claimant contends, on the other hand, that the FET requires that the State act *consistently* as highlighted in the *Bilcon* and *Merrill & Ring v. Canada*[810] cases.[811]

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[806] Cl. Memorial, ¶ 397.

[807] Cl. Memorial, ¶ 399.

[808] **Exhibit CL-051**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, ¶¶ 98-99.

[809] Cl. Memorial, ¶¶ 406-407.

[810] **Exhibit CL-068**, *Merrill & Ring Forestry L.P. v. The Government of Canada*, ICSID Case No. UNCT/07/1, March 31, 2010, ¶¶ 201, 204, 210, 231.

[811] Cl. Memorial, ¶¶ 410-411.

842. In its Post-Hearing Brief, Claimant identifies the wrongful act(s) undertaken by Respondent that form the basis of its claims. Claimant believes that the primary act is the issuance of Judgment C-035, but adds that this needs to be viewed "*within the entire context of the State conduct at issue, which, cumulatively, amounts to a breach of the Treaty,*" which includes the following considerations:[812]

a). Colombian executive and legislative branches established a right to mine in *páramo*s through Law 685 (which right was maintained in Laws 1382, 1450 and 1753 for concession holders who held those rights prior to those amendments) the right to mine in Concession 14833 was specifically affirmed by the environmental permits and approvals issued in respect of the concession by the State, and Claimant therefore had a reasonable and legitimate expectation that, if nothing else, it was at least constitutional under Colombian law to mine in Concession 14833. Claimant adds that it invested in Colombia on that basis;

b). Colombia was well aware of the existence, importance and location of *páramo* ecosystems while it was enacting such legislation and granting mining concessions in those same *páramo* areas; however, through Judgment C-035, the Constitutional Court banned all mining in *páramos* on the basis that it was contrary to the Colombian Constitution;

c). Although Colombia has repeatedly been directed to delineate *páramo* areas so that concession holders could know with certainty whether their concessions overlap with *páramos*, Colombia has failed to do so to this date, perpetuating the uncertainty that has surrounded the *páramos* for decades; and

d). Claimant also includes the fact that the NMA "*improperly refused*" to record its interest in Concession 14833 to avoid Claimant´s claim arising out of Judgment C-035.[813]

(ii) Denial of Justice is Not an Essential Element of Breach of MST

843. Claimant submits that a denial of justice is only *one* of the ways in which judicial decisions may breach the FTA, and that "*judicial conduct*" can cause *or contribute* to a treaty breach wherever the cumulative conduct of various organs of the State, including a court or tribunal, is unfair and inequitable, adding that this is exactly what the tribunal held in the

[812] Claimant's PH Brief, ¶162.

[813] Claimant's PH Brief, ¶ 163.

Bilcon case, applying Article 1105 of NAFTA, which imposes substantively the same standard as Article 805 of the FTA.[814]

844. The Tribunal notes, however, that Claimant is not asking the Tribunal to add the denial of justice consideration to its FET claim.

(iii) Legitimate Expectations and MST

845. Another aspect that Claimant addresses in the interpretation of the international standard of treatment is the protection of investor's *legitimate expectations*. A State will fail to meet the standard, Claimant asserts, when it frustrates the legitimate expectations of an investor, and Claimant again draws support from *Bilcon*,[815] *Glamis*,[816] *ADF*,[817] and *Thunderbird v. Mexico*.[818]

846. Claimant acknowledges that there is a debate in investment law jurisprudence over the degree of specificity required before representations by a State can create or affirm a legitimate expectation but asserts that this Tribunal need not resolve that debate to find that Colombia has breached the FTA, including through its breach of Claimant's legitimate expectations.

847. Claimant believes that the *Bilcon* tribunal's analysis applies equally to this case since the executive and legislative branches of Government of Colombia adopted and maintained a mining regime permitting mining in *páramos* through the adoption of Law 685. Concessionaires whose rights existed prior to the enactment of Law 1382 continued to be able to mine in *páramos* even after the enactment of Laws 1382, 1450 and 1753. Through this legislation, the Colombian Government expressly represented that it was permissible to mine in Concession 14833 by issuing the concession environmental permits. Having been entitled to mine under Concession 14833 for some 15 years, Claimant therefore had a legitimate expectation that it was, at the very least, constitutionally permissible to mine therein, whether or not it overlapped with a *páramo*.[819]

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[814] Claimant's PH Brief, ¶167, *citing* **Exhibit CL-044**, *Bilcon of Delaware Inc. v. Government of Canada,* UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015, ¶¶ 446-454.

[815] **Exhibit CL-044**, *Bilcon of Delaware Inc. v. Government of Canada,* UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015, ¶ 453.

[816] **Exhibit CL-069**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, June 8, 2009, ¶ 22.

[817] **Exhibit CL-046**, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, January 9, 2003, ¶ 189.

[818] **Exhibit CL-070**, *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award, January 26, 2006, ¶ 147.

[819] Claimant's PH Brief, ¶ 170.

848. According to Claimant, that expectation was breached in 2016 with the issuance of Judgment C-035. Using the language of the *Bilcon* tribunal, Claimant adds that it appears that "*Colombia's left hand*" (*i.e.*, the Constitutional Court, which held that it was never permissible to mine in *páramos* under the Colombian Constitution) did not know what its "*right hand*" (*i.e.*, the executive and legislative branches that created and maintained a mining regime that applied in *páramos*) was doing.[820]

849. Claimant notes that in the *Biwater*[821] case, the tribunal confirmed that the FET standard includes, *inter alia*, protection of legitimate expectations, good faith, and consistency, and outlined the specific components of the FET standard to include: (i) *protection of legitimate expectations*: where the purpose of the fair and equitable treatment standard is to 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, as long as these expectations are reasonable and legitimate, and have been relied upon by the investor to make the investment; (ii) *good faith*, where the standard includes the general principle recognized in international law that the contracting parties must act in good faith, although bad faith on the part of the State is not required for its violation; and (iii) *transparency, consistency, non-discrimination*, where the standard also implies that the conduct of the State must be transparent, consistent and non-discriminatory, that is, not based on unjustifiable distinctions or arbitrary.[822]

850. In this connection, Claimant asserts that (a) while the Colombian legislature and administrative branches of Colombia permitted and encouraged mining under Concession 14833 for well over a decade, and "*excluded concessions –including Concession 14833– from prohibitions and restrictions on mining in páramos between 2010 and 2015 through Laws 1382, 1450, and 1753*" thereby permitting and encouraging mining activities in the Mining Area, (b) Respondent in parallel "*created confusion and uncertainty*" by "*inconsistently and incoherently taking steps to attempt to restrict mining in páramo areas*" culminating with the Constitutional Court's Judgment C-035, in which it declared that *ab initio*, it was *never* permissible under Colombia's constitution to mine in *páramo*s.[823]

851. Claimant cites instances where Claimant was also in regular communication with Respondent's agencies regarding exploration activities in the Mining Area such as a letter sent on August 20, 2010 to the CDMB by Mr. Alfonso Gómez Rengifo, Galway's General

[820] Claimant's PH Brief, ¶ 171.

[821] **Exhibit CL-062**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, July 24, 2008, ¶ 602.

[822] Cl. Memorial, ¶ 422.

[823] Claimant's PH Brief, ¶¶ 118-119.

Manager in Colombia, ratifying the Mining-Environmental Guidelines to carry out exploration activities, and the response by the CDMB on December 13, 2010, confirming that Concession 14833 did not overlap with the *páramo* area being proposed for the Santurbán *Páramo* and indicating that the Environmental Guide in force was being followed-up by the environmental authority.[824]

852. According to Claimant, it was relying on the "*Colombian law principle of* legitimate expectations *and the Colombian law relating to acquired rights*" which, as confirmed by Advisory Opinion 2233, ensures that in the event of a retroactive application of the law leading to loss of an acquired right compensation must be paid, including compensation for actual damages suffered as well as certain future losses and loss of chance.[825]

853. Since its operations were always conducted responsibly and in accordance with the governing law, Claimant contends that it was entitled to an expectation that its business could be operated within a legislative and administrative framework free from interference from regulations not underpinned by arbitrary policy objectives.[826]

854. Claimant contends that where a State has created legitimate expectations on the part of an investor upon which the investor relied in making or sustaining an investment, the frustration of these legitimate expectations constitutes a breach of the obligation to provide FET,[827] and also draws support from *Tecmed,* where the tribunal held that the standard encompasses the legitimate expectations of investors regarding the key terms of their investment and the stability of the host State's legal and business framework,[828] and *Saluka v. Czech Republic*, where the tribunal determined that legitimate expectations are a "*closely tied*" element of FET.[829]

855. Once the legitimate expectations are found to exist, any host State conduct contrary to such expectations constitutes a breach of its FET obligations; a claimant need not demonstrate

[824] Claimant's PH Brief, ¶ 128, *citing* **Exhibit C-071**, Letter from Galway Resources to Autonomous Corporation of the Plateau of Bucaramanga, August 10, 2010; **Exhibit C-105**, Letter from the Autonomous Corporation of the Plateau of Bucaramanga, Re: "Socialization Regional Natural Park Mooreland of Santurban", December 13, 2010.

[825] Claimant's PH Brief, ¶ 129, *citing* **Exhibit R-111**, Consejo de Estado, Sala de Consulta y Servicio Civil, Advisory Opinion No. 2233, December 11, 2014.

[826] Claimant's PH Brief, ¶ 132.

[827] Cl. Memorial, ¶ 425.

[828] **Exhibit CL-030**, *Técnicas Medioambientales, TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, ¶ 154.

[829] **Exhibit CL-057**, *Saluka Investments B.V. v. Czech Republic,* UNCITRAL, Partial Award, March 17, 2006, ¶¶ 301-302.

that the respondent acted in bad faith to breach the legitimate expectations doctrine.[830] Claimant draws support as well from *Gold Reserve v. Venezuela,* where the tribunal held that a Government's policy regarding the mining sector did not excuse conduct in breach of the fair and equitable treatment standard, and instead concluded that politically-driven policy changes violated the fair and equitable treatment standard.[831]

856. In addressing its position on the subject, Claimant highlights the findings of the tribunal in *Bilcon* – noting that it is a recent case that also concerned environmental regulation which is therefore a particularly relevant authority in assessing the content of the MST – including the application of the doctrine of legitimate expectations.[832] The tribunal held that a State thus violates its obligation to provide FET if it "*eviscerates the arrangements in reliance upon which the foreign investor was induced to invest*."[833]

857. Claimant recalls the *Micula v. Romania*, where the tribunal concluded that, to demonstrate a breach of legitimate expectations, a claimant must show that: (i) the State made a promise, assurance, or representation; (ii) the claimant relied on the promise or assurance; and (iii) such reliance was reasonable.[834]

858. Claimant also argues that States are expected to maintain a certain degree of *stability and predictability* in their regulatory framework, which is relied upon by investors when making and maintaining investments. It is a breach of the FET standard to retroactively dispense with the legal framework that an investor reasonably relied upon in making and maintaining an investment.[835]

859. In its Post-Hearing Brief, Claimant asserts that, following the decision made in *Eco Oro* – a case which is analogous to the facts of this one – the Tribunal should hold that Colombia's actions have frustrated Claimant's legitimate expectations by: (i) refusing to allow mining exploitations activities to take place in the entire area of the concession without payment of compensation; (ii) adopting an inconsistent approach to the

[830] Cl. Memorial, ¶ 430, *citing* **Exhibit CL-061**, *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, ¶ 357.

[831] **Exhibit CL-076**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/01, Award, September 22, 2014, ¶ 607.

[832] Cl. Memorial, ¶ 436.

[833] Cl. Memorial, ¶ 437.

[834] **Exhibit CL-083**, *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I]*, ICSID Case No. ARB/05/20, Final Award, December 11, 2013, ¶ 668.

[835] Cl. Memorial, ¶ 432.

delimitation of the Santurbán *Páramo*, and (iii) committing an ultimate (and continuing) failure to delimit the Santurbán *Páramo*.[836]

860. Continuing to draw support from *Eco Oro*, Claimant argues that the tribunal in such case also held that it was "*grossly unfair to those such as Eco Oro*" that, even after the Constitutional Court ordered the Environment Ministry to complete the delimitation within one year of Judgment T-361, such delimitation had not been completed.[837]

(iv) Transparency

861. The final element that Claimant submits is a requirement of the FET standard is *transparency*. It requires a State to treat investments transparently, which refers to "… *the absence of any administrative ambiguity or opacity and requires the legal framework for an investor's operations to be readily apparent.*"[838]

862. Claimant asserts that Respondent failed to act with transparency, and rejects Respondent's position that there is no obligation on Colombia to act transparently and consistently vis-à-vis a protected investment and because Claimant "*ought to have known, at all material times, that all arms of the government were consistently working towards one paramount goal: protecting the páramo*,"[839] since other NAFTA tribunals interpreting the scope of the obligation to treat protected investments fairly and equitable in accordance with the minimum standard have held that the standard includes an obligation for different arms of the State to act transparently and consistently vis-à-vis the protected investment. In this regard, Claimant cites *Bilcon*,[840] and adds that the legislature and administrative departments of the State of Colombia not only permitted but actively encouraged and supported the development of the Mining Area under Concession 14833, and then, suddenly, the Constitutional Court held that this was *never* permissible under Colombian law.[841]

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[836] Claimant's PH Brief, ¶ 156, *citing* **Exhibit CL-112**, *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.

[837] Claimant's PH Brief, ¶ 157.

[838] Cl. Memorial, ¶ 442, *citing* **Exhibit CL-082**, *Frontier Petroleum Ltd. v. Czech Republic*, UNCITRAL, Final Award, November 12, 2010, ¶ 285.

[839] C-Memorial on Liability, ¶ 456.

[840] **Exhibit CL-044***, William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. The Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015, ¶ 593.

[841] Reply, ¶¶ 253-254; Rejoinder, ¶ 231.

(v) Claimant's Challenge of Respondent's Defenses regarding Failure to Provide Fair and Equitable Treatment under the FTA

863. In its Reply, Claimant challenges Respondent's position and defenses relating to FET under the FTA.

864. Galway contends that a breach of the fair and equitable treatment obligation includes, among other conduct, a breach of commitments made to induce the investment, a breach of the investor's legitimate expectations arising from a State's representations or assurances, arbitrary treatment, grossly unfair treatment, and the requirement to act with transparency, and concludes that Respondent has breached all of these obligations.[842]

865. Claimant states that the Colombian Constitutional Court's sudden imposition of an absolute and unqualified prohibition on mining in the Mining Area after the legislative and administrative branches of the State had permitted and encouraged Claimant's investment for the preceding fifteen years was "*deeply unfair and inequitable*", particularly given Colombia's refusal to compensate Claimant in the wake of the Court's decision that mining in *páramos* was, in fact, impermissible *ab initio* under Colombian law.[843]

866. Further, Claimant argues that:

(i) Respondent has misstated the burden of proof applicable to demonstrating the applicable standard under Article 805 of the FTA, and that the standard under Article 805 is as set out in Claimant's Memorial; and
(ii) insists that Respondent has breached Article 805 of the FTA.

867. In connection with the *first* item, Claimant acknowledges that it has the burden of proving what it asserts to be the applicable standard under Article 805 of the FTA and that Respondent has breached it. At the same time, however, Claimant contends that Respondent bears the burden of proving what *Respondent* asserts to be the applicable standard under Article 805. Claimant draws support in the decision from the tribunal in the *Windstream Energy* case which decided on the relevant article of NAFTA which, according to Claimant, is essentially identical to that in the FTA, and where the tribunal stated that "*… it is for each Party to support its position as to the content of the rule with appropriate legal authorities and evidence.*"[844]

[842] Reply, ¶¶ 181-182.

[843] Reply, ¶ 183.

[844] Reply, ¶¶ 185-187, *citing* **Exhibit CL-101**, *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award, September 27, 2016, ¶ 350.

868. Claimant contends that it has fully demonstrated the applicable legal standard under Article 805 of the FTA and that this standard was breached by Respondent. To determine whether Respondent has provided fair and equitable treatment in accordance with the minimum standard under international law, the Tribunal must determine the *content* of international law, as incorporated into the FTA.[845] To this end, the Tribunal may have regard to decisions of other international tribunals who have considered the minimum standard of treatment as a legal standard recognized under international law, and cites the tribunals in *Mondev v. United States of America*,[846] *Cargill v. Mexico,*[847] and *Windstream Energy v. Canada*.[848]

869. Citing different NAFTA and FTA cases,[849] Claimant states that to determine the applicable standard under Article 805 FTA, and assess the content of the obligation to provide fair and equitable treatment in accordance with the minimum standard of treatment, tribunals have consistently found a breach of States' obligations in circumstances involving treatment that: (i) breaches commitments to the investor made to induce investment or breaches the investor's legitimate expectations arising from State representations and assurances; (ii) fails to maintain regulatory fairness and predictability; (iii) is unfair, inequitable, or unreasonable; (iv) is grossly unfair, unjust or idiosyncratic; or (v) is arbitrary.[850]

870. Thus, Claimant argues that there is no merit to Respondent's contention in the sense that Claimant is seeking to apply a higher standard than required by Article 805 of the FTA.[851]

871. According to Claimant, Respondent incorrectly argues that there is a "*high bar*" for establishing a breach of Article 805 of the FTA, such that the standard "*is only violated*

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[845] Reply, ¶¶ 192-197.

[846] **Exhibit CL-018**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, ¶ 113.

[847] **Exhibit CL-045**, *Cargill Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, ¶ 278.

[848] **Exhibit CL-101**, *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award, September 27, 2016, ¶ 351.

[849] **Exhibit CL-044**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. The Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015, ¶¶ 442, 445, 455; **Exhibit CL-051**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, ¶ 98; **Exhibit CL-102**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, May 22, 2012, ¶ 152; **Exhibit CL-103**, *Abengoa, S.A. y COFIDES, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award, April 18, 2013, ¶ 641; **Exhibit CL-104**, *GAMI Investments, Inc. v. United Mexican States*, UNCITRAL, Final Award, November 15, 2004, ¶ 104; **Exhibit CL-068***, Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, Award, March 31, 2010, ¶ 210; **Exhibit CL-066**, *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, December 19, 2013, ¶ 454.

[850] Reply, ¶ 199.

[851] Reply, ¶ 201.

where governmental 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" (*i.e.,* the *Neer* standard). Claimant contends that this argument, which has been made by States (including Colombia) in several cases, has been rejected by several NAFTA tribunals,[852] pointing to *Bilcon v. Canada* which rejected Canada's arguments that the impugned conduct must rise to the level of shocking or outrageous behavior.[853] The only NAFTA tribunal that accepted the *Neer* standard, adds Claimant, was the one in *Glamis Gold*, where its reasoning rested entirely on its finding that it was bound to apply the standard from the *Neer* decision absent evidence that the minimum standard of treatment under customary international law had evolved since 1926.[854]

872. In connection with the *second* issue, dealing with Respondent's breach to Article 805 of the FTA, Claimant contends that Respondent's submissions are premised almost entirely on its "*false characterization of the facts of this case*,"[855] and confirms its position expressed in its Memorial:

(a). That contrary to Respondent's position, which states that its actions would not amount to a breach of the duty of good faith because those steps were not taken in "bad faith", the obligation to treat an investor fairly and equitably in accordance with the minimum standard of treatment imposes an obligation on States to act in good faith. This has long been well-recognized by numerous tribunals. The obligation to act in good faith does not require any proof of bad faith or that the State acted with an ulterior motive; it is a positive obligation to act. It is more than, and cannot be reduced to, a prohibition of acting in bad faith;[856]

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[852] Claimant cites, for example, **Exhibit CL-018**, *Mondev International Ltd. v United States of America*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, ¶¶ 114-119; **Exhibit CL-046**, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1, Award, January 9, 2003, ¶¶ 179-186; **Exhibit CL-051**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, ¶ 93; **Exhibit CL-068**, *Merrill & Ring Forestry L.P. v Canada*, ICSID Case No. UNCT/07/1, Award, March 31, 2010, ¶¶ 209, 213; **Exhibit CL-044**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. The Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015, ¶¶ 433-441; **Exhibit RL-069**, *Chemtura Corporation v. Government of Canada,* UNCITRAL, Award, August 2, 2010, ¶ 121; **Exhibit CL-104**, *GAMI Investments, Inc. v. United Mexican States*, UNCITRAL, Final Award, November 15, 2004, ¶ 95; **Exhibit CL-105**, *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, April 10, 2001, ¶ 118.

[853] Reply, ¶ 206; **Exhibit CL-044**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. The Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015, ¶ 444.

[854] Reply, ¶ 207.

[855] Reply, ¶ 209.

[856] Reply, ¶¶ 211-220.

(b). That Respondent's conduct was arbitrary, unjust, unreasonable, lacking in due process, and generally inequitable. While Respondent contends that it was not, because its actions were "*adopted in pursuit of Colombia's unchanging policy of protecting the páramo*,"[857] which is a false characterization of the facts. In connection with Respondent's assertion that a showing of arbitrariness or unreasonableness requires a showing that the measures constitute an "*unexpected and shocking repudiation of a policy's very purpose and goals, or otherwise grossly subverts a domestic law or policy for ulterior motive*," Claimant contends that Respondent's support are *Cargill* and *Glamis Gold*, which have not been followed by the majority of tribunals.[858] Although Respondent claims that some actions were undertaken by the Colombian legislature, Claimant recalls that for the purposes of international law the State cannot point to actions of one branch of Government to avoid its obligations.[859] Although the legislature and the executive branches had permitted and encouraged mining under Concession 14833 for well over a decade, in 2016 the Constitutional Court unexpectedly declared that, *ab initio,* it was *never* permissible under Colombia's constitution to mine in *páramos*. The Court's decision was premised on, and confined to its interpretation of Colombia's constitution and, in particular, the precautionary principle. The prohibition on mining became absolute, and the Constitutional Court's decision constituted a complete and unexpected repudiation of the policy Colombia deliberately fostered for the previous fifteen years in order to induce investment and comply with its treaty obligations. The issue is not whether Colombia has any right to regulate the environment, but what are the consequences of its inconsistent approach to mining under Concession 14833. Besides, Claimant adds, the reliance of the Constitutional Court's on the precautionary principle to impose a complete prohibition on mining under Concession 14833 is also arbitrary because it divorces any consideration of Claimant's specific circumstances from the regulation in place. Put simply, it is irrelevant whether the Mining Area could be mined in an environmentally safe manner, because Colombia has prohibited mining in the *páramos* under *any* circumstances.

(c). That Respondent denied and frustrated Claimant's legitimate expectations, because, contrary to Respondent's position that expectations are only protected under standalone FET provisions and that, in any event, Claimant can have no legitimate expectations in this case because Colombia "*never made any specific commitments or representations to Galway*", tribunals applying an obligation to

[857] Reply, ¶ 221, *citing* C-Memorial on Liability, ¶ 444.

[858] Reply, ¶ 223.

[859] Reply, ¶ 226.

treat investors fairly and equitably in accordance with the minimum standard of treatment have consistently held that, in determining whether the standard has been breached, it is relevant to consider whether a State has breached an investor's legitimate expectations arising from commitments to the investor that induced the investment.[860] In support of this assertion, Claimant makes reference to *Mobil v. Canada* which established a three-part test for a claimant to establish a breach of the MST based on a breach of legitimate expectations,[861] which text was applied by the tribunal in *Bilcon* and concluded that a breach of Article 1105(1) had occurred.[862] Likewise, in *International Thunderbird v. Mexico* the tribunal explained in respect of Article 1105(1) of NAFTA, that a "*contracting Party's conduct creates reasonable and justifiable expectations on the part of the investor (or investment) to act in reliance on said conduct, such that failure by the NAFTA Party to honour these expectations could cause the investor (or investment) to suffer damages.*"[863]

b) Respondent's Position

873. Respondent contends that Article 805(1) of the FTA requires that Colombia treat covered investments in accordance with the customary international law minimum standard of treatment, and that treatment *above* this standard is not required. It rejects the position of Claimant who, it alleges, seeks to rely on the decisions of tribunals applying the "*standalone FET standard*" from other treaties to read in obligations which the State Parties to the FTA deliberately eschewed.[864]

874. Respondent asserts that Claimant "*ignores*" that the plain language of Article 805 of the FTA, the Joint Commission's binding interpretative decision on it and Canada's Non-

[860] Reply, ¶¶ 237-238.

[861] The test was:(1) clear and explicit representations were made by or attributable to [the State] in order to induce the investment, (2) the representations were reasonably relied upon by the claimants; and (3) these representations were subsequently repudiated by [the State]. *See* **Exhibit CL-102**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, May 22, 2012, ¶ 152.

[862] Reply, ¶ 242, *citing* **Exhibit CL-044**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. The Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015, ¶¶ 446-454.

[863] **Exhibit RL-053**, *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award, January 26, 2006, ¶ 147.

[864] C-Memorial on Liability, ¶ 404.

Disputing Party Submission, all confirm that Article 805 of the FTA does not provide protection beyond the customary international law MST.[865]

875. To challenge the allegations of Claimant, Respondent structures its position as follows:[866]

i). The FTA does not require treatment beyond the customary international law MST;

ii). Claimant has not proven any rule of customary international law on which it relies to claim the alleged breach;

iii). The threshold for finding a violation of the MST is a high one, and Claimant seeks to dilute it;

iv). The MST affords States a wide margin of appreciation in adopting regulatory measures; and

v). Regardless of the applicable standard, Colombia's measures, adopted in accordance with Colombia's longstanding policy of protecting the *páramos*, do not constitute breaches of the FTA.

(i) The FTA does not require treatment beyond the customary international law Minimum Standard of Treatment

876. First, Respondent asserts that the standard of protection under Article 805(1) of the FTA is 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, adding that the formulation is "unequivocal". The States Party to the FTA elected not to provide treatment in accordance with any standalone FET standard, but only the much more limited customary international law standard.[867]

877. Respondent adds that Article 805(1) of the FTA "*could not be clearer*," since it refers to "fair and equitable treatment" as a component of the minimum standard of treatment, not as an autonomous concept, and the second sentence of Article 805(1) of the FTA expressly confirms that the first sentence's reference to "fair and equitable treatment" is not to be

[865] Respondent's PH Brief, ¶ 111.

[866] C-Memorial on Liability, ¶ 405; Rejoinder, ¶ 231.

[867] C-Memorial on Liability, ¶¶ 406-408; Rejoinder, ¶ 232.

read as imposing any obligation "*beyond that which is required by the customary international law minimum standard*."[868]

878. Besides, Respondent makes reference to Canada's Non-Disputing Party submissions in respect to the Canada-Peru FTA and NAFTA, and points to the legislative history relating to the wording of Article 805(1) of the FTA, from which it is clear that the State Parties intended to provide treatment in accordance with the customary international law minimum standard treatment, and nothing more.[869]

879. In its Post-Hearing Brief, Respondent mentions that Claimant sought to rely during the Hearing on the *Eco Oro* majority tribunal's Decision in relation to the MST,[870] and contends that Claimant's attempt to do so was misconceived, because under Article 832 of the FTA, the Tribunal is bound to apply the actual provisions of the FTA and applicable rules of international law. Respondent adds that "… *the FTA, both treaty parties, and international law all make clear that in order to state a valid claim under the MST, a claimant is required to prove the rules of customary international law through State practice and* opinio juris*, not arbitral awards of prior investment treaty tribunals*."[871]

880. According to Respondent, tribunals that "*have correctly interpreted the MST*" have repeatedly rejected attempts by claimants asserting that the customary international law FET standard is an umbrella standard encompassing any broad obligation that can be read into the words "fair" and "equitable", and that the standard has evolved in light of what investment treaty tribunals have variously suggested those words could mean.[872]

(ii) Claimant has still not proven any rule of customary international law on which it relies

881. *Second*, Respondent argues that Claimant has not met its burden of proving the rules of customary international law that it alleges to have been breached. The burden is on Claimant to prove that a custom has become binding on the State Party, *i.e.*, general and consistent State practice and *opinio juris.* According to Respondent,[873] Claimant relies mostly on awards of tribunals interpreting FET standards under other treaties, but awards of tribunals are neither evidence of State practice nor *opinio juris* and, as Canada has also

[868] Rejoinder, ¶ 234.

[869] Rejoinder, ¶¶ 235-238.

[870] Respondent's PH Brief, ¶ 112, *citing* Tr. Day 1, 94:12-95:8.

[871] Respondent's PH Brief, ¶ 112.

[872] Respondent's PH Brief, ¶ 113, *citing* **Exhibit RL-176***, Resolute Forest Products Inc v. Government of Canada*, PCA Case No. 2016-13, Award, July 25, 2022.

[873] C-Memorial on Liability, ¶¶ 409-418; Rejoinder, ¶ 241-244.

specifically confirmed in a Non-Disputing Party Submission in *Bear Creek Mining v. Peru*, decisions of tribunals are not adequate proof of any rules of customary international law.[874] The Decision of the Canada-Colombia Joint Commission of October 2017 confirmed that it is incumbent on a claimant seeking to rely on the MST to prove the content of that standard by reference to State practice and *opinio juris.*[875]

(iii) Claimant Mischaracterizes the Threshold It Is Required to Meet in Order to Establish a Violation of the MST

882. *Third*, Claimant's claim for breach of Article 805 of the FTA should be dismissed, in any event, argues Respondent, because the facts of this case do not meet the heightened threshold for establishing a breach of the MST, particularly in light of the wide margin of appreciation that States enjoy under international law in adopting public policy measures to protect the environment.[876]

883. Respondent contends that it is generally accepted that the "*seminal formulation of the customary international law minimum standard of treatment*" was established in *Neer v. Mexico*.[877] In that case, it was held that the standard is only violated where governmental 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*." Further, citing decisions of other tribunals, Respondent reaches additional conclusions, including that: (i) customary international law does not recognize a "*principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation*,"[878] and that such recognition cannot be inferred from "*references to legitimate expectations … in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment*;"[879] that customary international law does not amount to a guarantee of stability of the regulatory environment; that customary international law does not establish a general, self-standing duty of

[874] **Exhibit RL-091**, Canada's Non-Disputing Party Submission in *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, June 9, 2016, ¶ 10.

[875] **Exhibit RL-030**, Free Trade Agreement between Canada and Colombia, Chapter 8, footnote 2: "*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.*"*; See* Joint Commission of the Free Trade Agreement Between the Republic of Colombia and Canada, Decision No. 6, 24 October 2017, ¶ 3(b).

[876] C-Memorial on Liability, ¶ 419; Rejoinder, ¶¶ 245-250.

[877] **Exhibit RL-034**, *L.F.H. Neer and Pauline Neer v. United Mexican States*, Award, IV RIAA 60, October 15, 1926, pp. 61-62.

[878] C-Memorial on Liability, ¶ 423.

[879] C-Memorial on Liability, ¶ 423.

transparency; that arbitrariness may lead to a breach of the minimum standard of treatment, "*but only when the State's actions move beyond a merely inconsistent or questionable application of administrative or legal policy or procedure to the point where the action constitutes an unexpected and shocking repudiation of a policy's very purpose and goals, or otherwise grossly subverts a domestic law or policy for an ulterior motive*,"[880] that customary international law contains no general prohibition against discrimination;[881] and that international law does not recognize any "*good faith principle*" as an independent source of obligations, but only a description of the manner in which obligations must be performed.[882]

(iv) Article 805 affords States a wide margin of appreciation in the adoption of public policy measures

884. *Fourth*, Respondent contends that, when examining the propriety of regulatory measures, tribunals have repeatedly held that substantial deference must be afforded to respondent States.[883] Further, it argues that in the Non-Disputing Party Submission of Canada in *Eco Oro v. Colombia,* Canada asserted that "*the minimum standard of treatment in Article 805 by its nature does not allow tribunals to second guess regulatory choices made by States.*"[884]

885. Respondent further argues that the Tribunal must construe and apply Chapter Eight of the FTA consistent with the common intention of the States Parties to the FTA to "[p]*reserve their flexibility to safeguard the public welfare*" that is necessary to allow them to exercise their sovereign rights to regulate in the public interest, and to fulfil their "*responsibilities to conserve and protect* [their] *environment*" and comply with "*their environmental obligations under their domestic law, as well as their international obligations under multilateral environmental agreements to which they are party,*" specifically affirmed under Article 1701 of the FTA. This necessarily means "… *applying a standard of review of Colombia's public policy determinations that accords substantial deference to the*

[880] C-Memorial on Liability, ¶ 423, *citing* **Exhibit CL-045***, Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, ¶ 293.

[881] C-Memorial on Liability, ¶ 423, *citing e.g.,* **Exhibit RL-041***, Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Judgment on Preliminary Objections, ICJ Report 1998, June 11, 1998, ¶ 59.

[882] C-Memorial on Liability, ¶¶ 421-423.

[883] C-Memorial on Liability, ¶ 424, *citing* **Exhibit CL-055**, *S.D. Myers, Inc. v. Government of Canada*, First Partial Award, November 13, 2000, ¶ 261; **Exhibit RL-053**, *International Thunderbird Gaming Corp. v. The United Mexican States*, UNCITRAL, Award, January 26, 2006, ¶ 127.

[884] **Exhibit RL-105**, Canada's Non-Disputing Party Submission of Canada in *Eco Oro Minerals Corp. v. Republic of Colombia,* ICSID Case No. ARB/16/41, February 27, 2020, footnote 15.

State's regulatory bodies."[885] This is particularly necessary, it adds, to protect a rare and biodiverse ecosystem, the integrity of which is essential to the supply of water to an entire region, and which is already being impacted by climate change.[886]

886. In any case, argues Respondent, even if Claimant could show that any of Colombia's measures had any impact on Galway's alleged investment, point to any inconsistencies or errors in the delimitation process, or suggest any credible or realistic alternative methodologies that could have been adopted, Colombia's measures would still not give rise to any violations of the FTA, since these were rationally related to the long-standing policy objective of protecting the *páramo*, in accordance with Colombia's international legal obligations and commitments enshrined in Colombia's Constitution, and Galway has failed to adduce any credible evidence to the contrary.[887]

(v) In any event, Colombia has not Breached the Customary International Law MST, or any broader FET Standard

887. *Fifth*, Respondent asserts that, even if, *quod non*, the MST under the FTA were to be equated to an autonomous FET standard and somehow the expansive list of types of conduct that Claimant alleges to form part of said MST, none of Colombia's measures violated such a standard. Assuming that an obligation of "good faith" were to exist, Respondent alleges that it would only be breached in the rarest of circumstances, and in light of clear evidence that the State has acted for an ulterior motive. It draws support from the *Conoco Phillips v. Venezuela* tribunal, which observed "*how rarely courts and tribunals have held that a good faith or related standard is breached*" and the "[t]*he standard is a high one*."[888]

888. Respondent challenges each of Claimant's assertions under the following arguments:

(i) Galway has not adduced any evidence of bad faith;
(ii) Galway has still failed to show that any of Colombia's measures were "*arbitrary, grossly unfair, unjust and idiosyncratic, unreasonable, lacking in due process, and generally inequitable*;"
(iii) Galway still cannot show that Colombia frustrated any of its legitimate expectations; and

[885] C-Memorial on Liability, ¶¶ 427-428.

[886] Rejoinder, ¶ 251-254.

[887] C-Memorial on Liability, ¶ 431.

[888] C-Memorial on Liability, ¶ 441; Rejoinder, ¶¶ 256-261; **Exhibit RL-083**, *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. and ConocoPhillips Company v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits, September 3, 2013, ¶ 275.

(iv) Colombia's measures were transparent and consistent.

i. Claimant has not adduced any evidence of bad faith

889. Respondent contends that Claimant merely asserts that Colombia breached the FET standard by acting in bad faith because "*in 2016,* [Colombia] *suddenly and without regard to the impact on GG completely reversed itself and adopted the harshest regulatory approach possible to Concession 14833, destroying GG's investment in the process and refuse* [sic] *to provide compensation in light of the reversal,*" which Respondent denies as false, but in any case argues that – even if Colombia had somehow "reversed" its policy by prohibiting mining in *páramo* areas – this would not constitute "bad faith", and Claimant offers no evidence that Colombia's authorities acted with any motive other than the protection of the *páramo* in accordance with the best available information and scientific methodologies.[889]

ii. Claimant has still failed to show that any of Colombia's measures were "arbitrary, grossly unfair, unjust and idiosyncratic, unreasonable, lacking in due process, and generally inequitable"

890. Respondent also objects to the description of the measures adopted by Colombia as "*arbitrary, grossly unfair, unjust and idiosyncratic, unreasonable, lacking in due process, and generally inequitable,*" and states that this claim is without merit.[890] The measures were adopted in pursuit of Colombia's unchanging policy of protecting the *páramo*, in accordance with Colombia's constitutional and international legal commitments to do so. To prove "unreasonableness" or "arbitrariness" capable of violating any FET standard under the FTA, Claimant would need to adduce evidence showing that "*the action constitutes an unexpected and shocking repudiation of a policy's very purpose and goals, or otherwise grossly subverts a domestic law or policy for an ulterior motive*," and Claimant has not even alleged any facts capable of sustaining such a finding.[891]

891. But even adopting Claimant's own broad standards of "*arbitrary, grossly unfair, unjust and idiosyncratic, unreasonable, lacking in due process, and generally inequitable*" treatment – which Respondent asserts are "*wrong*"– Respondent argues that Claimant still fails on the facts, and its critiques of the measures adopted by Colombia have no merit.[892]

[889] C-Memorial on Liability, ¶ 442.

[890] Rejoinder, ¶¶ 262-268.

[891] C-Memorial on Liability, ¶¶ 444-447, *citing* **Exhibit CL-045**, *Cargill Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, ¶ 293.

[892] Rejoinder, ¶ 267.

In this connection, Respondent contends that Judgment C-035 was not a "*repudiation*" or "*reversal*" of any policy to induce mining in the *páramos*, and the grandfathering regime did not encourage or promote mining in the *páramos*. Rather, these simply sought to protect the exploitation activities already underway by the time of the mining ban. Further, Respondent recalls that Claimant never had an acquired right to develop the Vetas Project because: (i) it never held title to Concession 14833; (ii) it never obtained a PTO and an environmental license authorizing the Vetas Gold Project to conduct the mining activities; (iii) Article 46 of the 2001 Mining Code did not "stabilize" the environmental legislation applicable to Concession 14833; and (iv) mining rights under Colombian law were always subject to the provisions of Articles 34 and 36 of the 2001 Mining Code, which allow for the designation of exclusion zones within pre-existing mining titles without payment of compensation.[893]

892. Respondent further affirms that its measures did not constitute "*arbitrary or unjustifiable discrimination or a disguised restriction on international trade or investment*", as suggested by Claimant[894] – which allegation was made without arguments or evidence to support its position.[895]

iii. Claimant still cannot show that Colombia frustrated any of its legitimate expectations

893. Respondent also rejects that it frustrated Claimant's legitimate expectations and recalls that tribunals have made clear that an investor's "legitimate expectations" are only protected under any standalone FET standard in certain narrow circumstances. In particular, Respondent asserts that: (i) legitimate expectations may arise only from a State's specific commitment or representation made to the investor, on which the latter has relied, and (ii) the investor must be aware of the general regulatory environment in the host country. Investors' expectations must be balanced against legitimate regulatory activities of host countries.[896]

894. According to Respondent, there is no assurance, specific or otherwise, that Claimant can point to argue that it would have been permitted to conduct a large-scale mining project in the entirety of the area covered by Concession 14833 regardless of the presence of *páramo*. On the contrary, Respondent asserts, Claimant proceeded with its alleged investment

[893] Rejoinder, ¶ 267 (b).

[894] Reply, ¶ 288.

[895] C-Memorial on Liability, ¶ 474; Rejoinder, ¶ 310.

[896] C-Memorial on Liability, ¶ 449; Rejoinder, ¶¶ 269-289, *citing* **Exhibit RL-028**, UNCTAD study on the FET standard, United Nations Conference of Trade and Development, UNCTAD Series on Issues in International Investment Agreements II, Fair and Equitable Treatment, 2012, p. 68.

against the backdrop of a legislative framework that prohibited mining in the *páramo*, in circumstances in which Colombia had already designated a substantial proportion of the Concession 14833 as a *páramo* since 2007 and, as such, Claimant could not have formed any reasonable expectations in these circumstances that it would be permitted to mine in the *páramo* area and develop the Vetas Gold Project in it.[897] Even though Claimant contends that it was "*specifically encouraged to proceed with its investment based not only on the stabilization regime in Law 685 and carve outs in Laws 1382, 1450, and 1753, but also by the licenses and other governmental action vis-à-vis Concession 14833*", according to Respondent, Claimant could not have formed any *legitimate* or *reasonable* expectations that the Vetas Gold Project would be exempt from the ban on mining in *páramo* areas of Concession 14833. Moreover, the "*laws*", "*licenses*" and "*other governmental action*" on which Claimant relies do not amount to "*specific assurances*" that the grandfathering would apply to the Vetas Gold Project, or that the grandfathering would not be reviewed by the Constitutional Court, should an application for such review be made.[898]

895. Respondent further asserts that Claimant held no "*distinct, reasonable, investment-backed expectations*" that it would be permitted to mine in the *páramo*. Having previously sought to support its claims to legitimate expectations on generic, vague and irrelevant statements of general support for investment in the mining sector, Galway now claims that it relied on the terms of Concession 14833, the Mining Code and other legislation as "*assurances*" giving rise to an expectation that mining in the *páramo* would be permitted. But Respondent adds that neither the legislation nor the terms of Concession 14833 could have given rise to any such expectations in circumstances in which mining was already prohibited in the *páramo* and the Vetas Gold Project was not grandfathered, as Claimant's witness Mr. Gómez Rengifo had warned.[899]

896. In addition, Claimant has failed to establish that it *actually relied* on the alleged expectations it now purports to have *at the time of the investment,* and tribunals rightly require that the investor prove the expectations it relies upon *actually existed* at the time of the investment.[900]

[897] C-Memorial on Liability, ¶¶ 450-453.

[898] Rejoinder, ¶ 275.

[899] Rejoinder, 12(a)(iii).

[900] Respondent cites *Duke Energy* where the tribunal found that "*expectations must be legitimate and reasonable at the time when the investor makes the investment*". **Exhibit CL-071**, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, August 18, 2008, ¶ 340.

iv. Colombia's measures were transparent and consistent

897. In response to Claimant's allegation that Colombia's actions were lacking in "transparency" and "consistency", and as such were unfair and inequitable, Respondent contends that the measures are perfectly reconcilable when viewed in the context of Colombia's overriding, long-standing policy of protecting the *páramos*, and further contends that Colombia never approved or endorsed in any other way Claimant's proposed large-scale mining project in the *páramo.*[901]

898. Although Claimant relied on *Tecmed v. Mexico*[902] and *Bilcon v. Canada*[903] to argue that Article 805 of the FTA requires Colombia to act in accordance with a duty of transparency and consistency, Respondent provides elements to challenge such position. As to the *Tecmed* case, it contends that the tribunal decided under the Mexico–Spain BIT whose FET provision does not refer to the customary international law MST at all. Regarding the *Bilcon* award, it distinguishes the facts, identifying that the Constitutional Court confirmed that the deficiencies of Resolution 2090 and Law 1753 did not amount to "*egregious*", "*shocking*" or "*blatantly unfair*" errors, and that the delimitation was otherwise an entirely lawful measure under Colombian law, and that the Colombian Constitution was not compatible with the grandfathering of existing projects in the *páramo.*[904]

II. The Tribunal's Analysis

899. The Tribunal recalls Article 805 of the FTA, which reads as follows:

> *Article 805: Minimum Standard of Treatment:*
>
> *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*

[901] C-Memorial on Liability, ¶¶ 454-456.

[902] **Exhibit CL-030**, *Técnicas Medioambientales, TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003.

[903] **Exhibit CL-044**, *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 on Jurisdiction and Liability, March 17, 2015.

[904] Rejoinder, ¶¶ 290-296.

> *administrative adjudicatory proceedings in accordance with the principle of due process….*

900. The Tribunal notes that this article includes the following footnote that is relevant for purposes of the analysis:

> *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.* [Emphasis added]

901. The Tribunal also notes that in its NDP Submission, Canada recalls that: (a) Article 805(1) of the FTA requires each Party to "*accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment*," and (b) that the Decision of the Canada-Colombia Joint Commission Interpretation of Certain Chapter Eight Provisions establishes that the disputing party alleging the existence of a rule of customary international law has the burden of proving it.[905]

902. Respondent also supports its assertion that it is necessary to prove State practice and *opinio juris* in the 2017 Canada-Colombia Joint Commission decision which interprets Chapter Eight of the FTA, and contends that "[i]*f an investor of a Party submits a claim under Section B of Chapter Eight, including a claim alleging that a Party has breached Article 805, the investor has the burden of proving all elements of its claim, consistent with general principles of international law applicable to international arbitration. This includes the burden to prove a rule of customary international law invoked under Article 805, through evidence of the elements of customary international law referred to in footnote 2 of Chapter Eight*."[906]

903. Canada further contends that to discharge its burden, an investor must demonstrate evidence of State practice and *opinio juris* in support of the elements that it alleges form part of the customary international law minimum standard of treatment, which requires evidence of consistent and general practice amongst States that is supported by a conviction by States that such practice is legally required by them under international law.[907]

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[905] Canada's NDP Submission, ¶¶ 38-39, *citing* the Canada-Colombia Joint Commission, "*Decision of the Canada-Colombia Joint Commission - Interpretation of Certain Chapter Eight Provisions*", 24 October 2017, ¶ 3(b).

[906] **Exhibit RL-030**, Free Trade Agreement between Canada and Colombia, Joint Commission of the Free Trade Agreement between the Republic of Colombia and Canada, Decision No. 6, October 24, 2017, ¶ 3(b).

[907] Canada's NDP Submission, ¶ 40.

904. In addition, Canada states that only a few rules have "… *crystallized to become part of the minimum standard of treatment. These include, for example, the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings and the obligation to provide full protection and security to investments of investors*."[908]

905. Finally, Canada states that Article 805 does not allow a tribunal "*to second-guess government policy and decision- making*", and that any such determination must be made in light of the "*high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders*."[909]

906. The Parties dispute the scope of the obligation to provide minimum standard of treatment under Article 805 of the FTA. On one hand, Claimant argues that the MST implies that Colombia has the obligation to provide fair and equitable treatment as it is understood by *investment case law*. In support, Claimant cited numerous cases that have examined the standard. On the other hand, Colombia alleges that Article 805 of the FTA does not establish a higher standard for MST that would imply a standalone right as FET. Further, according to Respondent, Claimant has not met its burden of proof since it has limited itself to citing cases based on different treaties but has not presented any evidence on State practice or *opinio juris* to prove that the MST implies the obligation to provide FET.

907. In this context, the appropriate approach in order to analyze Article 805 of the FTA in the present case is to:

- *first*, identify whether the scope of the applicable standard can be determined resorting to case law that has already established the scope of MST;
- *second*, to determine whether each of the sub-standards whose breach is alleged by Claimant is covered by MST; and
- *third*, in case any of the sub-standards is covered by MST, to determine whether any of those specific sub-standards has been breached in this specific case.

908. In relation to the first point, the Tribunal notes that the majority of the tribunal in *Eco Oro* considered that it was feasible and justified to resort to case law to prove the scope of MST. Thus, the *Eco Oro* decision stated that "[t]*he Tribunal also accepts that Colombia is under no obligation to exceed this standard and, as it is not considering an autonomous treaty standard of FET but a 'minimum' standard, the Tribunal further accepts the obligation*

[908] Canada's NDP Submission, ¶ 43.

[909] Canada's NDP Submission, ¶ 44, *citing* **Exhibit CL-055**, *S.D. Myers, Inc. v. Government of Canada*, First Partial Award, November 13, 2000, ¶ 263. *See also* **Exhibit RL-154**, *Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Award, March 24, 2016, ¶ 553.

should not be interpreted expansively. The Tribunal does not, however, accept that footnote 2 to Article 805 limits it as to what sources the Tribunal may refer to as evidence in analyzing the meaning of MST under customary international law; the concept has been considered by several tribunals and where the Tribunal finds it to be of assistance in ascertaining what is the current meaning of MST under customary international law, it considers those decisions which it finds to be relevant."[910] As part of his dissenting opinion, Prof. Sands pointed out that the claimant in such case had failed to meet its burden of proving the existence of State practice and *opinio iuris*.[911]

909. Although it is true that the MST needs to be examined within the scope of the FTA, and the considerations and decisions of other tribunals in cases that have been decided under the terms of other treaties are not necessarily applicable when attempting to interpret the FTA and the obligations of Respondent under the MST, the majority of the Tribunal nonetheless believes that to determine the scope of such obligations, it needs to follow that which is most reasonable and consistent with case law, *i.e.*, resort to what has been stated by other arbitral tribunals. Claimant has submitted other awards in support of this position,[912] and it is accepted that this can be considered as sufficient to prove the scope of the applicable standard.

910. Also, even though the Tribunal acknowledges the assertions from both Canada and Colombia in connection with the 2017 Canada-Colombia Joint Commission Decision which interprets Chapter Eight of the FTA, the majority of the Tribunal believes that said decision is valuable in the analysis but cannot impose an obligation on Claimant to prove State practice and *opinio juris* to define MST. In the first place, because this decision dates to 2017 – which is well after the time Claimant made its investment in Colombia – and, second, because this decision constitutes a subsequent agreement which, although it must

[910] **Exhibit CL-112**, *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, ¶ 745.

[911] **Exhibit CL-112**, *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, Partial Dissent of Professor Philippe Sands, ¶ 6.

[912] Particularly, Claimant relies on **Exhibit CL-046**, *ADF Group Inc. v. United States*, ICSID Case No. ARB (AF)/00/1, Award, January 9, 2003, ¶184:"*We understand Mondev to be saying – and we would respectfully agree with it – that any general requirement to accord "fair and equitable treatment" and "full protection and security" must be disciplined by being based upon State practice and judicial or arbitral caselaw or other sources of customary or general international law*"; **Exhibit CL-044**, *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 on Jurisdictionand Liability, March 17, 2015, ¶ 441: "*NAFTA Article 1105 has by now been the subject of considerable analysis and interpretation by numerous arbitral tribunals. The Tribunal in the present case is guided by these earlier cases, particularly the formulation of the international minimum standard by the Waste Management Tribunal*".

be "taken into account" in accordance with Article 31(3)(a) of the VCLT,[913] it is not binding.

911. Taking into account the above, the Tribunal now proceeds to examine the allegations of the Parties regarding the four sub-standards that are covered by the MST under the FTA: (i) good faith; (ii) arbitrariness; (iii) legitimate expectations; and (iv) transparency.

a) Good Faith

912. According to Claimant, the MST in the FTA establishes an affirmative or positive obligation "*to act*" in good faith, and this duty was breached by Colombia through the issuance of Judgment C-035, when it reversed its previous decision that, in essence, was in support of the mining policy, even within the *páramos*, from 2001 to 2015.[914] In response, Respondent questions that there is no independent obligation under the MST "*to act*" in good faith, but only to perform other obligations in good faith; and that there is no evidence of subreptitious intentions in its measures to protect the *páramos*, but a consistent policy established since Law 1382 and Law 1450, both of which predated both the FTA and Claimant's investment.

913. Claimant has not provided any case where a State was found liable for "*not acting in good faith*," as an independent element of MST. While it is true that the *Neer*[915] case established that bad faith is contrary to the MST, there is no evidence in the present case of an "*ulterior motive*" by Colombia with the issuance of Judgment C-035 – the act described by Claimant as contrary to good faith – nor has such ulterior motive been alleged by Claimant.

914. This is probably the case because, as argued by Respondent, international law does not recognize good faith as an independent source of obligations, but as the manner in which already established obligations should be performed, as held, for instance, by the International Court of Justice in *Case concerning Border and Transborder Actions*[916], as well as the tribunals in *Vigotop v. Hungary*,[917] and *Mobil v. Canada*.[918] Consequently, the better view would be for the Tribunal to analyze Respondent's compliance with other

[913] **Exhibit CL-025**, Vienna Convention on the Law of Treaties, May 23, 1969, Art. 31.3(a).

[914] Claimant's PH Brief, ¶¶ 118-119.

[915] **Exhibit RL-034**, *L.F.H. Neer and Pauline Neer v. United Mexican States*, Award, IV RIAA 60, October 15, 1926.

[916] **Exhibit RL-038**, *Case concerning Border and Transborder Actions (Nicaragua v. Honduras)*, International Court of Justice, Judgment on Jurisdiction of the Court and Admissibility of the Application, December 20, 1988, ¶ 94.

[917] **Exhibit RL-148**, *Vigotop Limited v. Hungary*, ICSID Case No. ARB/11/22, Award, October 1, 2014, ¶ 585.

[918] **Exhibit RL-158**, *Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, July 13, 2018, ¶¶168-169.

obligations derived from MST and, afterwards, determine if they were performed in good faith.

b) Arbitrariness

915. In connection with the *second* sub-standard, Claimant alleges that Colombia acted arbitrarily through the issuance of Judgment C-035 and NMA's Resolution 341.[919]

916. According to Claimant, Judgment C-035 was arbitrary because it represented a sudden change, motivated by no new information whatsoever, after having promoted investment in mining from 2001 to 2016, and Claimant assured complied the applicable requirements for mining in Concession 14833. Furthermore, Claimant contends that the application of the precautionary principle – instead of an approach tailored for the Vetas Gold Project – constituted an expansive and non-specific approach to mining regulation, despite the fact that Resolution 2090 and Law 1753 had exempted Claimant from the prohibition.[920]

917. Respondent argues, on the other hand, that the precautionary principle was already enshrined in Colombian law and that the development of the prohibition in the *páramos* was part of a regulatory process which preceded both the FTA and Claimant's investment.[921] Furthermore, Colombia asserts that Judgment C-035 had no effect over Claimant because the Vetas Gold Project was not protected by Law 1753's transitional regime.[922]

918. It is undisputed that MST gives investors protections against arbitrary measures. The *Waste Management II* tribunal described the content of the MST as follows:

> *The search here is for the Article 1105 standard of review, and it is not necessary to consider the specific results reached in the cases discussed above. But as this survey shows, despite certain differences of emphasis a general standard for Article 1105 is emerging. 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*

[919] Reply, ¶ 221.

[920] Reply, ¶ 236.

[921] C-Memorial on Liability, ¶¶ 43-49.

[922] C-Memorial on Liability, ¶ 277.

> *proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.*
>
> *Evidently the standard is to some extent a flexible one which must be adapted to the circumstances of each case.*[923]

919. Although it is true that the Vetas Gold Project – as planned by Claimant – was not protected by the transitional regime because the mining activities that were being carried out were on a small-scale basis under environmental permits issues considering such mining activities, this does not mean that Claimant was in no way affected by Judgment C-035. The small-scale exploitation of Reina de Oro would have been acquired by Claimant as a result of the exercise of the option under the Option Agreement, provided the actions to complete the assignment were completed, including, but not limited to the execution of the Assignment Agreement. Consequently, the Tribunal deems that Claimant could have been affected – albeit in limited form – when exploitation was banned.

920. However, this alleged breach would face the same determination that the Constitutional Court acted within the margin typically recognized to the judiciary bodies to apply the law and adapt it to society's evolving values.

921. With regard to Claimant's allegations relating to the arbitrariness of Resolution 341, the Tribunal fails to identify that it was arbitrary since Claimant did not comply with the filing of the application for registration in accordance with the requirements under Colombian law. The NMA acted in accordance with applicable regulations in force at the time, while Claimant failed to pursue, among other routes available, the applicable "*protocolización*" procedure for the positive administrative silence to take effect.

c) Legitimate Expectations

922. In connection with the *third* sub-standard, Claimant asserts that it had legitimate expectations that: (i) Colombia would not eliminate, restrict, undermine, or interfere with the validly granted rights under Concession Contract 14833; and (ii) Claimant would develop the Vetas Gold Project.

923. According to Claimant, such expectations were based on "*repeated representations and assurances contained in the legislative framework, and administrative and judicial decisions between 2001 and 2016*" (*i.e.*, the 2001 Mining Code, the transitional regime

[923] **Exhibit CL-051**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, ¶¶ 98-99.

established in Law 1382, Resolution 2090 and Law 1753, the environmental license of Concession 14833 issued in 2002 and the judicial decisions regarding the Reina de Oro Arbitration).[924] Furthermore, it adds, they were also confirmed by the Executive branch's defense of Law 1753's transitional regime which led to Judgment C-035, which argued that it would be unconstitutional to apply the mining ban retroactively and that it would give raise to monetary claims, as also recognized by the plaintiffs and the dissenting judges in the proceeding.[925]

924. It is true, as Claimant contends, that some tribunals have concluded that the MST includes the protection of legitimate expectations (for example, *Mobil v. Canada*;[926] *Bilcon v. Canada*[927]). Under these cases, and similar precedents, for legitimate expectations to be frustrated, it must be shown that: "*(1) clear and explicit representations were made by or attributable to* [the State] *in order to induce the investment, (2) the representations were reasonably relied upon by the Claimants; and (3) these representations were subsequently repudiated by* [the State]".

925. Canada contends in its NDP Submission that there is no general obligation under the customary international law minimum standard of treatment, and therefore under Article 805 of the FTA, to protect an investor's legitimate expectations. The mere fact that a State takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of the customary international law minimum standard of treatment, even if there is loss or damage to the investment as a result.[928]

926. There are two assurances or "*guarantees*" that are relevant for Claimant's case: (a) Article 46 of the 2001 Mining Code, which established a stabilization and transition in case of amendments and legal reforms, and that any new or amended legislation would only apply to the concessionaire insofar as it broadens, confirms, or improves the concessionaire's entitlements; and (b) the transitional regime established under Law 1382, Resolution 2090 and Law 1753, which only protected projects which were in operation and had obtained the applicable environmental authorizations before the mining ban was approved. The Tribunal has decided above that none of these can be deemed, however, to be a representation to Claimant that new regulations would not be applied to new projects, such

[924] Tr. Day 1, 97:7-10.

[925] Cl. Memorial, ¶ 458.

[926] **Exhibit CL-102**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, May 22, 2012, ¶ 152.

[927] **Exhibit CL-044**, *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, ¶¶ 446-454.

[928] Canada's NDP Submission, ¶ 45, adding that several of Canada treaty partners, including all three NAFTA Parties agree on this point.

as the Vetas Gold Project. The Tribunal deems that Claimant cannot argue it had the legitimate expectation that it would develop the Vetas Gold Project and be exonerated from the mining ban when it acquired its interest in the Option Agreement in 2012.

927. Even though Claimant still had the chance of developing a mining project , since the official delimitation of the *páramos* had not been established by the competent authority by mid 2012 and there may have been uncertainty as to whether the mining exclusion zone would make the project inviable, such chance disappeared in December 2014 when Resolution 2090 was issued and the mining exclusion zone was officially delimited for the first time, covering almost 80% of the surface area of Concession 14833.

928. However, by the same token, Claimant had not received any "*clear and explicit representation*" that the *páramo* delimitation would not overlap with the area of Concession 14833.

929. It can be argued that Claimant had a legitimate expectation that the mining ban would not be applied to the small-scale mining exploitation of Reina de Oro as it was being carried out, since this exclusion had been consistently carved when the ban was first established through Law 1382. Under this scenario, the argument would be that Claimant's reasonable expectation was frustrated when the Constitutional Court issued Judgment C-035 in 2016 and declared that the transitional regime to be unconstitutional.

930. However, even if such an argument could be made that Colombia made the "*clear and explicit representation*" in Article 46 of the 2001 Mining Code that compensation would be paid in case new mining regulations were to be retroactively applied to concession contracts, the Tribunal finds that such representation was directed to title holders that could have been affected by such retroactive application, and the Tribunal needs to keep in mind that Claimant was never the title holder of Concession 14833 because the assignment of Concession 14833 was never completed.

931. Further, the Tribunal recalls that Claimant has stated that its legitimate expectation was to develop the Vetas Gold Project and has not argued in this Arbitration that its legitimate expectation was to receive a compensation under Article 46 of the 2001 Mining Code in the event that the small-scale mining was affected. In light of the above, even assuming that Claimant did have a right to Concession 14833 – which the Tribunal has determined it did not – the fact that Colombia has not paid a compensation to Claimant cannot be considered a repudiation of such representation.

d) Transparency and Consistency

932. The *fourth* sub-standard to consider deals with transparency. Claimant states that for over a decade – up until 2016 – the legislature and administrative departments of Colombia actively encouraged and supported the development of the Mining Area under Concession 14833. Despite this, Respondent suddenly issued Judgment C-035 which mandated a complete ban on mining in the *páramos* that affected Concession 14833.

933. The Tribunal is well aware that by the time the FTA came into force (on August 15, 2011) and Claimant acquired its interest in the Option Agreement (on December 6, 2012), the creation of a mining exclusion zones over the *páramos* had *already been enacted*. First, through Law 1382, and then through Law 1450. Perhaps the only question that remained was which areas would be legally defined within the "*páramos*" ecosystems, leaving the chance that the areas needed for the Vetas Gold Project could be located outside the mining exclusion zone. Consequently, it would be difficult to hold that Colombia's three branches of Government had actively encouraged and supported the development of new mining projects in Concession 14833 up until 2016.

934. In addition, there were different actions taken by various areas of the Government of Colombia with evident steps to protect the *páramo* ecosystems, including, among others:

a). The Ministry of the Environment began implementing strategies to raise public awareness of the *páramos,* and to support their protection at the national level, and in May 2007 the IAVH published the *Atlas de Páramos de Colombia*, which showed that 100% of Reina de Oro's Concession 14833 overlapped with the *Jurisdicciones Santurbán Páramo*.

b). Enactment of Law 1450 on June 16, 2011, establishing a new prohibition on all mining activities within *páramo* areas; and

c). Issuance of Resolution 2090 in December 2014 which "*finally delimited*" the Santurbán-Berlin *Páramo*;

935. Claimant knew, or should have known, that Reina de Oro's Concession 14833 overlapped with the 2007 *Páramo* Atlas. Evidence on the record shows that since 2007 the IAVH *Páramo* Atlas[929] showed an overlap with Concession 14833 which, following Resolution 937, the 2007 *Páramo* Atlas became the applicable cartographic information determining the *páramo* areas in which the mining ban took effect. It was incorporated into the ANM's mining cadaster and Claimant could have confirmed the IAVH *Páramo* Atlas's 100%

[929] **Exhibit R-115**, shows the overlap between Concession 14833 (in blue squares) and the 2007 *Páramo* Atlas; C-Memorial on Liability, ¶ 109.

overlap with Concession 14833. Therefore, by that time Claimant could not reasonably have expected to conduct mining activities in that area.

936. A final re-delineation of the *páramo* through Resolution 2090 of 2014 – following three years of study undertaken by the Ministry of Environment – did no more than confirm the overlap that already existed between Concession 14833 and the 2007 *Páramo* Atlas. Both the 2007 *Páramo* Atlas and the Resolution 2090 delimitation overlapped with of Concession 14833.[930]

e) Conclusion

937. It is clear that Respondent did not act without fault in the determination of the *páramo* protection zones where mining activities would be excluded, the Santurbán-Berlin *Páramo*, in this case. There was inconsistent action among the legislature, the executive and the judiciary in the determination of the protected *páramo* zones. There were delays, certainly. But the Tribunal does not believe that such conduct amounts to a breach of the FET standard under the FTA, understood as a minimum standard under international law.

938. The Tribunal finds that the opinion of Prof. Sands in his partial dissent in the *Eco Oro* decision applies to this case. Prof. Sands acknowledged that "… [t]*he Majority is correct to point out that there were problems with the manner in which the government handled the process of delimiting the Santurbán Parámo. It was slow, it was inconsistent, it was uncertain ....*" But, he added, "… *the key question, however, is: did the process of delimitation cross the line of departing from the rule of law, or proceed on a basis that shocks our sense of juridical propriety? In my view it did not, and the heart of the Decision makes that clear, premised as it is on the view that the Respondent acted in good faith*. ….."[931]

939. The responsibilities of a State are elaborate and multifaceted. Coordination among the different departments of the administrative or executive branch is not easy. This becomes harder when such coordination requires the involvement of the legislature and the judiciary. A seamless coordination is complex to achieve. What becomes relevant in a case such as this, is whether the conduct and the effect of such conduct on the investor becomes a breach

[930] For example, Respondent indicates that after the Resolution 2090 delimitation it overlapped 100% (Rejoinder, ¶ 8), but also indicates that the overlap left 21.8% unaffected (Rejoinder, ¶ 209, Resp. PH Brief, ¶ 95). Claimant refers to 21.9% (Reply, ¶¶ 160, 163, 165).

[931] **Exhibit CL-112**, *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, Partial Dissent of Professor Philippe Sands, ¶ 34.

under the FTA. In consideration of the reasoning above, this Tribunal believes that it does not.

940. In conclusion, the Tribunal believes that Claimant has not proven the content of the customary international law concept of MST based on States' practice and *opinio juris*. Moreover, Claimant had no legitimate expectations that Colombia would not protect the *páramos*. The MST, which has a higher threshold than the standalone FET, has not been breached by Colombia, whose acts cannot be qualified as manifestly arbitrary, grossly unfair or inherently unjust.

X. WHETHER COLOMBIA'S MEASURES FALL WITHIN THE FTA'S ENVIRONMENTAL EXCEPTION

I. The Parties' Positions

a) Respondent's Position

(i) The Parties to the FTA Specifically Excluded Environmental Measures from the Scope of Chapter Eight the FTA

941. Respondent contends that the State Parties to the FTA struck a balance between trade and environmental protection, which gives effect to the State Parties' policy decision to subordinate the investment protections under Chapter Eight of the FTA to the State's right to take such environmental measures as it may consider appropriate, subject only to the requirement that those measures be non-discriminatory and not be disguised restrictions on trade. Thus, Colombia's measures in this case fall squarely within the scope of Article 2201(3) of the FTA and cannot therefore give rise to liability under Chapter Eight.[932]

942. Respondent asserts that, contemporaneous with the conclusion of the FTA, Canada and Colombia entered into the Canada-Colombia Environment Agreement,[933] which forms part of the interpretive context of the FTA, which should be considered in connection with the interpretation of that instrument pursuant to Article 31(2)(a) VCLT. Further, according to Respondent, the Parties to the FTA intended the FTA and the Environment Agreement to be complementary and interrelated, as is clear from Article 1704(1) of the FTA.[934]

943. This provision, adds Respondent, should be interpreted in accordance with the "object and purpose" of the FTA; the other terms of the FTA concerning the same subject matter

[932] C-Memorial on Liability, ¶¶ 457-458.

[933] **Exhibit R-089**, Canada-Colombia Environment Agreement, November 21, 2008, p. 2.

[934] C-Memorial on Liability, ¶¶ 339-340.

(particularly, Chapter Seventeen '*Environment*'); and the Environment Agreement, meaning that there is subordination of the investment protections under Chapter Eight to the State Parties' sovereign rights and duties to protect the environment. Article 2201(3) of the FTA is also to be read consistently with Article XX of the General Agreement on Tariffs and Trade ("**GATT**"), on which the Environment Agreement is based and to which both Canada and Colombia are Parties, and should be interpreted to exclude from the scope of the FTA's investment protections any measures that would "*prevent a Party from adopting or enforcing*" the environmental measures at issue, and where three conditions are met, namely, the measure: (i) 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.[935]

944. Thus, according to Respondent, where a measure falling within Article 2201(3) of the FTA would otherwise amount to a breach of the investment protections provided under Chapter Eight of the FTA, a State will not be liable for any violation of Chapter Eight with respect to that measure provided that these narrow conditions are satisfied.[936]

945. Respondent asserts that Canada shares this understanding, and notes that in its NDP Submission in *Eco Oro v. Colombia*, Canada confirmed that the exception under Article 2201(3) operates as a "*safety net*" to protect the State's exercise of regulatory powers in pursuit of certain specific legitimate objectives; where it applies, "*there is no violation of the Agreement and no State liability. Payment of compensation would therefore not be required*."[937]

946. Respondent rejects Claimant's assertion that "*the leading case on the interpretation of Article 2201(3) is Bear Creek.*"[938] Respondent adds that Canada's statement – with which Respondent agrees – is the only authority interpreting Article 2201(3) of the FTA. According to Respondent, the *Bear Creek* decision, even if it were persuasive authority (which it is not), concerned the Canada-Peru FTA, and not the Canada-Colombia FTA. Further, unlike in *Bear Creek*, Respondent points to the fact that Canada has commented on the Canada-Colombia FTA's Article 2201(3) in this case, and its submission is the most relevant and persuasive authority before the Tribunal.[939]

[935] C-Memorial on Liability, ¶¶ 459-463.

[936] C-Memorial on Liability, ¶ 464; Rejoinder, ¶ 301.

[937] **Exhibit RL-105**, Canada's Non-Disputing Party Submission of Canada in *Eco Oro Minerals Corp. v. Republic of Colombia,* ICSID Case No. ARB/16/41, February 27, 2020, ¶¶ 16, 20.

[938] As alleged by Claimant in Reply, ¶¶ 269, 276.

[939] Rejoinder, ¶ 303.

947. In reference to Claimant's interpretation of Article 2201(3) of the FTA, Respondent argues that it would render the exception in Article 2201(3) devoid of meaning and *effet utile* and would also be inconsistent with the wording of the FTA. Further, Respondent contends that this is the intent and understanding of both Canada and Colombia's with respect to this provision. In connection with the argument posed by Claimant to the effect that any exemption of liability under Article 2201(3) would be "*contrary to and incompatible with the final 'without prejudice' provision in Article 2201(4)*",[940] Respondent contends that the inclusion of that sentence in Article 2201(4) and its omission from Article 2201(3) of the FTA confirms that Canada and Colombia did indeed intend said article to provide an exemption from liability. The Contracting Parties' inclusion of the preservation of the rights of investors in the paragraph that immediately follows Article 2201(3) of the FTA is clear evidence that the Contracting Parties were aware of such a term, but deliberately chose not to include it therein.[941]

948. Respondent argues that Claimant's reliance on Article 802(1) of the FTA is inapposite,[942] adding that such article concerns inconsistent provisions between different chapters of the FTA and is of no assistance whatsoever in the interpretation of Article 2201(3) of the FTA.[943]

(ii) Galway's Claims Concern Measures that fall within the FTA's Environmental Exception

949. Respondent asserts that the measures adopted by Colombia giving rise to Galway's claims were necessary for the purposes of protecting the *páramo* ecosystems, both within Concession 14833 and in the broader region.[944]

950. The prohibition on mining in *páramo* areas unquestionably serves the objective of protecting the *páramo* from harm. As such, Respondent contends that the measures fully and directly contribute to the objective of protecting the *páramo*, and therefore the burden is on Claimant to show that measures that would have permitted the Vetas Gold Project to

[940] Cl. Memorial, ¶ 475.

[941] C-Memorial on Liability, ¶¶ 466-469. Respondent also asserts that it is noteworthy that the second sentence in Article 2201(4) does not appear in the treaty giving rise to the disputes in *Bear Creek v. Peru* (the Canada-Peru FTA), cited by Claimant in support of its interpretation of Article 2201(3). According to Respondent, *Bear Creek* is thus clearly distinguishable on this basis alone, and cannot inform the Tribunal's interpretation of Article 2201(3), which must, in any event, be construed on its own terms, against the background of the other terms of the FTA, and in light of its particular object and purpose and all other important principles of international treaty interpretation.

[942] **Exhibit C-001**, Free Trade Agreement between Canada and Colombia, Art. 802(1) provides that "[*i*]*n the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.*"

[943] Rejoinder, ¶ 305.

[944] C-Memorial on Liability, ¶ 471.

proceed could have been adopted and would have made an equivalent contribution to the achievement of the objective of protecting the *páramo.*[945]

951. In its Rejoinder, Respondent recalls that Canada's and Colombia's mutual undertakings were to "*strengthen*" environmental protection norms in the Environment Agreement entered into concurrently with the FTA.[946] The Environment Agreement also 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 State Party to "*ensure that its environmental laws and policies provide for high levels of environmental protection.*"[947]

952. In response to Claimant's contention that "[t]*he bar to invoke a treaty exemption is high*", Respondent rejects this and states that there is no basis in the language of Article 2201(3) of the FTA or any principles of interpretation for imposing any extraneous "*high bar*" to the elements expressly provided for thereunder.[948] In respect to the argument that Colombia's measures were not "*necessary*" to protect the *páramo* within Concession 14833 because Colombia, according to Claimant, has not shown that its measures were "*minimally impairing.*"[949] Respondent explains that Law 1450 was adopted for the prohibition of mining activities, as well as other environmentally destructive activities such as the exploitation of hydrocarbons and the construction of oil refineries, to protect *páramo* ecosystems from adverse environmental impact and to allow for the restoration of areas that had been harmed in the past.[950]

953. Respondent contends in its Post-Hearing Brief that, although Claimant "*continued to rely*" on the Eco Oro decision at the Hearing to assert that "[t]*here is no exemption ... under Article 2201 to the obligations otherwise existing and the protections against expropriation or the required Minimum Standard of Treatment*",[951] it is clear that "…*Canada and Colombia agree that Article 2201— titled "General Exceptions" — plainly does provide an exception to the State Parties' obligations under Chapter Eight*."[952]

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[945] C-Memorial on Liability, ¶¶ 472-475.

[946] **Exhibit RL-027**, Canada-Colombia Environment Agreement, November 21, 2008, Art. 7.2.

[947] **Exhibit RL-027**, Canada-Colombia Environment Agreement, November 21, 2008, Art. 2.1.

[948] Rejoinder, ¶ 308.

[949] Reply, ¶ 294.

[950] Rejoinder, ¶ 309.

[951] Tr. Day 1, 97:13-16.

[952] Respondent's PH Brief, ¶ 115.

954. According to Respondent, the Eco Oro majority tribunal's decision on the interpretation of Article 2201 of the FTA "*was plainly wrong and manifestly exceeded that tribunal's powers, including because it failed to give effect to the State Parties' agreement on the interpretation of said Article as required by Article 31(3) of the VCLT*," and interpreted the Article in a manner that renders it meaningless and thus leads to a "*manifestly absurd or unreasonable result*."[953]

b) Claimant's Position

955. Claimant contends, on the other hand, that Article 2201(3) of the FTA is not a "*general exception*" which insulates Respondent for liability to pay compensation arising from breaches of Articles 805 and 811 of the FTA.

956. According to Claimant, Respondent advanced identical arguments before the tribunal in *Eco Oro* which were considered and rejected, and adds that the Tribunal in *Eco Oro* pointed that Colombia had provided no justification as to why it is necessary for the protection of the environment not to offer compensation to an investor for any loss suffered as a result of measures taken by Colombia to protect the environment, nor explained how such a construction would support the protection of investment in addition to the protection of the environment.[954]

957. Claimant asserts that the "*proper construction*" of Article 2201(3) of the FTA has now been provided by two prior tribunals, in *Eco Oro* and in *Bear Creek*. In its view, it is a "*permissive provision allowing a State to adopt certain measures without finding itself in breach of the FTA, but this does not prevent an investor claiming under Chapter Eight that such measures entitle it to the payment of compensation*."[955]

958. Claimant challenges the position of Respondent, and argues four reasons for which Respondent's allegations "*cannot withstand scrutiny.*"[956]

(a). When read properly in light of its language, object, purpose, and context, the FTA does not establish the categorical "primacy" of environmental protection over investment;

(b). The clear and unambiguous language of Article 2201 of the FTA sets limited

[953] Respondent's PH Brief, ¶ 115.

[954] Claimant's PH Brief, ¶ 176, *citing* **Exhibit CL-112**, *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, ¶ 832.

[955] Claimant's PH Brief, ¶ 177.

[956] Reply, ¶ 257.

parameters for when an environmental exception can apply to a claim;

(c). The clear and unambiguous language of Article 2201 of the FTA does not exempt Colombia from its obligation to compensate for breaches of the Treaty; and

(d). Colombia has failed to meet the high threshold required to invoke the protection of Article 2201 of the FTA, namely that each of its measures were necessary and minimally impairing.

(i) The FTA does not establish the categorical "primacy" of environmental protection

959. Claimant contends that, although Respondent seeks to balance economic and social objectives, nothing in the clear language of the FTA's object and purpose, or its context, indicate that social (including environmental) considerations inherently predominate over other considerations and obligations in the FTA.[957] No good faith reading of the entire preamble could support the characterization that the integral economic objectives set forth in the Preamble of the FTA are "subordinate" or secondary objectives.[958]

960. Further, Claimant contends that Chapter Seventeen, which Respondent deems as reinforcing the "primacy" of environmental protection over trade under the FTA, does not create a free-standing primacy of environmental considerations over the Treaty's economic objectives – especially in the face of the FTA's far more extensively elaborated architecture addressing its economic objectives.[959]

(ii) The clear and unambiguous language of Article 2201 of the FTA sets limited parameters for when an environmental exception can apply to a claim

961. Claimant asserts that Article 2201(3) of the FTA is a carefully crafted provision with several composite qualifications limiting its scope. Importantly, Claimant adds, it does not state that Chapter Eight (Investment) does not apply to measures necessary to protect human, animal or plant life. Instead, Article 2201 of the FTA provides more narrowly that Chapter Eight cannot "*be construed to prevent a party from adopting or enforcing*

[957] Reply, ¶¶ 142-144, 259.

[958] Claimant cites the "economic objectives" in the Preamble of the FTA provides as its objectives: "*PROMOTE hemispheric economic integration; CREATE an expanded and secure market for the goods and services produced in their territories, as well as new employment opportunities and improved working conditions and living standards in their respective territories; REDUCE distortions to trade; ESTABLISH clear and mutually advantageous rules to govern their trade; ENSURE a predictable commercial framework for business planning and investment; and, ENHANCE the competitiveness of their firms in global markets.*"

[959] Reply, ¶¶ 145-146.

measures necessary […] to protect human, animal or plant life."[960] [Emphasis added by Claimant].

962. According to Claimant, where the State Parties intended to oust the application of a chapter elsewhere in the FTA, they said so specifically and directly. For example, Claimant cites Article 802(3) of the FTA, which expressly provides that all of Chapter Eight "*shall not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter Eleven (Financial Services)*". This means that the State Parties knew how to expressly exclude the application of chapters where that was their intention, and the decision not to expressly exclude the application of Chapter Eight in Article 2201 must therefore be interpreted as reflecting an intention not to oust the application of Chapter Eight entirely.[961]

963. Claimant argues that, although Respondent states that its interpretation would render Article 2201(3) of the FTA "*devoid of meaning and* effet utile," the basis for this argument is unclear, since Respondent provided no further explanation or support for that position.[962]

964. Rather than precluding liability under Chapter Eight, Article 2201(3) of the FTA limits what types of claims or remedies remain viable. But it does *not* prohibit investors from seeking to enforce their rights and entitlements under Chapter Eight where those rights do not impact the State's adoption or enforcement of the impugned measures.[963] In this respect, Claimant states that the leading case on the interpretation of Article 2201(3) is *Bear Creek v. Peru*[964] which examined an identical provision of the Canada–Peru FTA, and interpreted Article 802 of the FTA (Relation to Other Chapters) which provides that "[i]*n the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.*" [Emphasis added by Claimant] Thus, concludes Claimant, where there is no inconsistency between the claim/remedy sought and the State's right to "*adopt and enforce*" compliant and necessary measures, there is no basis to displace the balance of rights and obligations guaranteed in Chapter Eight.[965]

[960] Reply, ¶¶ 260-261.

[961] Reply, ¶¶ 262-263.

[962] Reply, ¶ 264.

[963] Reply, ¶¶ 266-268.

[964] **Exhibit CL-037**, *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, November 30, 2017, ¶¶ 472-473.

[965] Reply, ¶ 271.

(iii) The clear and unambiguous language of Article 2201 does not exempt Colombia from its obligation to compensate for breaches of the Treaty

965. The *third* argument presented by Claimant deals with the fact that Chapter Eight claims for compensation are not inconsistent with Article 2201(3) of the FTA's preservation of the rights of State Parties to adopt and enforce necessary and compliant measures to regulate the environment, which was confirmed by *Bear Creek v. Peru*. Claimant adds that, although Respondent has attempted to distinguish this case from *Bear Creek* by alleging that the Canada-Colombia FTA contains Article 2201(4), Claimant rejects any value because such provision deals with measures concerning *public order*.[966]

966. Claimant argues that Respondent's reliance on the GATT and related case law is misplaced because it has no application to this case because (i) GATT deals with trade and tariffs, not investment; (ii) investment case law on whether the general exceptions provision in Article XX of the GATT categorically excludes other obligations in the treaty does not support Colombia's position; and (iii) GATT case law places a high bar on a State seeking to invoke an exception that Colombia has not and cannot meet in this case.[967]

(iv) Colombia has failed to meet the high threshold required to invoke the protection of Article 2201 of the FTA, namely that each of its measures were necessary and minimally impairing

967. In connection with this point, Claimant contends that Respondent has not demonstrated that its conduct was: (i) necessary to protect the environment; and (ii) not applied in a manner that constitutes arbitrary or unjustifiable discrimination between investments or between investors or a disguised restriction on international trade or investment.[968] In this connection, Claimant asserts that the question for this Tribunal is not, as Respondent suggests, simply whether a prohibition on mining was necessary and non-discriminatory in protecting *páramos*. Rather, the question is whether the specific conduct through which Respondent implemented the prohibition as against Claimant and Concession 14833 was necessary and non-discriminatory.[969]

968. As the Party seeking to invoke a treaty exception, Respondent bears the burden of proving that the exception applies. "Necessity", argues Claimant, requires demonstrating more than the measures are rationally connected to a legitimate/qualifying object and purpose. The specific measures in question must be essential to achieving that purpose. In evaluating

[966] Reply, ¶¶ 272-275.
[967] Reply, ¶¶ 279-284.
[968] Reply, ¶ 286.
[969] Reply, ¶¶ 290-291.

whether measures are "necessary", tribunals have routinely considered the principle of minimal impairment, and deem that a measure will *not* be viewed as "necessary" where its object and purpose could have been achieved in a manner that was less impactful or prejudicial to the investor or less divergent from the norms derogated from.[970]

969. According to Claimant, Respondent focuses exclusively on whether an absolute prohibition on mining protects *páramos* and not on establishing the necessity of its specific measures and conduct. It has failed to establish the necessity of any of the *specific* measures undertaken to implement the prohibition on mining. In particular, no evidence or argument has been put forward that Respondent's specific measures affecting Claimant were "necessary" means for the implementing the protection of the *páramos* against mining activity.[971]

970. Further, Claimant asserts that Respondent has not shown that the prohibition on mining under Concession 14833 was minimally impairing. As the Party purporting to rely on Article 2201 of the FTA, Colombia bears the burden of proving that the preconditions for its application are met, while it has adduced *no* evidence to show that a complete prohibition on mining under Concession 14833 was the only way to protect the *páramos.* Respondent has never even purported to consider whether there are other, less-impairing means that could accomplish its stated environmental objectives. [972]

II. The Tribunal's Analysis

971. The Tribunal starts the analysis by recalling the terms of Article 2201:

> *Article 2201: General Exceptions […]*
>
> *3. For the purposes of Chapter Eight (Investment), subject to the requirement that such measures are not applied in a manner that constitute arbitrary or unjustifiable discrimination between investment or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:*
>
> *(a). To protect human, animal or plant life or health, which the Parties understand to include environmental measures necessary to protect human, animal or plant life and health;*
> *(b). To ensure compliance with laws and regulations that are not inconsistent with this Agreement; or*

[970] Reply, ¶¶ 292-294.
[971] Reply, ¶ 296.
[972] Reply, ¶¶ 297-299.

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

972. The Parties disagree as to the interpretation and applicability of this exception in relation to the measures adopted by Colombia. The main dispute is whether the FTA Parties specifically excluded environmental measures from the scope of Chapter Eight of the FTA and, consequently, whether the State would be exempted from paying compensation in cases where the measures it has adopted qualify under the exception.

973. The Tribunal notes that in its NDP Submission, Canada points to the exceptions established under Chapter 22 of the FTA, and specifically to Article 2201 (General Exceptions) that contain public policy exceptions that apply as general exceptions to the obligations in the FTA, adding that "… *by providing an exception to otherwise applicable obligations, exceptions ensure that a Party can adopt or maintain certain measures without violating the agreement and without being subject to retaliation by the other Party or having to pay compensation to an investor of the other Party.*"[973]

974. Canada asserts that the first three paragraphs of Article 2201 of the FTA are standard in trade agreements to which Canada is a party and the language used is generally similar across Canada's agreements, and that the first and second paragraphs clarify application to environmental measures,[974] and adds that the general exceptions in Article 2201 only apply once there has been a determination of breach of an obligation in the Agreement. In this regard, Canada states that for the general exception in Article 2201(3) of the FTA to apply, the measure must: (i) not be applied in a manner that constitutes arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment; (ii) relate to one of the policy objectives set out in paragraphs (a)-(c) (which includes the protection of the environment); and (iii) be "necessary" to achieve these objectives. If the general exception applies, Canada adds, then "*there is no violation of the Agreement and therefore no State liability. Payment of*

[973] Canada's NDP Submission, ¶ 47.

[974] Canada's NDP Submission, ¶¶ 48-49.

compensation would therefore not be required. Any other interpretation would render the general exception meaningless." [975]

975. Finally, Canada states that the Parties to the FTA "… *did not view their investment obligations as being at odds with the protection of environmental and social goals and their environment and human rights obligations. Notably, the Preamble of the Agreement not only refers to 'the promotion and protection of investments,' but also to a number of other social and environmental goals. For example, the Parties 'undertook to implement the Agreement in a manner that is consistent with environmental protection and conservation,' to 'enhance and enforce environmental laws and regulations, and to strengthen cooperation on environmental matters' 'promote sustainable development' and they 'preserve[d] their flexibility to safeguard the public welfare' and that this is clear from various provisions in the FTA*."[976] Further, Canada adds that the Parties affirmed in Article 1701 of the FTA that trade and environment policies are mutually supportive, and that the Agreement should be implemented, and therefore interpreted, "*in a manner consistent with environmental protection and conservation and sustainable use of their resources,*" and that a good faith interpretation of investment obligations in their context and in light of the purpose and objective of the treaty, will not be inconsistent with a State's ability to adopt bona fide environmental protection measures.[977]

976. From a literal interpretation, as found under Article 31(1) of the VCLT,[978] a majority of the Tribunal finds that the exception only refers to not preventing the State from carrying out two specific actions, which are "adopting" and "enforcing" the necessary measures to protect the environment. But the provision does not provide that the State is relieved from paying compensation to the investor in case it adopts measures that qualify under the exception while, at the same time, breach other provisions of the FTA.

977. The Tribunal finds that in order for the exception of Article 2201(3) of the FTA to apply, four requirements must be met: (i) the measures must be of an environmental nature, (ii) they must be "necessary", (iii) they must not constitute an "*arbitrary or unjustifiable discrimination between investment or between investor*s", and (iv) they must not be "*a disguised restriction on international trade or investment*."

[975] Canada's NDP Submission, ¶ 50.

[976] Canada's NDP Submission, ¶ 55.

[977] Canada's NDP Submission, ¶ 56.

[978] **Exhibit C-001**, Free Trade Agreement between Canada and Colombia, Art. 31.1. "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*"

978. The *Eco Oro* tribunal directly interpreted the same provision in the FTA applicable in this case. In its decision, the tribunal stated that "*neither environmental protection nor investment protection is subservient to the other, they must co-exist in a mutually beneficial manner.*" [979] The tribunal interpreted Article 2201(3) of the FTA "*as being permissive, ensuring a Party is not prohibited from adopting or enforcing a measure to protect human, animal or plant life and health* […]. *Equally, however, there is no provision in Article 2201(3) permitting such action to be taken without the payment of compensation.*"[980] In that sense, the *Eco Oro* tribunal arrived to the following conclusion: "[t]*he Tribunal therefore construes Article 2201.3 such that whilst a State may adopt or enforce a measure pursuant to the stated objectives in Article 2201.3 without finding itself in breach of the FTA, this does not prevent an investor claiming under Chapter Eight that such a measure entitles it to the payment of compensation.*"[981] The Tribunal agrees with this interpretation.

979. Colombia has failed to put forward arguments as to why the decision in *Eco Oro* would not be relevant in this case. On the contrary, it has merely pointed out that the decision "*was plainly wrong and manifestly exceeded the powers of that tribunal, because it failed to give effect to the agreement of the States Parties on the interpretation of Article 2201, as required by Article 31.3 of the VCLT, and interpreted Article 2201 in a manner that renders it meaningless.*"[982]

980. On the other hand, while it is true that the *Bear Creek* tribunal interpreted the Canada-Peru FTA, and not the Canada-Colombia FTA, this Tribunal notes that the former treaty contains a provision identical to Article 2201(3) of the FTA applicable in this case. Thus, the decision in *Bear Creek* is undoubtedly of interest. The *Bear Creek* tribunal explained that the claims for compensation under Chapter Eight of the Canada-Peru FTA were not inconsistent with the "General Exceptions" provided in Article 2201 of the same treaty. As stated in the award, "[t]*he Tribunal considers that already the title of Article 2201 'General Exceptions' shows that otherwise Chapter Eight (investment) remains applicable including its Article 812 and, by the express footnote to the title of Article 812, as well as Article 812.1.*"[983]

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[979] **Exhibit CL-112**, *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, ¶ 828.

[980] **Exhibit CL-112**, *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,¶ 829.

[981] **Exhibit CL-112**, *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, ¶ 830.

[982] Respondent's PH Brief, ¶ 115.

[983] **Exhibit CL-037**, *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, November 30, 2017, ¶ 473.

981. Contrary to submissions of Colombia and Canada, the majority of the Tribunal does not believe that the stated interpretation renders the exception devoid of content or purpose. Article 2201(3) of the FTA continues to have a useful effect: specifically, that of precluding an arbitral tribunal from preventing the adoption and enforcement of measures to protect the environment. This prevents an investor from requesting, and the tribunal from granting, for example, that Colombia reinstate the exceptions to mining in the *páramos*.

982. Therefore, regardless of whether Article 2201(3) of the FTA is applicable to the case, the most reasonable interpretation is that it only precludes orders by an arbitral tribunal affecting the adoption and enforcement of the measures. The majority of the Tribunal deems that it does not preclude the payment of compensation.

983. But for this effect to apply, in a situation where a respondent State has adopted and/or enforced measures for the protection of the environment – as in this case –, and in doing so breached the terms of an international obligation, the relevant claimant seeking compensation for an action taken in breach would need to first evidence such breach. In other words, a finding of State liability would first need to be found by the tribunal.

984. In this case, the Tribunal has not found a breach on the part of Respondent, and therefore there is no need to address whether or not the requirements under Article 2201(3) of the FTA stated above have been met.

XI. DAMAGES

985. After consultation with the Parties, the Tribunal issued Procedural Order No. 1. Section ¶14.1 thereof provides that the proceedings are to be "*bifurcated into a first stage of jurisdiction and liability to be followed, if necessary, by a second stage on damages and quantum*", and according to Section 14.3: "*In the event that the Tribunal's Decision on Jurisdiction and Liability is not dispositive of the entirety of the arbitration, the Tribunal shall establish, after consultation with the parties, a procedural calendar for the remaining procedural steps with regard to the damages and quantum stage*".

986. In line with such paragraph, while Claimant maintained its position that it has the right to be awarded damages and compensation for losses caused by Colombia's breaches of the FTA, it reserved its submissions on the issue of damages and compensation until the proper procedural stage in consideration of Procedural Order No. 1.[984]

[984] Reply, ¶ 301. Paragraph 14.1 of Procedural Order No. 1 provides: "*The proceedings shall be bifurcated into a first stage of jurisdiction and liability to be followed, if necessary, by a second stage on damages and quantum*."

987. Respondent contends that, for Claimant to have a claim for damages, Claimant would need to establish – in accordance with well-established principles of international law – a causal link between the alleged unlawful measures and the damage suffered, and further that the damages claimed are not overly remote as a matter of law.[985] Respondent elected not to address Claimant's alleged entitlement to damages at this stage.[986]

988. Thus, the determination of damages was premised on the finding by the Tribunal of liability of Colombia for the Disputed Measures.

989. Since the Tribunal has found that none of the Disputed Measures alleged by Claimant have breached Respondent's obligations under the FTA, there is no reason for the Tribunal to examine the issue of damages, and hence no need to structure a second stage of the proceedings with a separate procedural calendar to address damages and *quantum*.

XII. COSTS

A. CLAIMANT'S SUBMISSION

990. Claimant requests that the Tribunal award it the costs and expenses it has incurred in the arbitration and interest,[987], which are quantified in its Statement of Costs of November 25, 2022, and updated on April 1, 2024, at CAD 3,927,006.00,[988] broken down as follows:

a). Costs of Legal Representation (CAD 2,272,200.38);
b). Expenses (CAD 78,434.86);
c). Costs of Witnesses, Experts and Consultants (CAD 246,370.76) and
d). Arbitration Costs (CAD 1,330,000.00)[989].

B. RESPONDENT'S SUBMISSION

991. Respondent requests that the Tribunal order Galway to pay it 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,[990] which are quantified in its

[985] C-Memorial on Liability, ¶ 481.
[986] Rejoinder, ¶ 313.
[987] Cl. Memorial, ¶ 486.
[988] Claimant's Statement of Costs, November 25, 2022; updated April 1, 2024.
[989] Equivalent of USD 1,000,000.00.
[990] Memorial on Jurisdiction, ¶ 100; C-Memorial on Liability, ¶ 484; Rejoinder, ¶ 314.

Statement of Costs of November 25, 2022 and confirmed on April 1, 2024, at USD 1,980,596.00,[991] broken down as follows:

a). Legal Fees and Expenses (USD 1,900,000.00);
b). Felipe de Vivero (USD 21,257.00)
c). ANDJE's In-House Costs (USD 53,263.00); and
d). Hearing Costs (USD 6,076.00).

992. The costs of the arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to:

Arbitrator's fees and expenses	
Mr. Eduardo Siqueiros	USD 268,538.36
Mr. Alfredo Bullard	USD 173,841.53
Prof. Brigitte Stern	USD 184,559.81
ICSID's administrative fees	USD 270,865.87
Direct expenses	USD 110,709.91
Total	**USD 1,008,515.48**

993. The costs of the arbitration have been paid out of exclusively from the advances made by Claimant.

994. Although Claimant paid each of the advances requested from it by ICSID during the proceedings, Respondent, on the other hand, failed to make payment of the advances requested from it throughout the proceedings. The following requests were made by the Secretary of the Tribunal, each of which Colombia ignored:

Date	Amount
September 26, 2019	USD 200,000
May 11, 2021	USD 200,000
February 23, 2023	USD 200,000

995. In absence of Respondent's payment in the first two requests for funds, the Secretary of the Tribunal notified the Parties of a default and sent various reminders inviting either of them to pay the outstanding amount. Upon default of Respondent to pay the first advance, Claimant made payment of Respondent's portion on June 8, 2021. Upon default of Respondent to pay the second advance, Claimant made payment on May 13, 2022. The

[991] Respondent's Statement of Costs, November 25, 2022.

Parties also failed to make payment of the third advance, despite several reminders. On July 14, 2023, the Secretariat acknowledged receipt of a communication from the Claimant requesting an extension to pay the third advance payment and, in view of the circumstances described by Claimant, the Centre decided to reduce the amount requested to USD 200,000. Considering that both Parties failed to make payment of the third advance by the July 28, 2023 deadline,[992] on August 11, 2023, the Acting Secretary-General decided to suspend the proceeding as of such date pursuant to ICSID Administrative and Financial Regulation 16(2)(b), noting, however, that "*upon payment of the outstanding amount by either party, the proceeding will resume*." Pursuant to ICSID Administrative and Financial Regulation 16(2)(c) "*if* [the] *proceeding is suspended for non-payment for more than 90 consecutive days, the Secretary-General may discontinue the proceeding, after giving notice to the parties and to the* […] *Tribunal* […] *if constituted*."[993] On November 9, 2023, the Claimant informed about the status of the payment. On January 11, 2024, the Secretariat acknowledged receipt of Claimant's portion of the third advance payment.

996. Whereas other investment treaties have specific provisions in connection with payment by the parties of the costs of arbitration,[994] the FTA is silent on the subject. Nonetheless, the obligation of the Parties, and of course the State to cover the costs of arbitration is clear under applicable law. Colombia is a party to the ICSID Convention, and upon agreeing to submit their dispute to ICSID, the Parties became subject to the terms of the Rules of Arbitration and ancillary rules for the proceedings.[995]

997. Article 59 of the ICSID Convention expressly provides that: "[t]*he charges payable by the parties for the use of the facilities of the Centre shall be determined by the Secretary-General in accordance with the regulations adopted by the Administrative Council*." In line thereof, Article 61(2) of the ICSID Convention establishes:

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[992] Letter of Mr. Lawrence E. Thacker to Mr. Gonzalo Flores, Acting Secretary-General of ICSID of May 9, 2023, whereby Claimant stated that it was "*experiencing financial difficulties. As a result, at the present time, … does not have sufficient available funds to make the required payment*". Claimant argued Respondent's "*deliberate and continuing refusal to comply with its clear obligations to pay in full all advance payments requested by ICSID is a clear, deliberate and continuing breach*" of several listed international obligations of Colombia.

[993] Letter from Mr. Gonzalo Flores, Acting Secretary-General, to the Parties, August 11, 2023.

[994] For example, the Comprehensive Trade and Economic Agreement between Canada and the European Union, signed on October 30, 2016.

[995] **Exhibit C-001**, Free Trade Agreement between Canada and Colombia, Art. 822(1): Submission of a Claim to Arbitration "*1. Except as provided in Annex 822, a disputing investor who meets the conditions precedent in Article 821 may submit the claim to arbitration under:*
(a) the ICSID Convention and the ICSID Rules of Procedures for Arbitration Proceedings, provided that both the disputing Party and the Party of the disputing investor are parties to the ICSID Convention;[…]"

> *(2) 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.*

998. The Rules of Arbitration further provide the right of the Tribunal to decide on the advances to be made to cover the costs of the proceedings. Rule 28 of the Rules of Arbitration provides:

> *Rule 28*
>
> *Cost of Proceeding*
>
> *(1) Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide:*
>
> *(a) at any stage of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 14, of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre;*
>
> *(b) with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties.* [Emphasis added]

999. The Administrative and Financial Regulations of ICSID – adopted by the Administrative Council pursuant to Article 6(1)(a) of the ICSID Convention, address the duty in a clear manner:

> *Regulation 14 (Direct Costs of Individual Proceedings)*
>
> *…*
>
> *(3) In order to enable the Centre to make the payments provided for in paragraph (2),*[996] *as well as to incur other direct expenses in connection with a proceeding (other than expenses covered by Regulation 15):*
>
> *(a) the parties shall make advance payments to the Centre as follows:*
>
> *(i) initially as soon as a Commission or Tribunal has been constituted, the Secretary-General shall, after consultation with the President of the*

[996] Paragraph (2) establishes that "[a]*ll payments, including reimbursement of expenses to the following shall in all cases be made by the Centre and not by or through either party to the proceeding: (a) members of … Tribunals …; (c) members of the Secretariat of the Centre, including persons (such as interpreters, translators, reporters or secretaries) especially engaged by the Centre for a particular proceeding ….*"

> *body in question and, as far as possible, the parties, estimate the expenses that will be incurred by the Centre during the next three to six months and request the parties to make an advance payment of this amount;*
>
> ....
>
> *(d) in connection with every conciliation proceeding, and in connection with every arbitration proceeding unless a different division is provided for in the Arbitration Rules or is decided by the parties or the Tribunal, each party shall pay one half of each advance or supplemental charge, without prejudice to the final decision on the payment of the cost of an arbitration proceeding to be made by the Tribunal pursuant to Article 61(2) of the Convention. All advances and charges shall be payable, at the place and in the currencies specified by the Secretary-General, as soon as a request for payment is made by him. If the amounts requested are not paid in full within 30 days, then the Secretary-General shall inform both parties of the default and give an opportunity to either of them to make the required payment.* [Emphasis added]

1000. The latest amendments to the ICSID Regulations and Rules adopted by the Administrative Council that came into effect on July 1, 2022, confirm the duty to make payment, now contained in Regulation 15.[997]

1001. According to the above provisions, the parties to a particular arbitration proceeding administered by ICSID may agree to a different distribution, or the tribunal to such proceeding may establish another share with justified reasons depending on the relevant case. *But failing such agreement or determination of the tribunal, the parties shall pay one half of each of any advance or supplemental advance*. The Tribunal notes that no such agreement was reached among the Parties.

1002. Procedural Order No. 1 issued by this Tribunal on December 10, 2019, confirms the principle in connection with costs and advance payments to ICSID:

> *Section 9*
>
> *9.1 The parties shall cover the direct costs of the proceeding in equal parts, without prejudice to the final decision of the Tribunal as to the allocation of costs.*

[997] Regulation 15(2) provides essentially the same language: "*In conciliation proceedings, each party shall pay one half of the payments referred to in paragraph (1)(b) and (c). In arbitration proceedings, each party shall pay one half of the payments referred to in paragraph (1)(b) and (c), unless a different division is agreed to by the parties or ordered by the Tribunal. Payment of these sums is without prejudice to the Tribunal's final decision on costs pursuant to Article 61(2) of the Convention*."

> *9.2 By letter of September 26, 2019, ICSID requested that each party pay US$200,000 (two hundred thousand United States dollars) to cover the initial costs of the proceeding. ICSID received Claimants' payment on October 7, 2019. Respondent's portion of its advance payment had not been received up to the date that the First Session was held (i.e. November 26, 2019).*
>
> *9.3 ICSID shall request further advances as needed. Such requests shall be accompanied by a detailed interim statement of account.* [Emphasis added]

1003. It is relevant to mention that the terms of Procedural Order No. 1 were consulted with the Parties, and these were discussed amongst them. In this connection, on October 14, 2019, the Secretary of the Tribunal sent to both Claimant and Respondent the draft Procedural Order No. 1 "*to facilitate the parties' preparation for the first session*" that took place on November 26, 2019. The Tribunal allowed the Parties to submit their comments by October 23, 2019, but no comments were received. Considering the relevance of document, the Tribunal again invited the Parties to attempt to reach agreements on its terms and extended the deadline until November 11, 2019, which deadline was again extended until November 18, 2019. Although Respondent made comments to Procedural Order No. 1, none referred to Section 9 above. Even during the First Session held on November 26, 2019, Respondent made some comments to Section 9, but did not object to the obligation thereunder. It is clear, therefore, that Respondent never raised an objection nor disputed its obligation to cover the ICSID costs of arbitration.

1004. Another fact that the Tribunal deems relevant in this connection is that, as described in Section II (Procedural History) above,[998] prior to the holding of the First Session and issuance of Procedural Order No. 1, on October 25, 2019, Colombia challenged the jurisdiction of the Tribunal through Respondent's Objection under Arbitration Rule 41(5), which the Tribunal rejected as reflected in its decision of December 20, 2019.

1005. In such context, Claimant submitted a letter on November 25, 2019, arguing that, since Colombia had refused to pay the advance for costs, Respondent was in breach not only of the FTA, but also of the Arbitration Rules and the ICSID Administrative and Financial Regulations. Thus, Claimant contended, Respondent had no right to a hearing on, or an adjudication of Respondent's Objection under Arbitration Rule 41(5). Claimant requested the Tribunal to dismiss the objection or, in the alternative, stay it indefinitely until such time as payment was made.

[998] *See supra* ¶¶ 22-30.

1006. At its First Session held on November 26, 2019, the Tribunal heard oral arguments from the Parties in respect to Claimant's request to dismiss Respondent's Objection due to lack of payment of the initial call for funds.

1007. In its Decision on Respondent's Preliminary Objection Pursuant to Rule 41(5) of December 20, 2019, the Tribunal considered the failure of Respondent to make payment of the required advance, and raised the following in its analysis:

> *85. This request was filed by the Claimant the day prior to the first session held by telephone conference among the Parties and the Tribunal. The Tribunal offered the Respondent an opportunity to submit a written response. The Respondent, however, chose to reply orally during the telephone conference. The Respondent indicated that its failure to pay was not a rejection of its obligations under the Canada-Colombia FTA, the ICSID Arbitration Rules or the ICSID Administrative and Financial Regulations, and added that Regulation 14(3)(d) of the ICSID Administrative and Financial Regulations invoked by the Claimant does not support the consequence suggested by the Claimant.*
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> *86. The Tribunal takes note that the delay in payment in this case is not significant and, therefore, believes that there is no reason at this time to dismiss or stay the analysis of the Respondent's Objection or take other action. The Tribunal, however, will continue to monitor the situation with the Secretariat. If payment is not made in full, the Acting Secretary-General may proceed with the options contained in Regulation 14(3)(d) and give an opportunity to either Party to make the outstanding payment.*

1008. In the Decision on Respondent's Preliminary Objection Pursuant to Rule 41(5), the Tribunal rejected both objections of Respondent based on the arguments, thus electing not dismiss or to stay the objection based on the non-payment of the first advance. However, the Tribunal decided (Section VI(iv)) that: "[t]*he determination of costs is deferred to a later stage in the proceedings*."

1009. Each request for an advance made by the Secretary of the Tribunal was supported expressly by the above Regulation and Section 9.3 of Procedural Order No. 1.

1010. Article 61(2) of the ICSID Convention allows tribunals discretion to allocate all costs of the arbitration, including attorney's fees and other expenses between the Parties as it deems appropriate. In exercising this discretion, ICSID tribunals tend to take into account the outcome of the arbitration, the length and complexity of the proceedings and the parties' procedural conduct.

1011. The Tribunal has considered all the circumstances of the case and observes, in particular, that: (i) Claimant prevailed on all of the objections to jurisdiction submitted by Respondent, including Respondent's Objection under Arbitration Rule 41(5) and each of the six additional objections examined in this Award; and (ii) Respondent prevailed on the claims for alleged breach of FTA obligations.

1012. The Tribunal has also considered that Respondent has willfully ignored each of the requests for payment of the advances towards the ICSID costs of arbitration determined by the Tribunal and transmitted to the Parties by the Secretary of the Tribunal. Repeated reminders were likewise ignored. With its conduct, Respondent forced Claimant to make payment of Respondent's share of the costs of arbitration under the risk of having the proceedings suspended or even discontinued. Such risk actually materialized on August 11, 2023, when the Acting Secretary-General of ICSID advised the Parties that the proceeding was suspended for non-payment, and further cautioned that if failure continued, the proceeding was to be discontinued.

1013. This clearly placed a considerable burden upon Claimant who had presented a non-frivolous claim against Colombia. If it failed to cover not only its own ICSID costs of arbitration (plus Claimant's legal costs and expenses), but also those of Respondent, it was threatened under applicable rules to have its claim discontinued.

1014. A claimant should not be placed in this position. When a State enters into a free trade agreement (or other bilateral investment treaty) providing for the protection of investments in its territory, and consents to submit to arbitration any claim brought thereunder, it is bound to abide to the rules imposed by its consent. This includes, but is not limited to, timely and fully pay for its share of the costs of arbitration. It is not voluntary for the State to choose whether or not to pay.

1015. The Tribunal believes that ignoring the requests by the relevant arbitral tribunal to cover its share of the costs of arbitration constitutes a breach to its treaty obligations, but also to conduct itself in good faith during the proceedings, because such inaction risks the integrity of the proceeding. As was the case in this arbitration, had Claimant not made payment of Respondent's share of the ICSID costs of arbitration, the proceedings would have been discontinued.

1016. The Tribunal acknowledges that it is a legitimate concern of a State to be reimbursed for the costs and expenses of an arbitration. Some States face multiple claims for measures taken in good faith and are nonetheless required to cover the arbitration costs of each such proceeding. This is also a financial and budgetary burden upon States. But this commitment

and contingency needs to be weighed at the time any State enters into an international agreement for the protection of investments made in its territory.

1017. Naturally, States that submit to arbitration should be compensated for their costs and expenses if they prevail in the proceedings. And tribunals regularly rule in favor of States, ordering claimants to pay their costs and expenses. The Tribunal is aware that it may be difficult for a State to pursue a claimant for payment of such amounts when the relevant investor may, for example, not have sufficient assets and the costs of the proceeding were even financed by a third party, with the result that, at the end of the arbitration there is no asset to pursue. There are, however, mechanisms available to States to address such situation, including the petition to the tribunal to issue an interim measure to ensure that funds shall be available to collect on any such decision. In this case, Colombia did not request the Tribunal to issue any such measure. Rather it decided to take on its own hands the decision of whether to pay the advances to cover ICSID costs, and willfully decided not to.

1018. In light of the foregoing, in the exercise of the discretion granted to it by Article 61(2) of the ICSID Convention, the Tribunal orders that each Party bears its own professional fees and disbursements incurred in this Arbitration, and one half of the ICSID costs of arbitration.

1019. The Tribunal notes that the tribunal in *Red Eagle Exploration Limited v. Republic of Colombia* reached the same decision on costs under similar circumstances.[999]

1020. Accordingly, the Tribunal orders Respondent to reimburse USD 504,257.74 for its corresponding share of arbitration costs.

XIII. AWARD

1021. For the reasons set forth above, the Tribunal unanimously decides as follows:

(1) The Tribunal has jurisdiction to hear the claims of alleged breach to the FTA brought by Claimant, and therefore the jurisdictional objections of Respondent are rejected.

(2) The Respondent has not breached its obligations to Articles 805 and/or 811 of the FTA.

(3) The Tribunal orders Respondent to pay Claimant the amount of USD 504,257.74 as reimbursement of its share of ICSID costs of arbitration paid by Claimant.

[999] *Red Eagle Exploration Limited v. Republic of Colombia*, ICSID Case ARB/18/12, Award, February 28, 2024, ¶¶ 439-443.

[Signed]

Mr. Alfredo Bullard
Arbitrator
Date: June 7, 2024

Prof. Brigitte Stern
Arbitrator
Date:

Mr. Eduardo Siqueiros T.
President of the Tribunal
Date:

[Signed]

Mr. Alfredo Bullard
Arbitrator
Date:

Prof. Brigitte Stern
Arbitrator
Date: June 7, 2024

Mr. Eduardo Siqueiros T.
President of the Tribunal
Date:

Mr. Alfredo Bullard
Arbitrator
Date:

Prof. Brigitte Stern
Arbitrator
Date:

[Signed]

Mr. Eduardo Siqueiros T.
President of the Tribunal
Date: June 7, 2024