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Ref. : **ECO ORO MINERALS CORP** (Claimant) and **REPUBLIC OF COLOMBIA** (Respondent). ICSID Case No. ARB/16/41

2nd Note of Dissent

1. After carefully considering the majority award on damages (the "Damages Award"), I find myself in the need of issuing this second note of dissent.

2. As stated in the Arbitral Tribunal's Decision on Jurisdiction, Liability and Directions on Quantum of 9 September 2021 (the "Decision"), the Claimant contends that the Respondent's conduct in violation of Claimant's legitimate expectations (including the maintenance of "*a stable and transparent investment environment*"[1]) protected by FET are the following measures: (i) Resolution 2090; (ii) Judgement C-35, (iii) Resolution VSC 829 and (iv) ANM's decisions and opinions[2]. The Arbitral Tribunal has accepted that "*…transparency, stability and the protection of the investor's legitimate expectations play a central role in defining the FET standard….*"[3].

3. In my view, the 9 December 2014 Resolution 2090 (the "2090 Resolution") is conduct in breach of the FET standard under BIT Article 805 (1). As set forth at para. 2 of my Note of Dissent of 9 September 2021 (the "Note"), I did not entirely share the majority Decision on the FET violation.

4. In that connection, I hereby refer to and incorporate by reference paras. 16-32 of my Note, which found that the 2090 Resolution Páramo delimitation was not a lawful exercise of Colombia's police powers under international law. Such illicit conduct is determinative both of the FET breach and the breach of BIT Annex 811 found in the Note. Such findings and conclusions are particularly relevant and meaningful in respect of the matters and issues addressed at the present stage of this arbitration, exclusively concerned, from an international law perspective, with the causation, determination and quantification of damages originated in a FET breach, i.e., irrespective of whether the exercise by Colombia of its police powers was lawful or not under Colombian national law.

5. As to damages causation, as alleged by the Claimant, the 2090 Resolution delimitation (part and parcel of Respondent's illicit conduct under international law) destroyed the Project and was thus a direct cause of damages to be compensated.

[1] Decision at para. 717.
[2] Decision at para. 716.
[3] Decision at para. 754.

6. Illicit conduct under international law cannot be brought to bear to deny application of the method to calculate damages resulting from the very breach causing damages ensuing from such conduct. Such method and the facts and circumstances taken into account to determine and value damages flowing from the Respondent's illicit conduct cannot be neutralized by the causative effects of the Respondent's illicit conduct (i.e., the 2090 Resolution) itself. This is consistent with the principle that reparation must, as far as possible, restore the situation that would have existed had the illegal act not been committed[4].

7. Therefore, the fact that transactions considered when applying the Comparative Transactions Method ("CT Method") respectively took place in February 2011 and October 2012 (well before 8 August 2016, the valuation date) is not relevant, not only for the above reasons, but also because the Respondent has not shown changes in the market between such dates and the date of valuation (2016) adversely affecting the market bases for the Claimant's damages calculation. On the contrary, as set forth by the Claimant in its Reply to the Arbitral Tribunal Questions[5], a transaction of 21 March 2022 for the sale of a minority interest in one of the properties considered when applying the CT Method yielded an acquisition price close to a billion US$, a circumstance showing that the CT Method applied by the Claimant and its economic outcome are both persuasive and correct.

8. Further circumstances (in part addressed below) militate in favor of reaching the above conclusions, because, as set forth in the Damages Award[6], "*the majority of the Tribunal accepts that Colombia may be benefitting from its failure to issue a final delimitation of the Santurbán Páramo given it is the absence of the final delimitation that prevents the Tribunal from assessing the percentage likelihood that economic exploitation could have been possible*".

9. The Claimant claims it had acquired rights to explore and exploit within the entirety of Concession 3452 (the "Concession")[7]. In furtherance of its acquired rights, the Claimant alleges that Respondent's conduct created uncertainty as to the Claimant's rights under the Concession, including as a result of the 2090 Resolution[8]. In addition to curtailing the Claimant's rights, this Resolution "*….created uncertainty; it was unclear what these detailed guidelines and documents would consist of and thus to what extent they would impact on mine planning or how PMAs of grandfathered projects would be amended and whether they would be made stricter*"[9]. This Resolution created *widespread level of uncertainty* as to the Claimant's Concession rights[10].

[4] *Factory of Chorzów,* Judgment, PCIJ Series A, No. 17, 13 September 1928, at 47.
[5] At para. 6 (b).
[6] At para. 317.
[7] Decision, at para. 499.
[8] Decision, at para. 502.
[9] Decision at para. 507.
[10] Decision at paras. 514, 515, 520.

Also, implementing Resolution 2090 delimitation would be disproportionate to the legitimate interest in protecting the Páramo ecosystem[11].

10. In my opinion, the arbitral record substantiates the Claimant's allegations referred to above.

11. As indeed set forth in the Decision, the level of uncertainty prejudicial to the Claimant's rights inaugurated by the 2090 Resolution is a clear source of "*… a level of adverse economic impact on Eco Oro's covered investment…*"[12]. Although the Decision (of which I dissented in this respect) concluded that the Respondent's conduct did not constitute an expropriation, the 2090 Resolution is in itself conduct in breach of FET causing damages and entitling to damage compensation.

12. As established in the Decision, the main source of uncertainty as to the Claimant's rights (already present in connection with the 2090 Resolution and the 2090 Atlas[13], the latter is an attachment and integral part of the 2090 Resolution cartographically representing the delimitation of the Santurbán Páramo[14]) was the lack of a lawfully compliant delimitation of the Santurbán Páramo, for which the Respondent was solely responsible[15], as accepted by Colombia's Attorney General[16] and confirmed by other circumstances set forth in the Decision, including the unexplained coordinates released as the 2090 Atlas and other errors as to the 2090 Atlas boundaries[17], the existence and continuation of which was confirmed by Decision T-361 of the Colombian Constitutional Court that struck down the 2090 Resolution[18] (although the 2090 Resolution was struck down, such Resolution was already in itself Colombia's conduct rendering the foreign investor's rights uncertain and confused and not later purged by Colombia). It should be noted that such conduct and its corresponding detrimental effects to such rights persisted after the issuance of the Colombian Constitutional Court decision and, apparently, persist until now.

13. These, among other things further described in the Decision, led to the Arbitral Tribunal's finding that "*Eco Oro's description of being on a regulatory roller-coaster to be apt*"[19]. The normative and regulatory framework confusion was further illustrated by remarks of Colombia's Minister of Mines[20], including whether mining activities were permitted in the restoration and sustainable use areas of the Páramo, already evidenced by the 2090 Atlas[21].

[11] Decision at para. 570.
[12] Decision at para. 630.
[13] Decision at para. 777.
[14] Decision at para. 505.
[15] Decision at paras. 775, 778.
[16] Decision at paras. 779, 780, 781,782.
[17] Decision at paras. 781, 782, 783.
[18] Decision at para. 799.
[19] Decision at para. 791.
[20] Decision at para. 793.
[21] Decision at para. 795.

14. As the Decision shows, such continuing conduct - actions or omissions - has not been discontinued [22]; as also found by the Decision, a central part of such conduct was the Santurbán Páramo delimitation "*…by the discredited 2090 Atlas*"[23], a basic component of the 2090 Resolution.

15. In sum, the issuance of the 2090 Resolution and the accompanying 2090 Atlas constitute illicit conduct attributable to Colombia in violation of the Claimant's legitimate expectations protected by the FET standard under international law which: a) was not cured by later conduct of the Respondent; b) denoted the failure of Colombia to "*…ensure a predictable commercial framework for business planning and investment…*" [24]; and c) was a direct source of damages caused by the Respondent the Claimant has the right under international law to be fully compensated for. In view of the above conclusions, arbitral and other fees and costs are to be borne by the Respondent.

Horacio A. Grigera Naón

Date: March 2024.

[22] Decision at para. 810.
[23] Decision at para. 811.
[24] Decision at paras. 801-805.