INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

ECO ORO MINERALS CORP.

the Claimant

and

THE REPUBLIC OF COLOMBIA

the Respondent

ICSID Case No. ARB/16/41

PARTIAL DISSENT OF PROFESSOR PHILIPPE SANDS QC

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1. This case turns on a struggle between competing societal objectives which pull in opposite directions: on the one hand, the protection of the treaty rights of an international investor; on the other hand, the ability of a community to take legitimate measures to conserve its environment. In the present matter, the issues which are presented to the Tribunal concern the lawfulness of the approach taken by the government of Colombia, on behalf of the Respondent, to reconcile the protection of the Santurbán Páramo with the rights granted to Eco Oro, the Claimant, under the 2008 Free Trade Agreement between Canada and the Republic of Colombia, which entered into force on 15 August 2011 (the FTA).

2. The dispute is centred on measures adopted by Colombia to protect the Santurbán Páramo, a high mountain ecosystem. The páramo is known to provide a significant role in maintaining biodiversity, with a unique capacity to retain, restore and distribute water across extended areas. This function is of great importance for the broader ecosystems, and for human populations. There is no dispute as to the significance of the páramos of Colombia, or that they represent a majority of such ecosystems around the world, and that they are subject to established and far-reaching protections under the laws of Colombia and international law.

3. The FTA between Canada and Colombia has evidently been drafted with care, to ensure that measures properly taken to protect the respective environments of the two countries are not undermined by rights granted to foreign investors. This shared concern for the environment is reflected in the FTA's specific provisions on (i) applicable law,[1] (ii) police powers,[2] and (iii) exceptions.[3]

[1] Free Trade Agreement between Canada and the Republic of Colombia (signed on 21 November 2008 and entered into force on 15 August 2011) (**Exhibit C-22**; see also **Exhibit R-137**), Article 832 (the Tribunal "shall decide the issues in dispute in accordance with [the FTA] and applicable rules of international law").
[2] *Id.*, Annex 811(2)(b) ("Except in rare circumstances, such as when a measure or series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted in good faith, non-discriminatory measures by a Party that are designed and applied to protect legitimate public welfare objectives, for example … the protection of the environment, do not constitute indirect expropriation").
[3] See *id*., Article 2201(3) ("For the purposes of Chapter Eight (Investment), subject to the requirement that such measures are not applied in a manner that constitute arbitrary or unjustifiable discrimination between investment or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary: … (c) For the conservation of living or non-living exhaustible natural resources").

4. The Tribunal has concluded that it has jurisdiction over the claims brought by Eco Oro, and (by a majority) that the indirect expropriation claim submitted under Article 811 of the FTA should be dismissed, having regard to the provisions of Annex 811(2)(b) on police powers. I support these conclusions. A majority of the Tribunal has further concluded that the claim brought by Eco Oro in respect of Article 805 of the FTA should succeed. I respectfully disagree with this conclusion. The approach taken by the majority fails to respect the text agreed by the drafters of the FTA, and is likely to undermine the protection of the environment.

Article 805

5. Article 805(1) of the FTA provides:

> "Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."

This language makes clear – as the Majority recognises – that the standard of protection which has been granted to the investor is the Minimum Standard of Treatment ('MST'), the one that exists in customary international law. The standard to be applied by the Tribunal is not the Fair and Equitable Treatment ('FET') standard, one that is to be found and applied in other investment protection agreements. The parties to the FTA have reinforced the distinction between the two different standards by the authoritative interpretation of Article 805 and MST adopted in 2017 by the Joint Commission established under the FTA; this confirms that the investor has "the burden to prove a rule of customary international law invoked under Article 805".[4]

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

6. As acknowledged by both the ICJ and the ILC, the fact that the FET provision can be found in a number of treaties is not enough to affect the content of customary international law.[5] Indeed, the widespread inclusion of FET provisions supports the opposite conclusion, as states which include such provisions in their treaties may be understood as expressing a desire to depart from the standard in customary international law. As with all rules of customary international law, the crucial issue is whether there is sufficient evidence of state practice and *opinio juris* to support the conclusion of the existence of a rule of customary law. As noted below, the majority has made no effort to address that evidentiary requirement, ignoring the explicit requirement of the FTA drafters that the Claimant must prove the content of the rule of customary international law invoked under Article 805.

7. In the past, certain tribunals have − accidentally or deliberately − sought to equate or meld the MST and FET standards. The two standards may share a common aim of imposing restrictions on the manner and extent to which a state is required to treat a foreign investor in its territory, but they do so to in different ways. A breach of the customary MST standard would invariably give rise to a breach of the FET standards, but the reverse is generally not the case. This is because the MST standard sets a much higher bar.

8. The position was stated with care and clarity in 1981, by F.A. Mann, who wrote:

> "The terms 'fair and equitable treatment' envisage conduct which goes far beyond the minimum standard and afford protection to a greater extent and according to a much more objective standard than any previously employed form of words. A tribunal would not be concerned with a minimum, maximum or average standard. It will have to decide whether in all circumstances the conduct in issue is fair and equitable or unfair and inequitable. No standard defined by other words is likely

[5] *Ahmadou Sadio Diallo (Guinea v Democratic Republic of the Congo)*, Preliminary Objections, (2007) ICJ Rep 582, at para 90 (discussing rules of diplomatic protection); ILC, 'Report of the International Law Commission on the Work of its 70th Session (30 April – 1 June and 2 July - 10 August 2018) UN Doc A/73/10, 143-146.

> to be material. The terms are to be understood and applied independently and autonomously."[6]

Dr Mann's conclusion, which is as pertinent today as when it was written, does not mean that the law on MST is set in stone, or is static. It does mean, however, that there is a cardinal distinction between the two standards, and in carrying out its task the duty of a tribunal is bound to take that distinction and apply it to the facts of the case. A failure to do so amounts to a departure from the intentions of the drafters of the FTA. As the Joint Commission has made clear, the burden is on the Claimant to prove the content of the customary rule, and that the standard it sets forth has not been met. A tribunal that melds the two terms, or which misapplies one standard (MST) by applying the conditions of the other (FET), or which fails to satisfy itself that the Claimant has met its requisite burdens of proof, or which fails to give effect to the intentions of the drafters, risks adopting an approach which might be said to manifestly exceed its powers.

9. In the present case, the Claimant has not met the burden of showing sufficient state practice, independent of the mere existence of FET provisions in modern investment treaties, to establish that the customary standard has evolved so as to be identical (or similar) to the FET standard. Nor has the Claimant offered any plausible evidence on the requisite *opinio juris*. In so proceeding, the Claimant has not engaged with the deliberate and explicit drafting choice made by the parties to the FTA, one that is premised on the customary standard (MST) continuing to have its own identity, autonomy and component elements.

10. The tribunal in *Glamis Gold v United States of America* noted that although the exact formulation of the MST in the old case of *Neer* is no longer directly applicable as such, the customary standard it articulated has not radically changed.[7] That conclusion is surely right. As outlined by the Majority in this case, the starting point in determining whether a state's conduct has breached the MST is whether it has acted in a way which is "arbitrary or grossly unfair or discriminatory, or otherwise inconsistent with the

[6] F. A. Mann, 'British Treaties for the Promotion and Protection of Investments' (1981) 52 *British Yearbook of International Law* 241, 244.
[7] *Glamis Gold, Ltd v United States of America*, UNCITRAL, Award (8 June 2009) (**Exhibit CL-59**), para 21.

customary international law standard".[8] The state's conduct must be "egregious and shocking",[9] and lead to an outcome which "offends judicial propriety".[10] In applying the standard it is important that a tribunal's analysis is made "in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders".[11] The Claimant has offered no plausible evidence to support a different standard, and the Majority Decision has cited no authority or evidence to support its conclusion. Whilst a finding of bad faith or malicious intention on the part of the state is not required, the threshold for finding a breach of the MST nevertheless remains very high, such that a finding that it has been breached must be based on facts which are truly exceptional. Although the ordinary decision-making processes of states may result in a breach of the FET standard, a breach of the MST is not an everyday occurrence and should be found only in truly egregious circumstances.[12]

11. The Majority has sought to construct its finding of a breach of the MST on three intertwined strands of reasoning: first, that the Respondent breached the Claimant's legitimate expectations; second, that the Respondent failed to provide a stable and predictable legal environment; and third, that the Respondent acted arbitrarily in its dealing with the Claimant. The approach is novel. I disagree with the Majority's reasoning in relation to all three strands, as there is no evidence to support the approach to the MST standard, or the finding that there has been a breach of it.

Legitimate Expectations

12. The notion of legitimate expectations has become a frequent and controversial issue in investment treaty disputes. It has become a recognised element of the FET standard, but its role in the context of an MST inquiry is not yet established.

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[8] *Mobil Investments Canada Inc and Murphy Oil Corporation v Government of Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (22 May 2012) (**Exhibit CL-179**), para 153.
[9] *Glamis Gold Ltd v United States of America*, UNCITRAL, Award (8 June 2009) (**Exhibit CL-59**), paras 616 and 627.
[10] *Waste Management Inc v United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004) (**Exhibit RL-64**), para 98.
[11] *S.D. Myers v Government of Canada*, UNCITRAL, Partial Award (13 November 2000) (**Exhibit RL-55**), para 263.
[12] *Mobil Investments Canada Inc and Murphy Oil Corporation v Government of Canada (I)*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (22 May 2012) (**Exhibit CL-179**), para 153.

13. First, as acknowledged by the Majority, in the context of the MST the failure to observe a claimant's legitimate expectations is just one factor a tribunal may take into account in determining whether there has been a breach of the MST.[13] The claimant must still show that the failure to observe its legitimate expectations was, in the circumstances, serious enough to amount to egregious and shocking behaviour.

14. Second, and more pertinently, if legitimate expectations are to have any place in the context of MST, the concept will have a more limited role than in relation to FET. Unlike in a FET inquiry, there is no authority for the proposition that it will be sufficient for a claimant to point to reliance on legislative provisions or broad statements. Rather, the limited jurisprudence that exists (in the NAFTA context) indicates *inter alia* that a claimant must be able to establish a "quasi-contractual" relationship or expectation,[14] in the sense that the state must have made "explicit" or "specific" encouragements or representations on which the investor has placed reliance.[15] The Majority's analysis fails to acknowledge or address this requirement, and in so doing has in effect conflated the FET and MST.

15. The Majority concludes that the Claimant had three legitimate expectations: (i) it would be entitled to undertake mining exploitation activities in the entirety of the area covered by Concession 3452; (ii) in the event that the State were to expropriate Eco Oro's acquired rights, compensation would be payable; and (iii) that Colombia would ensure a predictable commercial framework for business planning and investment.

16. With regard to (i), there is no evidence before the Tribunal to establish that the Respondent gave a "quasi-contractual" commitment that the Claimant would have the right to exploit the entirety of the Concession area. Indeed, the right to exploit was premised on the relevant environmental authorisations being obtained, in circumstances in which the Claimant was aware at the time of its investment that the grant of such

[13] *Glamis Gold Ltd v United States of America*, UNCITRAL, Award (8 June 2009) (**Exhibit CL-59**), para 627.
[14] *Glamis Gold Ltd v United States of America*, UNCITRAL, Award (8 June 2009) (**Exhibit CL-59**), paras 766 and 799; *Cargill Incorporated v United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009) (**Exhibit RL-81**), para 290.
[15] *Glamis Gold Ltd v United States of America*, UNCITRAL, Award (8 June 2009) (**Exhibit CL-59**), para 767; *Mobil Investments Canada Inc and Murphy Oil Corporation v Government of Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (22 May 2012) (**Exhibit CL-179**), para 152.

authorisations was uncertain. To get around this fact, the Majority relies mainly on general statements of encouragement from certain of the Respondent's ministers and officials, as well as the mere fact of the granting of the Concession, but neither gives rise to a "quasi-contractual" relationship. As the Tribunal acknowledges in relation to the expropriation claim, the Claimant was aware, or should have been aware, of the existence and effect of the páramo in the Concession area; that the Respondent was committed to the protection of the environment, and that its right or ability to go beyond exploration to exploit the Concession area was subject to the overriding need to protect the environment. Considering that, in its analysis of the Art 811 claim, these same facts led the Tribunal to conclude that the Claimant had not received a specific assurance or representation such as to give rise to a legitimate expectation,[16] it is wholly inconsistent for the Majority to reach a different conclusion in its analysis of the Art 805 claim.

17. Likewise, I do not believe that there was any quasi-contractual commitment with regard to expectations (ii) and (iii). The Claimant has not pointed to any specific assurances that it would receive compensation in the event of an expropriation, or that the Respondent would ensure a predictable framework for planning and investing. Any investor could claim to have such 'expectations' on the basis of the Respondent's domestic law and general statements from ministers and officials, but these would not be protected under the MST. I find the reference to expectation (ii) particularly odd given that the Tribunal has concluded that no expropriation has taken place. The concepts of stability and predictability, which underpin expectation (iii), are addressed below.

18. There is a further difficulty with the majority's conclusion that the Respondent has violated the Claimant's legitimate expectations under MST (and 805). The Tribunal has recognised that: (1) in order to rely on a claim of legitimate expectation (under FET) an investor must show that its expectation would have been shared by a "prudent" or "reasonable investor", and to that end it must have engaged in some sort of due diligence;[17] (2) there is nothing in the record before it to show that any due diligence

[16] Tribunal's Decision, para 694.
[17] See Tribunal's Decision, paras. 681, 762; see *Antaris & Göde v Czech Republic*, PCA Case No. 2014-01, Award of 2 May 2018, para. 360(6): "in order to rely on legitimate expectations the investor should inquire in advance regarding the prospects of a change in the regulatory framework in light of the then prevailing or reasonably to be expected changes in the economic and social conditions of the host State."

was undertaken by Eco Oro in respect of any of the representations upon which it was said to have relied;[18] (3) "the most cursory due diligence even before Concession 3452 was granted would have revealed *(i)* the potential existence of a páramo ecosystem within the boundaries of Concession 3452; *(ii)* the Government's commitment and obligation to protect these ecosystems; and *(iii)* that such protection could be achieved by the imposition of a mining ban";[19] (4) Eco Oro had no "distinct reasonable investment backed expectations that exploitation would be permitted in the entirety of the concession area";[20] and (5) an appropriate due diligence exercise would have advised Eco Oro "that Colombia could retrospectively impose a mining ban on all or part of Concession 3452 to protect a páramo ecosystem".[21] Yet notwithstanding these rather clear conclusions, largely in relation to the failed Article 811 claim, the majority nevertheless concludes that Eco Oro had a legitimate expectation in relation to MST, on which it could rely notwithstanding the total absence of any exercise of due diligence. In reaching its conclusion (at paras. 804 and 805 of the Decision), the majority passes in silence on due diligence.[22]

Stability and Predictability

19. The Majority's reliance on the concepts of stability and predictability are no less problematic. Despite the Majority's tendency to refer to the concepts separately, they are closely interconnected and cannot really be said to be distinct in any meaningful sense; indeed, it is not clear from the Decision what the Majority understands to be the difference between stability and predictability. In any case, the obligation to provide stability or predictability has no foundation in the FTA or in the case law on the MST. In its initial explanation of the MST, the Majority makes no mention of matters of legal or regulatory stability; indeed, at various parts of the Decision, including at paragraph 749, the Majority explicitly states that the Respondent is not under an obligation to provide a stable legal framework. Yet when it comes to the application of

[18] Tribunal's Decision, paras. 682, 694, 768.
[19] Tribunal's Decision, para. 682.
[20] Tribunal's Decision, para. 694.
[21] Tribunal's Decision, para. 765.
[22] In relation to the Article 811 claim, the majority concludes that "Eco Oro could not have anticipated through due diligence the immense confusion in the applicable legal regime created by the contradictory State decisions and changing positions of different State organs" on the delimitation of the páramo (Tribunal's Decision, para. 696). In reaching this conclusion, the majority offers no evidence: it is mere assertion, unsupported by the record of the proceedings. The point is not made in relation to the Article 805 claim.

the MST standard to the facts of the case, out of nowhere the obligation of stability suddenly emerges, as though magically concocted out of thin air, with no reference to be found either to the Claimant's evidentiary burdens (on state practise or *opinio juris* in relation to the customary law standard) or any legal authority. Legal or regulatory stability is then mentioned repeatedly in the Majority's reasoning, most brightly at paragraphs 754, 762, 781, 803 and 805; this is despite that fact that legal and regulatory stability has never before been treated as part of MST, and no authority or evidence is cited for the conclusion.

20. The reliance on predictability, to the extent that it is distinct from stability, is also unsupported by any evidence or authority. The sole source which the Majority invokes in relation to the relevance of predictability is a single line in the preamble to the FTA. It is, however, widely recognised that a preambular aspiration cannot as such give rise to a hard edged or actionable obligation.[23]

21. This reliance on stability and predictability is therefore manifestly incorrect. To be sure, there is ongoing debate as to whether the FET standard encapsulates any sort of an obligation to ensure legal and regulatory stability, with the weight of jurisprudence indicating that such an obligation only exists where the FET provision in question explicitly mentions stability. Without such clear language, most tribunals have recognised that international investment law does not – and cannot, and should not – freeze the regulatory environment of a host state, and must not act in effect as a mechanism of insurance system for investors.[24] The decision of treaty parties – as in this FTA – not to include a stability clause in an international agreement is one that a Tribunal must take seriously, as it represents a deliberate choice of the drafters to preserve a greater degree of regulatory discretion. The same goes for domestic

[23] *Cargill Incorporated v United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009) (**Exhibit RL-81**), paras 289-290.
[24] *MTD Equity Sdn. Bhd and MTD Chile S.A. v Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment (21 March 2007), para 67; *Mobil Investments Canada Inc and Murphy Oil Corporation v Government of Canada (I)*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (22 May 2012) (**Exhibit CL-179**), para 153; *Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum (9 March 2020), para 584.

legislation. Invoking the concept of legitimate expectations, as the Majority does by way of magical thinking, cannot change this.[25]

22. These considerations apply with particular force under the customary MST, which is the standard applicable in this case. Where is the authority for the proposition that a failure to provide stability or predictability can give rise to a violation of the MST standard? The Majority has cited none. I am aware of none. The Majority has effectively engaged in judicial law-making; it has invented a new element for the identification of the customary standard which no state has appeared to have articulated, in the total absence of any evidence of state practise or *opinio juris*. Despite the fact that the drafters of the FTA have made it clear that in relation to Article 805 and MST a claimant must prove the customary rule, with all that implies for evidence of state practise and *opinio juris*, the Majority makes no mention of these elements in relation to the facts of stability or predictability. Without evidence of *opinion juris* or state practise, the claim to a customary standard does not get off the ground.

23. The Majority has not explained why what has happened in Colombia is contrary to the rule of law – indeed, it has done the very opposite, invoking a series of legislative and regulatory acts and ensuing litigation, including before the Constitutional Court, in its narrative. The Claimant's own witnesses and experts testified as to the existence of remedies still available to the Claimant, and the failure to pursue them, and the plausibility of decisions of the Constitutional Court, even if they do not necessarily agree with them. The comportment of Colombia may not be perfect, but in failing to provide stability or predictability it cannot be said to violate the rule of law, or customary law, or to even come close to shocking or offending a sense of judicial propriety. By concluding as it has, the Majority ignores the obvious diligence with which the Constitutional Court of Colombia addressed matters of considerable complexity, offering reasons for all of its conclusions which are drafted with evident care and balance. There is here a manifest inconsistency in the conclusions of the Majority. In the absence of an aggravating factor, such as one of Professor Schreuer's

[25] *Cargill Incorporated v United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009) (**Exhibit RL-81**), paras 289-290.

indicia, mere instability can never of itself be serious enough to give rise to a breach of the MST.

24. Consequently, I do not believe that, in itself, the stability or predictability of the domestic legal framework has any relevance in determining whether the Respondent has breached the MST.

Arbitrariness

25. I agree with the Majority that a state which acts arbitrarily may be in breach of the MST. The starting point in assessing whether a state has acted arbitrarily is the decision of the International Court of Justice in *ELSI*. In that case the Court indicated that a finding of arbitrariness was only appropriate when a state has acted contrary to the rule of law, or its conduct shocks or offends a sense of juridical propriety.[26] Similar language has also been used by investment tribunals,[27] and it continues to reflect the state of the law today. The Claimant has offered no plausible evidence to support a contrary view, and the Majority Decision has cited no authority to the contrary.

26. In assessing arbitrariness, tribunals must recognise that they should not simply substitute their own views on a particular issue for those of the host state. As stated by the tribunal in *Cargill v Mexico*, and cited by the Majority, "an actionable finding of arbitrariness must not be based simply on a tribunal's determination that a domestic agency or legislature incorrectly weighed various factors, made legitimate compromises between disputing constituencies, or applied social or economic reasoning in a manner that the tribunal criticises".[28] I fully agree with the Majority that the indicia of arbitrariness given by Professor Christoph Schreuer in *EDF (Services) Limited v Romania* are relevant to the customary MST and helpful in the present case.[29]

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[26] *Elettronica Sicula S.P.A. (ELSI)*, Judgment, I.C.J. Reports 1989 (**Exhibit CL-153 / RL-50**), p. 15, para 128.
[27] *Waste Management Inc v United Mexican States*, ICSID Case No. ARB(AF)/00/3 Award (30 April 2004) (**Exhibit RL-64**), para 98; *Glamis Gold v United States of America*, UNCITRAL, Award (8 June 2009) (**Exhibit CL-59**), para 21; *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009) (**Exhibit RL-81**), paras 285-296; *Mobil Investments Canada Inc and Murphy Oil Corporation v Government of Canada (I)*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (22 May 2012) (**Exhibit CL-179**), para 152.
[28] *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009) (**Exhibit RL-81**), para 292.
[29] *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award (8 October 2009) (**Exhibit CL-174**), para 303.

27. For the reasons outlined above, mere instability cannot amount to a breach of the MST. Beyond 'instability', the Majority's conclusion appears to turn on its view that the Respondent acted for a reason other than environmental protection, and/or that the Respondent did not act for a legitimate purpose.[30] This view seems to be based on three factors: that the Respondent referred to factors other than environmental protection in some of its decision-making processes; that there were competing approaches to the delimitation of the Santurbán Parámo in different parts of the Respondent's government; and that the Respondent has not eliminated illegal mining in its territory. In my view, these factors, whether taken individually or cumulatively, are manifestly not sufficiently grave to amount to arbitrariness, or a breach of the MST.

28. In determining whether measures taken by a state is arbitrary to the point of being shocking, tribunals must be sensitive to the difficulties of government decision-making in the face of legitimate objectives that pull in different directions. In the search for balance, and in the face of competing pressures, different arms of the same government may inevitably give expression to different and potentially conflicting priorities. As noted above, this is particularly the case when the protection of the environment or human health is at stake (one need only think of the current challenges faced by so many governments around the world as they confront the emerging reality of global warming/climate change and biodiversity losses and their consequences, or the reality of Covid-19, as governments struggle to find a way through the difficulties of protecting human health whilst also securing economic wellbeing).

29. Although states increasingly sign treaties committing themselves to the protection of the environment, they are still often under pressure to prioritise other social objectives. These competing objectives will often be economic in nature. As concern about the protection of the environment increases, states are increasingly likely to be confronted with decisions that involve complex trade-offs, making internal government debate – and changes of direction – more likely. When a government does choose to prioritise a certain interest, such as environmental protection, there are a variety of ways a policy can be designed and implemented depending on the weight a government wishes to

[30] Tribunal's Decision, paras 810 and 821.

give to other interests. Such policy decisions imply delicate balancing acts and may leave particular stakeholders disappointed or even financially worse-off. None of this, in my view, is sufficient of itself to cast doubt on the sincerity of the government's stated objectives. These decisions and their consequences are not extraordinary in any sense, but have become routine and the business of government.

30. In this context, arbitrators and judges, as well as other adjudicators, must take care to remain within the arbitral or judicial function: they must not legislate, and they must take care not to trespass into a forbidden domain by imposing their own policy preferences where the legislative branch – and perhaps also a divided executive arm – oscillates over time between competing social objectives and policy goals. I fear that the Majority has fallen into error: it has failed to take into account the realities of governmental decision-making in legitimate domains, and the clear limits imposed by the drafters of the FTA in relation to the protection of the environment, not least by imposing the application of MST with all that implies for proving the content of the customary rule.

31. On the factual record before the Tribunal, I do not consider that the behaviour of the Respondent can be characterised as having shocked or offended a sense of juridical propriety, or may be said to be contrary to the rule of law. Indeed, the Decision makes crystal clear that Colombia has acted throughout in good faith, seeking to find compromises in balancing the competing objectives of environmental protection and economic development (in this case by means of mining activity). The Decision passes in relative silence on the compelling testimony offered by witnesses, in particular Ms Brigitte Baptiste, on behalf of the Respondent. As she explained, in her capacity as Director General of the Alexander von Humboldt Institute (from 2010 to 2019), she described how the Institute contributed to the delimitation of the páramo, confirming the complexity of the task, the manner in which non-ecological factors were taken into account, and the significance and challenge of delimiting the transition zone (strip) between the páramo and other areas ("The transitional strip from any ecosystem to another one is the area where you have the most ecological exchanges, where you have the most flows because it is a border […] So, the strip is key for the operation of the ecosystem, and the strip is considered a key protection area for the páramo because this is the ecosystem that is above, and also the flow of ecosystem and, in particular,

water."[31]) Ms Baptiste's evidence on the delimitation was honest, balanced, compelling and persuasive, reflective of her integrity; it strongly supported the conclusion that the Respondent's effort to delimit the páramo may not have been perfect, but it was carried out in good faith, was motivated by genuine environmental considerations, and cannot be said to have been arbitrary. Her evidence was undamaged by cross-examination or other evidence.

32. Like many governments around the world, Colombia has found the challenge of taking reasonable measures to protect its environment to be daunting, one that takes time and is often composed of a multitude of decisions that apparently take contrary directions. At a time when the need to protect the environment is, in legal terms, a relatively recent development, it is understandable that different parts of a government may on occasion pull in different directions, or that over time contradictory legislation may be adopted, or that different judicial decisions may be handed down.

33. In the age of climate change and significant loss of biological diversity, it is clear that society finds itself in a state of transition. The law – including international law – must take account of that state of transition, which gives rise to numerous uncertainties. Adjudicators – judges and arbitrators – recognise the need to proceed with caution at a time of transition and uncertainty. Indeed, the precautionary principle has been developed to assist in the taking of decisions in times of uncertainty, and the Tribunal has correctly determined that the application of the precautionary principle – treated as being applicable as a rule of law in accordance with Article 832 of the FTA – to this case has contributed to the conclusion that there has been no actionable violation of Article 811 of the FTA. Yet in respect of Article 805, it seems that precaution has no place for the Majority.

34. To be clear, the Respondent has not acted perfectly in its management of the páramo, but the MST standard does not require it to have done so. Neither the MST nor the FTA offer a right against confusion. The Majority is correct to point out that there were problems with the manner in which the government handled the process of delimiting the Santurbán Parámo. It was slow, it was inconsistent, it was uncertain. The key

[31] Transcript, day 3, page 741, lines 7-22, and surrounding exchanges (Wednesday 22 January 2020).

question, however, is: did the process of delimitation cross the line of departing from the rule of law, or proceed on a basis that shocks our sense of juridical propriety? In my view it did not, and the heart of the Decision makes that clear, premised as it is on the view that the Respondent acted in good faith. Yet when it comes to the final and permanent delimitation of the parámo, and all the difficulties that gave rise to, including delays, the Majority has taken the evidence before the Tribunal and concluded that the Respondent was somehow not truly motivated by the aim of environmental protection. This conclusion is difficult to comprehend, given the evidence and the finding in the context of the expropriation claim that the Respondent's actions *were* motivated by a desire to protect the environment.[32]

Conclusion on Article 805

35. The Majority's finding of a breach of Article 805 appears to be based on little more than the evidence that the Respondent struggled with the compromises to be made as between different interests, with reasoning and decision-making that was not as efficient, timely or consistent as it could have been. Whilst there are legitimate criticisms to be made as to how the Respondent acted, the same criticisms may be made of any government faced with such decisions, and subject to judicial challenges at every stage. This is why the standard to be applied is paramount, as reflected in the clearly expressed intentions of the drafters of the FTA. In my view, the Majority has manifestly failed to apply the correct standard.

36. The Majority's analysis undercuts the plain meaning of the FTA and well-established principles of customary law. The effect of its approach is to significantly lower the bar, and in effect rewrite the FTA and the content and effect of MST. As the language of the ICJ in *ELSI* and other investment tribunals shows, a finding that a state has breached the MST will be rare and extraordinary.

37. It is not in dispute the protection of the parámo was a legitimate objective. The designation of the general area of the parámo in 2007 has not been impugned, and the Tribunal has recognised that the area in which mining has been prohibited has not

[32] Tribunal's Decision, paras 678 and 699.

crossed a line of impropriety or illegality under the FTA. The Claimant went into this project with its eyes open, knowing that it was investing in a parámo which was already subject to certain protections, and it knew – or should have known – that over time those protections were likely to become even more restrictive. By the time of its renewed and revised project in 2011, when it abandoned an open cast mine for an underground mine, the Claimant was well aware of the difficulties it faced. What the Tribunal impugns is merely the fact that the Respondent has failed to give precise and detailed effect in a timely manner to the permanent and final delimitation of the parámo in accordance with a particular scale, timetable and factors. By any reasonable standard, the situation faced by the Respondent, in seeking to give effect to a legitimate objective of environmental protection, was challenging. Its approach in meeting that challenge was not perfect, but it was not contrary to the rule of law, and it was not conduct that shocked or offended a sense of juridical propriety.

The 2201(3) exception

38. Having concluded that there has been no breach of either Article 805 or Article 811, I do not address the interpretation and applicability of Article 2201(3).

Retroactivity

39. Retroactivity, which has been addressed by Mr Grigera Naón as a matter of concern. As a general proposition, outside of the criminal law context it cannot be said that there is a strict rule against retroactivity. The point was addressed the tribunal in *Cairn Energy v India*,[33] a case concerned with whether retroactive tax measures violated the FET standard, independently of the doctrine of legitimate expectations. This appears to be the first decision to consider the point in any detail.[34] The tribunal rejected the proposition that a principle of legal certainty entailed an absolute prohibition against retroactive measures.[35] Instead, it stated that retroactive measures may not lead to a

[33] *Cairn Energy PLC and Cairn UK Holdings Limited v The Republic of India*, PCA Case No. 2016-7, Award (21 December 2020) (Arbs. Laurent Lévy (Pres.), Stanimir A. Alexandrov and J. Christopher Thomas QC).
[34] *Cairn Energy PLC and Cairn UK Holdings Limited v The Republic of India*, PCA Case No. 2016-7, Award (21 December 2020), para 1734.
[35] *Cairn Energy PLC and Cairn UK Holdings Limited v The Republic of India*, PCA Case No. 2016-7, Award (21 December 2020), paras 1757 and 1760.

breach of the FET when taken for the public interest and in conformity with the principle of proportionality.[36] A two stage test was suggested:

> "(i) [T]he retroactive application of a new regulation is only justified when the prospective application of that regulation would not achieve the specific public purpose sought, and (ii) the importance of that specific public purpose must manifestly outweigh the prejudice suffered by the individuals affected by the retroactive application of the regulation."[37]

Although in the context of an FET claim, the analysis in *Cairn Energy* is premised on the proposition that it is not correct to assume that retroactive measures are strictly prohibited. This is consistent with international case law and the practise of many domestic legal systems, which do not support the idea of a general principle of law (understood in the sense of Article 38 of the ICJ Statute) prohibiting retroactive measures. The better view is that of the tribunal in *Cairn Energy* – that retroactive measures are permissible if taken for the public interest and in accordance with the principle of proportionality. The fact that a measure may have retroactive effects cannot be sufficient for a tribunal to conclude that the facts of a case bring it within the "rare circumstances" so that Annex 811 does not apply. Tribunals must instead consider whether contested retroactive measures were taken in the public interest, and whether they are proportionate. This ties in with the analysis in the Decision, as stated in paras 623-699, to the effect that the measures were taken in the public interest and were proportionate.

Damages

40. Having concluded that there has been no breach of Article 805 or Article 811, in my view the question of damages does not arise. The majority having concluded otherwise, in relation to Article 805, it will be necessary to have an additional phase to identify the loss suffered by Eco Oro if any, and the methodology by which it is to be valued. In this

[36] *Cairn Energy PLC and Cairn UK Holdings Limited v The Republic of India*, PCA Case No. 2016-7, Award (21 December 2020), paras 1760 and 1788.
[37] *Cairn Energy PLC and Cairn UK Holdings Limited v The Republic of India*, PCA Case No. 2016-7, Award (21 December 2020), para 1760.

regard, as the questions put by the Tribunal make clear, the finding that Eco Oro had no right to engage in any exploitation without the grant of necessary environmental licenses, coupled with the absence of any exercise in due diligence as to what the likelihood of receiving such licences was in relation to an underground mine, makes this a not entirely straightforward task.

41. In this regard, ss to the question of acquired rights,[38] it may be that as a matter of Colombian law Eco Oro may be said to have rights that could be characterised, as the majority does, as 'acquired rights'. That characterisation, however, is of limited, if any, consequence, for the case before us, which is concerned with what right Eco Oro actually had under the FTA in relation to the concession. It had a right to explore, and it had a right to apply for an environmental license which would allow it to engage in future exploitation. It had no right, however, as such, to exploit, or to apply to extend the concession for the purpose of future exploitation, without the grant of an environmental license. Nor did Eco Oro have any right to an environmental license. To conclude, as the majority does, that Eco Oro had an 'acquired right' to exploit subject to the grant of a future (and speculative) environmental license does not, in my view, materially assist in the identification and valuation of any loss as the majority may determine to have occurred.

Professor Philippe Sands QC

09 September 2021

[38] See e.g. Tribunal's Decision, paras. 449 and 499.