INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID Case No. ARB/16/41

ECO ORO MINERALS CORP. V. REPUBLIC OF COLOMBIA

AWARD ON DAMAGES

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15 July 2024

Tribunal:
Juliet Blanch (President)
Horacio A. Grigera Naón (Appointed by the investor)
Philippe J. Sands (Appointed by the State)

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I. INTRODUCTION[1]

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of Section B of Chapter Eight of the Free Trade Agreement between Canada and the Republic of Colombia, signed on 21 November 2008 and which entered into force on 15 August 2011 (the "**FTA**" or the "**Treaty**")[2] and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States dated 18 March 1965, which entered into force on 14 October 1966 (the "**ICSID Convention**").

2. The instant award is rendered further to the Decision on Jurisdiction, Liability and Directions on Quantum issued by the Tribunal on 9 September 2021 ("**Decision**"). The Decision constitutes an integral part of this Award and it is hereby incorporated as **Annex A**. The Decision sets out the full procedural background of this arbitration, the factual background to the dispute, the submissions made by the Parties and the Parties' respective requests for relief. In consequence, none of that is repeated here. An updated chronology of relevant facts is provided under **Annex B**.

3. In this Award, unless the context otherwise requires, the Tribunal adopts the abbreviations used in the Decision.[3]

A. The Parties

4. The claimant is Eco Oro Minerals Corp. (formerly known as Greystar Resources Limited ("**Greystar**")), a corporation constituted under the laws of British Columbia, Canada, and trading publicly on the Canadian Securities Exchange (formerly, on the Toronto Stock Exchange), with its registered address at Suite 300-1055 West Hastings Street, Vancouver, BC V6E 2E9, Canada ("**Eco Oro**" or the "**Claimant**").[4]

5. The respondent is the Republic of Colombia, a sovereign State ("**Colombia**" or the "**Respondent**").

6. The Claimant and the Respondent are collectively referred to as the "**Parties**". The Parties' representatives and their addresses are listed above on page (i).

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[2] 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**); and Circular No. 024 of the Directorate of Foreign Commerce of the Ministry of Commerce concerning the entry into force of the Treaty (3 August 2011) (**Exhibit C-21**). See also Canada-Colombia Environment Agreement (also signed on 21 November 2008 and in force on 15 August 2011) (**Exhibit R-138**).

[3] Decision, pp. ix-xvii.

[4] For ease of reference, the Tribunal refers to the Claimant as Eco Oro even when referring to actions undertaken before it had changed its name from Greystar to Eco Oro.

B. The Arbitral Tribunal

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. Pursuant to the Parties' agreed method of constitution, failing an agreement of the Parties on the presiding arbitrator, she or he would be appointed by the Secretary-General of ICSID, without limitation to the ICSID Panel of Arbitrators.

8. The Tribunal is composed of:
a. Ms Juliet Blanch, a national of the United Kingdom, President, appointed by the Secretary-General pursuant to the Parties' agreement. Ms Blanch's contact details are as follows:

Ms Juliet Blanch
Lamb Building
3rd Floor South
Temple
London
EC4Y 7AS
United Kingdom

b. Professor Horacio A. Grigera Naón, a national of Argentina, appointed by the Claimant. Professor Grigera Naón's contact details are as follows:

Professor Horacio A. Grigera Naón
5224 Elliott Road
Bethesda
Maryland 20816
United States of America

and

c. Professor Philippe Sands KC, a national of France, the United Kingdom and Mauritius,[5] appointed by the Respondent. Professor Sands' contact details are as follows:

Professor Philippe Sands KC
11KBW
11 Kings Bench Walk
Temple
London EC4Y 7EQ United Kingdom

9. On 11 September 2017 and in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**ICSID Arbitration Rules**"), the Secretary-General notified the Parties that all three arbitrators had accepted their appointments and that the Arbitral Tribunal was therefore deemed to have been constituted on that date. Ms Ana Constanza Conover Blancas, ICSID

[5] The Parties were notified on 8 March 2021 of the fact that Professor Sands had been granted the nationality of Mauritius.

Legal Counsel, was designated to serve as Secretary of the Tribunal.

10. On 10 October 2017, the Secretary of the Tribunal wrote to the Parties, on behalf of the President of the Tribunal, to inquire whether the Parties would agree to the appointment of Mr João Vilhena Valério as an assistant to the President of the Tribunal in this case. By communications of 13 and 16 October 2017, the Parties confirmed their agreement on the appointment of Mr Vilhena Valério. On 30 October 2017, the Secretary of the Tribunal transmitted a copy of Mr Vilhena Valério's signed declaration of independence and impartiality to the Parties.

C. The Decision

11. This dispute relates to measures adopted by the Respondent in connection with the *páramo* ecosystem in Santurbán, which allegedly have deprived Eco Oro of its mining rights under a concession contract for the exploration and exploitation of a deposit of gold, silver, chromium, zinc, copper, tin, lead, manganese, precious metals and associated minerals entered into on 8 February 2007 between Eco Oro and INGEOMINAS. The contract relates to the Angostura gold and silver deposit located in the Soto Norte region of the department of Santander, within the Vetas-California gold district: Concession Contract 3452 ("**Concession 3452**" or the "**Concession**").

12. The Claimant alleges that Colombia has breached its obligations under *(i)* Article 811 of the FTA by means of the unlawful, creeping and indirect expropriation of its investment; and *(ii)* Article 805 of the FTA by failing to accord Eco Oro's investment the minimum standard of treatment ("**MST**"). The Claimant seeks full reparation for what it deems to be the destruction of its investment in Colombia, claiming compensation for damage caused as a result of the Respondent's breaches and violations of the FTA and international law in an amount of USD 696 million, plus pre-award and post-award interest. The Respondent submits that Eco Oro's claims ought to be dismissed in their entirety as the Tribunal lacks jurisdiction over this dispute and there is no basis of liability accruing to Colombia under the FTA.

13. In its Decision, the Tribunal declared its jurisdiction over the Claimant's claims in the present arbitration. By a majority, the Tribunal *(i)* dismissed the claim concerning expropriation, concluding that Colombia was not in breach of Article 811 of the FTA and *(ii)* upheld the claim concerning MST, finding that Colombia was in breach of Article 805 of the FTA. The Tribunal further decided that "[a]*ny award of damages will be expressly ordered to be net of all applicable Colombian taxes. Colombia will be ordered not to tax or attempt to tax the award and to indemnify Eco Oro in respect of any adverse consequences that may result from the imposition of a double taxation liability by the Colombian tax authorities if the declaration in the award recognising that the award is net of Colombian taxes is not accepted as the equivalent of evidence of payment*." The Decision was accompanied by a Partial Dissenting Opinion of Professor Grigera Naón and a Partial Dissent of Professor Sands.

14. Even though the Tribunal has considered that Eco Oro was entitled to make a claim for damages in respect of any loss that it could show to have been caused as a result of Colombia's breach of Article 805,[6] the Tribunal considered that it did not have sufficient information at that stage to determine

the quantum of damages, if any, that flowed from Colombia's said breach.[7] Therefore, at paragraphs 902, 913 (with regard to interest), 919 (with regard to remediation costs) and 920(4) of the Decision, the Tribunal, underscoring that Eco Oro had the burden of proof to make its case, posed certain questions to the Parties to assist the Tribunal in determining the quantum of loss suffered by Eco Oro ("**Questions**"), based on the following considerations:

"*Having weighed up the similarities between the transactions identified by Eco Oro and Colombia - and subject to the point made above in relation to the absence of a license to engage in exploitation - the Tribunal considers that, in the absence of any track record of established trading, and given the presence of the three similar projects in the vicinity of Concession 3452, the evidence relating to the three Comparable Transactions identified by Eco Oro appears to offer the best evidence before the Tribunal as to the methodology that might be followed. The Tribunal therefore finds it reasonable to consider this approach in considering what loss has been suffered by Eco Oro. However, there is no evidence before the Tribunal as to the application of that methodology – or indeed any other – to the valuation of a loss that could be established as a direct consequence of the loss of the right to apply for an environmental license. In this context, before the Tribunal determines the quantum of loss suffered by Eco Oro, the Tribunal raises a number of questions to be addressed by the Parties, to be supplemented with such expert evidence as the Parties each considers to be necessary to adduce in support of their further submissions. In this regard, given, as Eco Oro accepts, it has the burden of proof to make its case on damages, Eco Oro is ordered to file its submissions responsive to the following questions and Colombia is then to file its submissions in response, if any. To the extent either the Parties agree or the Tribunal so orders, a second round of sequential reply submissions will be permitted.* [...]"[8]

The questions are as follows:[9]

a. Are the losses suffered by Eco Oro for a breach of Article 805 and Article 811 the same, and to be measured in the same way? If not, given the majority Tribunal's reasoning, what is the nature of the loss that Eco Oro has actually suffered, if any?

b. Should the expert evidence adduced by the Parties be revised, given the majority Tribunal's findings that Colombia is not in breach of Article 811 but is in breach of Article 805? If so, how?

c. Given the Tribunal's findings on the merits and given its analysis above with respect to the inapplicability both of an income-based valuation methodology and Colombia's chosen comparable transactions, is Eco Oro's proposed Comparable Transactions methodology the one to be applied, or is there an alternative methodology which should be considered given the nature of Eco Oro's losses?

d. How can Eco Oro's loss of opportunity to apply for an environmental licence to allow exploitation be valued? On what basis is the quantum of that loss, if any, to be assessed?

e. What is the probability that the Santurbán Páramo overlaps with the Angostura Deposit and to what extent?

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[6] Decision, para. 847.

[7] Decision, para. 893.

[8] Decision, para. 902 (internal footnote omitted).

[9] Decision, para. 920(4).

f. What is the probability that Eco Oro would have been awarded an environmental licence to allow exploitation in the following scenarios:

i. The Angostura Deposit is not within the boundaries of the páramo as determined by the final delimitation;

ii. The Angostura Deposit is partially within the boundaries of the páramo as determined by the final delimitation; or

iii. The Angostura Deposit is wholly within the boundaries of the páramo as determined by the final delimitation.

g. What is the effect on the identification of the loss suffered, and its valuation, if any, if Eco Oro failed to establish that an exercise in due diligence had been carried out prior to the decision to move to the development of an underground mine?

h. What is the correct valuation date for a breach of Article 805 of the FTA?

i. If there is a significant gap between the identified valuation date and the dates on which the Comparable Transactions took place, what adjustment, if any, should be made to the Comparable Transactions valuation?

j. What evidence, if any, is there on the record, in addition to Mr. Moseley-William's testimony that the area of Concession 3452 that does not lie within the current delimitation cannot be ascribed a value, such that no deduction should be made in the event that a fair market valuation is adopted to value Eco Oro's loss?

k. What evidence is there to support Eco Oro's assertion of the costs it has incurred to date?

l. What is a commercially reasonable interest rate?

m. What is the anticipated timetable for Eco Oro to undertake remediation work?

and

n. What is the likely nature of that remediation work?"

15. Pursuant to paragraph 920(5) of the Decision, the Parties were invited to confer and to reach an agreement on the format and timetable for the additional submissions requested by the Tribunal in its Decision and to apprise the Tribunal of the terms of such an agreement by no later than 7 October 2021.

II. POST-DECISION PROCEDURAL BACKGROUND

16. By letter of 17 September 2021, the Respondent objected to the majority of the Tribunal's decision not to dismiss the Claimant's claim for damages and to order the conduct of an additional

procedural phase including further submissions and evidence. The Respondent further reserved its rights to apply for the annulment of the Decision upon its incorporation into the Tribunal's final award, including, without limitation, because, in the Respondent's opinion, the majority of the Tribunal *(i)* had manifestly exceeded its powers by failing to dismiss Claimant's claims for damages as unproven and by ordering that a further phase be held; and *(ii)* had violated Colombia's right of due process when issuing its Decision without allowing the Parties an opportunity to address the Tribunal on its appropriateness.

17. On 27 September 2021, the Claimant provided observations on the Respondent's letter to the Tribunal of 17 September 2021. The Claimant opposed the Respondent's objections, arguing that they were without merit and noting that Colombia's "*attempt to create a record upon which to seek the annulment of the Tribunal's eventual award* [was] *unavailing*".

18. In accordance with paragraph 920(5) of the Tribunal's Decision, on 7 October 2021, the Parties informed the Tribunal that they were conferring on the format and timetable for the additional submissions on quantum requested by the Tribunal and requested an extension to the deadline to apprise the Tribunal on the terms of their agreement until 11 October 2021. The Tribunal approved the extension on the same date.

19. On 11 October 2021, the Parties informed the Tribunal that they had agreed the following with respect to the format and timetable for the additional submissions requested by the Tribunal ("**Parties' Agreed Procedure**"):

1. *The parties agree that they will file one round of written submissions as follows:*

a. Claimant will file its First Submission within 120 days of the issuance of the Tribunal's Decision on 9 September 2021;

b. Respondent will file its Response Submission 120 days from the date on which Claimant filed its First submission.

2. The parties agree that the filing of a second round of written submissions is optional:

a. Claimant may, at its discretion, file a Reply Submission within [a specified period] of the date on which Respondent filed its Response Submission. Claimant will indicate whether it intends to exercise its right of response within 14 days of the filing of Respondent's Response Submission;

b. Insofar as Claimant has filed a Reply Submission, Respondent may, at its discretion, file a Rejoinder Submission within [a specified period] of the date on which Claimant filed its Reply Submission. Respondent will indicate whether it intends to exercise its right of response within 14 days of the filing of Claimant's Reply Submission.

c. A party's decision not to exercise its right of response does not imply that that party is in agreement with the arguments and allegations put forward by the opposing party in its last written submission.

d. The parties disagree on the deadlines for responsive submissions and will make separate proposals to the Tribunal in this regard.

3. The parties agree that their written submissions will only address the questions raised by the Tribunal in paragraphs 902, 913, 919 and 920 of the Decision, and in the case of any responsive submissions, the allegations put forward by the other party in its previous submission.

4. The parties disagree on whether additional evidence may be adduced with their submissions and will make separate proposals to the Tribunal in this regard.

5. The parties disagree on whether either party should have the right to request a hearing, and will make separate proposals to the Tribunal in this regard.

6. The parties shall send their respective proposals on the outstanding points referenced above to the ICSID Secretary only (without copying opposing counsel or the Tribunal) by COB on Tuesday 12 October 2021. The ICSID Secretary will then circulate both proposals simultaneously to the parties and the Tribunal.

20. On 12 October 2021, pursuant to paragraph 6 of the Parties' Agreed Procedure, the Parties submitted their respective proposals on the outstanding points referenced in the Parties' Agreed Procedure concerning the submission of additional evidence, the deadlines for potential second-round submissions, and the right to request a hearing.

21. On 21 October 2021, the Tribunal invited the Parties to submit brief responsive comments on each other's proposals in relation to the procedural matters on which the Parties disagreed by 28 October 2021.

22. On 28 October 2021, each Party filed its respective comments on the opposing Party's proposals in relation to the procedural matters on which the Parties disagreed.

23. On 3 November 2021, the Tribunal issued **Procedural Order No. 12** (On the Format and Timetable for the Additional Submissions Requested by the Tribunal in its Decision) ("**PO12**"). The Tribunal determined that: *(i)* a period of 90 days was reasonable to ensure each Party had a fair opportunity to present its case with respect to the Questions; *(ii)* the Parties could submit further expert evidence with their submissions; and *(iii)* the need of an oral hearing would be determined on the basis of the written submissions and taking into account its own views on the matter. In addition, the Tribunal established the following procedural rules at paragraph 38 of PO12:

"*38.1. Eco Oro will file its First Submission within 120 days of the issuance of the Tribunal's Decision on 9 September 2021.*

38.2. Colombia will file its Response Submission 120 days from the date on which Eco Oro filed its First Submission.

38.3. Eco Oro may, at its discretion, file a Reply Submission within 90 days of the date on which Colombia filed its Response Submission. Eco Oro will indicate whether it intends to exercise its right of response within 14 days of the filing of Colombia's Response Submission.

38.4. Insofar as Eco Oro has filed a Reply Submission, Colombia may, at its discretion, file a Rejoinder

Submission within 90 days of the date on which Eco Oro filed its Reply Submission. Colombia will indicate whether it intends to exercise its right of response within 14 days of the filing of Eco Oro's Reply Submission.

38.5. A Party's decision not to exercise its right of response does not imply that that Party is in agreement with the arguments and allegations put forward by the opposing Party in its last written submission.

38.6. The Parties agree that their written submissions will only address the questions raised by the Tribunal in paragraphs 902, 913, 919 and 920 of the Decision, and in the case of any responsive submissions, the allegations put forward by the other Party in its previous submission.

38.7. The Parties may submit such additional evidence as the Parties each considers to be necessary in support of their further submissions addressing the Questions.

38.8. The Tribunal will determine whether an oral hearing will take place at the request of either of the Parties, such request to be made within 14 days from the date of the last written submission of the Parties. If the opposing Party does not consent to such application, it must make its reasoned objection within 14 days of the date on which the application is filed.

38.9. Subject to the provision in paragraph 38.8 above, following receipt of the Parties' additional submissions, the Tribunal will deliberate and proceed to render its award on damages."

24. On 6 January 2022, the Parties informed the Tribunal of their agreement to modify the procedural calendar for the filing of submissions addressing the Tribunal's Questions.

25. On 10 January 2022, the Tribunal approved the Parties' agreement. Accordingly: *(i)* the Claimant was authorised to file its first submission within 127 days of the issuance of the Tribunal's Decision (i.e., by 14 January 2022); and *(ii)* the Respondent was authorised to file its response submission 127 days from the date on which the Claimant filed its first submission (i.e., if the Claimant filed its submission on 14 January 2022, by 23 May 2022).

26. On 15 January 2022, the Claimant filed its First Submission on the Tribunal's Questions, together with factual exhibits C-458 to C-461,[10] legal authorities CL-217 to CL-230,[11] a consolidated list of

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[10] Eco Oro Closure Plan (5 July 2019) (**Exhibit C-458**); Letter from Eco Oro to the CDMB (5 July 2019) (**Exhibit C-459**); Minutes of Bilateral Liquidation of Concession Contract 3452 (30 December 2020) (**Exhibit C-460**); and Email from Eco Oro (Ms Arenas) to the ANM (Mr García) (2 June 2021) (**Exhibit C-461**).

[11] B. Sabahi, N. Rubins and D. Wallace (Jr), *Investor-State Arbitration* (2nd edn) (2019) (**Exhibit CL-217**); S. Ripinsky and K. Williams, *Damages in International Investment Law* (2008) (**Exhibit CL-218**); *Azurix Corp. v The Argentine Republic (I)* (ICSID Case No. ARB/01/12) Decision on the Application for Annulment of the Argentine Republic (1 September 2009) (**Exhibit CL-219**); *Chevron Corporation and Texaco Petroleum Company v The Republic of Ecuador* (UNCITRAL) Partial Award on the Merits (30 March 2010) (**Exhibit CL-220**); *Copper Mesa Mining Corporation v The Republic of Ecuador* (UNCITRAL) Award (15 March 2016) (**Exhibit CL-221**); *Flemingo DutyFree Shop Private Limited v The Republic of Poland* (UNCITRAL) Award (12 August 2016) (**Exhibit CL-222**); *Marco Gavazzi and Stefano Gavazzi v Romania* (ICSID Case No. ARB/12/25) Excerpts of the Award (18 April 2017) (**Exhibit CL-223**); *Valores Mundiales, S.L. and Consorcio Andino, S.L. v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/13/11) Award (25 July 2017) (**Exhibit CL-224**); *Bear Creek Mining Corporation v Republic of Peru* (ICSID Case No. ARB/14/21) Award (30 November 2017) (**Exhibit CL-225**); *Hydro S.R.L. and others v Republic of Albania* (ICSID Case No. ARB/15/28) Award (24 April 2019) (**Exhibit CL-226**); *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan* (ICSID Case No. ARB/12/1) Award (12 July 2019) (**Exhibit CL-227**); *Perenco Ecuador Limited v The Republic of Ecuador* (ICSID Case No. ARB/08/6) Award (27 September 2019) (**Exhibit CL-228**); *Watkins Holdings S.Á.R.L. and others v The Kingdom of Spain* (ICSID Case No. ARB/15/44) Award (21 January 2020) (**Exhibit CL-229**); and *Perenco Ecuador Limited v Republic of Ecuador* (ICSID Case No. ARB/08/6) Decision on Annulment (28 May 2021) (**Exhibit CL-230**).

factual exhibits, and a consolidated list of legal authorities ("**Claimant's First Submission**").

27. On 23 May 2022, the Respondent filed its Response Submission on the Tribunal's Questions, together with factual exhibits R-198 to R-273, [12] legal authorities RL-188 to RL-197, [13] and a consolidated list of

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[12] Republic of Colombia, Law No. 141 (28 June 1994) (**Exhibit R-198**); Complementation to the Environmental Management Plan for the Santa Isabel Exploitation Project (December 1997) (**Exhibit R-199**); CDMB, Technical Report on Sociedades Mineras Trompeteros Ltda. and La Elsy Ltda's Environmental Management Plan (May 1999) (**Exhibit R-200**); CDMB, Resolution No. 450 (28 May 1999) (**Exhibit R-201**); Asomineros, Environmental Management Plan (2001) (**Exhibit R-202**); CDMB, Technical Report on Asomineros' Environmental Management Plan (September 2001) (**Exhibit R-203**); CDMB, Resolution No. 124 (18 February 2002) (**Exhibit R-204**); CDMB, Resolution No. 125 (18 February 2002) (**Exhibit R-205**); CDMB, Resolution No. 127 (18 February 2002) (**Exhibit R-206**); CDMB, Resolution No. 271 (23 April 2002) (**Exhibit C-207**); Constitutional Court, Judgment C-293 (23 April 2002) (**Exhibit R-208**); CDMB, Resolution No. 811 (21 October 2002) (**Exhibit R-209**); CDMB, Resolution No. 610 (11 July 2003) (**Exhibit R-210**); Sociedad Minera La Elsy Ltda., Environmental Management Plan, Exploitation Licence No. 089-68 (November 2007) (**Exhibit R-211**); CDMB, Resolution No. 715 (10 August 2009) (**Exhibit R-212**); Greystar, Internal Memorandum (4 November 2010) (**Exhibit R-213**); Environmental Compliance Report of Empresa Minera La Providencia (12 November 2010) (**Exhibit R-214**); E.A. Buitrago, *Between Water and Gold: Tensions and Territorial Changes in the Municipality of Vetas*, Santander, Colombia (2012) (**Exhibit R-215**); Constitutional Court, Judgment T-204/14 (1 April 2014) (**Exhibit R-216**); ANLA, Resolution No. 0041 (Environmental licence for the Agua Bonita Construction Materials Exploitation) (22 January 2014) (**Exhibit R-217**); ANLA, Resolution No. 1433 (Environmental licence for the Conconcreto Construction Materials Exploitation) (26 November 2014) (**Exhibit R-218**); ANLA, Resolution No. 1514 (Environmental licence for the Gramalote Gold Project) (25 November 2015) (**Exhibit R-219**); ANLA, Resolution No. 1540 (Environmental licence for the Cerro Matoso La Esmeralda Mine Expansion) (2 December 2015) (**Exhibit R-220**); ANM, Resolution No. VSC 545 (3 June 2016) (**Exhibit R-221**); Ministry of Mines, Decree No. 1666 (21 October 2016) (**Exhibit R- 222**); Letter from Eco Oro to the Commander of the California Police Department (31 March 2017) (**Exhibit R-223**); ANLA, Resolution No. 00077 (Environmental licence for the La Luna Underground Coal Exploitation) (24 January 2018) (**Exhibit R-224**); ANLA, Order No. 01026 (13 March 2018) (**Exhibit R-225**); Ministry of Environment, First Implementation Report of Judgment T-361 (27 March 2018) (**Exhibit R-226**); Consejo de Estado, Judgment 00230 (11 April 2018) (**Exhibit R-227**); Ministry of Environment, Second Implementation Report of Judgment T-361 (13 July 2018) (**Exhibit R-228**); Administrative Tribunal of Santander, File No. 2015-00734-00, Order (25 September 2018) (**Exhibit R-229**); Ministry of Environment, Third Implementation Report of Judgment T-361 (12 October 2018) (**Exhibit R-230**); Ministry of Environment, Fourth Implementation Report of Judgment T-361 (1 December 2018) (**Exhibit R-231**); Ministry of Environment, Fifth Implementation Report Judgment T-361 (13 April 2019) (**Exhibit R-232**); Ministry of Environment, Sixth Implementation Report of Judgment T-361 (14 July 2019) (**Exhibit R-233**); Ministry of Environment, Santurbán Avanza website, "Integrated Proposal for Delimitation" (22 September 2019) (**Exhibit R-234**); Ministry of Environment, Integrated Proposal Document for the Consultation Phase of the Participative Delimitation of the Páramo Jurisdicciones - Santurbán-Berlín (December 2019) (**Exhibit R-235**); Administrative Tribunal of Santander, File No. 2015-00734-00, Order (2 December 2019) (**Exhibit R- 236**); Letter from the ANM to the CDMB (22 January 2020) (**Exhibit R-237**); Ministry of Environment, Seventh Implementation Report of Judgment T-361 (12 February 2020) (**Exhibit R-238**); Letter from the ANM to Eco Oro (2 March 2020) (**Exhibit R-239**); ANLA, Resolution No. 446 (Environmental Licence for Sator Mina Bijao Project) (16 March 2020) (**Exhibit R-240**); CDMB, Resolution No. 200 (16 March 2020) (**Exhibit R-241**); CDMB, Resolution No. 213 (31 March 2020) (**Exhibit R-242**); CDMB, Resolution No. 221 (13 April 2020) (**Exhibit R-243**); CDMB, Resolution No. 230 (27 April 2020) (**Exhibit R-244**); CDMB, Resolution No. 238 (8 May 2020) (**Exhibit R-245**); CDMB, Resolution No. 243 (26 May 2020) (**Exhibit R-246**); CDMB, Resolution No. 254 (1 June 2020) (**Exhibit R-247**); Ministry of Environment, Eighth Implementation Report of Judgment T-361 (26 June 2020) (**Exhibit R-248**); CDMB, Resolution No. 363 (30 June 2020) (**Exhibit R- 249**); ANLA, Resolution No. 1622 (Environmental Licence for the Cerro Matoso Queresas Licence) (1 October 2020) (**Exhibit R-250**); ANLA, Order No. 09674 (2 October 2020) (**Exhibit R-251**); Ministry of Environment, Implementation Report No. 9 (12 October 2020) (**Exhibit R-252**); Letter from the ANM to Eco Oro (13 October 2020) (**Exhibit R-253**); ANLA, Resolution No. 1878 (Environmental Licence for Cerro Matoso Ferroniquel exploitation) (23 November 2020) (**Exhibit R-254**); Administrative Tribunal of Santander, File No. 2015-00734-00, Order (2 February 2021) (**Exhibit R-255**); Ministry of Environment, Tenth Implementation Report of Judgment T-361 (4 March 2021) (**Exhibit R-256**); *Concepto* 100921, Departamento Administrativo de la Función Pública (23 March 2021) (**Exhibit R-257**); Administrative Tribunal of Santander, File No. 2015-00734-00, Order (6 May 2021) (**Exhibit R-258**); CDMB, Technical Report on Site Visit to Concession 3452 (16 May 2021) (**Exhibit R-259**); Ministry of Environment, Map of Concession 3452, the Ministry of Environment's 2019 delimitation proposal for the Santurbán Páramo and the transitional zone of the Santurbán Páramo (June 2021) (**Exhibit R-260**); Ministry of Environment, Eleventh Implementation Report of Judgment T-361 (30 June 2021) (**Exhibit R-261**); Ministry of Environment, Twelfth Implementation Report of Judgment T-361 (20 October 2021) (**Exhibit R-262**); Ministry of Environment, Thirteenth Implementation Report of Judgment T-361 (March 2022) (**Exhibit R-263**); Letter from the CDMB to Eco Oro (1 March 2022) (**Exhibit R-264**); ANM, Map of Concession 3452 and the Ministry of Environment's 2019 delimitation proposal for the Santurbán Páramo (18 March 2022) (**Exhibit R-265**); ANM, Map of overlap between comparable projects and the 2007 Atlas (11 May 2022) (**Exhibit R-266**); Adjusted Compass Lexecon Comparable Transactions Model (Undated) (**Exhibit R-267**); Colombian Code of Administrative Procedure and of Administrative Disputes (Undated) (**Exhibit R-268**); Updated Interest Calculation Spreadsheet (Undated) (**Exhibit C-269**); ANM, Overlap between Titles 073-68, FCC-814 and HDB-081 with the 2007 IAvH Páramo Atlas (Undated) (**Exhibit R-270**); Ministry of Environment, Santurbán Avanza website, "Implementation Reports" (Undated) (**Exhibit R-271**); Ministry of Environment, Santurbán Avanza website, "Imperious Points" (Undated) (**Exhibit R-272**); and Summary table of ANLA's Environmental Licensing Procedures from 2010 to 2022 (**Exhibit R-273**).

[13] J. Paulsson, 'Chapter 3. The Expectation Model' in Y. Derains and R. Kreindler (eds) *Evaluation of Damages in International Arbitration* (2006) (**Exhibit RL-188**); *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua SA v The Argentine*

exhibits and legal authorities ("**Respondent's Response**").

28. By letter of 1 June 2022, the Claimant requested the Tribunal to *(i)* shorten the 90-day time period set for the filing of Reply submissions to 45 days; *(ii)* strike Colombia's new fact exhibits that did not relate to issues of remediation; and *(iii)* order Colombia to re-submit its submission in redacted form so as to omit all text and footnotes referring to or describing the offending documents. The Claimant further made the following remarks and request:

"*Pursuant to paragraph 38.3 of PO12, Claimant is scheduled to elect whether to exercise its right to make a Reply submission by 6 June 2022. The Tribunal's ruling on the present application may bear on Claimant's election. In the circumstances, Claimant therefore respectfully requests that the Tribunal revise Claimant's forthcoming deadline so that it may make its election by the later of 6 June or three business days following the Tribunal's ruling on the present application.*"

29. On 2 June 2022, the Respondent was invited to submit, by 15 June 2022, comments on the Claimant's letter of 1 June 2022. On the same date, the Claimant made reference to the interim request contained in its letter of 1 June 2022 and requested the Tribunal's guidance in that regard in advance of 6 June 2022.

30. On 3 June 2022, the Tribunal confirmed its agreement to the Claimant's interim request to revise the forthcoming deadline set out at paragraph 38.3 of PO12. Accordingly, the Claimant was allowed to elect whether to exercise its right to make a Reply submission by the later of 6 June or three business days following the Tribunal's ruling on the Claimant's requests of 1 June 2022.

31. By letter of 10 June 2022, the Respondent submitted its comments on the Claimant's requests of 1 June 2022, whereby it requested that the Claimant's requests be denied.

32. On 27 June 2022, the Tribunal issued **Procedural Order No. 13** (Decision on the Claimant's Application dated 1 June 2022) ("**PO13**"). The Tribunal ordered the following:

"*37. Having considered the Parties' positions with regard to the procedural matters upon which the Tribunal's determination is required, the Tribunal hereby orders the following:*

37.1. The time-period for the filing of any Reply submissions on the Tribunal's Questions under paragraphs 38.3 or 38.4 of PO12 is reduced to 45 days.

37.2. The Claimant's request to strike the Respondent's further documents and associated parts of Respondent's Submission from the record is rejected.

Republic (ICSID Case No. ARB/03/17) Decision on Liability (30 July 2010) (**Exhibit RL-189**); N. Blackaby, C. Partasides, et al., 'Chapter 8. Arbitration under Investment Treaties', in *Redfern and Hunter on International Arbitration* (6th ed. 2015) (**Exhibit RL-190**); UNIDROIT Principles of International Commercial Contracts (with comments) (2016) (**Exhibit RL-191**); *Caratube International Oil Company LLP and Devincci Salah Hourani v Republic of Kazakhstan* (ICSID Case No. ARB/13/13) Award (27 September 2017) (**Exhibit RL-192**); *Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v Republic of Cyprus* (ICSID Case No. ARB/13/27) Award (26 July 2018) (**Exhibit RL-193**); *South American Silver Limited v The Plurinational State of Bolivia* (PCA Case No. 2013-15) Award (22 November 2018) (**Exhibit RL-194**); A. Ali and D. Attanasio, 'Chapter 8: Reparations: Remedies for Violations of Investment Protection' in *International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (2021) (**Exhibit RL-195**); *Abed El Jaouni and Imperial Holding SAL v Lebanese Republic* (ICSID Case No. ARB/15/3) Award (14 January 2021) (**Exhibit RL-196**); and *Infinito Gold Ltd. v Republic of Costa Rica* (ICSID Case No. ARB/14/5) Award (3 June 2021) (**Exhibit RL-197**).

37.3. By no later than three business days following the date of this Procedural Order (i.e., 30 June 2022), the Claimant is invited to comment on whether it wishes to submit additional evidence."

33. By communication of 29 June 2022, the Claimant confirmed its intention to *(i)* file a reply submission within the 45-day deadline established in paragraph 37.1 of PO13 (i.e., by 7 July 2022); and *(ii)* file additional evidence with its reply submission responsive to new evidence submitted by the Respondent as envisaged in paragraphs 36 and 37.3 of PO13.

34. On 8 July 2022, the Claimant filed its Reply Submission on the Tribunal's Questions, together with Appendix A, factual exhibits C-462 to C-482,[14] legal authorities CL-231 to CL-233,[15] a consolidated list of factual exhibits, and a consolidated list of legal authorities ("**Claimant's Reply**").

35. On 11 August 2022, the Tribunal informed the Parties that, pursuant to paragraph 38.4 of PO12 and paragraph 37.1 of PO13, the Respondent could, at its discretion, file a rejoinder submission within 45 days of the date on which the Claimant filed its Reply Submission (i.e., by 22 August 2022). The Tribunal invited the Respondent to indicate at its earliest convenience whether it intended to exercise its right to file a rejoinder by 22 August 2022. On the same date, the Respondent confirmed its intention to file a rejoinder submission by 22 August 2022.

36. On 22 August 2022, the Respondent filed its Rejoinder Submission on the Tribunal's Questions,[16] together with Appendix A, factual exhibits R-274 to R-312,[17] legal authorities RL-198 to RL-200,[18] and

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[14] Map of the 2019 Proposed Delimitation area in the Municipality of Vetas (Undated) (**Exhibit C-462**); Map of the Agreed Páramo Delimitation area in the Municipality of Vetas (Undated) (**Exhibit C-463**); Colombia's Comparable Transactions Valuation Model of 23 May 2022, with Claimant's corrections (Undated) (**Exhibit C-464**); Map showing the overlap of the 2019 Proposed Delimitation with Minesa's concession (Undated) (**Exhibit C-465**); Map of the 2090 Atlas area in the Municipality of Vetas (Undated) (**Exhibit C-466**); Ministry of Environment, "Manual for the evaluation of environmental studies" (excerpts) (2002) (**Exhibit C-467**); Constitutional Court Judgement T-462A (excerpts) (2014) (**Exhibit C-468**); General Comptroller's Office, "El proceso administrativo de licenciamiento ambiental en Colombia" (2017) (**Exhibit C-469**); Corpoboyacá, "Estudio socioeconómico de las comunidades vinculadas a las actividades agropecuarias y mineras del complejo de páramo de Pisba en jurisdicción de Corpoboyacá" (excerpts) (May 2017) (**Exhibit C-470**); Constitutional Court Judgement T-614 (excerpts) (2019) (**Exhibit C-471**); ANLA Order 00092 (19 January 2021) (**Exhibit C-472**); "Minesa volverá a realizar el Estudio de Impacto Ambiental de su proyecto en Soto Norte", *Vanguardia* (26 February 2021) (**Exhibit C-473**); ANM Press Release, "Colombia, un país con grandes recursos minerales y potencial productivo" (23 June 2021) (**Exhibit C-474**); Agreement between the Ministry of Environment and the Municipality of Vetas concerning the delimitation of the Santurbán Páramo (29 November 2021) (**Exhibit C-475**); "Vetas se convirtió en el primer municipio en firmar pacto para delimitación del páramo de Santurbán", *Vanguardia* (21 January 2022) (**Exhibit C-476**); Minutes of consultations meeting between the Ministry of Environment and the community of California (25 January 2022) (**Exhibit C-477**); "Minambiente y municipio de Vetas acuerdan delimitación del Santurbán", *Portafolio* (9 March 2022) (**Exhibit C-478**); Aris Gold Press Release, "Aris Gold To Become Operator Of The Soto Norte Gold Project In Colombia" (21 March 2022) (**Exhibit C-479**); MVIS Global Junior Gold Miners Index (21 March 2022) (**Exhibit C-480**); E-mail from the CDMB to Eco Oro (5 April 2022) (**Exhibit C-481**); and Letter from Eco Oro to the CDMB (30 June 2022) (**Exhibit C-482**).

[15] *Abengoa, S.A. and COFIDES, S.A. v United Mexican States* (ICSID Case No. ARB(AF)/09/2) Award (18 April 2013) (**Exhibit CL-231**); P Pearsall and J Heath, "Causation and Injury in Investor-State Arbitration" in: C L Beharry (ed.), *Contemporary and Emerging Issues on the law of Damages and Valuation in International Investment Arbitration* (excerpts) (2018) (**Exhibit CL-232**); and *Deutsche Telekom AG v The Republic of India* (PCA Case No. 2014-10) Final Award (27 May 2020) (**Exhibit CL-233**).

[16] In footnote 143 of its Rejoinder, Colombia notes that it "*cited to the Word versions of the Hearing transcripts in the Response Submission rather than the consolidated PDF versions. Throughout this Rejoinder Submission, Colombia will refer to the consolidated PDF versions of the transcripts. For the avoidance of doubt, the consolidated PDF version references which correspond to those cited to in the Response Submission are as follows: (i) at footnote 81 Day 5, 1451:4-1453:15 (Word) corresponds to Day 5, 1450:5-1452:16 (PDF); (ii) at footnote 82, Day 4, 1131:12-1132:5 (Word) corresponds to Day 4, 1127:6-19 (PDF); (iii) at footnote 83 Day 4, 1133:16-21 (Word) corresponds to Day 4, 1129:8-13 (PDF); (iv) at footnote 84, Day 4, 1114:14-1115:5 (Word) corresponds to Day 4, 1110:13-1111:4 (PDF); (v) at footnote 86, 1456:3-1456:12 (Word) corresponds to Day 5, 1455:5-14 (PDF); (vi) at footnote 110, Day 5, 1470:6-21 (Word) corresponds to Day 5, 1469:10-1470:3 (PDF), and Day 4, 1132:15-1133:6 (Word) corresponds to Day 4, 1128:7-20 (PDF); (vii) at footnote 203, Day 2, 516:16-517:2 (Word) corresponds to Day 2, 514:2-10 (PDF); (viii) at footnote 282, Day 2, 443:10-444:13 (Word) corresponds to Day 2, 441:15-442:18 (PDF); and (ix) at footnote 306, Day 1, 229:10-230:16 (Word) corresponds to Day 1, 228:9-229:15 (PDF).*"

a consolidated list of exhibits and legal authorities ("**Respondent's Rejoinder**").

37. On 14 September 2022, the Tribunal informed the Parties that, having received the Parties' submissions on the Tribunal's Questions, and in the absence of a request for an oral hearing from either Party within the deadline set forth at paragraph 38.8 of PO12, the Tribunal would proceed to deliberate and work on its award, in accordance with paragraph 38.9 of PO12.

38. On 27 February 2023, in reply to the Claimant's e-mail of 24 February 2023, the Tribunal informed the Parties that, "*while the Tribunal* [wa]*s working diligently to finalize its ruling, it d*[id] *not envisage the Award to be ready for a few months*".

39. On 18 May 2023, Ms Blanch made a disclosure.

40. On 31 May 2023, in reply to the Claimant's e-mail of 30 May 2023, the Tribunal informed the Parties that it was "*still working diligently to finalize its ruling, but d*[id] *not envisage the Award to be ready for a few more months*".

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[17] CORPONOR, Resolution No. 1079 (29 December 2003) (**Exhibit R-274**); CORPONOR, Resolution No. 296 (2 July 2004) (**Exhibit R-275**); E. Wolff Carreño, J.M. Pinzón Ángel, R. Contreras Moreno and C. Bernardy, *Geological Setting, Mining and Reduction of Mercury Vapor Contamination in the Gold-Silver District of Vetas-California (Santander, Colombia)* (December 2005) (**Exhibit R-276**); CDMB, Resolution No. 829 (16 September 2008) (**Exhibit R-277**); F. Urrego-Ortiz, M. Quinche-Ramírez, "Los decretos en el sistema normativo colombiano", Vniversitas No. 116:53-83 (July-December 2008) (**Exhibit R-278**); CORPONOR, Resolution No. 1161 (18 December 2009) (**Exhibit R-279**); CORPONOR, Resolution No. 455 (17 May 2011) (**Exhibit R-280**); E.J. Arboleda Perdomo, *Commentary to the New Code on Administrative Procedure and of Administrative Disputes (Law 1437 of 2011)* (2nd ed. 2012) (**Exhibit R-281**); ANLA, Resolution No. 12 (Rejected environmental licence for the Mining Project Mina el Amoladero) (13 January 2012) (**Exhibit R- 282**); ANLA, Resolution No. 535 (Rejected environmental licence for the Cerro Largo Sur Project) (5 July 2012) (**Exhibit R-283**); ANLA, Resolution No. 740 (Rejected environmental licence for the Concession Contract ID3-09191) (6 September 2012) (**Exhibit R-284**); ANLA, Resolution No. 912 (Rejected environmental licence for the Mining Project Cantera el Pilar No. 2) (6 November 2012) (**Exhibit R-285**); Law No. 1658 (15 July 2013) (**Exhibit R-286**); ANLA, Auto No. 4474 (Withdrawn environmental licence for the new Cerrejón Sur Project) (27 December 2013) (**Exhibit R-287**); VALMIN, "The Australian Code for Public Reporting of Technical Assessments and Valuations of Mineral Assets" (2015) (**Exhibit R-288**); ANLA, Auto No. 3389 (Withdrawn environmental licence for the Mining Concession HGV-12391X) (19 August 2015) (**Exhibit R-289**); ANLA, Auto No. 3458 (Withdrawn environmental licence for Mina La Luna) (21 August 2015) (**Exhibit R-290**); ANLA, Resolution No. 5064 (Transferred PMA for the San Antonio mine) (19 October 2016) (**Exhibit R-291**); ANLA, Auto No. 1026 (Withdrawn environmental licence for the Soto Norte underground exploitation) (13 March 2018) (**Exhibit R-292**); "Minesa desiste del actual proceso para obtener licencia ambiental en Soto Norte", *Vanguardia* (14 March 2018) (**Exhibit R-293**); ANLA, Resolution No. 616 (Rejected environmental licence for the Aurífera Aluvial Project) (30 April 2018) (**Exhibit R-294**); ANLA, Auto No. 4821 (Archived environmental licence application for the Bijao mine) (15 August 2018) (**Exhibit R- 295**); ANLA, Auto No. 3370 (Archived environmental licence application for the Mining Title 4676) (22 May 2019) (**Exhibit R-296**); ANLA, Auto No. 7744 (Withdrawn environmental licence application for the Bijao mine) (16 September 2019) (**Exhibit R-297**); "El proyecto Soto Norte no está dentro del Páramo de Santurbán", *El Tiempo* (12 February 2020) (**Exhibit R-298**); ANLA, Auto No. 1903 (Archived environmental licence application for the Concession Contract ICQ-8473C1) (10 March 2020) (**Exhibit R-299**); ANLA, Auto No. 9674 (Archived environmental licence application for the underground Mining of Auro-Argentine Ore Project) (2 October 2020) (**Exhibit R-300**); SRK Consulting, NI 43-101 Technical Report Feasibility Study of the Soto Norte Gold Project, Santander, Colombia (1 January 2021) (**Exhibit R-301**); S. Malan, "*How to Advance Sustainable Mining*", IISD Earth Negotiations Bulletin (October 2021) (**Exhibit R-302**); ANLA, Auto No. 9023 (Archived environmental licence application for the Quebradona copper mining project) (25 October 2021) (**Exhibit R-303**); ANM, Resolution VPFF No. 058 (23 May 2022) (**Exhibit R-304**); Colombian Geological Service, *Generación de conocimiento hidrogeológico que permita establecer la ocurrencia, origen y conexión entre los flujos de agua subterránea de la cuenca alta de las quebradas La Baja y Angostura con el paramo de Santurbán mediante técnicas hidrogeoquímicas e isotópicas* (June 2022) (**Exhibit R-305**); Letter from the CDMB to Eco Oro (22 July 2022) (**Exhibit R-306**); "La extraña muerte de un minero en medio de un operativo del Ejército en Santander", *El Colombiano* (22 July 2022) (**Exhibit R-307**); '"Ay, hijue... lo mató, lo mató": investigan confusa muerte de minero en Santander', *Semana* (22 July 2022) (**Exhibit R-308**); Summary table of environmental authorisations issued in the Pisba Páramo by Corpoboyaca between 1993 and 2011 (**Exhibit R-309**); Sovereign bond yield spreads at Parties' respective valuation dates (data drawn from CLEX-69) (**Exhibit R-310**); Oxford English Dictionary, definition of "risk" (**Exhibit R-311**); and Cambridge English Dictionary, definition of "risk" (**Exhibit R-312**).

[18] *Stans Energy and Kutisay Mining v Kyrgyzstan (II)* (PCA Case No. 2015-32) Award (20 August 2019) (**Exhibit RL-198**); R. Hern, Z. Janeckova, Y. Yin and K. Bivolaris, 'Chapter 17. Market or Comparables Approach' in J.Trenor, *The Guide to Damages in International Arbitration* (2021) (**Exhibit RL-199**); and *Air Canada v Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/17/1) Award (13 September 2021) (**Exhibit RL-200**).

41. On 9 June 2023, ICSID informed the Parties that Ms Marisa Planells-Valero would serve as Secretary of the Tribunal as of 12 June 2023, during Ms Ana Conover's maternity leave.

42. On 5 September 2023, in reply to the Claimant's e-mail of 31 August 2023, the Tribunal informed the Parties that it "*continue*[d] *drafting its Award*". The Tribunal further noted that it was "*not yet in a position to provide the Parties with an expected date of issuance of the Award but w*[ould] *continue updating the Parties on its progress periodically*".

43. On 18 December 2023, in reply to the Claimant's letter of 5 December 2023, the Tribunal informed the Parties that it "*ha*[d] *been advancing in its deliberations and continue*[d] *drafting its Award in the above referenced case*". The Tribunal further noted that, "[f]*rom now on, the Tribunal plan*[ned] *on providing the Parties with monthly updates on its progress.*"

44. On 9 January 2024, Professor Sands made a disclosure.

45. On 26 January 2024, following up on its communication of 18 December 2024, the Tribunal informed the Parties that it "*ha*[d] *continued working diligently in this case*". The Tribunal further noted that it had made "*substantial progress in the preparation of the Award and expect*[ed] *to (i) invite the Parties to submit their statements of costs, and (ii) close the proceeding in the next few weeks.*"

46. On 23 February 2024, the Tribunal invited the Parties to agree on a template for their Statements of Costs (which were not to include legal arguments) and to submit their respective Statements of Costs by 8 March 2024. The Tribunal further informed that, following receipt of the Parties' Statements of Costs, the Tribunal would proceed to close the proceedings in accordance with ICSID Arbitration Rule 38(1).

47. On 1 March 2024, the Claimant filed an application requesting the Tribunal's directions as to *(i)* the inclusion of a line item for the costs that the Claimant had incurred to obtain financing to pursue this arbitration; and *(ii)* the submission of short argumentation of up to two pages in their cost submissions to address exclusively the recoverability of arbitration finance costs.

48. On 5 March 2024, the Tribunal informed the Parties that it had decided to *(i)* allow the Claimant's application of 1 March 2024 to include details of its financing costs as a line item in its Statement of Costs; and *(ii)* allow the Parties to file short argumentation of up to two pages in their cost submissions to address exclusively the recoverability of arbitration financing costs.

49. On 8 March 2024, the Parties filed their respective Statements of Costs.

50. On 22 March 2024, the Parties were informed that Ms Conover had resumed her functions as Secretary of the Tribunal.

51. On 25 March 2024, in reply to the Claimant's email of 22 March 2024, the Tribunal informed the Parties that it had "*nearly completed the drafting of the Award.*"

52. By communications of 25 and 27 March 2024, the Parties agreed on an applicable procedure for the

publication of the Award.

53. The proceeding was closed on 29 April 2024.

III. THE PARTIES' REQUESTS FOR RELIEF

A. Eco Oro's Request for Relief

54. The Claimant requested [19] that the Tribunal issue an award that:

"*(a) INCORPORATES the decisions of the Tribunal or Majority Tribunal in the Decision of 9 September 2021 that:*

(i) the Tribunal has jurisdiction over Eco Oro's claims (Decision, para 920(1));

(ii) Colombia breached Article 805 of the Treaty (Decision, para 920([3]*));*

(iii) any award of damages is net of all applicable Colombian taxes (Decision, para 920(6));

(iv) Colombia shall not tax or attempt to tax the award (Decision, para 920(6));

(v) Colombia shall indemnify Eco Oro in respect of any adverse consequences that may result from the imposition of a double taxation liability by the Colombian tax authorities if the declaration in the award recognizing that the award is net of Colombian taxes is not accepted as the equivalent of evidence of payment (Decision, para 920(6));

(b) ORDERS Colombia to compensate Eco Oro for the losses that it sustained as a result of Colombia's breaches of the Treaty and international law in an amount of US$696 million;

(c) ORDERS Colombia to pay pre-award interest on the amount stated in request (b), or such other amount ordered by the Tribunal for the payment of compensation for the losses that Eco Oro sustained as a result of Colombia's breaches of Article 805 of the Treaty, from 8 August 2016 to the date of the Award at a rate of 6.6% per annum, compounded semi-annually, or at such other rate and compounding period as the Tribunal determines will ensure full reparation;

(d) ORDERS Colombia to pay post-award compound interest on the amounts stated in requests (b) and (c) from the date of the Tribunal's Award at such rate as the Tribunal determines will ensure full reparation, but at a rate no less than the rate and at the compounding period ordered pursuant to request (c);

(e) ORDERS Colombia to compensate Eco Oro for the remediation costs that it has or will sustain in connection with Concession 3452 in the amount of US$2,178,705.37;

(f) ORDERS Colombia to indemnify Eco Oro for any remediation costs that it incurs in excess of the

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[19] Claimant's First Submission, para. 351; Claimant's Reply, para. 267.

amount stated in request (e);

(g) AWARDS such other relief as the Tribunal considers appropriate; and

(h) ORDERS Colombia to pay all of the costs and expenses of this arbitration, including Eco Oro's legal and expert fees, the fees and expenses of the Tribunal and ICSID's other costs and fees."

B. Colombia's Request for Relief

55. The Respondent requested [20] the Tribunal to:

"a. Dismiss Eco Oro's damages claims in their entirety;

b. Order that Eco Oro pay the Republic of Colombia all costs associated with these proceedings, including arbitration costs and all professional fees and disbursements, as well as the fees of the Arbitral Tribunal, plus interest thereon; and

c. Grant such relief that the Tribunal may deem just and appropriate."

IV. THE PARTIES' GENERAL REMARKS

56. In addition to providing specific answers to the fourteen questions posed by the Tribunal, the Parties seized the opportunity to make the following submissions.

A. Background and Majority Tribunal Findings

(1) The Claimant's Position

57. Eco Oro recalls that the Majority Tribunal had made two noteworthy findings regarding Eco Oro's development of the Angostura Project [21]:

a. Eco Oro had acquired exploitation rights in respect of the Angostura Project through Concession 3452. While that right to exploit could only be exercised upon fulfilling licensing conditions, Eco Oro's right to exploit means that – upon fulfilling those conditions – it had the right to proceed with a commercial operation designed to generate revenue; and

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[20] Respondent's Response, para. 246; Respondent's Rejoinder, para. 300.

[21] Claimant's First Submission, paras. 7-10, referring to Decision, paras. 439, 440, 634, 689-691, 693, 767, 848.

b. Eco Oro developed and continued investing in the Angostura Project with the "*significant encouragement from a number of different State bodies*", even after Judgment C-35 was issued in February 2016.

58. Eco Oro notes that the Majority Tribunal had considered that Resolution VSC 829 of 8 August 2016 had been the critical measure causing Eco Oro to suffer a loss. [22]

59. Eco Oro submits that, in light of the Majority Tribunal's findings regarding Colombia's extinguishment of Eco Oro's exploitation rights, Eco Oro's loss must be measured as the difference between the value of a project with the right to generate revenues through exploitation discounted to reflect the risks associated with permitting risks and a project without any right or ability to proceed to exploitation. [23]

60. Eco Oro notes that, while the Tribunal dismissed Eco Oro's Article 811 claim on other grounds, it found that "*this loss is capable of being considered to be a substantial deprivation, such as to amount to an indirect expropriation*", and it is those very same measures that the Tribunal found amounted to a breach of Article 805 of the Treaty. [24]

61. Eco Oro submits that, as the Angostura Project was destroyed in its totality by Colombia's unlawful conduct, Eco Oro is entitled to an award of damages for the full value of the Angostura Project but-for Colombia's unlawful measures. According to Eco Oro, it has submitted expert valuation evidence from Compass Lexecon, based on the three Comparable Transactions, showing that the Angostura Project had a value of USD696 million as of 8 August 2016 (on which interest is owing), excluding the effects of Colombia's unlawful conduct. Eco Oro further notes that, while the Tribunal has not rendered a conclusion on damages, it has provisionally observed that Eco Oro's valuation involving "*the three Comparable Transactions* [...] *appears to offer the best evidence*" of the value of Eco Oro's Angostura Project but-for Colombia's unlawful conduct. [25]

(2) The Respondent's Position

62. According to Colombia, the Majority Tribunal found that the Challenged Measures – "*the totality of the events commencing with Resolution 2090 and concluding with the deprivation created by Resolution VSC 829*" – were a valid exercise of Colombia's police powers and did not breach either Article 811 or Article 805. [26]

63. Colombia submits that Eco Oro seeks to recast the Tribunal's Decision in order to claim USD696 million for the loss of an opportunity to apply for an environmental licence that had no real chance

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[22] Claimant's First Submission, para. 11, referring to paras. 633-634 of the Decision.

[23] Claimant's First Submission, para. 12.

[24] Claimant's First Submission, para. 13, referring to para. 634 of the Decision.

[25] Claimant's First Submission, para. 15, referring to Decision, paras. 894, 902; Second Compass Lexecon Report, para. 3; Direct Presentation of Compass Lexecon (**Exhibit CH-7**), slide 26.

[26] Respondent's Rejoinder, para. 14, referring to Decision, paras. 502, 806.

of ever being granted. Despite the Tribunal giving Eco Oro a further opportunity to prove its case on damages, Eco Oro has still failed to do so. Rather than submitting any revised expert evidence or answering the Tribunal's questions as to how a loss of opportunity to apply for an environmental licence could actually be valued in light of the Tribunal's findings, Eco Oro has attempted to re-package its previous damages valuation in order to continue to claim a windfall. [27]

64. Colombia recalls that the Majority Tribunal had made the following noteworthy findings:

a. The only measures that breached Article 805 of the Treaty were adopted after Resolution VSC 829 had already lawfully deprived Eco Oro of its rights over the area of the Concession overlapping with the Resolution 2090 Delimitation; [28] and

b. Eco Oro's prospects of securing an environmental licence were "*minimal*", and Colombia had the right to curtail the area over which Eco Oro may apply for an environmental licence through a final delimitation of the páramo. [29]

65. Colombia further submits that Compass Lexecon's assessment is not an appropriate valuation of Eco Oro's lost opportunity because it reflects no such risks. As Professor Spiller admitted in cross-examination, Compass Lexecon did not carry out any assessment of the risk of an environmental licence being denied or how that risk compared with the environmental permitting risk faced by the three properties identified as comparable by Behre Dolbear. Behre Dolbear, in turn, conceded that they had simply assumed that an environmental permit would be granted for the Angostura Project and that the Concession would not be impacted by any páramo delimitation. [30]

B. The Standard of Proof

(1) The Claimant's Position

66. Eco Oro submits that the computation of damages to make a claimant whole for its loss is not an exact science. [31] In that regard, Eco Oro's standard of proof requires it *(a)* to prove, with a sufficient degree of certainty, that it has suffered a loss caused by Colombia's breaches of the Treaty, and *(b)* to provide a reasonable basis to compute that loss. [32]

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[27] Respondent's Response, paras. 2-3.

[28] Respondent's Response, para. 4, referring to Decision, paras. 699, 502, 804, 762, 820.

[29] Respondent's Response, paras. 6, 53, referring to Decision, paras. 634, 698.

[30] Respondent's Response, para. 7, referring to Tr. Day 5, 1451:4-1453:15 (Mr Manuel Abdala and Mr Spiller); Tr. Day 4, 1133:16-21 (Mr Jorgensen and Mr Guarnera).

[31] Claimant's First Submission, para. 18, citing to *Gold Reserve Inc. v Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/09/1) Award (22 September 2014) (**Exhibit RL-96**), para. 686; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic* (ICSID Case No. ARB/97/3) Award (20 August 2007) (**Exhibit CL-43**), para. 3.8.16; *Ioannis Kardassopoulos and Ron Fuchs v The Republic of Georgia* (ICSID Case No. ARB/05/18 and ARB/07/15) Award (3 March 2010) (**Exhibit CL-62**), para. 594.

[32] Claimant's First Submission, para. 18, citing to *Hydro S.R.L. and others v Republic of Albania* (ICSID Case No. ARB/15/28) Award (24 April 2019) (**Exhibit CL-226**), para. 845; *Watkins Holdings S.Á.R.L. and others v The Kingdom of Spain* (ICSID Case No. ARB/15/44) Award (21 January 2020) (**Exhibit CL-229**), para. 685; *Crystallex International Corporation v Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2) Award (4 April 2016) (**Exhibit CL-85**), paras. 867-869.

67. So far as the 'sufficient degree of certainty' requirement is concerned, Eco Oro contends that the balance of probabilities test applies. [33]

68. So far as the 'reasonable basis' requirement is concerned, Eco Oro submits that residual uncertainty associated with the computation of damages should not be used to deprive a claimant of its damages where that uncertainty is a consequence of the State's unlawful conduct. [34]

69. Eco Oro submits that it has established that it has suffered a loss – i.e., a total loss of its Angostura Project, referring to the Tribunal's finding in paragraph 634 of the Decision that "*without a right to exploit* [...] *the Concession became valueless*". Eco Oro further notes that the Angostura Project had substantial value, which could be observed from objective market behaviour, i.e., the Comparable Transactions. [35]

70. Eco Oro submits that it has provided a more than reasonable basis upon which to compute its losses. In this regard, Eco Oro points to the leading guidelines on the valuation of mining assets prepared by CIMVAL, which endorses the comparable transactions methodology as being a "*primary*" and "*widely used*" methodology to value projects at the Angostura Project's stage of development. [36] Eco Oro further notes that this methodology has been accepted by the Parties' experts [37] and that the Tribunal has manifested an inclination to follow it in its Decision. [38]

71. Eco Oro notes that the Comparable Transactions provide a more than reasonable basis for valuing the Angostura Project, especially when *(i)* the Angostura Project was used to leverage a higher offer by Ventana and *(ii)* numerous independent mining experts, known as qualified persons under NI 43-101 ("**Qualified Persons**"), have opined that the Angostura Project is geologically comparable to the mining properties owned by the Comparable Companies – which were, in fact, described as 'adjacent properties' in the NI 43-101 reports. [39]

72. Eco Oro notes that valuing the Angostura Project based on the Comparable Transactions captures the discount that the market applies to such properties for the risk either that they may not obtain an environmental license or that they may have to adapt their projects to conform to licensing

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[33] Claimant's First Submission, para. 19, citing to *Gold Reserve Inc. v Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/09/1) Award (22 September 2014) (**Exhibit RL-96**), para. 685.

[34] Claimant's First Submission, paras. 19-23, citing to *Gold Reserve Inc. v Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/09/1) Award (22 September 2014) (**Exhibit RL-96**), para. 686; *Crystallex International Corporation v Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2) Award (4 April 2016) (**Exhibit CL-85**), paras. 869 and 871; *Hydro S.R.L. and others v Republic of Albania* (ICSID Case No. ARB/15/28) Award (24 April 2019) (**Exhibit CL-226**), paras. 845, 849; and *Watkins Holdings S.Á.R.L. and others v The Kingdom of Spain* (ICSID Case No. ARB/15/44) Award (21 January 2020) (**Exhibit CL-229**), para. 685.

[35] Claimant's First Submission, paras. 26-31.

[36] Claimant's First Submission, paras. 32-36, referring to CIMVAL, Standards and Guidelines for Valuation of Mineral Properties (February 2003) (**Exhibit C-85**), pp. 23-24. Eco Oro notes that it is only "*reasonable*" to use the comparable transactions methodology to value the Angostura Project if there exist arms-length transactions involving comparable mining properties.

[37] Claimant's First Submission, para. 33, referring to Decision, paras. 899-901; First Compass Lexecon Report, para. 47; First CRA Report, paras. 44 and 64.

[38] Claimant's First Submission, paras. 34-35, referring to Decision, paras. 856-858, 902.

[39] Claimant's First Submission, paras. 35-36, referring to Ventana Gold Corp., Director's Circular Recommending Rejection of the Offer by AUX Canada Acquisition Inc of Ventana Gold Corp (22 December 2010) (**Exhibit C-141**), p. 26; Samuel Engineering, Preliminary Assessment of the La Bodega Project (prepared for Ventana Gold Corp.) (8 November 2010) (**Exhibit BD-13**), p. 62 (PDF p. 78); SRK Consulting, Technical Report on Resources for the California Gold-Silver Project (prepared for Galway Resources) (25 October 2012) (**Exhibit BD-26**), p. 110 (PDF p. 126); Dr Vadim Galkine, Updated Technical Report on the California Gold Project (prepared for Calvista Gold Corporation) (11 October 2012) (**Exhibit BD-25**), p. 110; Decision, para. 900.

requirements in a manner that reduces their value. Therefore, Eco Oro argues that there is no need to ascribe an additional precise probability on the likelihood of Angostura's licensability or to amend further Eco Oro's damages computation because the risk that, but-for Colombia's measures, Eco Oro would not have been granted an environmental license for the Angostura Project is already reflected in the valuation. [40]

73. Eco Oro alludes to the fact that Colombia had a legal framework for the granting of environmental licenses in páramos and that Colombia had in fact granted dozens of such licenses. [41]

74. Eco Oro stresses that the uncertainty associated with the extent to which the Angostura Project would have obtained an environmental license was a consequence of Colombia's own unlawful acts. Therefore, allowing Colombia to reduce the damages owing to Eco Oro on such grounds would not only discount Eco Oro's damages twice for the same risk (because Eco Oro's Comparable Transactions valuation already factors in the negative value effect of the Angostura Project's permitting risks), but it would also reward Colombia for its own wrongdoing. [42]

75. Eco Oro points to an erroneous reliance on *Bilcon* by Colombia, submitting that there is an important and obvious distinction between Eco Oro's approach to valuation in the present arbitration and the claimant's approach in *Bilcon*: according to Eco Oro, a market-based valuation does not call for an inquiry on licensing probability whereas a discounted cash-flow ("**DCF**") valuation does. Finally, Eco Oro notes that the issue limiting the *Bilcon* tribunal's ability to rely on prior transactions for valuation purposes that resulted in the tribunal taking a hybrid approach to valuing damages – a mid-way point between the claimant's sunk costs and the value implied by the prior transactions – does not exist in the present case, as each Party's experts accept that the Comparable Transactions must be used in a valuation of the Angostura Project. [43]

(2) The Respondent's Position

76. Colombia asserts that the burden of proving its losses to the requisite standards falls squarely on Eco Oro. It is Eco Oro's affirmative case that the opportunity that it lost as a result of Colombia's breach of Article 805 had value and consequently it falls on Eco Oro to prove both its losses to a sufficient degree of certainty and that the assumptions underlying its valuation are reasonable rather than speculative. [44]

77. Colombia concurs that the 'balance of probabilities' standard applies so far as causation is

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[40] Claimant's First Submission, paras. 40-41, 52. Eco Oro notes that if there were any meaningful difference in terms of permitting risk profile between the Angostura Project and the properties that were the subject of the Comparable Transactions, Colombia and its experts would have already raised it.

[41] Claimant's First Submission, para. 42, referring to Letter from the National Mining Agency to the Constitutional Court (24 February 2016) (**Exhibit C-44**), p. 8; Decision, para. 793.

[42] Claimant's First Submission, paras. 43-44, citing to *Hydro S.R.L. and others v Republic of Albania* (ICSID Case No. ARB/15/28) Award (24 April 2019) (**Exhibit CL-226**), para. 848; *Crystallex International Corporation v Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2) Award (4 April 2016) (**Exhibit CL-85**), para. 871.

[43] Claimant's First Submission, paras. 45-52, citing to *William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware v Government of Canada* (UNCITRAL) Award on Damages (10 January 2019) (**Exhibit RL-158**), paras. 136, 168-169, 220, 276-303. First CRA Report, paras. 47, 64.

[44] Respondent's Response, para. 62.

concerned.[45] In this regard, Colombia asserts that Eco Oro must prove that Colombia's conduct caused its losses "*in all probability*" or "*with a sufficient degree of certainty*".[46]

78. Colombia submits that, where the uncertainty of a threshold event or assumption prevents the claimant from establishing causation to the requisite standard, any monetary loss suffered by the claimant is limited to that of a loss of opportunity. Colombia stresses that, even then, damages for loss of opportunity can only be awarded where the claimant can establish a realistic prospect of the threshold event or assumption materialising.[47]

79. According to Colombia, loss of opportunity damages are calculated on a different – significantly lower – basis to damages which can be claimed when causation has been established to the requisite standard. That is because such damages must reflect the likelihood of the opportunity not materialising in light of all relevant risks. Thus, loss of opportunity damages are not calculated on the basis of fair market value, but rather by multiplying expected profits by the probability of such profits materialising.[48]

C. Quantum

(1) The Claimant's Position

80. According to Eco Oro, its loss suffered as a result of Colombia's breach of Article 805 is equal to the full value of its investment, i.e., the Angostura Project.

81. Eco Oro submits that the Comparable Transactions are a more than "reasonable basis" upon which to compute Eco Oro's damages and that they yield a fair market value for the Angostura Project of USD696 million as of 8 August 2016, on which pre-award interest is owing.[49] Eco Oro has provided the following table[50]:

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[45] Respondent's Response, para. 49, citing to *William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware, Inc. v The Government of Canada* (UNCITRAL) Award on Damages (10 January 2019) (**Exhibit RL-158**), para. 87. See also Respondent's Rejoinder, para. 35, fn. 76, para. 97(b).

[46] Respondent's Response, paras. 45-46, citing to *William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware, Inc. v The Government of Canada* (UNCITRAL) Award on Damages (10 January 2019) (**Exhibit RL-158**), paras. 110 ("*Authorities in public international law require a high standard of factual certainty to prove a causal link between breach and injury: the alleged injury must 'in all probability' have been caused by the breach (as in Chorzów), or a conclusion with a 'sufficient degree of certainty' is required that, absent a breach, the injury would have been avoided (as in Genocide).*"), 168, 175-176.

[47] Respondent's Response, paras. 49-50, citing to *William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware, Inc. v The Government of Canada* (UNCITRAL) Award on Damages (10 January 2019) (**Exhibit RL-158**), para. 303; *Infinito Gold Ltd. v Republic of Costa Rica* (ICSID Case No. ARB/14/5) Award (3 June 2021) (**Exhibit RL-197**), para. 585; *Caratube International Oil Company LLP and Devincci Salah Hourani v Republic of Kazakhstan* (ICSID Case No. ARB/13/13) Award (27 September 2017) (**Exhibit RL-192**), paras. 943, 945, 986, 1165; *Burlington Resources Inc v Republic of Ecuador* (ICSID Case No. ARB/08/5) Decision on Reconsideration and Award (7 February 2017) (**Exhibit CL-90**), paras. 250, 278, 279, 287-288.

[48] Respondent's Response, para. 51, citing to *Joseph Charles Lemire v Ukraine* (ICSID Case No. ARB/06/18) Award (28 March 2011) (**Exhibit CL-177**), para. 251, which paraphrases the UNIDROIT Principles of International Commercial Contracts (with comments) (2016) (**Exhibit RL-191**), Article 7.4.3(2), comment 2, p. 275: "*The compensation will therefore be calculated as a proportion of the profit which A might have made.*"

[49] Claimant's First Submission, paras. 53-54.

8-Aug-16	Transaction Multiple (USD per oz)	Weighted Gold Ounce Equivalent (oz mm)	Unadjusted Enterprise Value (USD mm)	Effective Additional Royalty in Transaction Multiple	Additional Royalty at Angostura Project	Incremental Royalty at Project	Enterprise Value of Angostura Project (USD mm)
	[a]	*[b]*	*[c] = [a] * [b]*	*[d]*	*[e]*	*[f] = [e]-[d]*	*[g] = [c]*([1-f])*
Angostura Deposit	*$242*	2.89	**$699.5**	0.76%	5.50%	4.74%	**$666.4**
Móngora Deposit	*$407*	0.07	**$29.4**	0.67%	0.00%	-0.67%	**$29.6**
Angostura Project		2.97	**$728.9**				**$696.0**

Figure 1: *Eco Oro's Valuation.*

(2) The Respondent's Position

82. Colombia submits that the Tribunal should value the opportunity lost as a result of Colombia's breach of Article 805 as zero. Colombia's measures that breached Article 805 deprived Eco Oro of an opportunity to apply for an environmental licence over the Remaining Area of the Concession only, and Eco Oro's own case is that such an opportunity was valueless. [51]

83. In the alternative, Colombia considers that Eco Oro would still not be entitled to damages because it has not formulated a loss of opportunity claim nor provided any evidence to assess the value of that opportunity. [52]

84. In the further alternative, even if the Tribunal were to accept Eco Oro's Comparable Transactions methodology as capable, in principle, of valuing Eco Oro's lost opportunity, the Tribunal should reject Compass Lexecon's valuation because it fails to account for differences in environmental permitting risk and risks associated with a lawful final delimitation of the páramo. [53]

85. In the further, further alternative, if the Tribunal were minded to rely on Compass Lexecon's valuation notwithstanding its failure to account for such differences, Colombia submits that the

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[50] Claimant's First Submission, paras. 54-55. According to Eco Oro, Compass Lexecon's valuation model (**CLEX-73**) is a dynamic Excel file, which enables the Tribunal to make adjustments to valuation assumptions to observe sensitivities to its valuation.

[51] Respondent's Response, paras. 35-36, 82, referring to the Claimant's Memorial, paras. 175-176; Decision, para. 634.

[52] Respondent's Rejoinder, paras. 84-87, citing to *William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware, Inc. v The Government of Canada* (UNCITRAL) Award on Damages (10 January 2019) (**Exhibit RL-158**), para. 175 (as the claimants had not proven a causal link between their claimed losses and Canada's NAFTA breach, they were at most entitled to compensation for loss of opportunity).

[53] Respondent's Rejoinder, para. 87.

Tribunal should make the adjustments set out in Exhibit R-267.[54] Applying such adjustments, Colombia asserts that the Angostura Project would be valued at USD93.84 million, as of the valuation date that Colombia deems correct, 21 December 2018.[55]

V. THE PARTIES' ANSWERS TO THE TRIBUNAL'S QUESTIONS

A. Question A

86. In paragraph 920(4)(a) of its Decision, the Tribunal sought an answer to the following question: "*Are the losses suffered by Eco Oro for a breach of Article 805 and Article 811 the same, and to be measured in the same way? If not, given the majority Tribunal's reasoning, what is the nature of the loss that Eco Oro has actually suffered, if any?*"

(1) The Claimant's First Submission

87. Eco Oro summarises its answer to this question as follows[56]:

"*57. Yes, Eco Oro's losses for breach of Article 805 (**Article 805 (MST) Damages**) and Article 811 (**Article 811 (Expropriation) Damages**) are to be measured in the same way.*[57] *The Majority Tribunal has held that the applicable standard of compensation is the international law standard of full reparation.*[58] *That standard requires the assessment of compensation sufficient to 'wipe out' the effects of Colombia's unlawful measures. As a practical matter, investment tribunals assess compensation to give effect to the principle of full reparation by computing the diminution in fair market value of an investment (ie, the difference in the value of the investment with and without*

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[54] Respondent's Rejoinder, para. 87, referring to the Adjusted Compass Lexecon Comparable Transactions Model (**Exhibit R-267**).

[55] Respondent's Response, para. 98, referring to Adjusted Compass Lexecon Comparable Transactions Model (**Exhibit R-267**).

[56] Claimant's First Submission, para. 57. In paragraphs 87-116 of Claimant's First Submission, Eco Oro expands on these arguments.

[57] Claimant's First Submission, para. 87, referring to Claimant's Memorial, para. 376: "*The harm suffered by Eco Oro as a result of Colombia's unlawful expropriation is the same as the harm suffered as a result of Colombia's unfair and inequitable treatment, and Colombia's failure to provide full protection and security: the total loss of value in its investment.*" Eco Oro further submits that what matters is the effects of Colombia's measures that breach the Treaty, which calls for a finding of fact, not which Treaty provision was breached (Claimant's First Submission, paras. 88, 100).

[58] Claimant's First Submission, paras. 88, 95-96, 105, referring to Decision, para. 894. See also Claimant's First Submission, para. 96, referring to International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001) (**Exhibit CL-17**), Article 31 ("*(1) The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. (2) Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.*"); Article 35 ("*A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution: (a) is not materially impossible; (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.*"); Article 36(1) ("*The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.*"); *Case Concerning the Factory at Chorzów (Germany/Poland)* (PCIJ), Merits (1928) (**Exhibit CL-1**), p. 47 ("*reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.*").

the effects of the unlawful State measures).[59] *Both Parties are in agreement with respect to that approach.*[60] *In successful expropriation cases, the value of the investment after the unlawful measures is nil, and so damages are computed by determining the fair market value of the investment*[61] *without the effects of the unlawful State measures. Here, while the Majority Tribunal has dismissed Eco Oro's expropriation claim, it has found as a factual matter that the effect of Colombia's measures was tantamount to expropriation given that Eco Oro suffered a 'complete deprivation' that resulted in its investment becoming 'valueless'.*[62] *The Majority Tribunal determined that those same measures breached Article 805 of the Treaty. Therefore, Eco Oro's loss suffered as a result of Colombia's breach of Article 805 is equal to the full value of the Angostura Project.*"

88. Finally, Eco Oro argues that, of the market-based methodologies available, the comparable

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[59] Claimant's First Submission, para. 99, citing to B. Sabahi, N. Rubins and D. Wallace (Jr), *Investor-State Arbitration* (2nd edn 2019) (**Exhibit CL-217**), p. 730: "*21.53 FMV is widely used to quantify compensation both for lawful expropriation and for various treaty breaches.*"; Claimant's Reply Memorial, paras. 537-550, citing *inter alia* to *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt* (ICSID Case No. ARB/05/15) Award (1 June 2009) (**Exhibit CL-58**), para. 564 (a comparable transaction needs to be "*an open-market transaction conducted at arms length on normal commercial terms*"); *Valores Mundiales, S.L. and Consorcio Andino, S.L. v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/13/11) Award (25 July 2017) (**Exhibit CL-224**), paras. 711-713, 722; *CMS Gas Transmission Company v The Republic of Argentina* (ICSID Case No. ARB/01/8) Award (12 May 2005) (**Exhibit CL-31**), para. 410; *Enron Corporation and Ponderosa Assets, LP v Argentine Republic* (ICSID Case No. ARB/01/3) Award (22 May 2007) (**Exhibit CL-42**), paras. 359-363; *Sempra Energy International v Argentine Republic* (ICSID Case No. ARB/02/16) Award (28 September 2007) (**Exhibit CL-44**), paras. 403-406; *El Paso Energy International Company v The Argentine Republic* (ICSID Case No. ARB/03/15) Award (31 October 2011) (**Exhibit CL-73**), paras. 703-705; *TECO Guatemala Holdings, LLC v Republic of Guatemala*, (ICSID Case No. ARB/10/23) Award (19 December 2013) (**Exhibit CL-184**), para. 154. Eco Oro also points to Ripinsky and Williams, who explain that "[i]*n a number of cases a non-expropriatory violation has produced effects similar to those of an expropriation, ie the total loss of the investment [...]. In these circumstances, arbitrators have logically chosen to measure the loss, and therefore compensation, by focusing on the market value of the investment lost.*" (Claimant's First Submission, para. 109-111, citing to S. Ripinsky and K. Williams, *Damages in International Investment Law* (2008) (**Exhibit CL-49**), p. 92); *Gold Reserve Inc. v Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/09/1) Award (22 September 2014) (**Exhibit RL-96**), paras. 668 (the tribunal rejected the claimant's expropriation claim because it found that Venezuela's measures were the result of the exercise of regulatory powers under the applicable legal framework, but considered that this did not detract from the fact that the manner by which such regulatory powers were exercised had led to a finding of a serious breach by the State of the FET standard), 674, 681-682 (appropriate measure of damages in the present circumstances is fair market value), 680 ("*the serious nature of the breach in the present circumstances and the fact that the breach has resulted in the total deprivation of mining rights suggests that, under the principles of full reparation and wiping-out the consequences of the breach, a fair market value methodology is also appropriate in the present circumstances*"); and *Azurix Corp v The Argentine Republic* (ICSID Case No. ARB/01/12) Award (14 July 2006) (**Exhibit CL-35**), paras. 377 (finding a breach of FET), 322 (finding no expropriation) and 424-425 (upholding compensation based on the total fair market value of the investment). In the annulment proceedings, Argentina argued that the Tribunal had no discretion to apply the fair market value standard of compensation because under the BIT this standard was reserved for expropriations. The annulment committee rejected such argument and held that "*if the Tribunal had... a discretion in the approach it adopted to the assessment of damages*", it was reasonable that "*in the exercise of such discretion* [the tribunal would] *also apply the 'fair market value' standard to cases of non-expropriatory breaches of the treaty*". See *Azurix Corp v The Argentine Republic (I)* (ICSID Case No. ARB/01/12) Decision on the Application for Annulment of the Argentine Republic (1 September 2009) (**Exhibit CL-219**), para. 322.

[60] Claimant's First Submission, paras. 90, 97, referring to Decision, para. 896; Instruction Letter (15 January 2018) (**Exhibit CLEX-1**); First Compass Lexecon Report, paras. 1, 8; First CRA Report, paras. 19, 27, 40, 47, 64, 66-75.

[61] Claimant's First Submission, para. 101, citing to J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002) (**Exhibit CL-19**) p. 225 ("*Compensation reflecting the capital value of property taken or destroyed as the result of an internationally wrongful act is generally assessed on the basis of the 'fair market value' of the property lost*") (emphasis added); *Azurix Corp v The Argentine Republic* (ICSID Case No. ARB/01/12) Award (14 July 2006) (**Exhibit CL-35**), para. 442; *TECO Guatemala Holdings, LLC v Republic of Guatemala* (ICSID Case No. ARB/10/23) Award (19 December 2013) (**Exhibit CL-184**), para. 154. Eco Oro underscores that its covered investment under the Treaty consists of its rights under Concession 3452, i.e., acquired and indivisible rights to explore and to exploit (Claimant's First Submission, paras. 102 *et seq.*, referring to Decision, paras. 439-440, 421-422). Eco Oro adds that the Tribunal had also found that Eco Oro had a right to compensation in the event of a retroactive application of the law leading to the loss of an acquired right (Claimant's First Submission, para. 102, referring to Decision, paras. 435, 439, 467, 470, 473, 476, 641, 687 and 768).

[62] Claimant's First Submission, fn. 88, referring to Decision, para. 634. See also Claimant's First Submission, para. 89, referring to Decision, paras. 633-634.

transactions methodology – which ascribes a value to the Angostura Project based on the value paid for the purchase of other comparable mining projects in real-world transactions – is considered in the industry to be a "*primary*" and "*widely used*" methodology for valuing properties that are at the Angostura Project's stage of development.[63] Eco Oro underlines that this methodology is only viable where there are transactions involving properties that are genuinely comparable, which is the case with the Comparable Transactions. Eco Oro notes that, given the close similarities to the Angostura Project, these transactions build in the effect on value of any market perception of risk involved in permitting an underground project in the immediate vicinity of the Angostura Project as applicable in the "but-for" scenario. Moreover, the Parties' experts have thus accepted that the projects underlying the Comparable Transactions faced sufficiently comparable permitting risks to the Angostura Project, making the Comparable Transactions suitable for valuation purposes.[64] Eco Oro further notes that the Tribunal had already expressed a preference for the methodology and the use of the Comparable Transactions for valuation purposes.[65]

(2) Respondent's Response

89. Colombia submits that the losses suffered by Eco Oro as a result of the specific measures that the Tribunal found to have breached Article 805 of the Treaty are not the same as the losses Eco Oro suffered as a result of the breaches of Article 811 of the Treaty that Eco Oro had alleged but which were rejected by the Tribunal.[66]

90. According to Colombia, after Resolution VSC 829 had removed the area of the Concession overlapping with the Resolution 2090 Delimitation, Eco Oro's only remaining right was to pursue a project and apply for an environmental licence over the Remaining Area. On Eco Oro's own case, the opportunity to pursue a project over the Remaining Area had no value whatsoever: without the part of the deposit lost to the Resolution 2090 Delimitation, the Angostura Project was not economically viable and the remainder of the Concession was therefore worthless.[67] Colombia submits that the Tribunal should therefore award Eco Oro zero damages.[68]

91. Colombia adds that, if Eco Oro's interpretation of the Decision were correct, the respective reasonings of the Tribunal in relation to Article 805 and Article 811 would cancel each other out, which would amount to a failure of the Tribunal to state the reasons on which the Decision is based, in violation of Article 48(3) of the ICSID Convention. Moreover, according to Colombia, no tribunal has ever found that a substantial deprivation carried out as a valid exercise of police powers

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[63] Claimant's First Submission, para. 113, citing to CIMVAL, Standards and Guidelines for Valuation of Mineral Properties (February 2003) (**Exhibit C-85**), pp. 23-24 (referring to the "*Market*" methodology, including "*comparable transactions*", as being the preferred methodology for "*Mineral Resource Properties*"); Rudenno, Victor, *The Mining Valuation Handbook*, 4th ed. Milton, Australia: John Wiley & Sons (1 January 2012) (**Exhibit CLEX-74**), pp. 284-288; Second Compass Lexecon Report, para. 38, which, in addition to the authorities referred to in this footnote, alludes to PwC "Discussion Paper on Valuation in the Extractive Industries", International Valuation Standards Council (19 October 2012) (**CLEX-72**), p. 7.

[64] Claimant's First Submission, paras. 114-116.

[65] Claimant's First Submission, para. 114, referring to Decision, para. 902.

[66] Respondent's Response, para. 13.

[67] Respondent's Response, paras. 22 *et seq.*, referring to Decision, paras. 502, 632, 634, 642, 662, 678, 762, 804- 806, 820-821.

[68] Respondent's Response, paras. 14-15, 40-42, citing to *Infinito Gold Ltd. v Republic of Costa Rica* (ICSID Case No. ARB/14/5) Award (3 June 2021) (**Exhibit RL-197**), para. 585 (internal citations omitted).

amounted, at the same time, to a violation of the MST. [69]

92. Colombia further submits that, even if it were open to Eco Oro to re-imagine the Tribunal's Decision and to claim that it has suffered a loss of opportunity to apply for a licence over the entirety of the Concession Area as a result of Colombia's Article 805 breach, such a loss could still not be measured as the loss of the fair market value of the Concession as Eco Oro contends. While fair market value is the applicable standard of compensation for expropriation, in all other cases damages must be measured according to the actual harm caused by the breach. [70] To the extent the harm suffered by Eco Oro is a loss of opportunity to apply for an environmental licence, such a loss would need to be measured in a manner that takes account of all relevant risks associated with the Angostura Project, including those identified as significant in the Tribunal's Decision. [71] Here, the Tribunal has found that Eco Oro's prospects of securing an environmental licence for the Angostura Project were "*minimal*", and that Colombia had the right to lawfully remove parts of the Concession in order to protect the páramo. Neither risk is reflected in Eco Oro's valuation of the fair market value of the Concession. The Tribunal cannot therefore rely on such a valuation. [72]

(3) Claimant's Reply

93. Eco Oro submits that Colombia's arguments have no merit, as they ignore the clear text of the Tribunal's Decision as well as basic principles on the assessment of loss under international law. [73]

94. According to Eco Oro, the Tribunal's reasoning is clear as to the fact that all of Colombia's measures,

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[69] Respondent's Response, paras. 31-32, citing to *Renée Rose Levy de Levi v The Republic of Peru* (ICSID Case No. ARB/10/17) Award (26 February 2014) (**Exhibit RL-95**), paras. 391, 474, 476; *Chemtura Corporation v Government of Canada* (UNCITRAL) Award (2 August 2010) (**Exhibit RL-84**), paras. 192-193, 266-267; *Philip Morris Brand Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7) Award (8 July 2016) (**Exhibit RL-102**), paras. 307, 420, 434; *Saluka Investments B.V. v The Czech Republic* (UNCITRAL) Partial Award (17 March 2006) (**Exhibit RL-71**), paras. 276, 407, 447; *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAgua Servicios Integrales del Agua S.A. v The Argentine Republic* (ICSID Case No. ARB/03/17) Decision on Liability (30 July 2010) (**Exhibit RL-189**), para. 148; *Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v Republic of Cyprus* (ICSID Case No. ARB/13/27) Award (26 July 2018) (**Exhibit RL-193**), paras. 1218, 1219, 1226, 1227, 1228, 1233.

[70] Respondent's Response, paras. 17 *et seq.*, citing to Decision, para. 894; FTA, Article 819: "*An investor of a Party may submit to arbitration under this Section a claim that the other Party has breached: (a) an obligation under Section A* [...] *and that the investor has incurred loss or damage by reason of, or arising out of, that breach*"; International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (2001) (**Exhibit CL-202**), Article 36(1), pp. 9, 99; *Case Concerning the Factory at Chorzów (Germany/Poland)* (PCIJ), Merits (1928) (**Exhibit CL-1**), p. 47; *S.D. Myers, Inc. v Government of Canada* (UNCITRAL) Partial Award (13 November 2000) (**Exhibit RL-55**), paras. 316-317.

[71] Respondent's Response, paras. 43 *et seq.*, citing to Decision, paras. 894; *William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware, Inc. v The Government of Canada* (UNCITRAL) Award on Damages (10 January 2019) (**Exhibit RL-158**), paras. 87, 110, 168, 175-176, 303; S. Ripinsky & K. Williams, *Damages in International Investment Law* (2008) (**Exhibit RL-120**), p. 135; N. Blackaby, C. Partasides, et al., 'Chapter 8. Arbitration under Investment Treaties', in *Redfern and Hunter on International Arbitration* (6th ed. 2015) (**Exhibit RL-190**), p. 491, paras. 8.143-8.144; A. Ali and D. Attanasio, 'Chapter 8: Reparations: Remedies for Violations of Investment Protection' in *International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (2021) (**Exhibit RL-195**), p. 353; J. Paulsson, 'Chapter 3. The Expectation Model' in Y. Derains and R. Kreindler (eds.) *Evaluation of Damages in International Arbitration* (2006) (**Exhibit RL-188**), p. 66; *Infinito Gold Ltd. v Republic of Costa Rica* (ICSID Case No. ARB/14/5) Award (3 June 2021) (**Exhibit RL-197**), para. 585; *Caratube International Oil Company LLP and Devincci Salah Hourani v Republic of Kazakhstan* (ICSID Case No. ARB/13/13) Award (27 September 2017) (**Exhibit RL-192**), paras. 943, 945, 986, 1165; *Burlington Resources Inc v Republic of Ecuador* (ICSID Case No. ARB/08/5) Decision on Reconsideration and Award (7 February 2017) (**Exhibit CL-90**), paras. 250, 271, 278-279, 287-288; *Joseph Charles Lemire v Ukraine* (ICSID Case No. ARB/06/18) Award (28 March 2011) (**Exhibit CL-177**), para. 251, which paraphrases the UNIDROIT Principles of International Commercial Contracts (with comments) (2016) (**Exhibit RL-191**), Article 7.4.3(2), comment 2, p. 275.

[72] Respondent's Response, para. 16.

[73] Claimant's Reply, para. 17.

including the Challenged Measures, breached Article 805 of the Treaty. Eco Oro underscores that the Tribunal's findings derive from an analysis of Colombia's actions "*viewed as a whole*".[74]

95. Eco Oro takes issue with Colombia's argument, which, according to Eco Oro, consists of ignoring the text of paragraph 821 of the Decision and then relying on the Tribunal's findings in relation to Article 811 of the Treaty that the Challenged Measures were adopted in good faith and thus as part of Colombia's exercise of police powers in order to infer that they therefore must have been acceptable from an international law perspective and thus not in breach of Article 805 of the Treaty. Eco Oro submits that the police powers analysis is based upon a different Treaty provision (Annex 811(b)) and upon different legal criteria than the analysis of the breach of Article 805 of the Treaty.[75]

96. Eco Oro further submits that there is no inconsistency in the Tribunal's conclusion that good faith measures falling within the exercise of a State's police powers pursuant to Annex 811(b) can rise to the level of a breach of the MST/FET standard under Article 805 of the Treaty. According to Eco Oro, this derives from the Tribunal's determination that "*bad faith is not required*" to determine that Colombia's actions are unacceptable from an international law standpoint and breach the MST/FET standard and is in keeping with a consistent line of case law holding that state measures need not be in bad faith to rise to the level of a breach of MST/FET.[76] Eco Oro stresses that the Tribunal applied two distinct legal obligations separately and, contrary to Colombia's contention, the Tribunal's reasoning under Article 811 and under Article 805 do not "*cancel each other out*".[77]

97. Eco Oro also dismisses Colombia's invocation of the *Marfin* award. According to Eco Oro, in none of the cases cited by Colombia did the tribunals hold that a legitimate exercise of police powers was a valid defence against a breach of the FET standard. Eco Oro submits that there is no inconsistency insofar as the Tribunal has interpreted each provision as setting out a different legal test and has made different findings in the context of each analysis.[78]

98. Eco Oro further dismisses Colombia's invocation of the *Suez v Argentina* decision, as, on that tribunal's own analysis, the police powers doctrine cannot be used as a defence to an FET claim. Moreover, Eco Oro invoked the decisions in *Vivendi v Argentina* and in *AWG v Argentina* to depict an instance where a substantial deprivation carried out as a valid exercise of police powers amounted, at the same time, to a violation of the MST.[79]

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[74] Claimant's Reply, paras. 19-20, referring to Decision, paras. 762, 804-806, 821.

[75] Claimant's Reply, para. 22.

[76] Claimant's Reply, para. 23, citing to Decision, para. 806; *Siemens AG v The Argentine Republic* (ICSID Case No. ARB/02/8) Award (6 February 2007) (**Exhibit CL-41**), paras. 292-300; *Mondev International Ltd. v United States of America* (ICSID Case No. ARB(AF)/99/2) Final Award (11 October 2002) (**Exhibit CL-161**), para. 116; *CMS Gas Transmission Company v The Republic of Argentina* (ICSID Case No. ARB/01/8) Award, (12 May 2005) (**Exhibit CL-31**), para. 280.

[77] Claimant's Reply, para. 24.

[78] Claimant's Reply, para. 26, citing to *Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v Republic of Cyprus* (ICSID Case No. ARB/13/27) Award (26 July 2018) (**Exhibit RL-193**), paras. 868-870, 888, 893-894, 991, 993, 1218; *Renée Rose Levy de Levi v Republic of Peru* (ICSID Case No. ARB/10/17) Award (26 February 2014) (**Exhibit RL-95**), paras. 324-392; *Philip Morris Brand Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7) Award (8 July 2016) (**Exhibit RL-102**), paras. 388-435; *Chemtura Corporation v Government of Canada* (UNCITRAL) Award (2 August 2010) (**Exhibit RL-84**); *Saluka Investments B.V. v The Czech Republic* (UNCITRAL) Partial Award (17 March 2006) (**Exhibit RL-71**), paras. 276-278, 497-499.

[79] Claimant's Reply, paras. 27-29, citing to *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v The Argentine Republic* (ICSID Case No. ARB/03/19) Decision on Liability (30 July 2010) (**Exhibit CL-65**), paras. 139-140, 147-148, 236-238, 243, 247. Despite invoking *AWG v Argentina* at paragraph 28 of its Reply, Eco Oro does not cite to any specific decision in this case nor does this case feature in Eco Oro's Consolidated Index of Legal Authorities. For completeness, *AWG v Argentina* was entered into the record with Respondent's

99. Eco Oro submits that the Tribunal would not have proceeded to consider damages insofar as the Challenged Measures (which the Tribunal held rendered Eco Oro's investment valueless) did not breach the Treaty. In other words, having concluded that the Challenged Measures resulted in Eco Oro's investment having zero value, had the Tribunal found that these Measures did not breach the Treaty, and only *subsequent* measures gave rise to a breach of Article 805 of the Treaty, there would have been no need to proceed to a damages analysis. Eco Oro adds that it would not have been necessary to make any finding as to causation if the Challenged Measures, which the Tribunal concluded caused 100% of any loss suffered by Eco Oro, had not breached the Treaty. [80]

100. Eco Oro further dismisses Colombia's invocation of the *Infinito Gold* decision, because, unlike Eco Oro, the *Infinito* claimant only had an exploration concession. [81] According to Eco Oro, it is the value of the right to exploit that must be assessed by the Tribunal, as it is a self-standing right that can be transferred and sold by its titleholder, and it is Eco Oro's investment under the Treaty. [82]

101. Eco Oro finally takes issue with Colombia's *volte face* so far as the abandonment of its prior endorsement of the fair market value standard is concerned. Eco Oro submits that the Tribunal has already decided to apply the fair market valuation standard, which has been the common position of the Parties and their experts throughout the arbitration, and that decision cannot be reopened at this stage. [83] Eco Oro adds that Colombia's newfound invocation of the loss of opportunity doctrine is unavailing. [84] Eco Oro submits that in this case there is objective market data in the form of the three Comparable Transactions in connection with three properties adjacent to and landlocked within Concession 3452. Both Parties' valuation experts agree these properties are comparable and should be used in a valuation of Claimant's losses based on the comparable transactions methodology.

(4) Respondent's Rejoinder

Memorial on Jurisdiction and Counter-Memorial on the Merits: *AWG Group Ltd. v The Argentine Republic* (UNCITRAL) Decision on Liability (30 July 2010) (**Exhibit RL-83**).

[80] Claimant's Reply, paras. 30-40.

[81] Claimant's Reply, para. 42, citing to *Infinito Gold Ltd. v Republic of Costa Rica* (ICSID Case No. ARB/14/5) Procedural Order No. 2 (1 June 2016) (**Exhibit RL-137**), paras. 584-585. See Respondent's Rejoinder, fn. 68, where Colombia notes that the correct reference is to *Infinito Gold Ltd. v Republic of Costa Rica* (ICSID Case No. ARB/14/5) Award (3 June 2021) (**Exhibit RL-197**), para. 585.

[82] Claimant's Reply, paras. 43-44.

[83] Claimant's Reply, paras. 47-49, citing to Respondent's Response, paras. 44-45; First CRA Report, para. 19; B. Sabahi, N. Rubins and D. Wallace (Jr), *Investor-State Arbitration* (2nd edn 2019) (**Exhibit CL-217**), pp. 730-732 (bates 14-15); Claimant's Reply Memorial, paras. 537-550; *CMS Gas Transmission Company v The Republic of Argentina* (ICSID Case No. ARB/01/8) Award (12 May 2005) (**Exhibit CL-31**), para. 410; *Enron Corporation and Ponderosa Assets, LP v Argentine Republic* (ICSID Case No. ARB/01/3) Award (22 May 2007) (**Exhibit CL-42**), paras. 359-363; *Sempra Energy International v Argentine Republic* (ICSID Case No. ARB/02/16) Award (28 September 2007) (**Exhibit CL-44**), paras. 403-405; *El Paso Energy International Company v The Argentine Republic* (ICSID Case No. ARB/03/15) Award (31 October 2011) (**Exhibit CL-73**), paras. 702-705. Eco Oro further notes that the Tribunal has already decided to apply the fair market valuation standard, which has been the common position of the Parties and their experts throughout the arbitration (Claimant's Reply, para. 48(b), referring to Decision, paras. 896-897).

[84] Claimant's Reply, paras. 50-57, citing to S. Ripinsky and K. Williams, *Damages in International Investment Law* (2008) (**Exhibit CL-218**), pp. 291-292; Principles of International Commercial Contracts adopted by the International Institute for the Unification of Private Law, Article 7.4.3(2), cited in *Joseph Charles Lemire v Ukraine* (ICSID Case No. ARB/06/18) Award (28 March 2011) (**Exhibit CL-177**), para. 251; *Marco Gavazzi and Stefano Gavazzi v Romania* (ICSID Case No. ARB/12/25) Excerpts of the Award (18 April 2017) (**Exhibit CL-223**), paras. 214, 217, 219, 224; *Gemplus, SA, et al v The United Mexican States* (ICSID Case Nos. ARB(AF)/04/3 and ARB(AF)/04/4) Award (16 June 2010) (**Exhibit CL-64**), paras. 13-100; *Perenco Ecuador Limited v The Republic of Ecuador* (ICSID Case No. ARB/08/6) Award (27 September 2019) (**Exhibit CL-228**), paras. 316, 318, 324; *Perenco Ecuador Limited v Republic of Ecuador* (ICSID Case No. ARB/08/6) Decision on Annulment (28 May 2021) (**Exhibit CL-230**), para. 465; *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt* (ICSID Case No. ARB/84/3) Award (20 May 1992) (**Exhibit CL-11**), para. 215; *Joseph Charles Lemire v Ukraine* (ICSID Case No. ARB/06/18) Award (28 March 2011) (**Exhibit CL-177**), paras. 250-252.

102. Colombia reiterates that the Majority Tribunal found that the Challenged Measures—"*the totality of the events commencing with Resolution 2090 and concluding with the deprivation created by Resolution VSC 829*"—were a valid exercise of Colombia's police powers and did not breach either Article 811 or Article 805. Colombia adds that the Majority Tribunal found that Colombia breached Article 805 by failing to provide clarity as to Eco Oro's rights in respect of the Remaining Area of the Concession (the area not deprived by the Challenged Measures), while not preserving Eco Oro's rights with respect to the Concession until such clarity was provided. [85]

103. Colombia asserts that Eco Oro was unable to rebut Colombia's arguments. First, the acts which gave rise to the MST breach occurred after the Challenged Measures, and are distinct from the Challenged Measures. [86] Second, the finding that there was no mining ban when the FTA entered into force means nothing more than that the implementation of the ban after the FTA entered into force could, in principle, breach the FTA. [87] Third, there is no reason to presume that the Challenged Measures breached Article 805 and doing so would render the second stage of the Tribunal's Article 805 analysis moot. [88] Fourth, if Eco Oro was right that the Challenged Measures breached Article 805 and Eco Oro's existing evidence that relies on a purported fair market value valuation of the Concession as at the date of VSC 829 was appropriate, the Tribunal would not have asked the Parties further questions. [89] Fifth, it would be nonsensical for the Tribunal to find that the same measures are diametrically opposed in nature in different sections of the Decision. [90]

104. Colombia notes the Tribunal found that Eco Oro's chances of obtaining an environmental licence for a project were "*minimal*" even assuming that no mining ban were to apply to the Concession. Accordingly, but for any of Colombia's measures, Eco Oro would, in all probability, have failed to secure an environmental licence. This means that Eco Oro would ultimately have relinquished the Concession without any financial return. Accordingly, no compensation is due under the *Chorzów Factory* principle because the difference between Eco Oro's position as a result of Colombia's breaches and the position it would have occupied, in all probability, but for such breaches is zero. [91]

105. Colombia submits that Eco Oro's continued attempt to sidestep its burden of proving a loss that is

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[85] Respondent's Rejoinder, para. 14.

[86] Respondent's Rejoinder, paras. 17-22.

[87] Respondent's Rejoinder, para. 23.

[88] Respondent's Rejoinder, para. 24.

[89] Respondent's Rejoinder, para. 25.

[90] Respondent's Rejoinder, para. 26, citing to *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAgua Servicios Integrales del Agua S.A. v The Argentine Republic* (ICSID Case No. ARB/03/17) Decision on Liability (30 July 2010) (**Exhibit RL-189**), para. 148; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v The Argentine Republic* (ICSID Case No. ARB/03/19) Decision on Liability (30 July 2010) (**Exhibit CL-65**), paras. 44-57, 140, 235, 237-246; *Renée Rose Levy de Levi v The Republic of Peru* (ICSID Case No. ARB/10/17) Award (26 February 2014) (**Exhibit RL-95**), paras. 333, 339, 349-359, 373, 382, 453; *Philip Morris Brand Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7) Award (8 July 2016) (**Exhibit RL-102**), paras. 306-307, 419-420; *Saluka Investments B.V. v The Czech Republic* (UNCITRAL) Partial Award (17 March 2006) (**Exhibit RL-71**), paras. 271-275, 498-499; *Chemtura Corporation v Government of Canada* (UNCITRAL) Award (2 August 2010) (**Exhibit RL-84**), para. 266; *Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v Republic of Cyprus* (ICSID Case No. ARB/13/27) Award (26 July 2018) (**Exhibit RL-193**), paras. 830, 983, 985, 987, 1218-1219, 1226-1228, 1233.

[91] Respondent's Rejoinder, paras. 28-29, citing to *William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware, Inc. v The Government of Canada* (UNCITRAL) Award on Damages (10 January 2019) (**Exhibit RL-158**), paras. 168, 175-176; *Infinito Gold Ltd. v Republic of Costa Rica* (ICSID Case No. ARB/14/5) Award (3 June 2021) (**Exhibit RL-197**), para. 585; *Caratube International Oil Company LLP and Devincci Salah Hourani v Republic of Kazakhstan* (ICSID Case No. ARB/13/13) Award (27 September 2017) (**Exhibit RL-192**), para. 1165; *Perenco Ecuador Limited v The Republic of Ecuador* (ICSID Case No. ARB/08/6) Award (27 September 2019) (**Exhibit CL-228**), paras. 317-325; *Burlington Resources Inc. v Republic of Ecuador* (ICSID Case No. ARB/08/5) Decision on Reconsideration and Award (7 February 2017) (**Exhibit CL-90**), paras. 279-283.

consistent with the Tribunal's findings further reinforces the conclusion that the opportunity to apply for such a licence lost by Eco Oro as a result of Colombia's Article 805 breaches is too speculative to have any tangible value. Colombia further takes issue with Eco Oro's construction of the decision in *Infinito Gold*.[92] The Tribunal did not conclude that causation between the treaty breach and the loss of a licensable project was established. The only loss that the Tribunal considered to be established was the loss of an opportunity to apply for an environmental licence which had "*minimal*" prospects of succeeding.[93] Colombia further submits that the authorities invoked by Eco Oro do not support its attempt to sidestep its burden of proof or to shift it onto Colombia.[94]

106. Finally, Colombia submits that it has not accepted that Eco Oro was entitled to the fair market value of the Concession. The fact that the Parties agree on the principles of fair market value does not mean that Colombia agrees that fair market value is the appropriate measure of any loss Eco Oro may have suffered as a result of the standalone breach of Article 805 found by the Tribunal.[95]

B. Question B

107. In paragraph 920(4)(b) of its Decision, the Tribunal sought an answer to the following question: "*Should the expert evidence adduced by the Parties be revised, given the majority Tribunal's findings that Colombia is not in breach of Article 811 but is in breach of Article 805? If so, how?*"

(1) Claimant's First Submission

108. Eco Oro summarises its answer to this question as follows[96]:

"*58. No, the Tribunal need not seek from the Parties nor turn to any revised expert evidence in order to compute Article 805 (MST) Damages. Both Parties agree that the appropriate measure of computing Article 805 (MST) Damages is to observe the diminution in the fair market value of the affected investment.*[97] *Both Parties have instructed their valuation experts to compute damages*

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[92] Respondent's Rejoinder, paras. 31-33, citing to *Infinito Gold Ltd. v Republic of Costa Rica* (ICSID Case No. ARB/14/5) Award (3 June 2021) (**Exhibit RL-197**), paras. 370, 520, 572, 584-585. Colombia notes that, in fn. 70 of Claimant's Reply, Eco Oro's citation to *Infinito Gold Ltd. v Republic of Costa Rica* (ICSID Case No. ARB/14/5) Procedural Order No. 2 (1 June 2016) (**Exhibit RL-137**) is incorrect, as Eco Oro intended to refer to the *Infinito* award (**Exhibit RL-197**) (Respondent's Rejoinder, fn. 68).

[93] Respondent's Rejoinder, para. 35.

[94] Respondent's Rejoinder, paras. 36-40, citing to *Gemplus, S.A., et al v The United Mexican States* (ICSID Case Nos. ARB(AF)/04/3 and ARB(AF)/04/4) Award (16 June 2010) (**Exhibit CL-64**), paras. 12-100; *Marco Gavazzi and Stefano Gavazzi v Romania* (ICSID Case No. ARB/12/25) Excerpts of the Award (18 April 2017) (**Exhibit CL-223**), paras. 103-121, 222, 224-226, 228, 232; *Perenco Ecuador Limited v The Republic of Ecuador* (ICSID Case No. ARB/08/6) Award (27 September 2019) (**Exhibit CL-228**), paras. 316-317, 320, 325; *Joseph Charles Lemire v Ukraine* (ICSID Case No. ARB/06/18) Award (28 March 2011) (**Exhibit CL-177**), paras. 250-252; *Caratube International Oil Company LLP and Devincci Salah Hourani v Republic of Kazakhstan* (ICSID Case No. ARB/13/13) Award (27 September 2017) (**Exhibit RL-192**), para. 1152.

[95] Respondent's Rejoinder, para. 41-45.

[96] Claimant's First Submission, para. 58. In paragraphs 117-124 of Claimant's First Submission, Eco Oro expands on these arguments.

[97] Claimant's First Submission, paras. 118-119, referring to Decision, paras. 894, 896; *CMS Gas Transmission Company v The Republic of Argentina* (ICSID Case No. ARB/01/8) Award (12 May 2005) (**Exhibit CL-31**), para. 410; *Azurix Corp. v The Argentine Republic* (ICSID Case No.

on that basis.[98] *Therefore, the Tribunal already has before it expert evidence that, by design and in accordance with the Parties' instructions, has been prepared to compute Article 805 (MST) Damages.*"

(2) Respondent's Response

109. According to Colombia, any damages resulting from Colombia's Article 805 breach cannot exceed the amount necessary to place Eco Oro in the financial position it would have occupied but for the specific measures identified by the Tribunal as an Article 805 breach. But for such measures, Eco Oro would have held a right to apply for an environmental licence in respect of the portion of the Concession that had not already lawfully been removed by the Challenged Measures. On Eco Oro's own case, the opportunity to apply for a licence for a project over the Remaining Area was valueless. Eco Oro's claim for damages should end here, and there is no need, therefore, for the expert evidence adduced by the Parties to be revised.[99]

110. In the event that the Tribunal were to accept Eco Oro's interpretation of the Decision being that the measures that breached Article 805 caused Eco Oro to lose the opportunity to apply for a licence over the entirety of the Concession (and not just the Remaining Area), Colombia submits that *(i)* as Eco Oro has not offered any evidence that would allow the Tribunal to reasonably compute the value, if any, of the lost opportunity to apply for a licence, the Tribunal cannot award any damages to Eco Oro;[100] and *(ii)* because Eco Oro has failed to revise its expert evidence to factor in the specific risk that a lawful delimitation of the páramo would result in a project being unfeasible within the Concession Area, the Tribunal cannot rely on Compass Lexecon's valuation as a measure of Eco Oro's lost opportunity.[101]

ARB/01/12) Award (14 July 2006) (**Exhibit CL-35**), para. 424; *Enron Corporation and Ponderosa Assets, L.P. v Argentine Republic* (ICSID Case No. ARB/01/3) Award (22 May 2007) (**Exhibit CL-42**), paras. 359-363; *Sempra Energy International v Argentine Republic* (ICSID Case No. ARB/02/16) Award (28 September 2007) (**Exhibit CL-44**), paras. 403-406; *El Paso Energy International Company v The Argentine Republic* (ICSID Case No. ARB/03/15) Award (31 October 2011) (**Exhibit CL-73**), paras. 703-705; Claimant's Memorial, paras. 375-377; Respondent's Counter-Memorial, paras. 441-443.

[98] Claimant's First Submission, paras. 120-123, referring to Instruction Letter (15 January 2018) (**Exhibit CLEX- 1**), p. 2; First CRA Report, paras. 16, 19; First Compass Lexecon Report, paras. 2-3, 8; First CRA Report, paras. 8-9. Eco Oro notes that, by instructing CRA to deduct "residual value" from the fair market value of the Angostura Project, Colombia's instructions necessarily implied a computation of Article 805 (MST) Damages as opposed to Article 811 (Expropriation) Damages, as the computation for an expropriation would plainly require no identification of or deduction for residual value (Claimant's First Submission, para. 123). Nonetheless, Eco Oro reiterates that Colombia's valuations are flawed and do not properly reflect the actual diminution in the fair market value of Eco Oro's investment (Claimant's First Submission, para. 123, referring to Claimant's Reply Memorial, paras. 623-626; Claimant's Opening Statement (**Exhibit CH-1(A)**), pp. 179-182; Claimant's PHB, paras. 80-84).

[99] Respondent's Response, paras. 52-55.

[100] Respondent's Response, paras. 56-67, citing to *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 of Jurisdiction and Liability (17 March 2015) (**Exhibit RL-18**), paras. 18, 552; *William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware, Inc. v The Government of Canada* (UNCITRAL) Award on Damages (10 January 2019) (**Exhibit RL-158**), paras. 87, 168, 276-279, 303; *Infinito Gold Ltd. v Republic of Costa Rica* (ICSID Case No. ARB/14/5) Decision on Jurisdiction (4 December 2017) (Exhibit RL-24), para. 252; *Infinito Gold Ltd. v Republic of Costa Rica* (ICSID Case No. ARB/14/5) Award (3 June 2021) (**Exhibit RL-197**), para. 585; *Caratube International Oil Company LLP and Devincci Salah Hourani v Republic of Kazakhstan* (ICSID Case No. ARB/13/13) Award (27 September 2017) (**Exhibit RL-192**), paras. 1159, 1165.

[101] Respondent's Response, paras. 68-81.

(3) Claimant's Reply

111. Eco Oro reiterates that there was no need to submit new expert evidence in light of the Tribunal's conclusions regarding Colombia's breaches of Article 805 of the Treaty. Eco Oro notes that Compass Lexecon's valuation, on which Eco Oro relies, properly reflects licensing risks associated with the Angostura Project and that none of Colombia's arguments in its Response undermines that conclusion. [102]

112. In any event, Eco Oro contends that *(i)* it has met its burden of proof and there was no need for expert evidence on licensability risks; [103] *(ii)* Eco Oro was insulated from the risk of a mining ban; [104] and *(iii)* Colombia's contention that the páramo delimitation risk renders the Angostura Project essentially valueless is demonstrably false given transactions involving the adjacent projects. [105]

113. Eco Oro submits that there is evidence that the Comparable Transactions are sufficiently comparable to the Angostura Project, contrary to Colombia's submission. [106] Eco Oro notes that Colombia's new argument suggesting material differences between the Angostura Project and the Comparable Transactions is opportunistic and reflects the fact that Colombia now has a fourth opportunity to make written submissions on Eco Oro's approach to valuation. [107] Eco Oro asserts that Colombia's valuation experts at CRA used the Comparable Transactions for valuation purposes, without making *any* adjustments to them. Eco Oro submits that, if there were any meaningful distinctions in respect of licensing risks between the Angostura Project and the Comparable Transactions, Colombia would have adduced evidence on that point. [108]

114. Eco Oro submits that Colombia's attempt to compare the availability of evidence before the present Tribunal on Angostura's licensing prospects with the evidence available in other, unrelated cases is inapposite. [109] Eco Oro submits that in all the cases that Colombia cites, the claimants were seeking

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[102] Claimant's Reply, para. 93.

[103] Claimant's Reply, paras. 62-85.

[104] Claimant's Reply, paras. 86-89, referring to Decision, paras. 435, 439, 467, 470, 473, 476, 641, 687, 768, 804.

[105] Claimant's Reply, paras. 90-92, referring to Aris Gold Press Release, "Aris Gold To Become Operator Of The Soto Norte Gold Project In Colombia" (21 March 2022) (**Exhibit C-479**).

[106] Claimant's Reply, paras. 64-72, referring to Samuel Engineering, "Preliminary Assessment: La Bodega Project Prepared for Ventana Gold Corp" (8 November 2010) (**Exhibit C-134**); Scott Wilson Mining, *Technical Report on the California Project for Calvista Gold Corporation* (17 January 2011) (**Exhibit C-143**); SRK Consulting (US), Inc, NI 43- 101 Technical Report on Resources: California Gold-Silver Project Report Prepared for Galway Resources (25 October 2012) (**Exhibit C-168**); Ventana Gold Corp., Director's Circular Recommending Rejection of the Offer by AUX Canada Acquisition Inc. of Ventana Gold Corp. (22 December 2010) (**Exhibit C-141**), p. 20; Respondent's Response, para. 76 (Eco Oro contends that Colombia concedes that all three Comparable Transactions overlapped with the 2007 Atlas in some respect, therefore being subject to páramo risk); Colombia's PHB, para. 22; Tr. Day 2, 597:16-598:1, 601:21-602:3 (Mr García) (Eng); Letter from the National Mining Agency to the Constitutional Court (24 February 2016) (**Exhibit C-44**), p. 7 (Eng).

[107] Claimant's Reply, para. 65. Eco Oro further notes that Colombia does not disagree with Eco Oro's submission that, if the Tribunal is to award damages based on the fair market value standard, then the Tribunal already has expert evidence upon which to make that computation. Instead, Colombia now contends for the first time in its Response that "fair market value" is not the correct standard of compensation (Claimant's Reply, para. 60).

[108] Claimant's Reply, para. 65.

[109] Claimant's Reply, paras. 73-85, citing to *William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware, Inc. v The Government of Canada* (UNCITRAL) Award on Damages (10 January 2019) (**Exhibit RL-158**), paras. 276-303; *William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware, Inc. v The Government of Canada* (UNCITRAL) Award on Jurisdiction and Liability (17 March 2015) (**Exhibit RL-18**), paras. 589-604; *Infinito Gold Ltd. v Republic of Costa Rica* (ICSID Case No. ARB/14/5) Award (3 June 2021) (**Exhibit RL-197**), paras. 584-585; *Caratube International Oil Company LLP and Devincci Salah Hourani v Republic of Kazakhstan* (ICSID Case No. ARB/13/13) Award (27 September 2017) (**Exhibit RL-192**), paras. 1131, 1147, 1151, 1162-1199; *Burlington Resources Inc. v Republic of Ecuador* (ICSID Case

damages computed by reference to a DCF methodology, which is premised on accepting the future profitability of the project at issue. That same assumption is not at the heart of Eco Oro's valuation, which is based on actual observed sums paid in the market for adjacent unlicensed projects for which future licensing and profitability was also not guaranteed. None of the cases that Colombia relies on in its Response had comparable transactions like the ones available in the present case, and so the different evidentiary findings made in the cases relied on by Colombia are meaningless. [110]

(4) Respondent's Rejoinder

115. Colombia notes Eco Oro accepts that if the Majority Tribunal's finding that Colombia's breach of Article 805 arose from distinct measures adopted after the Challenged Measures is correct, the loss of opportunity to pursue a project over the remainder of the Concession was valueless. In that scenario, there is no need for the expert evidence adduced by the Parties to be revised. [111] Conversely, if, as Eco Oro contends, the Article 805 breach included the Challenged Measures and deprived Eco Oro of an opportunity to apply for an environmental licence over the entirety of the Concession, then it was incumbent upon Eco Oro to revise its expert evidence in order to prove that its lost opportunity had a value. [112]

116. Colombia argues that Eco Oro's expert evidence remains premised on assumptions that are inconsistent with the Majority Tribunal's findings. Eco Oro's "fair market value" damages claim fails to factor in the environmental licensing risk and the risk of mining being banned over part of the Angostura Deposit. Colombia accuses Eco Oro of mischaracterising the decisions cited by Colombia. [113]

117. Colombia contends that fair market value, whether assessed through DCF or a comparables approach, reflects a project's forward-looking value or expected profitability. [114] A project that is expected to generate no profit is worthless. Colombia therefore considers that Eco Oro's contention that the Comparable Transactions methodology does not require proving future profitability is a fallacious distinction between a comparables analysis and a DCF. [115]

No. ARB/08/5) Decision on Reconsideration and Award (7 February 2017) (**Exhibit CL-90**), paras. 287-288.

[110] Claimant's Reply, para. 84.

[111] Respondent's Rejoinder, para. 46.

[112] Respondent's Rejoinder, para. 47.

[113] Respondent's Rejoinder, paras. 48-53, citing to *William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware, Inc. v The Government of Canada* (UNCITRAL) Award on Damages (10 January 2019) (**Exhibit RL-158**), paras. 231, 276 (the *Bilcon* claimants requested damages on the basis of the profits they would have made had their project obtained an environmental permit); para. 168 (causal link not proven to the international law standard with regard to future profits, but a realistic possibility of success of the environmental permit application was proven on the basis of extensive and specific evidence, reason why the Tribunal awarded loss of chance damages – see also, with regard to "realistic possibility", paras. 137-142); paras. 175-176 (the only injury that had been proven was the loss of the opportunity to have the environmental impact of the project assessed fairly); paras. 134-144, 552 (environmental licensability).

[114] Respondent's Rejoinder, paras. 54-55, referring to First Compass Lexecon Report, para. 54; CIMVAL, "Standards and Guidelines for Valuation of Mineral Properties" (February 2003) (**Exhibit CRA-43**), G2.1; South African Mineral Asset Valuation Committee of the South African Institute of Mining and Metallurgy, South African Code for the Reporting of Mineral Asset Valuation (**Exhibit BD-11**), para. 18; VALMIN, "The Australian Code for Public Reporting of Technical Assessments and Valuations of Mineral Assets" (2015) (**Exhibit R-288**), para. 8.1; R. Hern, Z. Janeckova, Y. Yin and K. Bivolaris, 'Chapter 17. Market or Comparables Approach' in J.Trenor, *The Guide to Damages in International Arbitration* (2021) (**Exhibit RL-199**), p. 249.

[115] Respondent's Rejoinder, paras. 56-62.

118. Colombia asserts that there is still no evidence on the record to prove that Compass Lexecon's Comparable Transactions faced comparable environmental licensing risk to the Angostura Project, as Behre Dolbear and Compass Lexecon simply assumed that Eco Oro would obtain a licence.[116] Colombia further notes that Eco Oro's assertion that it could not have produced or commissioned any analysis of the environmental licensability of an underground project is not credible, as *(i)* such an analysis would be expected for a project that claimed to be world-class; *(ii)* the La Bodega project had no difficulty in carrying out an environmental permitting study as part of its PEA for an underground project; *(iii)* the IFC had insisted Eco Oro perform such studies and eventually decided to divest from Eco Oro; and *(iv)* Eco Oro was even granted another opportunity to present evidence of environmental licensability and has refused to do so.[117]

119. Finally, Colombia underscores that Eco Oro was not "insulated" from the risk of a mining ban. Colombia notes that a potential purchaser of the Angostura Project, at either Party's valuation date, or a transacting party of any of the Comparable Transactions, would have been acutely aware that the most recent and detailed páramo delimitation showed a value-destroying overlap with the Angostura Deposit, but none with the deposits of the Comparable Transactions.[118]

C. Question C

120. In paragraph 920(4)(c) of its Decision, the Tribunal sought an answer to the following question:
"*Given the Tribunal's findings on the merits and given its analysis above with respect to the inapplicability both of an income-based valuation methodology and Colombia's chosen comparable transactions, is Eco Oro's proposed Comparable Transactions methodology the one to be applied, or is there an alternative methodology which should be considered given the nature of Eco Oro's losses?*"

(1) Claimant's First Submission

121. Eco Oro summarises its answer to this question as follows[119]:

"59. *Eco Oro's valuation using the three Comparable Transactions is the most appropriate way to calculate Eco Oro's damages, and more than exceeds Eco Oro's standard of proof.*[120] *Both*

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[116] Respondent's Rejoinder, paras. 63-72, referring to Tr. Day 4, 1110:13-1111:4, 1129:8-13 (Mr Jorgensen and Mr Guarnera); Tr. Day 5, 1450:5-1452:16 (Mr Abdala and Mr Spiller).

[117] Respondent's Rejoinder, paras. 68-72, referring to Samuel Engineering, Preliminary Assessment La Bodega Project (**Exhibit CLEX-4**), p. 7; Golder Associates, Updated Preliminary Economic Assessment on the Angostura Gold-Silver Underground Project (prepared for Eco Oro) (**Exhibit BD-21**); Office of the Compliance Advisor Ombudsman (CAO), "Compliance Investigation, IFC Investment in Eco Oro (Project # 27961), Colombia" (**Exhibit MR-10**), pp. 41-43; Article Mongabay "World Bank exits controversial Angostura goldmine project in Colombian moorland" (https://news.mongabay.com/2017/03/world-bank-exits-controversial-angostura-goldmine- project-in-colombian-moorland/ (**Exhibit MR-9**).

[118] Respondent's Rejoinder, paras. 73-80, referring, *inter alia*, to SRK Consulting, NI 43-101 Technical Report Feasibility Study of the Soto Norte Gold Project, Santander, Colombia (1 January 2021) (**Exhibit R-301**), Sections 1.12.6, 20.2; "El proyecto Soto Norte no está dentro del Páramo de Santurbán", *El Tiempo* (12 February 2020) (**Exhibit R-298**).

[119] Claimant's First Submission, para. 59. In paragraphs 125-154 of Claimant's First Submission, Eco Oro expands on these arguments.

[120] Claimant's First Submission, paras. 129, 142, submitting that "[a]*fter establishing the fact of loss, Eco Oro is required to provide a*

Parties' experts agree that, in accordance with the leading industry-specific guidance supplied by CIMVAL, the appropriate valuation methodology for the Angostura Project, based on its stage of development, is a market-based valuation.[121] *Both Parties' experts have dismissed an income-based*[122] *or cost-based valuation.*[123] *The Parties' experts have submitted two types of market-based valuations: valuations based on comparable transactions (both Parties' experts have computed damages using this methodology), and a valuation based on Eco Oro's market capitalization (only Colombia's experts have used this methodology). The Majority Tribunal has dismissed Colombia's market capitalization methodology,*[124] *leaving a valuation based on comparable transactions as the only remaining methodology that is both (i) endorsed by both parties' experts,*[125] *and (ii) consistent with CIMVAL's industry-specific guidance.*[126] *There is significant expert testimony available here and independent, third-party market evidence to enable the Tribunal to conclude that the three Comparable Transactions*[127] *are appropriate to use for valuing the Angostura Project. The Tribunal can take comfort in the fact that both Parties' experts*

'reasonable basis' upon which to compute that loss." Eco Oro cites to *Hydro S.R.L. and others v Republic of Albania* (ICSID Case No. ARB/15/28) Award (24 April 2019) (**Exhibit CL-226**), para. 685. See also Claimant's First Submission, paras. 17 *et seq.*, citing to *Hydro S.R.L. and others v Republic of Albania* (ICSID Case No. ARB/15/28) Award (24 April 2019) (**Exhibit CL-226**), para. 845; *Watkins Holdings S.Á.R.L. and others v The Kingdom of Spain* (ICSID Case No. ARB/15/44) Award (21 January 2020) (**Exhibit CL-229**), para. 685; *Crystallex International Corporation v Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2) Award (4 April 2016) (**Exhibit CL-85**), paras. 867-869.

[121] Claimant's First Submission, paras. 129, 133(a), referring to Decision, para. 896; First Compass Lexecon Report, para. 56; First CRA Report, para. 52.

[122] Claimant's First Submission, para. 149, referring to First Compass Lexecon Report, para. 53; First CRA Report, para. 43; Decision, para. 896.

[123] Claimant's First Submission, para. 150, referring to First Compass Lexecon Report, para. 54; Second CRA Report, p. 104. Eco Oro alludes to a possible application of a costs-based valuation: one that yields a value equal to a multiple of sunk costs to adequately reflect the fact that historical costs are incurred to derive a greater, future economic benefit. Based on the Angostura Project's stage of development, Eco Oro submits that a multiplication factor of 3 would be appropriate to Eco Oro's sunk costs of approximately USD250 million. This would bring its value to USD750 million, before interest, which is 7.7% higher than Compass Lexecon's comparable transactions valuation based on the Comparable Transactions (Claimant's First Submission, para. 151, referring to CIMVAL, Standards and Guidelines for Valuation of Mineral Properties (February 2003) (**Exhibit C-85**), p. 23 (PDF, p. 25); Rudenno, Victor, *The Mining Valuation Handbook*, 4th ed. Milton, Australia: John Wiley & Sons (1 January 2012) (**Exhibit CLEX-74**), pp. 291-293).

[124] Claimant's First Submission, para. 126, referring to Decision, para. 902. See also Claimant's First Submission, para. 147, referring to First CRA Report, paras. 39-43; First Compass Lexecon Report, paras. 48-51; Second Compass Lexecon Report, para. 83; Compass Lexecon Direct Presentation, pp. 11-15; Tr. Day 5, 1395:10-1404:4 (Compass Lexecon) (Eng); Decision, para. 898.

[125] Claimant's First Submission, para. 133(b), referring to Decision, paras. 899-901; First Compass Lexecon Report, para. 47; First CRA Report, para. 44.

[126] Claimant's First Submission, para. 133(c), referring to CIMVAL, Standards and Guidelines for Valuation of Mineral Properties (February 2003) (**Exhibit C-85**), pp. 23-24; First Behre Dolbear Report, para. 76; First Compass Lexecon Report, para. 52; First CRA Report, para. 39; Decision, paras. 853, 876; *Crystallex International Corporation v Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2) Award (4 April 2016) (**Exhibit CL-85**), paras. 883-885; *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan* (ICSID Case No. ARB/12/1) Award (12 July 2019) (**Exhibit CL-227**), paras. 348-349; *Gold Reserve Inc. v Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/09/1) Award (22 September 2014) (**Exhibit RL-96**), para. 780; Rudenno, Victor, *The Mining Valuation Handbook*, 4th ed. Milton, Australia: John Wiley & Sons (1 January 2012) (**Exhibit CLEX-74**), pp. 284-288; Second Compass Lexecon Report, para. 38.
In para. 133(d) of Claimant's First Submission, Eco Oro cites to decisions rendered by investment arbitration tribunals adopting or endorsing the comparable transactions or other similar market-based methodologies for the purposes of computing damages: *Crystallex International Corporation v Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2) Award (4 April 2016) (**Exhibit CL-85**), para. 901; *Windstream Energy LLC v Government of Canada* (UNCITRAL, PCA Case No. 2013-22) Award (27 September 2016) (**Exhibit CL-88**), paras. 474-476; *Ioannis Kardassopoulos and Ron Fuchs v The Republic of Georgia* (ICSID Case Nos. ARB/05/18 and ARB/07/15) Award (3 March 2010) (**Exhibit CL-62**), para. 598. See also Claimant's Memorial, paras. 414-415; Claimant's Reply Memorial, paras. 563-565.

[127] Claimant's First Submission, paras. 134-135, referring to First Compass Lexecon Report, para. 47; Claimant's Memorial, paras. 414-450; Claimant's Reply Memorial, paras. 608-621; First Behre Dolbear Report, paras. 97-124; Second Behre Dolbear Report, paras. 108-122; Claimant's Memorial, para. 417; Claimant's Opening Statement (**Exhibit CH-1(A)**), pp. 175-176; Samuel Engineering, Preliminary Assessment of the La Bodega Project (prepared for Ventana Gold Corp.) (8 November 2010) (**Exhibit BD-13**), pp. 17-18; Dr Vadim Galkine, *Updated Technical Report on the California Gold Project* (prepared for Calvista Gold Corporation) (11 October 2012) (**Exhibit C-166**), pp. 109-110; SRK Consulting (US), Inc, *NI 43-101 Technical Report on Resources: California Gold-Silver Project Report* (prepared for Galway Resources) (25 October 2012) (**Exhibit C-168**), p. 48; Decision, paras. 900-901.

agree that a valuation of the Angostura Project based on comparable transactions would have to include the three Comparable Transactions.[128] *There are no other comparable transactions that are relevant here,*[129] *as Colombia's additional proposed transactions were all discredited during the course of the proceedings and have been dismissed by the Tribunal.*[130]"

122. Eco Oro provides the following table, which translates the CIMVAL's guidance regarding valuation approaches for different types of mineral properties[131]:

(2) Respondent's Response

123. Colombia contends that the Tribunal should value the opportunity lost as a result of Colombia's breach of Article 805 as zero, as it is Eco Oro's own evidence that such an opportunity was valueless: the Tribunal's analysis should end there.[132]

124. If, contrary to Colombia's submission, the Tribunal were to accept Eco Oro's interpretation of the Decision that the Article 805 breach caused Eco Oro to lose the opportunity to apply for a licence over the entirety of the Concession (and not just the Remaining Area), Colombia asserts that the Tribunal cannot rely on Eco Oro's Comparable Transactions methodology to value that loss of opportunity, as it does not take account of the risks of an environmental licence being denied and/or a lawful delimitation of the páramo rendering any project within the Concession unfeasible.[133]

125. According to Colombia, damages for loss of opportunity are assessed as a proportion of the profits reasonably expected if the uncertain event occurs,[134] and tribunals have repeatedly rejected attempts by claimants to seek damages for loss of opportunity based on methodologies that do not adequately factor in the probability of the opportunity not materialising.[135]

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[128] Claimant's First Submission, para. 139, referring to First CRA Report, para. 64 ("*the range of comparable properties we consider as part of our analysis, includ*[es] *the three transactions identified by Compass Lexecon*").

[129] Claimant's First Submission, paras. 143-151, referring to First Compass Lexecon Report, paras. 36, 38-40, 52-53; First CRA Report, para. 39; Decision, paras. 853, 876; CIMVAL, Standards and Guidelines for Valuation of Mineral Properties (February 2003) (**Exhibit C-85**), pp. 22-24; Compass Lexecon Direct Presentation, p. 3; Tr. Day 5, 1385:8-1387:2 (Compass Lexecon).

[130] Claimant's First Submission, paras. 135-139, referring to Decision, paras. 900-901; First CRA Report, paras. 91-93, 96; First Behre Dolbear Report, paras. 97-124; Second Behre Dolbear Report, paras. 108-122; First Compass Lexecon Report, paras. 8-10, 63-68; Second Compass Lexecon Report, paras. 41-59; Tr. Day 4, 1101-1147; Tr. Day 5, 1506:14–19, 1509:17–1511:15 (CRA) (conceding that the underwater gold exploration project in China was "*not technically comparable*"); Second CRA Report, paras. 23, 136, 137, 153. Eco Oro notes that Mr Rossi clarified that, in his report, he "*did not say that they* [i.e., the CRA Additional Properties] *were comparable or otherwise*" (Tr. Day 5, 1353:17–1354:7 (Mr Rossi)) and said that his review was limited to "*identifying certain commonalities*" because "*it would have taken a lot of work*" to do an "*in depth comparison*" (Tr. Day 5, 1355:21–1356:14 (Mr Rossi)).

[131] Claimant's First Submission, paras. 144, 309-310, referring to Compass Lexecon Direct Presentation, p. 3; Tr. Day 5, 1385:8-1387:2 (Compass Lexecon).

[132] Respondent's Response, para. 82.

[133] Respondent's Response, para. 83.

[134] Respondent's Response, para. 84, citing to *Joseph Charles Lemire v Ukraine* (ICSID Case No. ARB/06/18) Award (28 March 2011) (**Exhibit CL-177**), para. 251; UNIDROIT Principles of International Commercial Contracts (with comments) (2016) (**Exhibit RL-191**), Article 7.4.3(2), comment 2, p. 275; Claimant's First Submission, para. 170, fn. 290; *Flemingo DutyFree Shop Private Limited v The Republic of Poland* (UNCITRAL) Award (12 August 2016) (**Exhibit CL-222**), para. 924.

[135] Respondent's Response, para. 85, citing to *Perenco Ecuador Limited v The Republic of Ecuador* (ICSID Case No. ARB/08/6) Award (27 September 2019) (**Exhibit CL-228**), para. 325; *Burlington Resources Inc. v Republic of Ecuador* (ICSID Case No. ARB/08/5) Decision on

126. Colombia takes issue with Eco Oro's construction of the *Bilcon* case with regard to the application of the DCF methodology [136]: according to Colombia *(i)* DCF and the comparable transactions methodologies are alternative approaches to assessing an asset's fair market value. [137] In both cases, the economic value of the asset is derived from its prospects of generating future profits. [138] Therefore, the critical question is whether the valuation appropriately factors in the risks of the future profits not materialising; and *(ii)* the *Bilcon* tribunal did not suggest that the comparable transactions methodology entitled a claimant to sidestep its burden of proving that it would have suffered the losses claimed but for the breaches [139] and did not suggest that a valuation on the basis of comparable transactions would have been appropriate notwithstanding a failure to prove causation to the international law standard. [140]

127. Finally, Colombia submits that, because Eco Oro has neither revised its expert evidence to account for the Tribunal's Decision, nor offered any alternative methodology to value its loss of opportunity that does properly account for the relevant risks, Eco Oro has failed to begin to meet its burden of proving its loss or offering any reasonable methodology for valuing its amount. [141]

(3) Claimant's Reply

128. Eco Oro asserts that Colombia's contentions *(i)* are premised on a mischaracterisation of the nature of Eco Oro's loss, *(ii)* are erroneous so far as the Comparable Transactions are concerned, and *(iii)* misconstrue the *Bilcon* decision. [142]

129. Eco Oro notes that, despite all protestations, Colombia's only valuation that it submits with its Response is one that uses, exclusively, the same three Comparable Transactions used in Eco Oro's valuation. [143]

(4) Respondent's Rejoinder

Reconsideration and Award (7 February 2017) (**Exhibit CL-90**), para. 279; *William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware, Inc. v The Government of Canada* (UNCITRAL) Award on Damages (10 January 2019) (**Exhibit RL-158**), para. 276.

[136] Respondent's Response, paras. 86-87, referring to Claimant's First Submission, paras. 45-52.

[137] Respondent's Response, para. 87, referring to CIMVAL, "Standards and Guidelines for Valuation of Mineral Properties" (February 2003) (**Exhibit CRA-43**), S3.1, p. 13; G3.3-G3.5, pp. 21-23; First CRA Report, paras. 39-41; Second CRA Report, paras. 2, 47, 52, 54, 57, 59; Second Compass Lexecon Report, paras. 38-39, fns. 67, 70.

[138] Respondent's Response, para. 87, referring to CIMVAL, "Standards and Guidelines for Valuation of Mineral Properties" (February 2003) (**Exhibit CRA-43**), G2.1, p. 20.

[139] Respondent's Response, para. 88, referring to Claimant's First Submission, paras. 49-50.

[140] Respondent's Response, para. 88, noting that the *Bilcon* tribunal assessed the value of the lost opportunity based on two indicators of value: *(i)* the costs incurred in pursuit of the environmental licence and *(ii)* past transactions; and citing to *William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware, Inc. v The Government of Canada* (UNCITRAL) Award on Damages (10 January 2019) (**Exhibit RL-158**), paras. 168, 281-282, 299.

[141] Respondent's Response, para. 89.

[142] Claimant's Reply, para. 96.

[143] Claimant's Reply, para. 97, referring to Respondent's Response, para. 98; Adjusted Compass Lexecon Comparable Transactions Model (**Exhibit R-267**).

130. Colombia asserts that Eco Oro's Comparable Transactions methodology should not be applied, because, on Eco Oro's own evidence, the opportunity that Eco Oro lost as a result of Colombia's Article 805 breach was valueless. Therefore, the Tribunal should value such opportunity as zero. [144]

131. In the alternative, Colombia considers that Eco Oro would still not be entitled to damages because it has not formulated a loss of opportunity claim nor provided any evidence to assess the value of that opportunity. [145]

132. In the further alternative, even if the Tribunal were to accept Eco Oro's Comparable Transactions methodology as capable, in principle, of valuing Eco Oro's lost opportunity, the Tribunal should reject Compass Lexecon's valuation because it fails to account for differences in environmental permitting risk and risks associated with a lawful final delimitation of the páramo. [146]

133. In the further, further alternative, if the Tribunal were minded to rely on Compass Lexecon's valuation notwithstanding its failure to account for such differences, Colombia submits that the Tribunal should make the adjustments set out in Exhibit R-267. [147]

D. Question D

134. In paragraph 920(4)(d) of its Decision, the Tribunal sought an answer to the following question: "*How can Eco Oro's loss of opportunity to apply for an environmental licence to allow exploitation be valued? On what basis is the quantum of that loss, if any, to be assessed?*"

(1) Claimant's First Submission

135. Eco Oro summarises its answer to this question as follows [148]:

"*60. Eco Oro's loss must be computed in accordance with the international law standard of full reparation.*[149] *The Parties agree that, to implement that standard, the Tribunal must observe the*

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144 Respondent's Rejoinder, para. 81.

145 Respondent's Rejoinder, paras. 84-87, citing to *William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware, Inc. v The Government of Canada* (UNCITRAL) Award on Damages (10 January 2019) (**Exhibit RL-158**), para. 175 (as the claimants had not proven a causal link between their claimed losses and Canada's NAFTA breach, they were at most entitled to compensation for loss of opportunity).

146 Respondent's Rejoinder, para. 87.

147 Respondent's Response, paras. 98-99 and Rejoinder, para. 87, referring to the Adjusted Compass Lexecon Comparable Transactions Model (**Exhibit R-267**).

148 Claimant's First Submission, paras. 60-61. In paragraphs 155-177 of Claimant's First Submission, Eco Oro expands on these arguments.

149 Claimant's First Submission, para. 157, referring to Decision, para. 894; International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001) (**Exhibit CL-17**), Article 31. See also, with regard to the consequences of Colombia's unlawful acts, which Eco Oro contends must be wiped out through an award of compensation pursuant to the standard of full reparation, Claimant's First Submission, paras. 157-158, referring to Decision, paras. 502, 633-634, 698, 783, 795, 796, 796(b)(i) (with regard to this paragraph of the Decision, see section VI and section X - Clarification of this Award), 796(b)(ii), 796(b)(iii), 796(c), 797, 820, 849, 895; First Compass Lexecon Report, para. 13; testimony of Mr Rossi, Tr. Day 5, 1353:17-1354:7, 1369:2-6, 1381:15-1382:1 (Mr Rossi) (Eng); National Mining Agency Resolution No. VSC 829 (notified to Eco Oro on 8 August 2016) (2 August 2016) (**Exhibit C-53**), Order 1.

diminution in the fair market value of the investment: that is, the value of the investment with and without the effects of the measures. For the reasons given in response to Question C, the best way to compute the fair market value of the Angostura Project is using the three Comparable Transactions that both Parties have endorsed for valuation purposes.

61. The value of Eco Oro having been deprived of the opportunity to apply for an environmental license is equal to the value of Eco Oro's acquired rights under Concession 3452 in relation to the Angostura Project.[150] *As the Decision states, by removing Eco Oro's ability to apply for an environmental license, Colombia removed Eco Oro's ability to pursue exploitation: 'there was no possibility of exploiting the Angostura Deposit such that the Concession became valueless'.*[151] *Calculating the Angostura Project's fair market value by reference to the Comparable Transactions naturally accounts for the value consequences that the market ascribes for permitting risks that both Parties' experts accept are comparable to those applicable to the Angostura Project.*[152]"

136. Eco Oro further submits that awarding compensation based on the doctrine of "loss of chance" or "loss of opportunity" would not be appropriate (nor applicable) in the present case.[153] Eco Oro underscores that it did not merely lose a chance or an opportunity as a result of Colombia's measures in breach of the Treaty; it was deprived of the bundle of rights it acquired under Concession 3452 that constituted its investment under the Treaty. According to Eco Oro, damages cannot be based on the loss of an opportunity to apply for an environmental license, which is not a free-standing right that can be bought, sold or valued independently of Eco Oro's concession rights.[154] Finally, Eco Oro notes that computing the "loss of chance" or "loss of opportunity" in this case would result in an *increase* to Eco Oro's damages, as Eco Oro, beyond the diminution in the fair market value of the Angostura Project, also lost the "opportunity" to increase the value of the project

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[150] Claimant's First Submission, paras. 161-165, referring to Decision, paras. 416-440, 634, 804; Tr. Day 4, 1019:14-1020:1, 1056:14-19 (Mr de Vivero) (Eng); Tr. Day 4, 971:2-17 (Ms Ricaurte) (Eng); Legal Opinion of Felipe de Vivero, para. 79; Council of State, Advisory Opinion No. 2233 (11 December 2014) (**Exhibit R-135**), p. 52; Corte Constitucional, Sentencia C-333 (1 August 1996) (**Exhibit PMR-9**), p. 12; Letter from Ministry of Mines (Ms Díaz López) to Ingeominas (Mr Montes) (27 September 2011) (**Exhibit C-330**); Gaceta Oficial No. 113 (14 April 2000) (**Exhibit PMR-10**); Gaceta Oficial No. 238 (22 May 2001) (**Exhibit PMR-14**), p. 7; Agencia Nacional de Minería, Memorando 2013-0725 (18 December 2013) (**Exhibit PMR-30**), pp. 4-5; Concession Contract 3452 (8 February 2007) (**Exhibit C-16**), Clauses 1, 5 and 6; 2001 Mining Code (Law 685) (8 September 2001) (**Exhibit C-8**), Articles 45, 49, 58-59, 197.

[151] Claimant's First Submission, fn. 89, referring to Decision, para. 634. See also, Claimant's First Submission, paras. 155(a), 157(a), 163, 166.

[152] Claimant's First Submission, paras. 166-168, referring to CIMVAL, "Standards and Guidelines for Valuation of Mineral Properties" (February 2003) (**Exhibit C-85**), pp. 23-24; *Crystallex International Corporation v Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2) Award (4 April 2016) (**Exhibit CL-85**) paras. 901-905 (accepting a market multiples method that valued the underlying asset by reference to the value of comparable companies); *Anatolie Stati and Others v The Republic of Kazakhstan* (SCC Arbitration V (116/2010)) Award (19 December 2013) (**Exhibit CL-80**), para. 1625 (adopting a comparable transactions analysis); *Yukos Universal Limited (Isle of Man) v The Russian Federation* (UNCITRAL, PCA Case No. AA 227) Award (18 July 2014) (**Exhibit CL-81**), paras. 1785-1787 (in the absence of comparable transactions, adopting a comparable companies analysis); Decision, paras. 899, 902.

[153] Claimant's First Submission, paras. 169-177, referring to S. Ripinsky and K. Williams, *Damages in International Investment Law* (2008) (**Exhibit CL-218**), pp. 291-292; Principles of International Commercial Contracts adopted by the International Institute for the Unification of Private Law, Article 7.4.3(2), cited in *Joseph Charles Lemire v Ukraine* (ICSID Case No. ARB/06/18) Award (28 March 2011) (**Exhibit CL-177**), para. 251; *Flemingo DutyFree Shop Private Limited v The Republic of Poland* (UNCITRAL) Award (12 August 2016) (**Exhibit CL-222**), para. 924; *Marco Gavazzi and Stefano Gavazzi v Romania* (ICSID Case No. ARB/12/25) Excerpts of the Award (18 April 2017) (**Exhibit CL-223**), paras. 214, 217, 219, 224; *Gemplus, S.A., et al v The United Mexican States* (ICSID Case Nos. ARB(AF)/04/3 and ARB(AF)/04/4) Award (16 June 2010) (**Exhibit CL-64**), paras. 13-100; *Perenco Ecuador Limited v The Republic of Ecuador* (ICSID Case No. ARB/08/6) Award (27 September 2019) (**Exhibit CL-228**), paras. 316, 318, 324; *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt* (ICSID Case No. ARB/84/3) Award (20 May 1992) (**Exhibit CL-11**), para. 215; *Perenco Ecuador Limited v Republic of Ecuador* (ICSID Case No. ARB/08/6) Decision on Annulment (28 May 2021) (**Exhibit CL-230**), para. 465; *Joseph Charles Lemire v Ukraine* (ICSID Case No. ARB/06/18) Award (28 March 2011) (**Exhibit CL-177**), paras. 250-252.

[154] Claimant's First Submission, para. 175.

in the future through the successful application for an environmental license. Eco Oro confirms that it has not advanced such a claim. [155]

(2) Respondent's Response

137. Colombia contends that the Tribunal should value the opportunity lost as a result of Colombia's breach of Article 805 as zero, as it is Eco Oro's own evidence that such an opportunity was valueless. [156]

138. Even if Eco Oro had lost an opportunity to apply for a licence over the entirety of the Concession Area as a result of Colombia's Article 805 breach, Colombia asserts that Eco Oro has failed to meet its burden of proving that it had any realistic prospects of securing an environmental licence and establishing a feasible project notwithstanding the final delimitation of the páramo, this being the reason why loss of opportunity should be deemed to be too speculative and Eco Oro should not be awarded any damages. [157]

139. In the further alternative, Colombia contends that, if Eco Oro's Comparable Transactions valuation were to be adopted to value Eco Oro's loss of opportunity over the entire Concession Area, such a valuation would require multiple downward adjustments. According to Colombia, Compass Lexecon's Comparable Transactions analysis suffers from multiple defects which render its results unreliable and grossly inflated. [158]

140. Colombia notes that the dynamic spreadsheet presented by Eco Oro [159] fails to allow the Tribunal to make adjustments for the majority of the flaws in Compass Lexecon's valuation identified by Colombia and its experts. Colombia therefore provides a calculation spreadsheet, [160] which mirrors the calculation spreadsheet prepared by Compass Lexecon, where the impact of such adjustments

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[155] Claimant's First Submission, para. 176.

[156] Respondent's Response, para. 90.

[157] Respondent's Response, paras. 91-95, citing to *Caratube International Oil Company LLP and Devincci Salah Hourani v Republic of Kazakhstan* (ICSID Case No. ARB/13/13) Award (27 September 2017) (**Exhibit RL-192**), para. 1152; *Infinito Gold Ltd. v Republic of Costa Rica* (ICSID Case No. ARB/14/5) Award (3 June 2021) (**Exhibit RL-197**), para. 585; *Burlington Resources Inc. v Republic of Ecuador* (ICSID Case No. ARB/08/5) Decision on Reconsideration and Award (7 February 2017) (**Exhibit CL-90**), paras. 280-283. Colombia notes that the Parties' valuation experts agree that the income approach, which consists of measuring the value of future profits, is a method for assessing fair market value (Respondent's Response, fn. 139, referring to First Compass Lexecon Report, paras. 52- 53; First CRA Report, paras. 37-43).

[158] Respondent's Response, paras. 96-97, referring to Respondent's Counter-Memorial, Section VII.B.2(i) and VII.B.3; Respondent's Rejoinder, Section V.B.2.; First Rossi Report, Section VII.A; Second Rossi Report, para. 13; First CRA Report, Section IX.B and IX.C; Second CRA Report, Section II.2; Johnson Report, para. 98, Section VII; Second Compass Lexecon Report, paras. 45-48, 107-115; First Rossi Report, V.C.4, VI.D.1; First Rossi Report, Sections III and IV, para. 92; First Rossi Report, VI.D.2; Second Rossi Report, Section V; First CRA Report, paras. 78-79; First Compass Lexecon Report, para. 59; Second CRA Report, Section II.1.2; First Rossi Report, para. 212; Second CRA Report, Section II.2.1.1; First Rossi Report, Section VII.A; Second Rossi Report, Section VII; Johnson Report, Section V.F-H; Second Compass Lexecon Report, paras. 45-48, 113-115; Second CRA Report, paras. 96-100; "Capital Cost Adjustment" tab (**Exhibit CLEX-73**); Samuel Engineering, "Canadian National Instrument 43-101 Technical Report, Preliminary Assessment, La Bodega Project, Department of Santander, Colombia" (Effective Date 8 November 2010) (**Exhibit CRA-62**), p. 118, Table 20.6; First CRA Report, para. 67; Updated Valuation of the Angostura Project Based on the Value of Comparable Assets, Tab 9 (**Exhibit CRA-97.9**); Second CRA Report, paras. 91-92, 94; Johnson Report, paras. 60, 96; Johnson Report, paras. 98-115, 117-121; Golder PEA (**Exhibit CRA-40**), pp. 6, 257; Updated Valuation of the Angostura Project Based on the Value of Comparable Assets (**Exhibit CRA-97.9**).

[159] Respondent's Response, para. 98, referring to Claimant's First Submission, para. 55; Updated Compass Lexecon Transactions Method Model (**Exhibit CLEX- 73**).

[160] Respondent's Response, para. 98, referring to Adjusted Compass Lexecon Comparable Transactions Model (**Exhibit R-267**).

is set out. Colombia asserts that, applying the adjustments which Colombia's experts have proven to be required would imply a valuation of the Angostura Project at USD93.84 million, as of the correct valuation date, 21 December 2018.

141. Finally, Colombia underscores that such an adjusted valuation would still not be appropriate for all of the reasons addressed in Colombia's responses to the Tribunal's other Questions, including because *(i)* it does not account for differences in the environmental licensing risk between the Angostura Project and Compass Lexecon's chosen transactions; *(ii)* it fails to account for the risk of a lawful delimitation of the páramo rendering any project unfeasible; and *(iii)* it uses Compass Lexecon's methodology for adjusting the comparable transaction values to the valuation date that the Tribunal has already rejected as unreliable.[161]

(3) Claimant's Reply

142. Eco Oro notes that Colombia has failed to address the vast majority of the points made by Eco Oro in its First Submission.[162] Eco Oro further takes issue with Colombia's contention that the Tribunal can only award damages to Eco Oro insofar as it can prove that it would have established a feasible mining project and received an environmental permit.

143. Eco Oro argues that Colombia's position must be rejected for the following reasons: *(i)* Eco Oro is not claiming the value of a licensed project nor has it carried out an income-based valuation of the Angostura Project based on a projection of the cash flows that the project would have generated had it received an environmental license (as the claimants did in the *Bilcon, Burlington, Infinito* and *Caratube* cases cited by Colombia). Moreover, Eco Oro asserts that it has not done so because Colombia's measures have prevented it from advancing its mine design to the point where it could prepare a PTO (and an EIA) upon which to base such an income-based valuation;[163] *(ii)* Eco Oro is claiming the value of its right to develop the Angostura Project in its unlicensed state, based on objective market data, which is already discounted to reflect licensing risks perceived by the market; *(iii)* Eco Oro is not calling upon the Tribunal to make a finding that, *but for* Colombia's measures, its Angostura Project would have received an environmental license and proceeded to operate a mine at any specific levels of production, thus generating a certain level of cash flows; *(iv)* it is only necessary for the Tribunal to determine that there were prospects of obtaining an environmental license for the Angostura Project, such that the causal link between Colombia's unlawful measures and Eco Oro's losses has not been broken.[164]

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[161] Respondent's Response, para. 99.

[162] Claimant's Reply, para. 99, referring to Claimant's First Submission, paras. 102-104 157-159, 165, 168, 169-176; Decision, paras. 416-440, 633-634, 896; Concession Contract 3452 (8 February 2007) (**Exhibit C-16**), Clauses 5 and 6; 2001 Mining Code (Law 685) (8 September 2001) (**Exhibit C-8**), Articles 45, 49, 58-59, 197; CIMVAL, "Standards and Guidelines for Valuation of Mineral Properties" (February 2003) (**Exhibit C-85**), pp. 23-25; *Crystallex International Corporation v Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2) Award (4 April 2016) (**Exhibit CL-85**), paras. 901-905; *Anatolie Stati and Others v The Republic of Kazakhstan* (SCC Arbitration V (116/2010)) Award (19 December 2013) (**Exhibit CL-80**), para. 1625; *Yukos Universal Limited (Isle of Man) v The Russian Federation* (UNCITRAL, PCA Case No. AA 227) Award (18 July 2014) (**Exhibit CL-81**), paras. 1785-1787; *Joseph Charles Lemire v Ukraine* (ICSID Case No. ARB/06/18) Award (28 March 2011) (**Exhibit CL-177**), paras. 250-252.

[163] Claimant's Reply, para. 100, referring to Decision, para. 896.

[164] Claimant's Reply, para. 100(d), referring to Decision, paras. 632, 848; Respondent's Rejoinder Memorial, para. 488 (licensability as a matter of causality).

144. With regard to the downward adjustments that Colombia submits should be made to Compass Lexecon's valuation, Eco Oro asserts that there is no basis for making the proposed adjustments.[165] Eco Oro submits that it would be unsafe for the Tribunal to rely on attempts at valuation and estimates of capital and operating costs prepared by Mr Johnson, who, according to Eco Oro, is inexperienced in valuation, uses metrics way beyond industry norms, and did not visit the Angostura Project site or review key aspects of the studies and data which were relied on by the Qualified Persons from NCL and Golder Associates when preparing PEAs in 2011 and 2012. Unlike Mr Johnson, these Qualified Persons – and Eco Oro's experts, Behre Dolbear – did visit the site and review relevant underlying data, before preparing their PEAs and expert reports.[166]

(4) Respondent's Rejoinder

145. Colombia submits that even if Eco Oro could claim for a loss of opportunity to apply for an environmental licence over the entire Concession Area, Eco Oro's failure to offer any basis for quantifying that loss confirms that such loss is too speculative to give rise to damages.[167] According to Colombia *(i)* it is irrelevant for valuation purposes that Eco Oro lost an "acquired right to exploit", considering that the Tribunal expressly confirmed that an acquired right to exploit would be worthless without an environmental permit;[168] *(ii)* it is not credible that Eco Oro's opportunity was worth USD696 million when the prospects of obtaining an environmental permit were "minimal".[169] Colombia notes that Eco Oro provides no support for the contention that the Comparable Transactions properties faced similar environmental permitting risk to the Angostura Project (Eco Oro's experts simply assumed it was not an issue).[170] Colombia adds that both Parties' experts agree that in order to be reliable, a comparable transaction valuation must be adjusted for risks specific to each property,[171] which Colombia asserts has not occurred in the present case; *(iii)* Colombia's experts did not endorse the comparable transactions approach, still less Compass Lexecon's Comparable Transactions analysis. Moreover, it was incumbent upon Eco Oro, and not Colombia, to adduce evidence from suitably qualified experts on matters of environmental permitting.[172]

146. Colombia takes issue with Eco Oro's contentions as to the inapplicability of the loss of chance principle,[173] the increase in value of Eco Oro's damages should it be proven that the environmental permit would have been granted,[174] and the prospects of securing an environmental permit.[175]

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[165] Claimant's Reply, para. 101.

[166] Claimant's Reply, para. 102, referring to Claimant's Opening Presentation, Tr. Day 1, 209:8-20; Tr. Day 5, 1220:21-22 (Mr Johnson); NCL Ingeniería y Construcción Limitada, Mineral Resources Estimate and Preliminary Economic Assessment for Underground Mining (25 April 2011) (**Exhibit CLEX-25**), pp. 22, 78-82, 195-197; Golder Associates, Resource Estimation of the Móngora Gold-Silver Deposit (prepared for Eco Oro) (18 April 2012) (**Exhibit BD- 22**), pp. 12, 50-51, 86-87; First Behre Dolbear Report, para. 4; (**Exhibits BD-1** to **BD-50**) referred to in the First and Second Behre Dolbear Reports.

[167] Respondent's Rejoinder, paras. 89-107.

[168] Respondent's Rejoinder, para. 92, referring to Decision, para. 439; Claimant's First Submission, para. 156.

[169] Respondent's Rejoinder, para. 93.

[170] Respondent's Rejoinder, para. 94, referring to Tr. Day 4, 1110:13-1111:4 (Mr Jorgensen and Mr Guarnera); Tr. Day 4, 1129:8-13 (Mr Jorgensen and Mr Guarnera); Tr. Day 5, 1450:5-1452:16 (Mr Abdala and Mr Spiller).

[171] Respondent's Rejoinder, para. 95, referring to First CRA Report, para. 44; First Compass Lexecon Report, para. 8.

[172] Respondent's Rejoinder, para. 96.

[173] Respondent's Rejoinder, para. 97.

[174] Respondent's Rejoinder, para. 98.

[175] Respondent's Rejoinder, paras. 99-107. Colombia asserts that Eco Oro concedes that it has not established that it would have obtained an

147. Colombia further submits that even if Eco Oro's Comparable Transactions valuation were to be adopted, such a valuation would require multiple downward adjustments.[176] Colombia reiterates that it does not consider a Comparable Transactions valuation is appropriate. The adjusted Compass Lexecon valuation submitted as Exhibit R-267 (resubmitted by Eco Oro as Exhibit C-464 with minor changes to account for rounding differences) is provided as a third alternative submission, should the Tribunal reject Colombia's first three submissions and should the Tribunal consider it appropriate to adopt Compass Lexecon's valuation notwithstanding its failure to adequately reflect the Angostura Project's "minimal" chances of securing an environmental licence and the risk of a lawful delimitation of the páramo over part or all of the Angostura Deposit.[177]

E. Question E

148. In paragraph 920(4)(e) of its Decision, the Tribunal sought an answer to the following question: "*What is the probability that the Santurbán Páramo overlaps with the Angostura Deposit and to what extent?*"

(1) Claimant's First Submission

149. Eco Oro summarises its answer to this question as follows[178]:

> "*62. There is an important distinction that has been drawn in these proceedings between the concept of the Santurbán Páramo from a regulatory perspective, as compared to an ecological (or scientific) perspective.*[179] *From an ecological and scientific perspective, páramo ecosystems can be identified based on the presence of a combination of specific factors – including atmospheric factors (eg high humidity, low temperature), geological factors (eg altitude, level terrain) and biological factors (eg soil composed of dense organic matter, vegetation dominated by grass and shrubs) – which result in certain functional characteristics that are specific to páramo ecosystems (eg the ability to capture water).*[180] *The location of the Santurbán Páramo ecosystem can therefore be objectively determined, from an ecological and scientific perspective, based on these factors and functional characteristics. By contrast, from a regulatory perspective, the delimitation of the mining exclusion zone known as the Santurbán Páramo would be based on criteria dictated not only by science but by policy. This could result in a delimitation that deviates significantly from the*

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environmental licence by arguing that it was not "*incumbent on Eco Oro to prove on the balance of probabilities that it would have received a license*" and that "*Eco Oro has not done so because Colombia's measures have prevented it from advancing its mine design to the point where it could prepare a PTO*" (Respondent's Rejoinder, para. 99, referring to Claimant's Reply, para. 100(a)).

176 Respondent's Rejoinder, paras. 108-110.

177 Respondent's Rejoinder, para. 110, referring to Compass Lexecon's valuation model (**Exhibit CLEX-73**); Adjusted Compass Lexecon Comparable Transactions Model (**Exhibit R-267**); Colombia's Comparable Transactions Valuation Model of 23 May 2022, with Claimant's corrections (**Exhibit C-464**); and **Appendix A** to Respondent's Rejoinder, containing references to the record justifying the required adjustments to the Comparable Transactions.

178 Claimant's First Submission, paras. 62-65. In paragraphs 178-196 of Claimant's First Submission, Eco Oro expands on these arguments.

179 Claimant's First Submission, paras. 178-180, referring to Decision, para. 671; Tr. Day 3, 717:13-719:14 (Ms Baptiste).

180 Claimant's First Submission, para. 178, referring to Respondent's Counter-Memorial, paras. 23-27; Claimant's Reply Memorial, para. 196; Claimant's Opening Statement (**Exhibit CH-1(A)**), pp. 46-47; Respondent's Opening Presentation, pp. 20-22.

boundaries of the ecological páramo.

63. It is not possible to predict the location of the 'regulatory Santurbán Páramo' (ie the area over which the Government wishes to establish a mining ban) because its delimitation will not be based solely upon objective scientific criteria, but on policy considerations that are inherently subjective in nature. That regulatory delimitation exercise has yet to be completed by Colombia, more than four years after the Colombian Constitutional Court struck down the delimitation set out in Resolution 2090 and ordered that a new delimitation be published within one year.[181]

64. The Tribunal's question regarding 'the probability that the Santurbán Páramo overlaps with the Angostura Deposit and to what extent' can be answered from an ecological perspective.[182] *The most precise delimitation available to the Tribunal is the one prepared by Ecodes,*[183] *and commissioned by Eco Oro, which even Colombia's witness, Ms Baptiste endorsed as a 'qualified and informed opinion' that was prepared 'in greater detail' than the work carried out by the IAVH.*[184] *Based on the Ecodes Report, the probability that the Santurbán Páramo, from an ecological perspective, overlaps with the Angostura Deposit is zero.*[185]

65. In any case, as addressed in Eco Oro's response to Question F, whether or not the 'regulatory' or the 'ecological' páramo overlaps with the Angostura Deposit, the issue is not relevant to determine the quantum of compensation owed to Eco Oro.[186]"

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[181] Claimant's First Submission, paras. 181-183, referring to Decision, paras. 506, 777, 782-783, 799-803, 811; Letter from IAvH (Ms Baptiste) to the Mayor of Vetas and others (30 October 2013) (**Exhibit C-189**).

[182] Claimant's First Submission, paras. 184-186, referring, with regard to the importance of the degrees of precision in the delimitation of páramos, to Decision, paras. 138, 777 (scale of 1:25,000 set out in Law 1450, tem times more precise than the 2007 Atlas); Tr. Day 3, 730:13-18; Discurso de Brigitte Baptiste, "Por qué y para qué delimitar los páramos?" (27 June 2013) (**Exhibit C-184**), p. 4; Meeting minutes No. 20 of 2013 of the Fifth Constitutional Commission, Congressional Gazette No. 565 (26 July 2013) (**Exhibit C-340**) p. 20; Letter from ANLA to Eco Oro attaching terms of reference (27 February 2012) (**Exhibit C-24**), pp. 28, 40 (requiring a mapping at a scale of 1:10,000 for the purposes of presenting an EIA for an underground project in Concession 3452). With regard to the importance of field data, see Claimant's First Submission, para. 191, referring to Tr. Day 3, 749:7-12 (Ms Baptiste); Day 3, 741:10-742:4 (Ms Baptiste); IAvH, *Transición Bosque-Páramo. Bases conceptuales y métodos para su identificación en los Andes colombianos* (2015) (**Exhibit R-123**), p. 67.

[183] Claimant's First Submission, paras. 187-190, referring to ECODES, "Estado de Conservación de la Biodiversidad en los ecosistemas asociados al Sector Angosturas California, Santander, Resumen Ejecutivo" (May 2013) (**Exhibit C-180**), pp. 4, 10-11 (scale of 1:5,000, and for some components, a scale of 1:2,000); First González Aldana Statement, paras. 46, 52; Second González Aldana Statement, para. 4; ECODES Presentation, "Biodiversity Conservation of the ecosystems within the Angosturas Sector, California, Santander" (Undated) (**Exhibit C-272**), pp. 2, 12, 16. In para. 189 of Claimant's First Submission, Eco Oro notes that, while the area of Concession 3452 occupies approximately 5,000 hectares (roughly the size of Manhattan), the Angostura Deposit is approximately 150 hectares (less than half the size of Central Park) – see also Claimant's Memorial, para. 136; Micon International Limited, *Technical Report on the Updated Mineral Resource Estimate for the Angostura Gold-Silver Deposit, Santander Department, Colombia* (17 July 2015) (**Exhibit C-37**), p. 14; First Behre Dolbear Report, para. 92; Claimant's Reply Memorial, paras. 241-246. Eco Oro adds that, in order to carry out the Angostura Project, Eco Oro would seek and environmental licence only in relation to the areas to be exploited, and not in relation to the whole Concession. This explains why the ecosystemic mapping of the area of the Angostura Deposit in the ECODES Report is particularly important for permitting purposes.

[184] Claimant's First Submission, fn. 90, referring to First Baptiste Statement, paras. 51-52. See also Claimant's First Submission, para. 193, referring, *inter alia*, to Decision, paras. 661, 767.

[185] Claimant's First Submission, fn. 91, referring to Decision, para. 136. See also, Claimant's First Submission, para. 192, referring to Decision, para. 136, fn. 130; ECODES Presentation, "Biodiversity Conservation of the ecosystems within the Angosturas Sector, California, Santander" (Undated) (**Exhibit C-272**); ECODES Report Chapter 2, *Componente Vegetación* (Undated) (**Exhibit C-441**), p. 30. Eco Oro notes that the ECODES Report's conclusion is not surprising given that Colombia's regulatory delimitation of the Santurbán Páramo also found a *de minimis* overlap with the Angostura Deposit (Claimant's First Submission, para. 194, referring to Claimant's Reply Memorial, paras. 231, 274(b); Claimant's Opening Statement (**Exhibit CH-1(A)**), pp. 65-67; Decision, paras. 782-783; Ministry of Environment Presentation, "Delimitación del Páramo de Santurbán" (December 2014) (**Exhibit C-217**), pp. 25, 43; First González Aldana Statement, para. 76.

[186] Claimant's First Submission, para. 196.

(2) Respondent's Response

150. Colombia asserts that under the existing delimitation there is a 71% overlap between the Angostura Deposit and the Santurbán Páramo. [187]

151. Colombia adds that the overlap with the Angostura Deposit under the final delimitation will be at least as extensive as the overlap with existing delimitation. [188] Colombia notes that the Ministry of Environment has published periodic reports on the status of the delimitation exercise on its website [189] and that none of those reports suggests that the consultations will result in any reduction of the area set out in the Ministry of Environment's proposal for the final delimitation. [190]

152. Finally, Colombia notes that there is no indication that the Ministry of Environment intends to rely on the ECODES Report for the final delimitation. Moreover, Colombia asserts that it would be inappropriate for it to do so in any event, because the ECODES Report's scale and methodology do not allow for the inclusion of a Transition Zone in the delimitation. [191]

(3) Claimant's Reply

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[187] Respondent's Response, paras. 100-106, referring to Administrative Tribunal of Santander, File No. 2015-00734-00, Order (25 September 2018) (**Exhibit R-229**), pp. 19, 23-24; Santander Administrative Tribunal, Order (9 October 2018) (**Exhibit C-414**), p. 3; Administrative Tribunal of Santander, File No. 2015-00734-00, Order (2 December 2019) (**Exhibit R-236**), pp. 20, 23-25; Administrative Tribunal of Santander, File No. 2015-00734-00, Order (2 February 2021) (**Exhibit R-255**), pp. 6-7; Administrative Tribunal of Santander, File No. 2015-00734-00, Order (6 May 2021) (**Exhibit R-258**), pp. 5-6.

[188] Respondent's Response, paras. 107-115, referring to Ministry of Environment, Santurbán Avanza website, "Imperious Points" (**Exhibit R-272**); Ministry of Environment, First Implementation Report of Judgment T-361 (27 March 2018) (**Exhibit R-226**), pp. 3-4; Ministry of Environment, *Integrated Proposal Document for the Consultation Phase of the Participative Delimitation of the Páramo Jurisdicciones - Santurbán-Berlín* (December 2019) (**Exhibit R-235**), p. 13; ANM, Map of Concession 3452 and the Ministry of Environment's 2019 delimitation proposal for the Santurbán Páramo (18 March 2022) (**Exhibit R-265**).

[189] Respondent's Rejoinder, para. 115, referring to Ministry of Environment, Santurbán Avanza website, "Implementation Reports" (**Exhibit R-271**); Ministry of Environment, First Implementation Report of Judgment T-361 (27 March 2018) (**Exhibit R-226**); Ministry of Environment, Second Implementation Report of Judgment T-361 (13 July 2018) (**Exhibit R-228**); Ministry of Environment, Third Implementation Report of Judgment T-361 (12 October 2018) (**Exhibit R-230**); Ministry of Environment, Fourth Implementation Report of Judgment T-361 (1 December 2018) (**Exhibit R-231**); Ministry of Environment, Fifth Implementation Report Judgment T- 361 (13 April 2019) (**Exhibit R-232**); Ministry of Environment, Sixth Implementation Report of Judgment T-361 (14 July 2019) (**Exhibit R-233**); Ministry of Environment, Seventh Implementation Report of Judgment T-361 (12 February 2020) (**Exhibit R-238**); Ministry of Environment, Eighth Implementation Report of Judgment T-361 (26 June 2020) (**Exhibit R-248**); Ministry of Environment, Implementation Report No. 9 (12 October 2020) (**Exhibit R-252**); Ministry of Environment, Tenth Implementation Report of Judgment T-361 (4 March 2021) (**Exhibit R-256**); Ministry of Environment, Eleventh Implementation Report of Judgment T-361 (30 June 2021) (**Exhibit R-261**); Ministry of Environment, Twelfth Implementation Report of Judgment T-361 (20 October 2021) (**Exhibit R-262**); Ministry of Environment, Thirteenth Implementation Report of Judgment T-361 (March 2022) (**Exhibit R-263**).

[190] Respondent's Rejoinder, para. 115. Colombia clarifies that, while the Constitutional Court had initially required that the delimitation exercise be completed within one year, the Ministry of Environment has lawfully extended the period for completion of the delimitation by obtaining extensions of this deadline in the domestic courts, as well as the dismissal of contempt proceedings initiated against it for alleged non-compliance with the Court's order (Administrative Tribunal of Santander, File No. 2015-00734-00, Order (25 September 2018) (**Exhibit R-229**), pp. 19, 23-24; Santander Administrative Tribunal, Order (9 October 2018) (**Exhibit C-414**); Administrative Tribunal of Santander, File No. 2015-00734-00, Order (2 December 2019) (**Exhibit R-236**), pp. 20, 23-25; Administrative Tribunal of Santander, File No. 2015-00734-00, Order (2 February 2021) (**Exhibit R-255**), pp. 6-7; Administrative Tribunal of Santander, File No. 2015-00734-00, Order (6 May 2021) (**Exhibit R-258**), pp. 5-6).

[191] Respondent's Rejoinder, paras. 116-119, referring to ECODES, "Estado de Conservación de la Biodiversidad en los ecosistemas asociados al Sector Angosturas, Municipio de California, Santander, Resumen Ejecutivo" (1 May 2013) (**Exhibit C-180**); Tr. Day 2, 516:16- 517:2 (Mr González Aldana); IAvH, *Transición Bosque-Páramo. Bases conceptuales y métodos para su identificación en los Andes colombianos* (2015) (**Exhibit R-123**), p. 70.

153. Eco Oro notes that, in its Response, Colombia entirely ignores the distinction between regulatory and ecological páramo and is focused on prejudging the final boundaries of the regulatory páramo, notwithstanding the fact that the re-delimitation process has yet to be completed.[192]

154. Eco Oro contends that the area of the regulatory páramo delimited under Resolution 2090 overlaps with 60% of the area of the Angostura Deposit, not 71% as Colombia suggests.[193]

155. Eco Oro submits that Colombia cannot claim to know where the final boundaries of the regulatory páramo will be located, nor can it claim to determine its potential overlap with the Angostura Deposit (unless Colombia does not plan to undertake a genuine consultation process, but instead present stakeholders with a *fait accompli*, as it did with the original 2090 Atlas, which the Constitutional Court found to be in bad faith).[194] Moreover, Eco Oro points to the example of the municipality of Vetas, which reached an agreement with the Ministry of Environment concerning the modification of the Santurbán Páramo delimitation.[195]

156. According to Eco Oro, this development regarding the municipality of Vetas puts the lie to Colombia's assertion in its response that "*the Ministry of Environment's methodology for the new delimitation* [pursuant to Constitutional Court Judgment T-361] *also recognized that mining activities cannot be allowed in any páramo areas"*, as the terms of the agreement with the municipality of Vetas demonstrate that the line has been modified so as to exclude existing mining projects.[196] Eco Oro adds that it is possible that similar agreements may be reached with other communities, including California, where the Angostura Deposit is located.[197]

157. Eco Oro submits it is clear that the regulatory delimitation of the Santurbán Páramo is still in flux, it is an iterative process[198] and Colombia cannot claim to know where the final boundaries will lie. As such, Eco Oro stands by its conclusion that "*from a regulatory perspective, it is impossible to determine the probability that the Santurbán Páramo overlaps with the Angostura Deposit*".[199]

158. Finally, Eco Oro notes that the Tribunal's question concerns the Angostura Deposit's location vis-à-vis the ecological páramo and that Colombia has not disputed that the ECODES Report is the most precise ecosystemic study of the Angostura area and is reliable.[200] Therefore, the Tribunal can accept that, from an ecological perspective, the probability that the páramo ecosystem overlaps with the Angostura Deposit is zero.[201] Eco Oro further notes that the Tribunal need not determine

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[192] Claimant's Reply, para. 109.

[193] Claimant's Reply, para. 111, referring to Tr. Day 1, 87:3-88:13 (Claimant's Opening); Claimant's Opening Statement (**Exhibit CH-1(A)**), pp. 66-67; Claimant's Reply Memorial, para. 164. According to Eco Oro, Colombia is double-counting (Claimant's Reply, fn. 256).

[194] Claimant's Reply, para. 116, referring to Decision, paras. 676-677.

[195] Claimant's Reply, paras. 117-123, referring to Agreement between the Ministry of Environment and the Municipality of Vetas concerning the delimitation of the Santurbán Páramo (29 November 2021) (**Exhibit C-475**), p. 5; "Vetas se convirtió en el primer municipio en firmar pacto para delimitación del páramo de Santurbán", *Vanguardia* (21 January 2022) (**Exhibit C-476**); "Minambiente y municipio de Vetas acuerdan delimitación del Santurbán", *Portafolio* (9 March 2022) (**Exhibit C-478**).

[196] Claimant's Reply, para. 124, referring to Respondent's Response, para. 111.

[197] Claimant's Reply, para. 125, referring to Minutes of consultations meeting between the Ministry of Environment and the community of California (25 January 2022) (**Exhibit C-477**), p. 3.

[198] Claimant's Reply, fn. 264.

[199] Claimant's Reply, para. 127, referring to Claimant's First Submission, para. 195(a).

[200] Claimant's Reply, para. 128. Eco Oro notes that it has not argued that the ECODES Report would be taken into account by the Ministry of Environment in finalising the boundaries of the regulatory páramo. See also Claimant's Reply, fn. 248.

whether the páramo – either regulatory or ecological – overlaps with the Angostura Deposit, as the question is not relevant to the assessment of the quantum of compensation owed to Eco Oro. [202]

(4) Respondent's Rejoinder

159. Colombia asserts that Eco Oro has still failed to provide an answer to the Tribunal's Question E. [203] Colombia reiterates that the probability that the Santurbán Páramo overlaps with the Angostura Deposit is 100% and that the overlap is approximately 71%, as the 2019 Páramo Delimitation Proposal shows no material difference with the Resolution 2090 Delimitation so far as the overlap with the Angostura Deposit area is concerned. [204]

160. Colombia argues that *(i)* there is nothing "*inherently subjective and discretionary*" in the delimitation of the "*regulatory páramo*" that would make it "*impossible*" to predict the outcome of the delimitation. [205] Colombia adds that the requirement to conduct 'social' and 'economic' studies does not mean that social and economic inputs will dictate the actual drawing of the 'regulatory' páramo boundary, as this would effectively defeat the purpose of the mining ban; [206] *(ii)* it is misleading for Eco Oro to state that, in the context of an environmental licensing process, there is a requirement to map the páramo ecosystem existing within the project area from an ecological perspective; [207] and *(iii)* Eco Oro's assertions about the Tribunal's findings as to Eco Oro's inability to predict the boundaries of the Santurbán Páramo are misleading, as the Tribunal made clear that "*Eco Oro could have reached certain assumptions as to the likely parameters of the Santurbán Páramo*". [208] Colombia concludes that there can be no question that the Tribunal's Question E refers to the probable overlap of the Angostura Deposit with the 'regulatory' páramo under Laws 1382, 1450, 1753 and 1930, as well as Constitutional Court Judgments C-35 and T-361. [209]

161. Colombia further contends that the ECODES Report is not a reliable indicator of the overlap of the Angostura Deposit with the Santurbán Páramo, because it adopts a minimalistic and self-serving definition of the 'scientific' and 'ecological' páramo. [210] According to Colombia, the purpose of the ECODES Report was not to map the 'ecological' or 'scientific' páramo, but instead to assess the "*state of conservation*" of the biodiversity of the ecosystems present in the Angostura Deposit area in order to develop "*conservation strategies*". [211] Colombia adds that the ECODES Report *(i)* very narrowly defined the areas worth conserving; [212] *(ii)* was not an independent scientific study; [213] *(iii)* did not

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[201] Claimant's Reply, para. 129.

[202] Claimant's Reply, para. 130.

[203] Respondent's Rejoinder, para. 111.

[204] Respondent's Rejoinder, para. 112. See also Respondent's Rejoinder, para. 181 and fn. 320, where Colombia rejects Eco Oro's submission that the overlap is 60% and not 71%. Colombia submits that, in any event, a 60% overlap would still render the Angostura Project unviable.

[205] Respondent's Rejoinder, para. 114.

[206] Respondent's Rejoinder, para. 115.

[207] Respondent's Rejoinder, para. 119.

[208] Respondent's Rejoinder, para. 120, referring to Decision, para. 811.

[209] Respondent's Rejoinder, paras. 121-125.

[210] Respondent's Rejoinder, para. 131, referring to Decision, paras. 655-656.

[211] Respondent's Rejoinder, para. 127, referring to ECODES, "Estado de Conservación de la Biodiversidad de los ecosistemas asociados al Sector Angosturas California, Santander, Resumen Ejecutivo" (1 May 2013) (**Exhibit C-180**), p. 1; ECODES Presentation, "Biodiversity Conservation of the ecosystems within the Angosturas Sector, California, Santander" (Undated) (**Exhibit C-272**), p. 2; First González Aldana Statement, paras. 44-46.

map the 'ecological' or 'scientific' páramo in the Angostura Deposit area;[214] and *(iv)* is not more appropriate or reliable to identify the overlap of the Angostura Deposit with the páramo just because it carried out field studies and adopted a more detailed scale.[215]

162. Finally, Colombia asserts that the new delimitation of the Santurbán Páramo will not significantly depart from the 2090 delimitation as far as the Angostura Deposit Area is concerned. Colombia contends that *(i)* Eco Oro misrepresents Mr García's evidence from the hearing, as Mr García simply stated that the boundaries could theoretically change pursuant to the order enshrined in Judgment T-361. In any event, Mr García did not work for the authorities involved in the delimitation exercise;[216] *(ii)* any changes between Resolution 2090 and the final delimitation will not be substantial, as evidenced by the 2019 Páramo Delimitation Proposal;[217] and *(iii)* it is not true that the consultations with the local communities in the context of the delimitation process will allow significant reductions in the páramo area on account of social and economic considerations, as Judgment T-361 established that the new delimitation could not be inferior in terms of environmental protection than that set out in Resolution 2090. Colombia notes, on the one hand, that the agreement reached with the Vetas community is preliminary and is subject to verification and confirmation in the final delimitation of the Santurbán Páramo. On the other hand, Colombia notes that Eco Oro's allegation that it is "*possible that similar agreements may be reached in California, where the Angostura Deposit is located*" is speculative and provides no valid basis for suggesting that the final delimitation will depart from the 2019 Delimitation Proposal, especially when the community of California has expressed its preference in maintaining the páramo boundary line set by Resolution 2090.[218]

F. Question F

163. In paragraph 920(4)(f) of its Decision, the Tribunal sought an answer to the following question: "*What is the probability that Eco Oro would have been awarded an environmental licence to allow exploitation in the following scenarios:*

i. The Angostura Deposit is not within the boundaries of the páramo as determined by the final delimitation;

ii. The Angostura Deposit is partially within the boundaries of the páramo as determined by the

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[212] Respondent's Rejoinder, para. 127, referring to ECODES Presentation, "Biodiversity Conservation of the ecosystems within the Angosturas Sector, California, Santander" (Undated) (**Exhibit C-272**), pp. 2-13; IAvH, *Aportes a la conservación estratégica de los páramos de Colombia: actualización de la cartografía de los complejos de páramo a escala 1:100.000* (6 February 2014) (**Exhibit C-200**), pp. 27, 37-47. Council of State, Advisory Opinion No. 2233 (11 December 2014) (**Exhibit R-135**), §2.b.7.

[213] Respondent's Rejoinder, para. 128, referring to ECODES, "Estado de Conservación de la Biodiversidad de los ecosistemas asociados al Sector Angosturas California, Santander, Resumen Ejecutivo" (1 May 2013) (**Exhibit C-180**), p. 1; ECODES Presentation, "Biodiversity Conservation of the ecosystems within the Angosturas Sector, California, Santander" (Undated) (**Exhibit C-272**), p. 6; First González Aldana Statement, paras. 44, 88-92.

[214] Respondent's Rejoinder, para. 129.

[215] Respondent's Rejoinder, para. 130.

[216] Respondent's Rejoinder, para. 135.

[217] Respondent's Rejoinder, para. 136.

[218] Respondent's Rejoinder, paras. 137-140, referring to ANM, Resolution VPFF No. 058 (23 May 2022) (**Exhibit R-304**), p. 6; Minutes of consultations meeting between the Ministry of Environment and the community of California (25 January 2022) (**Exhibit C-477**), p. 2.

final delimitation; or

iii. The Angostura Deposit is wholly within the boundaries of the páramo as determined by the final delimitation."

(1) Claimant's First Submission

164. Eco Oro summarises its answer to this question as follows [219]:

"*66. The Tribunal need not make any findings regarding the probability that the Angostura Project would have obtained a license because Eco Oro's valuation based on the three Comparable Transactions already builds in the value effects of the permitting risks associated with the Angostura Project. Before addressing why Eco Oro's approach to valuation captures permitting risks, some preliminary observations are warranted.*[220]

(a) Question F calls for the same distinction between regulatory páramo and ecological páramo, as noted in response to Question E.

(b) If the Angostura Deposit overlaps with regulatory páramo in whole or in part, there would be no prospects of obtaining a license in relation to the overlapping areas in which mining is banned. The assessment of licensability, however, must be undertaken in the absence of Colombia's unlawful measures.

(c) Eco Oro thus assumes that the Tribunal is questioning the likelihood that Eco Oro would have obtained an environmental license depending on the extent and degree of overlap between the Angostura Deposit and the ecological páramo. As noted in response to Question E, the best evidence on the record (the Ecodes Report) shows no such overlap. Ultimately, however, whether it is or is not within ecological páramo is not determinative from a licensability perspective. This is because the granting of an environmental license for mining activities in the páramo, or in other sensitive ecosystems (such as the Andean forest), is subject to the same stringent environmental licensing process set out under Colombian law.

(d) As such, in the absence of a mining ban (ie regulatory páramo), there is no binary decision-making process whereby, if a mining project is located in the páramo, a license will not be granted, whereas if it is outside the páramo, it will be granted. What matters is the environmental impact of the specific mining activities to be carried out according to the concessionaire's mine plan, and the manner in which those impacts are to be mitigated, compensated and remediated, according to the concessionaire's EIA.[221] *Indeed, Colombia even passed a specific decree – Decree 2820 of 2010 – which specifically provides for the issuance of environmental licenses for projects in páramo areas.*[222] *At least 67 environmental licenses have been issued to mining projects in páramo areas*

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[219] Claimant's First Submission, paras. 66-71. In paragraphs 197-256 of Claimant's First Submission, Eco Oro expands on these arguments.

[220] Claimant's First Submission, para. 197, referring to Decision, para. 896.

[221] Claimant's First Submission, para. 204, referring to Law 99 (22 December 1993) (**Exhibit C-66**), Articles 50, 57; Decree 2820 (5 August 2010) (**Exhibit C-129**), Articles 21-22. In paras. 207-208 of Claimant's First Submission, reference is made to The Rio Declaration on Environment and Development (1992) (**Exhibit RL-32**), Principle 17; Law 99 (22 December 1993) (**Exhibit C-66**), Articles 11, 49.

pursuant to this framework.[223]

67. With this background (ie that, but for Colombia's measures, it had in place a specific framework for the granting of environmental licenses in páramos and Colombia in fact granted a number of such licenses), there are three important points that Claimant submits should inform the Tribunal's approach to considering permitting risks.

68. First, although there is a track record for the issuance of licenses in páramos and sensitive ecosystems,[224] *the probability of a license being granted cannot be accurately and objectively estimated. Environmental license applications require a detailed mine plan and an EIA, both of which are labor-intensive processes involving significant discussions with Colombia's regulatory bodies and which Eco Oro did not complete given Colombia's measures.*[225] *Moreover, identifying the probability that a license would be granted based on a hypothetical mine plan that has not been prepared and a hypothetical EIA that has not been prepared would then require divining the likely response from ANLA in respect of the hypothetical submissions, which is exceedingly speculative.*[226] *Drawing a conclusion on the likely outcome of such a process would involve the Tribunal acting as a substitute licensing authority, which is an inappropriate exercise.*[227]

69. Second, although no precise probability can be ascribed to the likelihood that Eco Oro would have obtained an environmental license, the Tribunal has the benefit of evidence that there were promising prospects of a license being issued for the Angostura Project. Aside from the fact that Colombia had issued licenses for other projects in páramo, the Decision observes that 'Eco Oro [...] received significant encouragement from a number of different State bodies that it would be permitted to undertake exploitation activities throughout its concession area.'[228] *Even after the 2090 Atlas had been issued, the Decision notes that Eco Oro received the support from the highest levels of Government: '[O]n 8 February 2016, Eco Oro received support for Concession 3452 from President Santos who explained Eco Oro should apply for its environmental licence as soon as possible to enable Colombia to 'showcase' the Angostura Project as a post-páramo delimitation*

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[222] Claimant's First Submission, para. 214, referring to Decree 2820 (5 August 2010) (**Exhibit C-129**), Article 10; Decree 1220 (21 April 2005) (**Exhibit C-97**), Article 10; Decree 2041 (15 October 2014) (**Exhibit C-216**), Article 10; Decree 1076 (29 May 2015) (**Exhibit C-279**), Article 2.2.2.3.2.4.

[223] Claimant's First Submission, paras. 215-218, referring to IAvH, *Aportes a la conservación estratégica de los páramos de Colombia: actualización de la cartografía de los complejos de páramo a escala 1:100.000* (6 February 2014) (**Exhibit C-200**), p. 42 (Spa), p. 13 (Eng); Law No. 1753 (9 June 2015) (**Exhibit C-36**), Article 173; Letter from the National Mining Agency to the Constitutional Court (24 February 2016) (**Exhibit C-44**), p. 8 (Eng); 2001 Mining Code (Law 685) (8 September 2001) (**Exhibit C-8**), Article 34.

[224] See fn. 221 above. See also Claimant's First Submission, paras. 231-237, referring to Ministry of Environment Resolution No. 2090 (19 December 2014) (**Exhibit C-34**), Article 9; Letter from the National Mining Agency to the Constitutional Court (24 February 2016) (**Exhibit C-44**), p. 7 (Eng); Constitutional Court Judgment T-361 (30 May 2017) (**Exhibit C-244**), pp. 5-6 (Eng); Constitutional Court Judgment T-361 (30 May 2017) (**Exhibit C-244**), pp. 43, 117-118 (Eng).

[225] Claimant's First Submission, paras. 238-242, referring to the reconfiguration of the Project as an underground mine.

[226] Claimant's First Submission, para. 228 and fn. 386, referring, with a view to demonstrating the impossibility of the speculative exercise, to Greystar, *Programa de Trabajos y Obras* (23 September 2009) (**Exhibit R-44**); Eco Oro, Environmental Impact Study, Chapter 1 (15 December 2009) (**Exhibit R-158**); Angostura Project Environmental Impact Assessment, Chapter 3: Environmental description and characterization of the influence area (1 December 2009) (**Exhibit C-321**). See also Claimant's First Submission, para. 174(a).

[227] Claimant's First Submission, paras. 198 and 228, citing to *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 of Jurisdiction and Liability (17 March 2015) (**Exhibit RL-18**), paras. 602-604; *William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware v Government of Canada* (UNCITRAL) Award on Damages (10 January 2019) (**Exhibit RL-158**), paras. 130-131; *Joseph Charles Lemire v Ukraine* (ICSID Case No. ARB/06/18) Decision on Jurisdiction and Liability (14 January 2010) (**Exhibit RL-82**), para. 283; *Glamis Gold, Ltd v The United States of America* (UNCITRAL) Award (8 June 2009) (**Exhibit CL-59**), para. 779.

[228] Claimant's First Submission, fn. 92, referring to Decision, para. 689.

success story.'[229] *There are a number of other indicia that Colombia supported the Angostura Project. While the Tribunal need not make any finding regarding the probability that the Angostura Project would have received an environmental license, it can take comfort in Colombia's support of the Angostura Project, which it would not have provided if Eco Oro's Angostura Project had low chances of advancing to the exploitation phase.*[230]

70. Third, and most importantly, insofar as there were prospects of obtaining a license for the Angostura Project (as concluded in the Decision[231]*), the Tribunal need not draw any conclusions regarding the probability that Eco Oro would have succeeded in obtaining an environmental license because Eco Oro's valuation based on the three Comparable Transactions already reflects the value consequences associated with the permitting risks facing the Angostura Project. The projects underlying the three Comparable Transactions were all at the same or an earlier stage of development as the Angostura Project, subject to the same regulatory requirements in Colombia and in Canada, would face the same need to satisfy the Colombian environmental authorities that their projects were environmentally feasible and should be granted an environmental license, and were subject to comparable market perception of social and political risk.*

71. Consequently, a valuation based on the three Comparable Transactions builds in the effect on value of any market perception of risk involved in permitting an underground gold mining project in the immediate vicinity of the Angostura Project. On that basis, the Tribunal need not make any other findings regarding the probability that the Angostura Project would have obtained a license.[232]"

165. Eco Oro submits that, since it was Colombia who deprived Eco Oro of, *inter alia*, the right to pursue an environmental license and have that application fairly considered on its own merits, it would be incumbent on Colombia to prove its assertion that a license would not have been granted in any event.[233]

166. Eco Oro notes that the Parties agree that the issue of licensability is an issue relating to causation. The question to be determined, as articulated by Colombia, is whether it has been "*establish*[ed] *that* [Eco Oro] *could ever have secured an EIA license for* [the Angostura Project]".[234] If there was no prospect of obtaining an environmental license for the Angostura Project, even in the absence of Colombia's unlawful measures, there would be no causal link between Colombia's measures and

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[229] Claimant's First Submission, fn. 93, referring to Decision, para. 789.

[230] Claimant's First Submission, paras. 243-246, referring to Decision, paras. 689, 691-694, 768, 784, 786, 789- 790; First Moseley-Williams Statement, para. 41; Email exchange between Mark Moseley-Williams, Juan Jose Rossel (International Finance Corporation) and others (10 February 2016) (**Exhibit C- 389**); Email from Mark Moseley-Williams to Juan Ordúz (11 February 2016) (**Exhibit C-390**); First González Aldana Statement, para. 123; "PDAC 2015: Mines Minister says Colombia is picking up the pace", *Northern Miner* (25 March 2015) (**Exhibit C-222**), p. 2.

[231] Claimant's First Submission, fn. 94, referring to Decision, para. 848. See also Claimant's First Submission, para. 229, referring to Decision, paras. 632, 848.

[232] Claimant's First Submission, paras. 197-198, 247-256, referring to Decision, paras. 632, 848. Eco Oro warns that "*discounting a market-based valuation based on the probability of a licence being issued would involve 'double discounting' and thus under-compensation (contrary to the 'full reparation' standard)*" (Claimant's First Submission, para. 198(a)). Finally, Eco Oro asserts that the Tribunal in the present case is in the "*enviable position of having the three Comparable Transactions involving gold mining projects of the same nature and stage of development as the Angostura Project, located on mining tenements immediately adjacent to the Angostura Project and, in fact, land-locked within Concession 3452*" (Claimant's First Submission, para. 249).

[233] Claimant's First Submission, para. 201, referring to Decision, paras. 632 and 848.

[234] Claimant's First Submission, para. 199, referring to Colombia's Rejoinder on the Merits, para. 488.

Eco Oro's losses. However, insofar as there were prospects of Eco Oro securing an environmental license for the Angostura Project in the absence of the measures, then Colombia's measures – which deprived Eco Oro of its mining rights and the opportunity to apply for an environmental license – did cause a loss. Therefore, Eco Oro submits that, insofar as causation exists, it is incumbent upon the Tribunal to assess compensation sufficient to wipe out the effects of Colombia's unlawful measures. [235]

(2) Respondent's Response

167. Colombia asserts that Eco Oro has failed to prove that it had any realistic prospects of being awarded an environmental licence to allow exploitation, whether the Angostura Deposit fell outside, partially within or wholly within the páramo as determined by the final delimitation. Colombia notes that Eco Oro seeks to shift the burden onto Colombia "*to prove its assertion that a license would not have been granted in any event*", but contends that it is incumbent upon Eco Oro to prove with a "*sufficient degree of certainty*" that, absent Colombia's Article 805 breach, the loss for which it claims would have been avoided. [236]

168. Colombia further asserts that any application for an environmental licence in or around the Santurbán Páramo was exceedingly unlikely to succeed in light of the precautionary principle. [237] According to Colombia, the environmental licensing process in Colombia is governed by two guiding principles: the prevention principle and the precautionary principle. The difference between the two is that the prevention principle operates on the basis of scientific certainty, while the precautionary principle applies when there is a lack of it. [238] Colombia adds that the precautionary principle also provides a margin of discretion to the environmental authorities to decide whether or not to grant an environmental licence in instances where there is no scientific certainty about the environmental effects of the project at issue. [239] Colombia notes that Eco Oro was required to establish with full scientific certainty that the project's prevention, compensation, mitigation and remediation measures were sufficient to protect the Santurbán Páramo. [240] Colombia reiterates that there is a heightened standard under Colombian law for the issuance of environmental licences in the páramos, because Decree 2820 of 2010 set forth two additional requirements for projects in the páramos. Colombia argues that these additional requirements would have made it inherently more difficult for Eco Oro to secure an environmental licence. [241] Colombia further asserts that the fact the ANM wrote a letter to the Constitutional Court in the wake of Judgment C-35 expressing its position that mining activities can be conducted in páramo ecosystems does not, *per se*, mean that the said position embodies the position of the Colombian Government. In fact, Colombia submits that the

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[235] Claimant's First Submission, paras. 199-200, 221, 229, referring to Colombia's Rejoinder on the Merits, para. 488; *Joseph Charles Lemire v Ukraine* (ICSID Case No. ARB/06/18) Award (28 March 2011) (**Exhibit CL-177**), para. 246; *Crystallex International Corporation v Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2) Award (4 April 2016) (**Exhibit CL-85**), paras. 868-869 (citing *Lemire* with approval). See also Claimant's First Submission, paras. 38, 45, 47, 51.

[236] Respondent's Response, paras. 120-124.

[237] Respondent's Response, para. 125, referring to Decision, para. 630.

[238] Respondent's Response, para. 127, referring to Consejo de Estado, Judgment 00230 (11 April 2018) (**Exhibit R-227**), pp. 18-19; Constitutional Court, Judgment T-204/14 (1 April 2014) (**Exhibit R-216**), p. 22; Constitutional Court, Judgment C-293 (23 April 2002) (**Exhibit R-208**), p. 22.

[239] Respondent's Response, para. 129, referring to Decision, para. 654.

[240] Respondent's Response, para. 130.

[241] Respondent's Response, paras. 131-132.

existence of conflicting views within the Colombian state on this subject is reflective of the lack of scientific certainty worldwide regarding the impact of mining in the páramos and, by extension, the need to apply the precautionary principle in all decision-making processes assessing the environmental feasibility of mining projects in the páramos. [242]

169. Colombia asserts that the vast majority of applications for environmental licences for large-scale mining projects in Colombia fail. In the period between 2010 and 2022, ANLA received 24 environmental licence requests for large-scale mining projects, and granted only 8 of them, none of which affected protected areas, sensitive ecosystems or mining exclusion zones. [243]

170. Colombia adds that the only application for an environmental licence for a large-scale Mining Project near a páramo ecosystem failed. According to Colombia, Minesa requested an environmental licence for the Soto Norte underground gold mining project. ANLA archived the request and returned to Minesa the documentation it had submitted, because ANLA considered that Minesa had failed to provide the minimum information required to perform an adequate evaluation. [244] Colombia submits that Minesa's example highlights *(i)* that the environmental licensing process for projects located in proximity to páramo ecosystems is extremely challenging and complex (requiring the input of several institutions and entities); [245] *(ii)* the importance of hydrogeological studies to determine the interaction between the páramo and the planned mining activities; [246] and *(iii)* that the licensing request of a large-scale project located near a páramo ecosystem is likely to generate significant public controversy and opposition. [247]

171. Colombia submits that no large-scale mining project has ever been granted environmental licences within or near the Santurbán Páramo. According to Colombia, the 2013 IAvH Páramo Atlas in fact refers to 67 "*autorizaciones ambientales*" (environmental authorisations), not 67 "*licencias ambientales*" (environmental licences), which Colombia submits is an important distinction; the authorisations do not generally involve an in-depth analysis of the impacts of the proposed activity. [248] Colombia notes that none of the 67 environmental authorisations authorised any

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[242] Respondent's Response, paras. 133-134.

[243] Respondent's Response, paras. 137-138, referring to ANLA, Resolution No. 00077 (Environmental licence for the La Luna Underground Coal Exploitation) (24 January 2018) (**Exhibit R-224**), pp. 86-89, 162-165; ANLA, Resolution No. 1433 (Environmental licence for the Conconcreto Construction Materials Exploitation) (26 November 2014) (**Exhibit R-218**), p. 45; ANLA, Resolution No. 0041 (Environmental licence for the Agua Bonita Construction Materials Exploitation) (22 January 2014) (**Exhibit R-217**), pp. 19-20, 71-74; ANLA, Resolution No. 1514 (Environmental licence for the Gramalote Gold Project) (25 November 2015) (**Exhibit R-219**), pp. 40-41, 174-175; ANLA, Resolution No. 1540 (Environmental licence for the Cerro Matoso La Esmeralda Mine Expansion) (2 December 2015) (**Exhibit R-220**), pp. 43-47, 99; ANLA, Resolution No. 446 (Environmental Licence for Sator Mina Bijao Project) (16 March 2020) (**Exhibit R-240**), pp. 46-47, 100, 178; ANLA, Resolution No. 1878 (Environmental Licence for Cerro Matoso Ferroniquel exploitation) (23 November 2020) (**Exhibit R-254**), pp. 74, 232-235; ANLA, Resolution No. 1622 (Environmental Licence for the Cerro Matoso Queresas Licence) (1 October 2020) (**Exhibit R-250**), pp. 117-120, 123-125, 143-149; Summary table of ANLA's Environmental Licensing Procedures from 2010 to 2022 (**Exhibit R-273**).

[244] Respondent's Response, paras. 139-142, referring to ANLA, Order No. 09674 (2 October 2020) (**Exhibit R- 251**), pp. 5-9, 15-36, 39-79, 123, 127-128.

[245] Respondent's Response, paras. 142-143.

[246] Respondent's Response, paras. 144-145, referring to Decision, paras. 119, 121. Colombia asserts that no hydrogeological work appears to have been undertaken for the Angostura underground project and the ECODES Report does not include any hydrogeological analysis either.

[247] Respondent's Response, paras. 146-147, referring to ANLA, Order No. 09674 (2 October 2020) (**Exhibit R- 251**), pp. 2-8, referring to: ANLA, Auto No. 4090, 14 June 2019 (recognised 15 third parties); ANLA, Auto No. 6433, 20 August 2019 (recognised 9184 third parties); ANLA, Auto No. 9005, 22 October 2019 (recognised 227 third parties); ANLA, Auto No. 12086, 31 December 2019 (recognised 4548 third parties); ANLA, Auto No. 5430, 11 June 2020 (recognised 14587 third parties); ANLA, Auto No. 5432, 11 June 2020 (recognised 9794 third parties); ANLA, Auto No. 8584, 3 September 2020 (recognised 543 third parties); ANLA, Auto No. 9596, 30 September 2020 (recognised 5319 third parties); Decision, para. 131.

[248] Respondent's Response, para. 149, referring to IAvH, *Aportes a la conservación estratégica de los páramos de Colombia: actualización de la cartografía de los complejos de páramo a escala 1:100.000* (6 February 2014) (**Exhibit C-200**), pp. 79-80.

activities that were remotely similar to the Angostura underground mining project, as they referred to artisanal, small-scale mining activities. By way of example, Colombia notes that Eco Oro anticipated that its underground project would process over 2 million tons of ore per year, or 600 tons of ore per day, being twice as much La Elsy processed in a whole month. As such, this artisanal mining project had very little in common with the industrialised, large-scale mine that Eco Oro intended to develop in the Angostura Deposit. [249]

172. Finally, Colombia submits that it never represented to Eco Oro that an underground project would be granted an environmental licence. According to Colombia, Eco Oro never provided Colombia's environmental authorities with sufficient technical information regarding the Angostura Project, such that no Colombian authority could have assured Eco Oro that the project would be able to secure an environmental licence. At best, Colombia's government officials simply invited Eco Oro to apply for an environmental licence, an application that would be treated fairly and seriously in accordance with applicable Colombian law. [250]

(3) Claimant's Reply

173. Eco Oro submits that the probability of an environmental license being granted for the Angostura Project cannot be objectively or accurately determined given its stage of development. [251] This is because, under Colombian law, the granting of a license depends on whether the specific adverse impacts of a defined project can be adequately prevented, mitigated, corrected and/or compensated. Eco Oro maintains that Colombia's unlawful measures prevented Eco Oro from preparing a PTO and an EIA. Eco Oro further reiterates that it is not the role of a treaty tribunal to act as a substitute licensing authority. [252] Eco Oro notes that Colombia agrees that the licensability of a project depends on its specific environmental impacts. [253]

174. Eco Oro further submits that the precautionary principle cannot be invoked in this case given the absence of any scientific evidence that mining generally, or the Angostura Project in particular,

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[249] Respondent's Response, paras. 148-152, referring to Golder Associates, Updated Preliminary Economic Assessment on the Angostura Gold-Silver Underground Project (**Exhibit CLEX-26**), Section 16.5.2, p. 144.

[250] Respondent's Response, paras. 153-165. Colombia notes that Eco Oro *(i)* still has not provided any contemporaneous evidence of what President Santos said during the alleged February 2016 meeting; and *(ii)* did not challenge María Isabel Ulloa's witness statement, where she explained that any expressions of support of the Ministry of Environment simply "*consisted in raising awareness of the regulations, hearing concerns and seeking spaces for dialogue to ensure the proper completion of the projects, in accordance with the applicable legal framework.*" (Ulloa Statement, para. 19). Finally, Colombia notes that the PIN and PINE designations simply sought to centralise and streamline the bureaucratic administration and monitoring of these projects, and did not signify the endorsement or pre-approval of the projects, nor the relaxation or reduction of the substantive requirements to obtain the permits and licences necessary to operate.

[251] Claimant's Reply, paras. 133-135.

[252] Claimant's Reply, paras. 133-134, referring to Decree 2820 (5 August 2010) (**Exhibit C-129**), Articles 22, 25, 28; Autoridad Nacional de Licencias Ambientales, Auto 917 (11 March 2019) (**Exhibit PMR-42**), p. 43; Decree 2041 (15 October 2014) (**Exhibit C-216**), Article 10; Decree 1076 (29 May 2015) (**Exhibit C-279**), Article 2.2.2.3.1.3; 2001 Mining Code (Law 685) (8 September 2001) (**Exhibit C-8**), Article 84; Letter from Eco Oro (Ms Arenas Uribe) to the NMA (Ms Habib) (21 June 2018) (**Exhibit R-104**), p. 2; Letter from ANLA to Eco Oro attaching terms of reference (27 February 2012) (**Exhibit C-24**), Sections 2.1, 4.2.1; *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 of Jurisdiction and Liability (17 March 2015) (**Exhibit RL-18**), para. 602; *William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware v Government of Canada* (UNCITRAL) Award on Damages (10 January 2019) (**Exhibit RL-158**), paras. 130-131; *Joseph Charles Lemire v Ukraine* (ICSID Case No. ARB/06/18) Decision on Jurisdiction and Liability (14 January 2010) (**Exhibit RL-82**), para. 283; *Glamis Gold, Ltd v The United States of America* (UNCITRAL) Award (8 June 2009) (**Exhibit CL-59**), para. 779.

[253] Claimant's Reply, para. 135, referring to Respondent's Response, paras. 128-129.

poses a risk of serious damage.[254] Eco Oro underscores that the mere existence of a potential risk is not sufficient to invoke the precautionary principle.[255]

175. Eco Oro argues that the licensability of a mining project cannot be determined based on whether the project is within or outside the páramo, partially or totally, as the decision to license a project under the Colombian licensing framework depends not on the characterization of the specific ecosystem in which the project is located, but rather on the evaluation of the specific environmental impacts described in the EIA, together with the measures proposed in the EIA to prevent, mitigate and compensate those impacts.[256] Eco Oro asserts that mining activities are not *per se* incompatible with the protection of the páramo or other sensitive ecosystems.[257] Eco Oro adds that the ANM's position is in line with the statements and conduct of multiple entities and officials within the Colombian Government, including those of the environmental authorities.[258] Eco Oro further asserts that there can be no 'conflict of views' between the ANM and the IAvH, as the IAvH has not taken a view on the compatibility of mining activities with the protection of the páramo, nor is it competent to do so.[259] Eco Oro reiterates that there is no basis to argue that there is a "*heightened standard*" for issuing an environmental license for projects in or near páramo.[260]

176. Eco Oro asserts that licensability is an issue relating to causation such that the Tribunal need only determine (as it already has) that there were prospects for the Angostura Project to be licensed to establish causation; once causation is established, it is then necessary to establish the quantum of the loss, a question that does not require determining the probability of a license being granted given the market valuation methods applied here.[261] Eco Oro further asserts that Colombia seeks to conflate the issue of causation (i.e., whether the State's measure caused a loss) and the issue of proof of the quantum of damages, which are two separate issues. Eco Oro adds that Colombia's arguments would lead to the conclusion that mining projects have no market value until it can be proven with sufficient certainty that they are environmentally feasible, which is disproved by the fact that unlicensed development projects are transacted for value all the time.

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[254] Claimant's Reply, paras. 136-138, referring to Decision, paras. 630-632, 848; IAvH Contributions Report (**Exhibit C-200**), p. 42; Tr. Day 3, 764:20-766:7 (Ms Baptiste) (Eng); Corpoboyacá, "Estudio socioeconómico de las comunidades vinculadas a las actividades agropecuarias y mineras del complejo de páramo de Pisba en jurisdicción de Corpoboyacá" (May 2017) (**Exhibit C-470**), Section 3.1.6.5, p. 229; Constitutional Court, Judgment C-35 (8 February 2016) (**Exhibit C-42**), p. 107.

[255] Claimant's Reply, para. 137, referring to Council of State, Advisory Opinion No. 2233 (11 December 2014) (**Exhibit R-135**), p. 31, citing Constitutional Court judgment C-998 (12 October 2004) (not in the record).

[256] Claimant's Reply, paras. 139-154.

[257] Claimant's Reply, paras. 142-145, referring to Letter from the National Mining Agency to the Constitutional Court (24 February 2016) (**Exhibit C-44**), p. 7 (Eng); Decision, para. 793.

[258] Claimant's Reply, paras. 143-144, referring to IAvH, *Aportes a la conservación estratégica de los páramos de Colombia: actualización de la cartografía de los complejos de páramo a escala 1:100.000* (6 February 2014) (**Exhibit C-200**), p. 42 (Spa), p. 13 (Eng); Corpoboyacá, "Estudio socioeconómico de las comunidades vinculadas a las actividades agropecuarias y mineras del complejo de páramo de Pisba en jurisdicción de Corpoboyacá" (May 2017) (**Exhibit C-470**), Sections 2.9.3.1 and 3.1.6.5, p. 229; Letter from the Attorney General to the Ministry of Environment, Ministry of Mines and National Mining Agency (9 September 2013) (**Exhibit C-28**), p. 4; Law No. 1753 (9 June 2015) (**Exhibit C-36**), Article 173; Ministry of Environment Resolution No. 2090 (19 December 2014) (**Exhibit C-34**), Article 9.

[259] Claimant's Reply, para. 145, referring to First Baptiste Statement, paras. 57-58; Second Baptiste Statement, para. 57; Tr. Day 3, 745:19-746:7 (Ms Baptiste) (Eng).

[260] Claimant's Reply, paras. 146-154, referring to Respondent's Response, para. 128; Constitutional Court Judgment C-339/02 (7 May 2002) (**Exhibit C-82**), pp. 18-19.

[261] Claimant's Reply, paras. 155-164, referring to *William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware v Government of Canada* (UNCITRAL) Award on Damages (10 January 2019) (**Exhibit RL-158**), paras. 136, 276-303; P Pearsall and J Heath, "Causation and Injury in Investor-State Arbitration" in: C L Beharry (ed.), *Contemporary and Emerging Issues on the law of Damages and Valuation in International Investment Arbitration* (2018) (**Exhibit CL-232**); *Deutsche Telekom AG v The Republic of India* (PCA Case No. 2014-10) Final Award (27 May 2020) (**Exhibit CL-233**), paras. 119-125.

177. Finally, Eco Oro notes that, in any case, Colombia has represented that the Angostura Project had promising prospects for licensing.[262] Eco Oro asserts that it strains credulity that the Government would have made all of these representations, expressions of support, and efforts if, as Colombia now claims in this arbitration, it believed that the chances that the Angostura Project could be developed and licensed were minimal.[263] Moreover, Eco Oro notes that Colombia's framework for the granting of environmental licenses is set out in Law 99 of 1993 which entered into force nearly three decades ago, yet Respondent inexplicably limits its analysis of licensing applications to the last 12 years.[264] In any event, the approval rate of environmental license applications does not support Colombia's contention that Eco Oro's future license application would inevitably be denied.[265] Eco Oro also asserts that there is no basis for distinguishing between environmental authorisations and licenses, given that the standard for granting both, i.e., the need to adequately mitigate, prevent and compensate environmental impacts of specified works, was the same.[266] Eco Oro further submits that, while the production levels of the smaller-scale projects invoked by Colombia may have been lower, Colombia is unable to show that the environmental impacts that these licensed mining projects would have on the páramo would have been less than those of the Angostura Project.[267] Eco Oro contends that *(i)* Minesa's example supports Eco Oro's position in this arbitration, as Minesa is entitled to resubmit its licensing application;[268] *(ii)* the decision made by the ANLA was not based on the project's location *vis-à-vis* the páramo[269]; and, *(iii)* notwithstanding such location, it has received significant encouragement on the part of the Colombian Government.[270]

(4) Respondent's Rejoinder

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[262] Claimant's Reply, paras. 165-174.

[263] Claimant's Reply, para. 168.

[264] Eco Oro asserts that "[t]*he dates selected by Colombia are suspicious considering that (i) environmental licenses have been required since 1993 (as a result of Law 99), and (ii) environmental authorities in Colombia (including the Ministry of the Environment) have issued reports showing that environmental licenses were issued in páramo areas after 2009*." (Claimant's Reply, fn. 394).

[265] Claimant's Reply, para. 170, referring to General Comptroller's Office, "El proceso administrativo de licenciamiento ambiental en Colombia" (2017) (**Exhibit C-469**), p. 44.

[266] Claimant's Reply, para. 171, referring to Constitutional Court Judgement T-462A (2014) (**Exhibit C-468**), Section 2.3.12.

[267] Claimant's Reply, para. 171, referring to First Moseley-Williams Statement, paras. 24, 30-39; First González Aldana Statement, para. 46; Micon International Limited, *Technical Report on the Updated Mineral Resource Estimate for the Angostura Gold-Silver Deposit, Santander Department, Colombia* (17 July 2015) (**Exhibit C-37**); ECODES, "Estado de Conservación de la Biodiversidad en los ecosistemas asociados al Sector Angosturas California, Santander, Resumen Ejecutivo" (May 2013) (**Exhibit C-180**); ECODES Presentation, "Biodiversity Conservation of the ecosystems within the Angosturas Sector, California, Santander" (Undated) (**Exhibit C-272**); Golder Associates, Updated Preliminary Economic Assessment on the Angostura Gold-Silver Underground Project (prepared for Eco Oro) (23 March 2012) (**Exhibit BD-21**); Micon International Limited, Technical Report on the Updated Mineral Resource Estimate for the Angostura Gold-Silver Deposit (prepared for Eco Oro) (17 July 2015) (**Exhibit BD-30**). Specifically with regard to the use of dangerous substances, Eco Oro refers to Respondent's Response, para. 151; Complementation to the Environmental Management Plan for the Santa Isabel Exploitation Project (December 1997) (**Exhibit R-199**), pp. 64-65; CDMB, Technical Report on Sociedades Mineras Trompeteros Ltda. and La Elsy Ltda's Environmental Management Plan (May 1999) (**Exhibit R-200**), pp. 2-3, 8 (this project uses 152kg/month of cyanide and 600gr/month of mercury); Asomineros, Environmental Management Plan (2001) (**Exhibit R-202**), pp. 22-23, 32-34, 43-45, 53- 55, 65-67, 75-77, 81, 88-90, 99-101, 108-110, 117-119, 122, 126 (this license covers 11 mines that use excess of mercury in their operations); CDMB, Technical Report on Asomineros' Environmental Management Plan (September 2001) (**Exhibit R-203**), pp. 5-6, 16-17 (this project uses 150kg/month of cyanide and 3kg/month of mercury); Environmental Compliance Report of Empresa Minera La Providencia (12 November 2010) (**Exhibit R-214**), p. 8 (this project uses 50kg/month of cyanide and 110gr/month of mercury).

[268] Claimant's Reply, para. 173(a), referring to Republic of Colombia, Decree No. 1076 (26 May 2015) (**Exhibit R-60**), Articles 2.2.2.3.6.3 (paragraph 4) and 2.2.2.3.8.1 (paragraph 4); "Minesa volverá a realizar el Estudio de Impacto Ambiental de su proyecto en Soto Norte", *Vanguardia* (26 February 2021) (**Exhibit C-473**).

[269] Claimant's Reply, para. 173(c), referring to ANLA, Order 00092 (19 January 2021) (**Exhibit C-472**) p. 304.

[270] Claimant's Reply, paras. 173(c)-174, referring to ANM Press Release, "Colombia, un país con grandes recursos minerales y potencial productivo" (23 June 2021) (**Exhibit C-474**).

178. Colombia asserts that Eco Oro has still failed to answer the Tribunal's question. According to Colombia, there is no valid excuse why Eco Oro should be excused from answering the Tribunal's questions. Colombia submits that, having failed to conduct any due diligence into the environmental feasibility of an underground mining project after the rejection of its EIA for an open pit project, Eco Oro alone is responsible for not being in a position to offer any contemporaneous evidence as to the probability of an environmental licence for such a project being granted. [271]

179. Colombia notes that the precautionary principle would almost certainly have compelled the rejection of any environmental licensing application on any scenario, as this principle is a fundamental tenet of Colombian environmental law. [272] According to Colombia, the precautionary principle applies precisely in instances where, despite the lack of scientific certainty, it is believed that a particular activity carries a risk of serious or irreversible damage. [273] Colombia adds that Eco Oro cannot dispute that mining, by its nature, adversely affects the environment by inducing loss of biodiversity, soil erosion, as well as the contamination of surface water, groundwater and soil. [274]

180. Colombia further asserts that the location of the Angostura Deposit vis-à-vis the Santurbán Páramo is a relevant factor in assessing the probability of an environmental licence being granted. [275] According to Colombia, the Colombian government has not taken the view that large-scale mining is not incompatible with the environmental preservation of the páramos. In fact, the opposite is true, as reflected by Congress' decision to ban mining in these ecosystems. If anything, there is a conflict of views within Congress, the Constitutional Court and the IAvH on the subject. This conflict, and the absence of scientific certainty to this date to resolve it, is precisely what necessitates the application of the precautionary principle. [276] Moreover, Colombia asserts that, under Colombian law, laws (*leyes*) —which are normally only issued by Congress—have a higher legal status than decrees or regulations (issued by the executive branch) and therefore can only be modified or repealed through another law. Therefore, Eco Oro's argument that Decree 2820 of 2010 and its successors somehow trump or otherwise prevail over the mining ban contained in Laws 1382, 1450, 1753 and 1930 is contrary to this basic tenet of Colombian law. [277] Colombia contends that Eco Oro is wrong to suggest that the terms "*grave harm*", "*great incompatibility*" or "*great uncertainty*" impose a lower or less stringent standard of review. This is inconsistent with the precautionary principle, as it would effectively allow the authorities to greenlight projects with respect to which there is 'uncertainty' as to their environmental feasibility. Similarly, Eco Oro's interpretation would defeat the purpose of the environmental licensing process altogether because it would allow projects that cause environmental 'harm' to obtain an environmental licence.

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[271] Respondent's Rejoinder, paras. 141-143.

[272] Respondent's Rejoinder, paras. 144-153.

[273] Respondent's Rejoinder, para. 148.

[274] Respondent's Rejoinder, para. 149, referring to Constitutional Court, Judgment C-35 (8 February 2016) (**Exhibit C-42**), paras. 155-160; Constitutional Court Judgment C-339/02 (7 May 2002) (**Exhibit C-82**), para. VI.3.1; Constitutional Court Judgment T-361 (30 May 2017) (**Exhibit C-244**), paras. 5.2(ii), 9.1.8; S. Malan, *How to Advance Sustainable Mining, IISD Earth Negotiations Bulletin* (October 2021) (**Exhibit R-302**). Colombia notes that those effects can be exacerbated in the páramos, given their fragile nature and extremely limited ability to recover (Respondent's Rejoinder, para. 149, referring to Constitutional Court, Judgment C-35 (8 February 2016) (**Exhibit C-42**), paras. 155-160).

[275] Respondent's Rejoinder, paras. 154-170.

[276] Respondent's Rejoinder, para. 164.

[277] Respondent's Rejoinder, para. 165, referring to Decree 2820 (5 August 2010) (**Exhibit C-129**), Article 10; Ministry of Environment Resolution No. 2090 (19 December 2014) (**Exhibit C-34**), Article 2; Concepto 100921, Departamento Administrativo de la Función Pública (23 March 2021) (**Exhibit R-257**), p. 2; Political Constitution of Colombia (4 June 1991) (**Exhibit C-65**), Article 153; F. Urrego-Ortiz, M. Quinche-Ramírez, "Los decretos en el sistema normativo colombiano", Vniversitas No. 116:53-83 (July-December 2008) (**Exhibit R-278**), p. 56.

181. Colombia submits that Eco Oro has not established the probability, if any, of an environmental licence being granted for an underground project.[278] According to Colombia, the recent Minesa transaction regarding the Soto Norte Project does not assist Eco Oro's case, because, unlike the Angostura Project, the Soto Norte Project *(i)* does not overlap with the 2019 Páramo Delimitation Proposal; and *(ii)* was conducted on the basis of due diligence into the Soto Norte Project's páramo and licensing risks, which states that the Project is capable of overcoming the potential and perceived risks related to its proximity with the Santurbán Páramo.[279]

182. Finally, Colombia says that Eco Oro's own evidence confirms that the Angostura Project had no realistic prospects of securing an environmental licence on any scenario.[280] Eco Oro concedes that Colombia never 'promised' Eco Oro an environmental licence.[281] Colombia further notes that the IAvH is not an environmental authority, but rather the scientific and research arm of the Ministry of Environment and it was in that capacity that it reviewed Golder's 2012 PEA in the context of providing the scientific inputs for the delimitation of the Santurbán Páramo, not as part of an environmental licensing process or to inform any comments on the licensability of an underground project.[282] Colombia further takes issue with Eco Oro's contentions with regard to the environmental licence applications' success rate, contending that, contrary to Eco Oro's view, it amounts to a paltry 30% rate.[283] Colombia adds that the La Luna Project did not contemplate any mining activities in the area of the wetland and that, in any event, the wetland located within the La Luna Project is not a protected area or a sensitive ecosystem under the Ramsar Convention.[284] Colombia submits that Eco Oro's recourse to the environmental licensing situation in the Pisba Páramo, for the first time in six years of proceedings, smacks of desperation, as there is no industrial gold mining in Pisba, only artisanal, small-scale coal mining.[285] Colombia further notes that the Angostura Project was expected to *(i)* produce 600 tons of ore per day (when the operating capacity of the projects in the Santurbán Páramo with environmental authorisations did not exceed 900 tons of ore in total per month); *(ii)* require 2,111m3 of water per day – the daily water requirements of the entire populations of Vetas, California, Surata, Tona and Matanza combined – and *(iii)* would have used cyanide without guaranteeing its proper handling.[286] Colombia asserts that, despite Aris Gold's purchase of a 20% stake in April 2022, the fate of the Soto Norte Project continues to be mired

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[278] Respondent's Rejoinder, paras. 171-178.

[279] Respondent's Rejoinder, paras. 177-178, referring to Aris Gold Press Release, "Aris Gold To Become Operator Of The Soto Norte Gold Project In Colombia" (21 March 2022) (**Exhibit C-479**); Map showing the overlap of the 2019 Proposed Delimitation with Minesa's concession (**Exhibit C-465**); "El proyecto Soto Norte no está dentro del Páramo de Santurbán", *El Tiempo* (12 February 2020) (**Exhibit R-298**); Aris Gold Press Release, "Aris Gold To Become Operator Of The Soto Norte Gold Project In Colombia" (21 March 2022) (**Exhibit C- 479**), p. 1; SRK Consulting, NI 43-101 Technical Report Feasibility Study of the Soto Norte Gold Project, Santander, Colombia (1 January 2021) (**Exhibit R-301**), p. 1, Sections 1.11.4, 1.12.6-1.12.7, 20.2, 20.6.1.

[280] Respondent's Rejoinder, paras. 179-205.

[281] Respondent's Rejoinder, para. 180, referring to Claimant's Reply, para. 167.

[282] Respondent's Rejoinder, para. 183.

[283] Respondent's Rejoinder, para. 186. Colombia considers that there is no reason to exclude from the analysis, as Eco Oro does, those environmental licence applications that were withdrawn or archived, as these applications were not approved and, hence, unsuccessful.

[284] Respondent's Rejoinder, para. 191, referring to Decree 1076 (29 May 2015) (**Exhibit C-279**), Articles 2.2.2.1.3.7, 2.2.2.1.3.8; Law No. 1382 (9 February 2010) (**Exhibit C-18**), Article 3; Law No. 1450 (Extracts) (16 June 2011) (**Exhibit C-20**), Article 202; Law No. 1753 (9 June 2015) (**Exhibit C-36**), Article 172; ANLA, Resolution No. 00077 (Environmental licence for the La Luna Underground Coal Exploitation) (24 January 2018) (**Exhibit R-224**), p. 164; Ramsar Sites Information Service, "Annotated List of Wetlands of International Importance" (**Exhibit R-153**).

[285] Respondent's Rejoinder, para. 195, referring to Summary table of environmental authorisations issued in the Pisba Páramo by Corpoboyaca between 1993 and 2011 (**Exhibit R-309**).

[286] Respondent's Rejoinder, para. 199, referring to Golder Associates, Updated Preliminary Economic Assessment on the Angostura Gold-Silver Underground Project (**Exhibit CLEX-26**), Section 17.3; IAvH, *Aportes a la delimitación del páramo*, Annex 7 (2014) (**Exhibit C-197**), p. 23; Tr. Day 4, 1122:2-22 (Mr Jorgensen).

in uncertainty as far as its environmental feasibility is concerned. Moreover, Minesa's Soto Norte Project demonstrates that a mining project can face significant páramo-related environmental challenges, even though it is located hundreds of meters away from páramo. [287]

G. Question G

183. In paragraph 920(4)(g) of its Decision, the Tribunal sought an answer to the following question: "*What is the effect on the identification of the loss suffered, and its valuation, if any, if Eco Oro failed to establish that an exercise in due diligence had been carried out prior to the decision to move to the development of an underground mine?*"

(1) Claimant's First Submission

184. Eco Oro summarises its answer to this question as follows [288]:

"*72. The record shows that Eco Oro did conduct extensive due diligence prior to announcing its intention in March 2011 to revert to earlier plans to develop the Angostura Project as an underground project. However, such due diligence (or even the lack of thereof) could not have affected the nature of the loss suffered or its valuation.*

At the outset, the Claimant has the following observations on the Tribunal's Question G.

(a) In Colombia's pre-hearing written submissions, it wrote a single sentence regarding the issue of due diligence and its observation was that, had Eco Oro conducted proper due diligence, it would have concluded that a mining ban was in effect in the area of Concession 3452 from the time that it entered into Concession 3452 in 2007.[[289]] *That submission has been discredited by the Tribunal.*[[290]] *It was only in the context of an exchange with the Tribunal at the hearing*[[291]] *that Colombia asserted for the first time in the arbitration that there was no evidence on the record of Claimant having performed any due diligence. The existence or not of Eco Oro's due diligence has thus not been a disputed issue of fact on which the Parties made any meaningful pre-hearing submissions.*

(b) The Decision confirms that Eco Oro could not have predicted Colombia's unlawful measures

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[287] Respondent's Rejoinder, paras. 202-204, referring to "El proyecto Soto Norte no está dentro del Páramo de Santurbán", El Tiempo (12 February 2020) (**Exhibit R-298**); ANLA, Order No. 09674 (2 October 2020) (**Exhibit R-251**), pp. 121-123; ANLA, Order 00092 (19 January 2021) (**Exhibit C-472**), p. 304.

[288] Claimant's First Submission, paras. 72-74. In paragraphs 257-277 of Claimant's First Submission, Eco Oro expands on these arguments.

[289] Claimant's First Submission, para. 259, referring to Colombia's Counter-Memorial, para. 366.

[290] Claimant's First Submission, para. 259, referring to Colombia's Counter-Memorial, paras. 110, 140, 146, 149, 151; and Decision, paras. 465, 479, 485, 491, 492, 496, 499, 632, 848.

[291] Claimant's First Submission, paras. 261-262, referring to Tr. Day 2, 377:13-379:7 (exchange between Arbitrator Sands and Colombia's Counsel during Colombia's Opening Statement); Decision, para. 681. In para. 260 of Claimant's First Submission, Eco Oro notes that Colombia, having iterated a single sentence in its Counter-Memorial, did not request any documents relating to Eco Oro's due diligence in the subsequent document production phase, nor did it raise any arguments regarding the scope or sufficiency of Eco Oro's due diligence in either its Counter-Memorial or its Rejoinder Memorial.

nor the final boundary of the páramo delimitation through due diligence.[292] *Importantly, what the Decision also states is that, because Eco Oro had acquired rights in connection with Concession 3452, it would be entitled to compensation if those rights were interfered with.*[293] *Accordingly, due diligence in March 2011 aside, Eco Oro was entitled to compensation upon the imposition of a mining ban in the area of Concession 3452, in respect of which it had acquired the right to exploit (which it could exercise upon fulfilling the applicable permitting requirements).*

(c) Eco Oro did conduct extensive due diligence. Indeed, a pre-exploitation mining company's main function is to carry out economic, technical, legal and environmental due diligence in determining the best mining plan to pursue. That is its raison d'être. The documents on the record establish that Eco Oro had conducted due diligence in the lead up to March 2011, pursuant to which it understood that it would be able to develop its underground mining project, apply for an environmental license for that project and have that application assessed on its merits pursuant to the applicable framework.[294]

74. Leaving those preliminary matters aside, the existence or not of due diligence does not affect the identification of the loss that Eco Oro suffered. The Decision sets out the finding of fact that, as a result of Colombia's unlawful measures, 'there was no possibility of exploiting the Angostura Deposit such that the Concession became valueless'[295] *In other words, the effect of Colombia's unlawful measures was a total deprivation of Eco Oro's rights in relation to the Angostura Project pursuant to Concession 3452. That deprivation is the loss that Eco Oro suffered. That loss is not affected by Eco Oro's due diligence which, as demonstrated above, was not inadequate, and which, as the Decision acknowledges, could not have resulted in Eco Oro predicting or assuming the risk that Colombia would deprive it of its acquired rights under Concession 3452 without compensation, contrary to Colombian law.*[296]"

185. Eco Oro adds that, pursuant to the principle of full reparation, the only circumstance that could justify not awarding the total amount of the losses suffered by an investor is if those losses were not solely attributable to the host State's unlawful measures. Since the full reparation standard only

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[292] Claimant's First Submission, fn. 95, referring to Decision, para. 696.

[293] Claimant's First Submission, para. 263, referring to Decision, para. 768.

[294] Claimant's First Submission, paras. 267-274, referring to two reports commissioned from outsider consultants and professionals in connection with the pursuance of an underground Project in March 2011: NCL Ingeniería y Construcción Limitada, Mineral Resources Estimate and Preliminary Economic Assessment for Underground Mining (25 April 2011) (**Exhibit CLEX-25**); and Cutfield Freeman & Co, "Greystar Resources Board Presentation" (March 2011) (**Exhibit C-326**). Eco Oro further makes reference to events occurred before March 2011. Those events, *inter alia*, include Greystar Resources to Study Viability of Alternate Project at Angostura (18 March 2011) (**Exhibit CLEX-24**); Eco Oro, *Plan de Manejo Ambiental Para la Integración de Áreas Mineras Para Exploración en el Proyecto Angostura* (April 2008) (**Exhibit C-17**), p. 4 (Spa) and p. 7 (Eng); Letter from Greystar (Mr Felder) to Ministry of Environment (Mr Peñaranda Correa) (29 April 2010) (**Exhibit R-85**), paras. 1.1.50, 2.1.1, 2.2(a)-(f), 2.2.2, 2.3.5, 2.3.10, 2.3.12-2.3.13, 2.3.18-2.3.21, 2.7.3-2.7.7, 2.8.2(f), 2.9.3, 4; Instituto Colombiano de Geología y Minería (Ingeominas) Resolution No. DSM-28 (22 February 2011) (**Exhibit C-19**), Article 1; Eco Oro, Environmental Impact Study, Chapter 1 (15 December 2009) (**Exhibit R-158**), pp. 16-22 (showing a list of professionals who worked on the EIA), Sections 1.5-12 and 1.5-14; Ministry of Environment, Order No. 1859 (27 May 2010) (**Exhibit R-15**); Email from Frederick Felder to Steve Kesler and others (19 May 2010) (**Exhibit C-323**), p. 1; Greystar Resources Ltd., "Greystar Resources Announces Request by The Colombian Government for A New Angostura Environmental Impact Assessment" (26 April 2010) (**Exhibit CRA-138**), p. 1; Decree 1220 (21 April 2005) (**Exhibit C-97**); GRD Minproc, "Angostura Gold Project, Preliminary Feasibility Study, Technical Report NI 43- 101" (1 May 2009) (**Exhibit CRA-126**), pp. 93, 95; Angostura Project Environmental Impact Assessment, Chapter 3: Environmental description and characterization of the influence area (1 December 2009) (**Exhibit C-321**), pp. 8, 20; Ministry of Environment, Order No. 1241 (20 April 2010) (**Exhibit R-14**), pp 24-25; Letter from Steve Kesler to the Eco Oro Board of Directors (14 March 2011) (**Exhibit C-327**).

[295] Claimant's First Submission, fn. 96, referring to Decision, para. 634.

[296] Claimant's First Submission, paras. 275-277, referring to Decision, paras. 632, 634, 718, 720, 837, 849, 894, 912.

requires the assessment of compensation sufficient to wipe out the effects of the unlawful measures, if a portion of the losses suffered by the investor did not result from the effects of (i.e., were not caused by) the unlawful measures, those losses need not be compensated. In the present case, the evidence and the Decision states that the loss of Eco Oro's rights to the Angostura Project was entirely attributable to Colombia's measures. Eco Oro concludes that there are no aspects of Eco Oro's due diligence as of March 2011 that suggest otherwise. [297]

(2) Respondent's Response

186. Colombia asserts that Eco Oro proceeded with an underground project without taking any steps to satisfy itself that there were any realistic prospects of securing an environmental licence for it. Colombia further submits that Eco Oro's lack of due diligence confirms that its project was speculative at best, hence the Tribunal cannot conclude that the opportunity lost by Eco Oro as a result of Colombia's Article 805 breach, even if it concerned the entirety of the Concession Area, had any tangible value. [298]

187. Colombia notes that it specifically and repeatedly addressed this issue in its submissions and requested documents evidencing due diligence in the document production phase. [299] Although the Tribunal granted each of these requests, Eco Oro produced only five documents, [300] none of which addressed the environmental feasibility of the project. Colombia submits that Eco Oro recklessly gambled—based on untested assumptions—on the possibility that it might be able to secure an environmental licence and that the delimitation of the Santurbán Páramo would spare the Angostura Project, despite the Ministry of Environment having already determined in its decision rejecting Eco Oro's open-pit environmental licence application that there was páramo in the area. [301]

188. Colombia notes that for the Ventana Project (the most significant of the three Comparable Transactions), two months before the Comparable Transaction took place, the PEA commissioned by Ventana expressly stated that while no EIA had yet been carried out, an "*environmental and permitting study*" had been conducted "*in late 2010*". Conversely, Eco Oro would not have had any equivalent analyses to satisfy itself that the Angostura Project had reasonable prospects of securing an environmental licence. Because Eco Oro failed to carry out any due diligence prior to moving its development to an underground project, Colombia argues that there is no basis for Compass Lexecon's assumption that the Angostura Project faced the same risks as those assessed by the purchaser of the adjoining properties. [302]

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[297] Claimant's First Submission, para. 277. In para. 275 of Claimant's First Submission, Eco Oro notes that, although not relevant to the time period relevant to the Tribunal's question, Eco Oro subsequently conducted precise due diligence regarding the extent to which the Angostura deposit in fact overlapped with páramo ecosystems, via the ECODES Report, which showed that it did not.

[298] Respondent's Response, paras. 166-169.

[299] Respondent's Response, paras. 170-173, referring to Respondent's Counter-Memorial, para. 399 and fn. 555; Respondent's Rejoinder, para. 503; Tr. Day 1, 229:10-230:16 (Mr Mantilla-Serrano); Respondent's Request for Documents, Request No. 6, pp. 10-12; Respondent's Request for Documents, Request No. 7, pp. 12-13; Respondent's Request for Documents, Request No. 17, p. 24.

[300] Respondent's Response, paras. 173-179, referring to Procedural Order No. 7, Decision on Document Disclosure, pp. 6-8; Greystar, Internal Memorandum (3 May 2010) (**Exhibit R-159**), pp. 2-3; Greystar, CEO report to the Board of Directors (3 May 2010) (**Exhibit R-160**), p. 1; Email from S. Kesler (Greystar) to D. Rovig (Greystar) and others (24 April 2010) (**Exhibit R-180**); Greystar, Internal Memorandum (4 November 2010) (**Exhibit R-213**), p. 5; Cutfield Freeman & Co, "Greystar Resources Board Presentation," (1 March 2011) (**Exhibit C-326**).

[301] Respondent's Response, para. 180, referring to Ministry of Environment, Resolution No. 1015 (31 May 2011) (**Exhibit R-71**), pp. 47-48, 50, 64, 80.

189. Finally, Colombia submits that the fact that Eco Oro recklessly decided to expend funds towards an underground project without having conducted any due diligence means that Eco Oro cannot turn to Colombia to seek to recover any such costs. [303]

(3) Claimant's Reply

190. Eco Oro submits that Colombia's responses are fundamentally misconceived because, in addition to repeating the fundamental mistake regarding the nature of Eco Oro's loss, they:
a. fail to establish a causal link between the loss suffered and any actions other than those resulting from its own breaches: Eco Oro asserts that the only circumstance that might justify the Tribunal reducing the damages payable to Eco Oro would be if its losses were not solely attributable to Colombia's unlawful measures, which has not been established. Eco Oro further argues that Colombia conflates and confuses the (already settled) questions of liability and causation while failing to address the Tribunal's question about the potential effect, if any, of due diligence on the quantum of loss suffered by Eco Oro. [304]

b. fail to address the extensive due diligence conducted by Eco Oro: the process of developing a mining project is one of constant due diligence. [305] Eco Oro could rely on an accumulated body of due diligence going back 17 years in taking the decision to move forward with an underground project in March 2011, which was a rational and logical response to the need to reduce surface impacts at high altitude. [306] Eco Oro takes issue with the fact that Colombia reduces Eco Oro's due diligence to the five documents produced during the document production phase following document requests where 'due diligence' was never mentioned. [307] Eco Oro reiterates that the question of licensability could not have been objectively or accurately determined through a due diligence exercise in, or prior to, March 2011. [308] Eco Oro further takes issue with the fact that Colombia purports to ignore the relevance of Decrees 1220 of 2005 and 2820 of 2010. [309] Finally, Eco Oro submits that Colombia has provided no authority or expert evidence for its assertion that an underground mine would have faced "*the same technical and environmental constraints*" as the open pit project. Eco Oro deems this assertion to be illogical, as the very purpose of moving to an underground project was to address the Ministry of Environment's concerns and reduce the size and nature of the project's impact on the environment by redesigning infrastructure and processing facilities and by relocating these to locations at lower altitude or underground. [310]

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[302] Respondent's Response, paras. 185-186, referring to Samuel Engineering, Preliminary Assessment La Bodega Project (**Exhibit CLEX-4**), p. 7.
[303] Respondent's Response, para. 187.

[304] Claimant's Reply, paras. 177-183, referring to Decision, paras. 499, 632-634, 696, 718, 720, 768, 811, 837, 849, 894.
[305] Claimant's Reply, para. 185, referring to Canadian Institute of Mining, Metallurgy and Petroleum, Standing Committee on Reserves Definition, Definition Standards for Mineral Resources and Mineral Reserves ("CIM Definition Standards") (**Exhibit BD-29**), p. 6; Second Behre Dolbear Report, p. 15.
[306] Claimant's Reply, paras. 186-187, referring to NCL Ingeniería y Construcción Limitada, Mineral Resources Estimate and Preliminary Economic Assessment for Underground Mining (25 April 2011) (**Exhibit CLEX-25**), p. 143.
[307] Claimant's Reply, para. 188.
[308] Claimant's Reply, para. 189.
[309] Claimant's Reply, paras. 190-191.
[310] Claimant's Reply, paras. 193-197, referring to Ministry of Environment, Resolution No. 1015 (31 May 2011) (**Exhibit R-71**), pp. 91-93; NCL Ingeniería y Construcción Limitada, Mineral Resources Estimate and Preliminary Economic Assessment for Underground Mining (25 April 2011) (**Exhibit CLEX-25**), p. 143.

c. mislabel Eco Oro's rational decision to proceed with an underground project as "*speculative*": Eco Oro notes that it could not, in March 2011, have rehearsed and claimed to predict the results of a hypothetical licensing exercise based on a putative underground project that it had not yet fully designed, nor can this exercise be undertaken by the Tribunal today. Eco Oro emphasises that in March 2011, Eco Oro was not a new investor piling into a promising new market with its eyes closed. Its decision to proceed with an underground project was a rational decision based on *(i)* 17 years of due diligence; *(ii)* extensive knowledge of the legal rights and obligations applying to a concession holder; *(iii)* interactions with the government about the perceived impacts of the open pit project; and (iv) sound technical advice. [311]

d. seek to draw a false distinction between the neighbouring comparable projects and Eco Oro's project: Eco Oro asserts that Ventana's project was at the same stage of development as the Angostura Project and would still need to prepare a PTO and an EIA analysing, in detail, the impacts of that project. [312] Eco Oro submits that the licensability of the Angostura Project and its neighbouring comparable projects could not have been fully assessed until the impacts – and corresponding mitigation measures – of each project had been fully described and analysed in a PTO and related EIA. A potential purchaser of the Angostura Project would, in fact, have had far *more* information available because, unlike Ventana, Eco Oro had been investing in its project in that region for more than 10 years longer than Ventana and had been through the extensive process of preparing a PTO and an EIA for the open pit project. [313] Eco Oro further notes that each of the neighbouring comparable projects that are the subject of the Comparable Transactions would have had to address – in their EIAs – similar issues relating not just to páramo but also to potential impacts on water resources, potential impacts affecting Andean forest and related mitigation measures. [314]

and

e. fail to explain why Eco Oro should bear the costs of its project and remediation costs given the Tribunal's findings on liability. [315]

(4) Respondent's Rejoinder

191. Colombia reiterates that Eco Oro proceeded with an underground project without taking any steps to ascertain whether such a project had any realistic prospects of securing an environmental licence. This confirms that *(i)* Eco Oro's prospects of securing an environmental licence were 'minimal', if not insignificant; and *(ii)* its Comparable Transactions analysis is inappropriate, as Eco Oro cannot assert that the Angostura Project faced similar risks to the Comparable Transactions in the absence of due diligence or other evidence showing that the environmental permitting risks

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[311] Claimant's Reply, paras. 200-201.

[312] Claimant's Reply, para. 204, referring to Dr Vadim Galkine, *Updated Technical Report on the California Gold Project for Calvista Gold Corporation* (11 October 2012) (**Exhibit C-166**), p. 23; SRK Consulting (US), Inc, NI 43-101 Technical Report on Resources: California Gold-Silver Project Report Prepared for Galway Resources (25 October 2012) (**Exhibit C-168**), pp. 125, 129.

[313] Claimant's Reply, para. 205.

[314] Claimant's Reply, para. 206.

[315] Claimant's Reply, paras. 207-208.

were indeed the same.[316]

192. Colombia submits that Eco Oro was never prevented from carrying out due diligence into the feasibility of the Angostura Project. Colombia asserts that *(i)* Eco Oro's assertions in this context are not backed by any contemporaneous evidence or the opinion of an environmental licensing expert;[317] *(ii)* the fact that no final delimitation had yet been issued did not prevent Ventana from conducting an environmental permitting study in conjunction with the PEA its consultants prepared for La Bodega;[318] *(iii)* Eco Oro should have investigated whether the project was licensable in the absence of any mining ban;[319] *(iv)* Eco Oro did not evaluate the licensability of the Angostura Project under any scenario at the time, and has refused to do so in these proceedings despite the Tribunal's specific request in its Decision;[320] *(v)* Eco Oro has not explained how any confusion created by Colombia's measures could have prevented it from carrying out any due diligence into the environmental licensability or feasibility of an underground project;[321] and *(vi)* it is not clear how the fact that compensation must be paid in the event of a retroactive application of the law leading to a loss of an acquired right could justify Eco Oro's failure to carry out due diligence.[322]

193. Colombia submits that Eco Oro has still failed to adduce any evidence of due diligence into the environmental licensability of an underground project.[323] Colombia notes that the Ministry of the Environment rejected Eco Oro's open-pit EIA for many reasons not specific to an open-pit mine, notably ecological integrity, preservation of biodiversity, vulnerability of paramunean soils, and risk of cyanide solution spills.[324] Colombia rejects Eco Oro's attempt to reverse the burden of proof, noting that the burden of proof falls on Eco Oro with respect to environmental matters, in particular that an underground project could have resolved the concerns raised by the open-pit project.[325] Moreover, Colombia notes that in order to announce to the market that Eco Oro considered that its project contained mineralisation which could be economically extracted—the definition of Reserves— Eco Oro would have had to consider environmental concerns: but Eco Oro never did declare Reserves for its underground project.[326] Colombia further points to the fact that Eco Oro's failure to progress any environmental studies specific to an underground project was one of the main reasons the IFC divested from the Angostura Project.[327] Colombia further asserts that NCL is not an environmental expert and published its report over a month before the EIA rejection.[328]

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[316] Respondent's Rejoinder, paras. 206-208.

[317] Respondent's Rejoinder, para. 210.

[318] Respondent's Rejoinder, para. 211, referring to Samuel Engineering, Preliminary Assessment La Bodega Project (**Exhibit CLEX-4**), p. 7; Aris Gold Press Release, "Aris Gold To Become Operator Of The Soto Norte Gold Project In Colombia" (21 March 2022) (**Exhibit C-479**).

[319] Respondent's Rejoinder, para. 212.

[320] Respondent's Rejoinder, paras. 213-215.

[321] Respondent's Rejoinder, para. 216.

[322] Respondent's Rejoinder, para. 217.

[323] Respondent's Rejoinder, paras. 218-236.

[324] Respondent's Rejoinder, paras. 220-222, referring to Ministry of Environment, Resolution No. 1015 (31 May 2011) (**Exhibit R-71**), pp. 70-71, 79, 81, 83, 109, 112, 117, 119-121; Tr. Day 4, 1122:2-22 (Mr Jorgensen).

[325] Respondent's Rejoinder, para. 223.

[326] Respondent's Rejoinder, para. 224.

[327] Respondent's Rejoinder, para. 229, referring to Office of the Compliance Advisor Ombudsman (CAO), "Compliance Investigation, IFC Investment in Eco Oro (Project # 27961), Colombia" (**Exhibit MR-10**), pp. 41-43; Article Mongabay "World Bank exits controversial Angostura goldmine project in Colombian moorland" (https://news.mongabay.com/2017/03/world-bank-exits-controversial-angostura-gold mine-project-in-colombian-moorland/) (**Exhibit MR-9**); Decision, para. 168.

[328] Respondent's Rejoinder, para. 231, referring to Ministry of Environment, Resolution No. 1015 (31 May 2011) (**Exhibit R-71**); NCL Ingeniería y Construcción Limitada, Mineral Resources Estimate and Preliminary Economic Assessment for Underground Mining (**Exhibit CLEX-25**).

H. Question H

194. In paragraph 920(4)(h) of its Decision, the Tribunal sought an answer to the following question: "*What is the correct valuation date for a breach of Article 805 of the FTA?*"

(1) Claimant's First Submission

195. Eco Oro summarises its answer to this question as follows [329]:

> "*75. The correct valuation date is 8 August 2016. Both Parties agree on the standard by which a valuation date should be selected to compute Article 805 (MST) Damages.*[330] *In order to wipe out all consequences of unlawful conduct, investment tribunals tasked with computing damages for breach of the minimum standard of treatment or the fair and equitable treatment standard – in other words, tribunals effectively computing Article 805 (MST) Damages – routinely use the first date on which the State's unlawful conduct caused 'serious damage' or 'irreversible' damage.*[331] *Eco Oro first suffered 'serious damage' or 'irreversible damage' when Colombia issued Resolution VSC 829 on 8 August 2016,*[332] *which was the act by which Colombia applied the 2090 Atlas to substantially reduce the area of Concession 3452. Colombia, for its part, has argued that Eco Oro was deprived of its rights relating to Concession 3452 earlier, upon the issuance of the 2090 Atlas in December 2014*[333] *or at the latest upon the issuance of Constitutional Court Decision C-35 in February 2016.*[334] *Those dates are erroneous, and the Decision acknowledges that the Government continued to encourage Eco Oro's Angostura Project even after Decision C-35, which undermines Colombia's valuation date arguments.*[335]"

196. Eco Oro further submits that the Decision confirms that Eco Oro suffered a substantial deprivation or serious damage as a result of Resolution VSC 829, which the Majority Tribunal concluded had

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[329] Claimant's First Submission, para. 75. In paragraphs 278-305 of Claimant's First Submission, Eco Oro expands on these arguments.

[330] Claimant's First Submission, para. 287, referring to Respondent's Counter-Memorial, para. 510. Eco Oro submits that the Tribunal can take the principles applicable to the selection of the valuation as agreed between the Parties, despite the fact that Colombia has misstated the effects of Resolution 2090 of December 2014 and Constitutional Court Decision C-35 of February 2016.

[331] Claimant's First Submission, paras. 281-286, noting that the Treaty does not provide the valuation date for computing Article 805 (MST) Damages, and citing to: *Azurix Corp v The Argentine Republic* (ICSID Case No. ARB/01/12) Award (14 July 2006) (**Exhibit CL-35**), paras. 322, 373-377, 417-418, 442; *Enron Corporation and Ponderosa Assets, LP v Argentine Republic* (ICSID Case No. ARB/01/3) Award (22 May 2007) (**Exhibit CL-42**), paras. 322, 373-377, 405, 442; *Crystallex International Corporation v Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2) Award (4 April 2016) (**Exhibit CL-85**), paras. 623, 718, 854-856; *Masdar Solar & Wind Cooperatief UA v Kingdom of Spain* (ICSID Case No. ARB/14/1) Award (16 May 2018) (**Exhibit CL-196**), paras. 601-606; *Anatolie Stati and Others v The Republic of Kazakhstan* (SCC Arbitration V (116/2010)) Award (19 December 2013) (**Exhibit CL-80**), paras. 1496-1497. Eco Oro asserts that "*Colombia has not to date addressed the case law on the appropriate valuation date*" (Claimant's First Submission, para. 287).

[332] Claimant's First Submission, paras. 278, 288-304, referring to National Mining Agency Resolution No. VSC 829 (notified to Eco Oro on 8 August 2016) (2 August 2016) (**Exhibit C-53**); Decision, paras. 633-634, 782, 785, 796(b)(i), 796(c), 804-805; Tr. Day 2, 564:11-572:22, 619:7-621:2 (Mr García) (Eng); [REDACTED] ; National Mining Agency Resolution VSC 3, 6 January 2015 (**Exhibit C-35**), Article 1.

[333] Claimant's First Submission, para. 295, referring to Respondent's Counter-Memorial, para. 510; Respondent's Rejoinder Memorial, para. 529.

[334] Claimant's First Submission, para. 295, referring to Respondent's Counter-Memorial, para. 511; Respondent's Rejoinder Memorial, para. 529.

[335] Claimant's First Submission, fn. 97, referring to Decision, para. 693.

frustrated Eco Oro's legitimate expectations in breach of Article 805 of the Treaty. [336]

197. Eco Oro adds that the Tribunal can find further comfort from the record that Eco Oro's rights were not substantially deprived until the ANM issued Resolution VSC 829 on 8 August 2016. [337]

198. Eco Oro submits that Colombia's alternative valuation dates should now be foreclosed by the Majority Tribunal's findings in the Decision. Moreover, Eco Oro considers that such dates are illogical, because they did not result in Eco Oro losing the "*right to conduct* [...] *mining exploitation activities in the area of its Concession*", the test that Colombia has previously advanced for justifying its valuation dates. [338]

199. Finally, Eco Oro submits that, if, *arguendo*, the Tribunal rejects Eco Oro's valuation date of 8 August 2016, then the appropriate date should be 1 April 2019, which is the date when Eco Oro's renunciation of its rights under Concession 3452 took effect. [339]

(2) Respondent's Response

200. According to Colombia, the correct valuation date for Colombia's breach of Article 805 is 21 December 2018, the date on which the ANM refused Eco Oro's request for a further extension of the deadline to submit a PTO. [340]

201. Colombia submits that Eco Oro's proposed valuation date is inconsistent with the findings of the Tribunal – notably, that Colombia's unlawful conduct here is the set of measures that the Tribunal found to have breached Article 805, not the Challenged Measures. Therefore, the date of Resolution VSC 829 cannot serve as the appropriate date for the valuation of the losses caused by the distinct measures that the Tribunal found to have breached Article 805, and which were only adopted after that date. [341] Colombia also argues that the alternative valuation date submitted by Eco Oro – 1 April 2019 – would not be apposite as it is not the date on which Eco Oro's losses resulting from Colombia's Article 805 breach occurred. [342]

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[336] Claimant's First Submission, paras. 289-293, referring to Decision, paras. 633-634, 782, 796(b)(i), 804-805.

[337] Claimant's First Submission, para. 294, referring to Tr. Day 2, 564:11-572:22, 619:7-621:2 (Mr García) (Eng); National Mining Agency Resolution No. VSC 829 (notified to Eco Oro on 8 August 2016) (2 August 2016) (**Exhibit C-53**), p. 4; [REDACTED] . See also Claimant's Reply Memorial, para. 298; Decision, para. 796(c).

[338] Claimant's First Submission, paras. 295-300.

[339] Claimant's First Submission, paras. 302-305, referring to: Letter from Eco Oro (Ms Arenas Uribe) to the National Mining Agency (Mr García Granados) (7 March 2017) (**Exhibit C-241**) p. 4; National Mining Agency Resolution VSC 906 (received by Eco Oro on 15 September 2017) (22 August 2017) (**Exhibit C-249**), pp. 5-6, 9; [REDACTED] ; National Mining Agency Resolution VSC 41 (14 February 2019) (**Exhibit C-418**); Claimant's Reply Memorial, paras. 315-322; Letter from Eco Oro (Ms Arenas Uribe) to NMA (Mr García Granados) (23 November 2018) (**Exhibit R-108**); National Mining Agency Resolution VSC 41 (14 February 2019) (**Exhibit C-418**); Letter from Eco Oro (Mr Ordúz) to the National Mining Agency (Ms Daza) (29 March 2019) (**Exhibit C-425**); Letter from Eco Oro (Mr Ordúz) to Ministry of Environment (Mr Lozano) (29 March 2019) (**Exhibit C-424**); Letter from Eco Oro (Mr Ordúz) to the Ministry of Mining and Energy (Ms Suárez) (29 March 2019) (**Exhibit C-423**). Eco Oro further points to Second Compass Lexecon Report, para. 92 (providing alternative damages calculations using the Claimant's Alternative Valuation Date and the Respondent's two valuation dates) and to Updated Compass Lexecon Transactions Method Model (**Exhibit CLEX-73**) (containing a dynamic control panel that allows the Tribunal to compute damages on different dates).

[340] Respondent's Response, paras. 188-191, referring to Decision, paras. 801, 820, 895; Letter from NMA (Mr García Granados) to Eco Oro (Ms Arenas Uribe) (21 December 2018) (**Exhibit R-109**).

[341] Respondent's Response, paras. 194.

[342] Respondent's Response, paras. 195.

202. Finally, Colombia contends that none of the cases cited by Eco Oro support its argument that the Tribunal should adopt a valuation date occurring before Colombia adopted any of the measures that the Tribunal found to have breached Article 805. [343]

(3) Claimant's Reply

203. Eco Oro submits that the Parties agree on the legal principles for determining the correct valuation date but disagree on is application. According to Eco Oro, this is so given the fact that Colombia misconstrues the Majority Tribunal's Decision when it considers that the Challenged Measures were not part of the measures that breached the Treaty and, on that basis, advances a new theory and valuation date. [344]

204. Eco Oro reiterates that the Decision can only be read as including the Challenged Measures within the measures that breached Article 805. Otherwise, there would have been no need for the Tribunal to make an observation as to the non-existence of a 'mining ban' prior to the Treaty's entry into force in making findings on causation if the imposition of the 'mining ban' via the Challenged Measures did not form part of Colombia's breaches. Nor would the Tribunal have asked fourteen damage-related questions. [345]

205. Finally, Eco Oro asserts that nothing took effect on 21 December 2018 and that Eco Oro's rights under Concession 3452 remained the same both the day before and after the ANM's decision on the PTO extension request. Therefore, Eco Oro submits that its valuation date (8 August 2016), or the alternative date put forward by Eco Oro (1 April 2019), should be adopted. [346]

(4) Respondent's Rejoinder

206. Colombia confirms that the legal principles regarding the valuation date are not in dispute. The disagreement relates to the date on which irreversible compensable damage occurred. [347]

207. Colombia submits that the Tribunal did not find that the implementation of the ban through VSC 829 breached the FTA or caused Eco Oro a compensable loss. [348] Colombia further submits that the value of the Remaining Area of the Concession was destroyed by Colombia's refusal to extend the deadline for submitting the PTO until the re-delimitation was complete. [349] Moreover, Colombia

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[343] Respondent's Response, paras. 196-197, citing to *Azurix Corp v The Argentine Republic* (ICSID Case No. ARB/01/12) Award (14 July 2006) (**Exhibit CL-35**), paras. 321-322, 373-378, 417-418; *Enron Corporation and Ponderosa Assets, LP v Argentine Republic* (ICSID Case No. ARB/01/3) Award (22 May 2007) (**Exhibit CL-42**), para. 405; *Crystallex International Corporation v Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2) Award (4 April 2016) (**Exhibit CL-85**), paras. 623, 718, 854-855; *Masdar Solar & Wind Cooperatief UA v Kingdom of Spain* (ICSID Case No. ARB/14/1) Award (16 May 2018) (**Exhibit CL-196**), paras. 602-603, 605.

[344] Claimant's Reply, paras. 209-211.

[345] Claimant's Reply, paras. 209-212.

[346] Claimant's Reply, paras. 213-215, referring to Updated Compass Lexecon Transactions Method Model (**Exhibit CLEX-73**); Colombia's Comparable Transactions Valuation Model of 23 May 2022, with Claimant's corrections (**Exhibit C-464**).

[347] Respondent's Rejoinder, para. 244, referring to Respondent's Response, para. 193; Claimant's Reply, para. 210.

[348] Respondent's Rejoinder, para. 246.

notes that the Tribunal specifically found that any losses caused by Colombia's Article 805 breach occurred prior to the renunciation. [350]

208. Finally, Colombia reiterates that the correct valuation date for any losses flowing from the Article 805 breach is 21 December 2018. [351]

I. Question I

209. In paragraph 920(4)(i) of its Decision, the Tribunal sought an answer to the following question: "*If there is a significant gap between the identified valuation date and the dates on which the Comparable Transactions took place, what adjustment, if any, should be made to the Comparable Transactions valuation?*"

(1) Claimant's First Submission

210. Eco Oro summarises its answer to this question as follows [352]:

"*76. Any difference in dates between when a comparable transaction was consummated and the valuation date requires making an adjustment to the agreed purchase price paid in the comparable transaction to account for changes between the two dates observed in the stock market index for junior mining companies, which closely tracks prevailing gold prices and gold price forecasts. Such adjustments have already been made by both Parties' experts, who agree on the methodology to be used for such adjustments.*[[353]]"

211. Eco Oro notes that both Compass Lexecon and CRA use the Junior Gold Miners Index to adjust the gap identified between the dates on which the Comparable Transactions took place and the valuation date, which makes the use of this Index appropriate and reliable. Eco Oro provides the following chart, which depicts the evolution of the Junior Gold Miners Index in the relevant period. [354]

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[349] Respondent's Rejoinder, para. 247.

[350] Respondent's Rejoinder, para. 247.

[351] Respondent's Rejoinder, para. 248.

[352] Claimant's First Submission, para. 76. In paragraphs 306-310 of Claimant's First Submission, Eco Oro expands on these arguments.

[353] Claimant's First Submission, paras. 307-308, referring to First Compass Lexecon Report, paras. 11, 79; Second Compass Lexecon Report, paras. 49-51; First CRA Report, paras. 119, 122; Second CRA Report, paras. 171-173 and Table 7-1; CRA Direct Presentation, slides 14-16, 20, 44, 47; Tr. Day 1, 215:13-216:20 (Claimant's Opening Statement) (Eng); Tr. Day 5, 1477:3-1477-7 and 1483:11-1483:19 (CRA) (Eng); CRA: Valuation of Angostura Project as of the Claimant's Valuation Date (8/8/2016), Based on the Value of Comparable Assets (Undated) (**Exhibit CRA-8**), p. 17 (showing the valuation of CRA's comparable assets as of Claimant's valuation date, updated with the Junior Gold Miners Index); CRA: Valuation of the Angostura Project as of the Respondent Valuation Date (2/8/2016), Based on the Value of Comparable Assets (Undated) (**Exhibit CRA-12**), p. 26 (showing the valuation of CRA's comparable assets as of Respondent's first valuation date); CRA: Valuation of the Angostura Project as of the Respondent Valuation (12/19/2014), Based on the Value of Comparable Assets (Undated) (**Exhibit CRA-13**), p. 29 (showing the valuation of CRA's comparable assets as of Respondent's second valuation date).

[354] Claimant's First Submission, paras. 309-310, making reference to Figure 8: Evolution of Junior Gold Miners Index, in First Compass Lexecon Report, para. 79.

(2) Respondent's Response

212. Colombia submits that there is a significant gap between both Parties' valuation dates (21 December 2018, as per Colombia, and 8 August 2016, as per Eco Oro) and the date of Eco Oro's Comparable Transactions (14 February 2011 and 19 October 2012 [355]), and that Eco Oro has failed to put forward a methodology that would allow for Eco Oro's Comparable Transaction values to be adjusted reliably to take account of that gap. [356]

213. According to Colombia, the Comparable Transactions are not a reliable measure of the value of the Angostura Project as of the valuation date for Colombia's breach of Article 805 (on either Party's case), in light of the significant lapse of time and the developments that occurred within this period – notably, the delimitation of the páramo through Resolution 2090 in 2014 and Judgment C-35 in February 2016 – that clearly would have impacted on the value of the Comparable Transactions. [357]

214. With regard to the adjustment of the Comparable Transactions using the Junior Gold Mining Index, Colombia asserts that the Tribunal rejected this approach when it refused to apply CRA's proposed market capitalisation methodology. [358] This is why it would be inconsistent for such a methodology to be used to adjust Eco Oro's Comparable Transactions. [359]

215. Finally, Colombia submits that Eco Oro ought to have offered a method for adjusting the Comparable Transaction values that properly takes account of relevant changes that had a bearing on the value of those transactions and the Angostura Project over the relevant period. In light of Eco Oro's failure to provide any such methodology, the Tribunal should find that Eco Oro's Comparable Transactions valuation is not reliable and reject Eco Oro's damages accordingly. [360]

(3) Claimant's Reply

216. Eco Oro submits that Colombia changed its position in its Response, against its experts' previous endorsement of the Junior Gold Miners Index to update the Comparable Transactions and with no expert testimony to support such about-face. [361]

217. Eco Oro notes that, notwithstanding Colombia's contentions, it still now continues to use that very methodology in the updated valuation model it submitted with the Response. Eco Oro submits that this confirms that the methodology is reliable and that there is no suitable alternative to update the Comparable Transactions to the valuation date. [362]

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[355] Respondent's Response, para. 199.

[356] Respondent's Response, para. 198.

[357] Respondent's Response, paras. 200-203.

[358] Respondent's Response, para. 204, referring to Decision, para. 898.

[359] Respondent's Response, para. 205.

[360] Respondent's Response, para. 206.

[361] Claimant's Reply, para. 217.

[362] Claimant's Reply, paras. 217-218, referring to Adjusted Compass Lexecon Comparable Transactions Model (**Exhibit R-267**) ("MVGDXJ TR Index" worksheet).

218. Finally, Eco Oro submits that the Tribunal did not dismiss Colombia's market capitalisation methodology because of any inherent unreliability in using the Junior Gold Miners Index, but rather because *(i)* there was insufficient traded volume during the course of the measures at issue, and *(ii)* Colombia did not make adjustments to reflect "*actual market news and press releases*".[363] Eco Oro further notes that neither side's expert considered that such adjustments were appropriate or necessary in updating the Comparable Transactions to the proposed valuation dates, as Eco Oro was publicly traded at all relevant times and the Comparable Transactions all involved companies that were taken private.[364]

(4) Respondent's Rejoinder

219. Colombia takes issue with the fact that Eco Oro has not engaged with the contentions put forward by Colombia in its Response, namely *(i)* the amount of time that elapsed and *(ii)* the events relating to environmental permitting and the delimitation of the páramo, which severely limited the prospects of any project in the area securing an environmental licence or being economically viable.[365]

220. Colombia asserts that *(i)* it has not changed its position, but merely taken note of the Tribunal's rejection of the Juniors Gold Miners Index as a reliable tool for adjusting valuations over similar lapses of time;[366] *(ii)* Eco Oro's contention that the Tribunal rejected Colombia's stock market valuation because CRA had not used "*actual market news and press releases*" instead of the index is wrong.[367] It is the market news about the Angostura Project, and not the Comparable Transactions, which must be adduced, as the key question is how the Angostura Project's value evolved relative to the value implied by the Comparable Transactions as at their respective transaction dates;[368] *(iii)* Colombia did not endorse the use of the Junior Gold Miners Index: it merely noted what adjustments would be required to be made to Eco Oro's Comparable Transactions analysis if the Tribunal decided to use it;[369] *(iv)* the Comparable Transactions analysis would yield an even more inflated value unless an adjustment is made to account for the substantially increased country risk in Colombia;[370] and *(v)* it was incumbent upon Eco Oro to adduce a suitable alternative method.[371]

221. Colombia submits that the Tribunal's concern that the Junior Gold Miners Index is unreliable to adjust the value of the Angostura Project through time remains unaddressed and the Comparable Transactions analysis should accordingly be dismissed.[372]

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[363] Claimant's Reply, paras. 219-220, referring to Decision, para. 898.

[364] Claimant's Reply, para. 221.

[365] Respondent's Rejoinder, paras. 250-251.

[366] Respondent's Rejoinder, para. 252.

[367] Respondent's Rejoinder, para. 253, referring to Decision, paras. 871, 898.

[368] Respondent's Rejoinder, para. 254, referring to Decision, para. 898.

[369] Respondent's Rejoinder, para. 256.

[370] Respondent's Rejoinder, para. 257, referring to Colombian sovereign bond yield data submitted onto the record by Compass Lexecon at tab "Colombia EMBI" (Emerging Markets Bond Index) of **Exhibit CLEX-69**; Sovereign bond yield spreads at Parties' respective valuation dates (data drawn from CLEX-69) (**Exhibit R- 310**).

[371] Respondent's Rejoinder, paras. 257-258, citing to *Amoco International Finance v The Government of the Islamic Republic of Iran, National Iranian Oil Company and others* (IUSCT Case No. 56 (1987 – Vol. 15), Iran-US CTR 189) Partial Award (14 July 1987) (**Exhibit RL-49**), para. 238; Claimant's First Submission, para. 18.

[372] Respondent's Rejoinder, para. 254.

J. Question J

222. In paragraph 920(4)(j) of its Decision, the Tribunal sought an answer to the following question: "*What evidence, if any, is there on the record, in addition to Mr. Moseley- William's testimony that the area of Concession 3452 that does not lie within the current delimitation cannot be ascribed a value, such that no deduction should be made in the event that a fair market valuation is adopted to value Eco Oro's loss?*"

(1) Claimant's First Submission

223. Eco Oro summarises its answer to this question as follows [373]:

> "*77. There is evidence on the record supporting the conclusion that no value should be ascribed to the area of Concession 3452 that lay outside of the preservation and restoration areas of Resolution 2090 (the* ***Remaining Concession Area****). Beyond Mr Moseley-Williams's testimony,*[374] *the Tribunal has Compass Lexecon's first report,*[375] *in which it explained that it could not ascribe any value to the Remaining Concession Area in light of the uncertainty as to where, if anywhere, mining activities could be pursued in that area given the uncertainty relating to the scope of the mining ban and the 2090 Atlas. As with Mr Moseley-Williams, Compass Lexecon was not cross-examined on this point. On the other hand, at the Hearing, Colombia's mining expert, Mr Rossi, conceded during cross-examination that – based on assumptions that he was asked to make reflecting the actual uncertainty prevailing in connection with the 2090 Atlas – he could not make any estimate of the Extractable Minerals associated with Concession 3452.*[376] *The estimate of a project's Extractable Minerals is the fundamental component that is needed to determine the value of a project at the Angostura Project's stage of development, as CRA has explained in its first expert report.*[377]
>
> *78. The Tribunal can also conclude that the Remaining Concession Area should be ascribed no value in computing Article 805 (MST) Damages based on the Majority Tribunal's own findings of fact that it made in considering the effects of Colombia's measures. In particular, amongst other things, the Decision states that 'the Concession became valueless' as a result of Colombia's measures.*[378]

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[373] Claimant's First Submission, paras. 77-79. In paragraphs 311-322 of Claimant's First Submission, Eco Oro expands on these arguments, making reference to Decision, paras. 201, 633, 634, 782, 801, 799-805, 820-821, 849; First Moseley-Williams Statement, paras. 57-69; First Compass Lexecon Report, paras. 12-13; Tr. Day 5, 1369:2-6, 1375:5-8, 1381:15-1382:1 (Mr Rossi) (Eng); First CRA Report, para. 28; Tr. Day 2, 596:8-598:14 (Mr García) (Eng).

[374] Claimant's First Submission, para. 313, referring to First Moseley-Williams Statement, paras. 57-69.

[375] Claimant's First Submission, paras. 317-319, referring to First Compass Lexecon Report, paras. 12-13.

[376] Claimant's First Submission, paras. 320-321, referring to Tr. Day 5, 1381:15-1382:1 (Mr Rossi) (Eng). Eco Oro notes that Mr Rossi acknowledged that a substantial reduction of the Angostura Project's resources "*puts the economic viability of the project in serious question*" (Claimant's First Submission, para. 318, referring to Tr. Day 5, 1369:2-6 (Mr Rossi) (Eng)). Eco Oro adds that Mr García conceded that a re-delimitation of the páramo could indeed affect a different portion of Concession 3452 than that affected by the delimitation of Resolution 2090 (Claimant's First Submission, para. 320, referring to Tr. Day 2, 596:8-598:14 (Mr García) (Eng)).

[377] Claimant's First Submission, para. 319, referring to First CRA Report, para. 28.

[378] Claimant's First Submission, fn. 98, referring to Decision, para. 634. See also Claimant's First Submission, para. 314, referring to Decision, paras. 201, 633, 782, 799-805, 820-821, 849.

79. Even if arguendo the value of the Remaining Concession Area was not destroyed when Resolution VSC 829 was issued on 8 August 2016, the residual value (if any) was destroyed by Colombia's subsequent measures. In particular, after the 2090 Atlas had been struck down, the Majority Tribunal found that Colombia's refusal to allow Eco Oro an extension of time to submit its PTO 'in circumstances where the páramo boundary had not been finally determined such that Eco Oro had no certainty as to where the páramo overlapped with the Angostura Deposit, if at all, and where Colombia itself was being given extensions of time to complete the delimitation, can only be viewed as grossly unfair. This comprises conduct that was arbitrary and disproportionate, and which has inflicted damage on Eco Oro without serving any apparent purpose, falling within Professor Schreuer's first indicium.'[379] *Indeed, that is why the Majority Tribunal's conclusion that Eco Oro's renunciation of Concession 3452 did not result in any further loss to Eco Oro makes good sense: all of Eco Oro's losses, including in connection with the Remaining Concession Area, were already incurred beforehand because of Colombia's measures.*[380]"

(2) Respondent's Response

224. Colombia asserts that the only possible loss that Eco Oro suffered as a result of Colombia's measures that did breach Article 805, and which occurred after Resolution VSC 829, was an opportunity to apply for an environmental license in the area that does not lie within the current delimitation. Colombia therefore contends that awarding damages with respect to the area falling within the current delimitation would be inconsistent with the Tribunal's Decision and would amount to awarding damages for a loss that was not caused by the breach.[381]

(3) Claimant's Reply

225. Eco Oro says that the Parties are in agreement that there is no value to be deducted in connection with the part of Concession 3452 that does not lie within the Resolution 2090 delimitation.[382]

(4) Respondent's Rejoinder

226. Colombia reiterates its position and contends that Eco Oro should be awarded zero damages, as Eco Oro bears the burden of proving its losses and its own evidence and submission is that the area falling outside of the current delimitation is valueless.[383]

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[379] Claimant's First Submission, fn. 99, referring to Decision, para. 820.

[380] Claimant's First Submission, fn. 100, referring to Decision, para. 849.

[381] Respondent's Response, para. 207, referring to the Answer to Question A; Decision, paras. 804-805, 820.

[382] Claimant's Reply, para. 223, referring to Claimant's First Submission, Section II.J; Respondent's Response, para. 207.

[383] Respondent's Rejoinder, para. 260.

K. Question K

227. In paragraph 920(4)(k) of its Decision, the Tribunal sought an answer to the following question: "*What evidence is there to support Eco Oro's assertion of the costs it has incurred to date?*"

(1) Claimant's First Submission

228. Eco Oro summarises its answer to this question as follows [384]:

> "*80. Eco Oro has incurred US$258 million in connection with the Angostura Project. The evidence available for the Tribunal includes: Eco Oro's audited financial statements (exhibited at CLEX-94),*[385] *Compass Lexecon's expert testimony based on its review of the audited financial statements,*[386] *and Behre Dolbear's expert testimony evaluating the activities associated with Eco Oro's historical costs.*[387] *It is important to note that both Parties' experts have specifically disclaimed sunk costs as being an appropriate way of computing Eco Oro's damages.*[388] *If Eco Oro's sunk costs were nevertheless to be used for valuation purposes, industry specific valuation guidance dictates that it should be multiplied by a factor of 0 to 5 to reflect the future potential value associated with the sunk costs.*[389] *Based on the Angostura Project's stage of development, a multiplication factor of 3 would be appropriate to apply to Eco Oro's sunk costs of approximately US$250 million, which would bring its value to US$750 million, before interest, which is 7.7% higher than Compass Lexecon's comparable transactions valuation based on the Comparable Transactions.*[390]"

229. Eco Oro submits that investment tribunals often rely on audited financial statements as a reliable foundation for computing damages on an entity's sunk costs. [391] Eco Oro further notes that Compass Lexecon reviewed and analysed Eco Oro's audited financial statements for the period 1997 to 2018, which are made available to the market on the online repository of materials filed with the Canadian Securities Administrators (SEDAR.com), arriving at an amount of approximately USD258

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[384] Claimant's First Submission, para. 80. In paragraphs 323-331 of Claimant's First Submission, Eco Oro expands on these arguments.

[385] Claimant's First Submission, para. 325(a), referring to Eco Oro's audited financial statements for every year from 1997 to 2018: Eco Oro's Financial Statements (**Exhibit CLEX-94**).

[386] Claimant's First Submission, para. 325(b), referring to Second Compass Lexecon Report, paras. 116-117; Compass Lexecon Historical Cost Summary (**Exhibit CLEX-96**).

[387] Claimant's First Submission, para. 325(c), referring to First Behre Dolbear Report, paras. 47-51; Second Behre Dolbear Report, paras. 10-11.

[388] Claimant's First Submission, paras. 323-324, noting that costs-based approaches would not reflect the future value to be derived from having incurred the costs, and referring to First Compass Lexecon Report, para. 54 (costs-based approaches "*do*[] *not reflect the forward-looking value of business*"; Second CRA Report, p. 104.

[389] Claimant's First Submission, para. 324, referring to CIMVAL, Standards and Guidelines for Valuation of Mineral Properties (February 2003) (**Exhibit C-85**), p. 23 (referring to including a "multiplier factor" in valuing a property based on sunk costs); Rudenno, Victor, *The Mining Valuation Handbook*, 4th ed. Milton, Australia: John Wiley & Sons (1 January 2012) (**Exhibit CLEX-74**), pp. 291-293.

[390] Claimant's First Submission, para. 324.

[391] Claimant's First Submission, para. 326, citing to *Bear Creek Mining Corporation v Republic of Peru* (ICSID Case No. ARB/14/21) Award (30 November 2017) (**Exhibit CL-225**), paras. 658, 661; and *Copper Mesa Mining Corporation v The Republic of Ecuador* (UNCITRAL) Award (15 March 2016) (**Exhibit CL-221**), paras. 7.27-7.28.

million spent on the Angostura Project.[392] Eco Oro adds that Behre Dolbear opined that Eco Oro's cost expenditures were logical, reasonable and added value.[393]

230. Finally, Eco Oro takes issue with Colombia's experts' assessment of Eco Oro's historical costs, which, in Eco Oro's opinion, has unduly sought to diminish Eco Oro's costs.[394]

(2) Respondent's Response

231. Colombia confirms that both Parties' quantum experts agree that sunk costs would not be an appropriate method for assessing the fair market value of the Angostura Project.[395] The only costs that could possibly be appropriately taken into account would be those specifically incurred by Eco Oro in connection with the opportunity lost as a result of Colombia's breach of Article 805, i.e., the opportunity to apply for an environmental licence over the Remaining Area of the Concession only.

232. Colombia notes that numerous tribunals have confirmed that a claimant seeking costs incurred as a basis for the valuation of its damages bears the burden of proving that such costs were incurred directly in relation to the project that was impacted by the respondent's breach.[396] Colombia adds that awarding expenditures that were not incurred to generate the specific opportunity that was lost would be contrary to the full reparation principle.[397] Colombia further submits that, while audited financial statements can provide an indication of costs incurred by a corporate entity generally, they are no more than a starting point for an analysis of the costs incurred in connection with a specific project.[398]

233. Colombia submits that Eco Oro cannot possibly meet its burden of proving the amount of the costs that were necessary to generate an opportunity to apply for a licence to pursue an underground project when it relies on its financial statements over a 22-year period, being undisputed that, prior to 2011, Eco Oro was not pursuing the underground project.[399] Colombia notes that Mr Rossi observed that most of the work commissioned by Eco Oro was directed towards the open-pit project, evidence that was not challenged by Eco Oro other than by a general statement of its expert Behre Dolbear.[400] Colombia further notes that the shift towards an underground project meant that much

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[392] Claimant's First Submission, paras. 326-328, referring to Second Compass Lexecon Report, p. 70, Table 7: Eco Oro's Historical Cost Summary (**Exhibit CLEX-96**). See also Claimant's First Submission, fn. 597.

[393] Claimant's First Submission, para. 329, referring to First Behre Dolbear Report, paras. 48-49; Second Behre Dolbear Report, paras. 10-11.

[394] Claimant's First Submission, paras. 330-331. Eco Oro asserts that CRA disregards the fact that even work carried out for an open pit operation would have added value for an underground mining operation (Claimant's First Submission, para. 330, referring to First Behre Dolbear Report, paras. 44, 47-51; Second Behre Dolbear Report, para. 35).

[395] Respondent's Response, para. 208.

[396] Respondent's Response, para. 212, citing to *South American Silver Limited v The Plurinational State of Bolivia* (PCA Case No. 2013-15) Award (22 November 2018) (**Exhibit RL-194**), paras. 824-825, 866-870; *Abed El Jaouni and Imperial Holding SAL v Lebanese Republic* (ICSID Case No. ARB/15/3) Award (14 January 2021) (**Exhibit RL-196**), para. 345; *Sistem Muhendislik Insaat Sanayi ve Ticaret A.S. v Kyrgyz Republic* (ICSID Case No. ARB(AF)/06/1) Award (9 September 2009) (**Exhibit RL-80**), para. 161.

[397] Respondent's Response, para. 213, citing to *Case Concerning the Factory at Chorzów* (Germany/Poland) (PCIJ), Merits (1928) (**Exhibit CL-1**), p. 47.

[398] Respondent's Response, para. 214, citing to *Bear Creek Mining Corporation v Republic of Peru* (ICSID Case No. ARB/14/21) Award (30 November 2017) (**Exhibit CL-225**), para. 658; and *Copper Mesa Mining Corporation v The Republic of Ecuador* (UNCITRAL) Award (15 March 2016) (**Exhibit CL-221**), paras. 7.27-7.28.

[399] Respondent's Response, para. 217, referring to paras. 130-133 of the Decision; and Ministry of Environment, Resolution No. 1015 (31 May 2011) (**Exhibit R-71**).

of the work carried out in preparation for the open-pit project was specific to that project, and was not necessary for the development of an underground project.[401] Colombia adds that Eco Oro itself acknowledges not having carried out any of the work required to apply for a PTO or environmental licence for an underground project.[402] Colombia alludes to CRA's evidence, which went unchallenged at the hearing, regarding deficiencies in Eco Oro's evidence.[403] Colombia points to the fact that, on the basis of the information available, CRA assessed that Eco Oro cannot reasonably be considered to have incurred more than USD40 million on the underground project.[404] Finally, Colombia notes that, in the document production phase, Eco Oro refused to provide any documents regarding the breakdown of costs. Colombia submits that Eco Oro should not be allowed to take advantage of its failure to share the information required to allow a reasonable assessment of the costs incurred towards the underground project and to disentangle underground costs from open-pit costs before 2011.[405]

234. Finally, Colombia takes issue with Eco Oro's new valuation approach, which proposes that the total amount expended by Eco Oro be multiplied by a factor of three. Colombia considers that this method is baseless and unreasonable, as *(i)* it does not follow any set methodology; *(ii)* it is not based on any expert testimony and directly conflicts with the opinions of both Parties' experts; and *(iii)* the factor of 3 is arbitrary and unjustified.[406]

(3) Claimant's Reply

235. Eco Oro notes that, while both Parties' experts agree that a market-based assessment, like one based on comparable transactions, is appropriate given the Angostura Project's stage of development before Colombia breached the Treaty, Eco Oro has provided a computation of its historical costs, based on its audited financial statements, in the event the Tribunal wishes to adopt a valuation that considers Eco Oro's historical costs.[407] In this context, Eco Oro highlights that Compass Lexecon made modifications to remove the small amount of costs that Eco Oro spent on activities other than the Angostura Project from 1997 and 2003. After 2003, Eco Oro focused exclusively on the Angostura Project.[408]

236. Eco Oro recalls that the *Bilcon* tribunal adopted a valuation based on a mid-point between the claimants' historical costs, which is treated as a floor to compensation, and the value discernible

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[400] Respondent's Response, para. 218, referring to Second Rossi Report, para. 169; and First Behre Dolbear Report, para. 47.

[401] Respondent's Response, para. 219, referring to Golder Associates, Updated Preliminary Economic Assessment on the Angostura Gold-Silver Underground Project (**Exhibit CLEX-26**), pp. 28-29; and GRD Minproc, Angostura Gold Project, Preliminary Feasibility Study (May 2009) (**Exhibit BD-42**), p. 4, para. 1.3, and p. 208, para. 18.1.1.

[402] Respondent's Response, para. 220, referring to Claimant's First Submission, para. 68.

[403] Respondent's Response, paras. 221-222, referring to Second CRA Report, Appendix 5.A, paras. 5 and 7.

[404] Respondent's Response, paras. 222, referring to Second CRA Report, Appendix 5.A, paras. 10-11.

[405] Respondent's Response, paras. 223-224, referring to the Respondent's Requests for Documents Nos. 27, 28; and the Respondent's Redfern Schedule, pp. 57-60.

[406] Respondent's Response, paras. 225-229, referring to Rudenno, Victor, *The Mining Valuation Handbook* (4th ed. Milton, Australia: John Wiley & Sons, 1 January 2012) (**Exhibit CLEX-74**), pp. 291-292.

[407] Claimant's Reply, paras. 225-227, referring to *Bear Creek Mining Corporation v Republic of Peru* (ICSID Case No. ARB/14/21) Award (30 November 2017) (**Exhibit CL-225**), paras. 658, 661; *Copper Mesa Mining Corporation v The Republic of Ecuador* (UNCITRAL) Award (15 March 2016) (**Exhibit CL-221**), paras. 7.27-7.28.

[408] Claimant's Reply, fn. 558 and Second Compass Lexecon Report, fn. 213.

from prior transactions relating to the property.[409]

237. With regard to Colombia's criticisms vis-à-vis the valuation method applying a multiplying factor to historical costs, Eco Oro explains that its argument is not new, it had been made previously.[410] Moreover, this method is not only advanced on the basis of the view of a leading authority on mining valuation but also on the CIMVAL, which provides that a costs-based valuation methodology should yield a value equal to a multiple of historical costs.[411] Finally, Eco Oro submits that, considering that Eco Oro was an advanced stage exploration property, a multiplication factor of 3 is appropriate and consistent with the guidance in Dr Rudenno's textbook.[412]

238. Eco Oro further argues that Colombia's observations with regard to Eco Oro's computation of its historical costs derive from Colombia's mischaracterization of the Tribunal's Decision. Eco Oro considers that there is no basis for Colombia's position that any award based on Eco Oro's historical costs must somehow reflect a *pro rata* reduction to reflect only damages associated with the 'Remaining Area.'[413]

239. Eco Oro further asserts that Colombia mischaracterizes the *Bilcon* tribunal's approach to awarding damages, as the latter did not endorse some extra-selective standard beyond the usual causation test in identifying historical costs for purposes of computing damages, rather awarding damages on the basis of a mid-point between the historical costs incurred in furtherance of the project and a value based on prior transactions.[414] Accordingly, Eco Oro asserts that an assessment of Eco Oro's historical costs incurred for damages purposes should reflect all of the costs that it incurred in connection with the Angostura Project. That is because Colombia's unlawful measures caused Eco Oro to lose the ability to pursue the Angostura Project and rendered Concession 3452 valueless.[415]

240. Eco Oro further rejects Colombia's attempt to exclude costs incurred before 2011, as those costs were incurred in furtherance of Eco Oro's endeavours to develop a licensable project pursuant to its rights under Concession 3452. Eco Oro characterizes Colombia's approach with respect to the computation of costs connected with satellite properties as an attempt to "*nickel and dime*" Eco Oro's historical costs assessment. Finally, Eco Oro reiterates that, since 2003, it has focused exclusively on the development of the Angostura Project, thus explaining why the overhead costs incurred in that respect should not be discarded.[416]

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[409] Claimant's Reply, para. 227, referring to *William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware v Government of Canada* (UNCITRAL) Award on Damages (10 January 2019) (**Exhibit RL-158**), paras. 287-303.

[410] Claimant's Reply, para. 229, referring to Claimant's Post-Hearing Brief, para. 54.

[411] Claimant's Reply, para. 229, referring to Victor Rudenno, *The Mining Valuation Handbook* (4th ed. Milton, Australia: John Wiley & Sons, 1 January 2012) (**Exhibit CLEX-74**), pp. 291-293; and CIMVAL, Standards and Guidelines for Valuation of Mineral Properties (February 2003) (**Exhibit C-85**), p. 23.

[412] Claimant's Reply, para. 229, referring to Victor Rudenno, *The Mining Valuation Handbook* (4th ed. Milton, Australia: John Wiley & Sons, 1 January 2012) (**Exhibit CLEX-74**), pp. 291-293.

[413] Claimant's Reply, para. 231.

[414] Claimant's Reply, para. 232, citing to *William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware v Government of Canada* (UNCITRAL) Award on Damages (10 January 2019) (**Exhibit RL-158**), paras. 281-282, 287-303.

[415] Claimant's Reply, para. 233.

[416] Claimant's Reply, paras. 234-235, referring to Tr. Day 5, 1303:12-1310:22 (Mr Rossi) (Eng) (Mr Rossi conceded that, from 1996 to 2007, Eco Oro was jointly pursuing open-pit and underground mining concepts); First Behre Dolbear Report, paras. 44, 47-51; Second Behre Dolbear Report, para. 35; 2012 Golder PEA (**Exhibit BD-21**), pp. 268-269; 2015 Micon Resource Estimate (**Exhibit C-37**), pp. 82-83; First Moseley-Williams Statement, para. 68; Second Compass Lexecon Report, fn. 213; Compass Lexecon Historical Cost Summary (**Exhibit CLEX-96**).

(4) Respondent's Rejoinder

241. Colombia asserts that, in stark contrast with the *Bilcon* claimants, Eco Oro did not conduct its business operations in a reasonable manner. Eco Oro spent years pursuing a hopeless and environmentally destructive open-pit project, only to then shift to an underground mining project without conducting any due diligence. None of the costs it purportedly incurred pursuing an underground project were reasonable. Colombia argues that, in any event, even if Eco Oro had incurred some costs reasonably, it still has not discharged its burden of proving that the USD258 million it claims to have spent on the Angostura Project as a whole are relevant to its loss of opportunity to pursue an underground project. Colombia argues that Eco Oro has not discharged its burden of proving how much of the pre-2011 work was useful to an underground project and that, in the absence of such evidence, it cannot be assumed that all of Eco Oro's expenses bore a causal relationship or were exclusively attributable to the underground Angostura Project. [417]

242. According to Colombia, so far as the expenses connected with satellite properties in Colombia are concerned, Eco Oro's justification is inadequate, as, in his Witness Statement, Mr Moseley-Williams was not referring to the same properties as CRA and Eco Oro has not proven that such costs were reasonably incurred or causally connected to the lost opportunity to pursue an underground project. [418] Colombia further argues that the "*variety of overhead costs*" remain equally unproven. As Eco Oro invested in a number of different properties and projects, it would have needed to provide more than its audited financial statements to discharge its burden of proof. [419]

243. Colombia notes that some of Eco Oro's claimed sunk costs were incurred once Eco Oro had ceased to pursue the Angostura Project and was instead focused on seeking compensation through this arbitration. Colombia submits that legal costs in this arbitration have no relationship with the opportunity to pursue the Angostura Project and cannot thus form the basis of an award on damages. [420]

244. Colombia takes issue with Eco Oro's contention that its claim to a threefold uplift to its purported expenses was not new, as it had been made in Eco Oro's Post-Hearing Brief. According to Colombia, that is exactly Colombia's point: this is a technical valuation argument made after the hearing and without apparent support from Compass Lexecon or even Behre Dolbear. [421] Colombia further notes that Eco Oro continues not to engage with the only two analyses where Dr Rudenno's treatise on mining valuation discusses multiplication factors. Eco Oro simply insists that its stage of development justifies the multiplication factor, which Colombia finds unsatisfactory. [422] Colombia finally highlights that the CIMVAL's Standards and Guidelines for Valuation of Mineral Properties do not support Eco Oro's position. According to Colombia, these guidelines do not explain how to determine the multiplication factor. Colombia adds that Dr Ruddeno's treatise makes clear that a

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[417] Respondent's Rejoinder, paras. 263-265, 267, citing to *South American Silver Limited v The Plurinational State of Bolivia* (PCA Case No. 2013-15) Award (22 November 2018) (**Exhibit RL-194**), para. 870; and *William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware, Inc. v The Government of Canada* (UNCITRAL) Award on Damages (10 January 2019) (**Exhibit RL-158**), paras. 168, 281, 286.

[418] Respondent's Rejoinder, para. 270.

[419] Respondent's Rejoinder, paras. 271-272.

[420] Respondent's Rejoinder, paras. 273-274, citing to *William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware, Inc. v The Government of Canada* (UNCITRAL) Award on Damages (10 January 2019) (**Exhibit RL-158**), para. 284.

[421] Respondent's Rejoinder, para. 275.

[422] Respondent's Rejoinder, para. 276.

multiplier of less than 1 can be warranted, which would yield a valuation lower than historical exploration costs.[423]

245. Finally, Colombia submits that, if the Tribunal were to decide – *quod non* – that the lost opportunity concerned the entire Concession Area, and had some value, it should find that no more than the USD40 million which can reliably be considered to have been incurred in pursuit of the underground Angostura Project can be of any relevance to assessing that loss.[424] For completeness, Colombia asserts that Eco Oro's suggestion that its sunk costs should be considered a floor to any damages it is awarded is misplaced. In that context, it considers that Eco Oro has not behaved as a reasonable investor, unlike the investors in *Bilcon*. Moreover, according to Colombia, the *Caratube* tribunal considered sunk costs as a ceiling, not a floor, awarding the claimant damages no higher than its sunk costs.[425]

L. Question L

246. In paragraph 920(4)(l) of its Decision, the Tribunal sought an answer to the following question: "*What is a commercially reasonable interest rate?*"

(1) Claimant's First Submission

247. Eco Oro summarises its answer to this question as follows[426]:

> "*81. A commercially reasonable interest rate is 6.6%, with interest compounded annually. As Compass Lexecon explains, that is the rate that was available for prime corporate borrowers as of the valuation date of 8 August 2016, as published by the Central Bank of Colombia. It reflects the rate at which private corporations can obtain financing.*[427] *Colombia has to date proposed an interest rate based on short term US treasury bills, which is a short-term risk-free rate of 1.1%, and does not reflect any of Eco Oro's commercial realities.*[428] *In fact, that rate is below the inflation level that*

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[423] Respondent's Rejoinder, para. 277.

[424] Respondent's Rejoinder, para. 278, referring to Second CRA Report, Appendix 5.A, para. 11.

[425] Respondent's Rejoinder, paras. 51, 263, 279, citing to *William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware, Inc. v The Government of Canada* (UNCITRAL) Award on Damages (10 January 2019) (**Exhibit RL-158**), paras. 134, 137-144, 168, 280-303; and *Caratube International Oil Company LLP and Devincci Salah Hourani v Republic of Kazakhstan* (ICSID Case No. ARB/13/13) Award (27 September 2017) (**Exhibit RL-192**) paras. 989, 1196, 1268.

[426] Claimant's First Submission, para. 81. In paragraphs 332-340 of Claimant's First Submission, Eco Oro expands on these arguments. Eco Oro's summary is not entirely consistent with the remainder of its submissions on interest, so far as the frequency of the compounding is concerned. In its summary, Eco Oro posits that interest shall be compounded annually, whereas in paras. 332 and 340 of its First Submission it posits that interest shall be compounded semi-annually. The request for relief in paras. 340 and 351(c) of Eco Oro's First Submission is equally for interest to be compounded semi-annually.

[427] Claimant's First Submission, paras. 332-335, referring to Claimant's Reply Memorial, paras. 641-647; Second Compass Lexecon Report, paras. 11, 96-98; Tr. Day 5, 1401:17-1403:4 (Compass Lexecon) (Eng). According to Compass Lexecon, the average cost of bank debt for private corporations in Colombia from the date of valuation, 8 August 2016, to the date of their last expert report, 31 May 2019, is 6.6%.

[428] Claimant's First Submission, para. 337, referring to CRA: Interest (**Exhibit CRA-11**); First CRA Report, para. 127; Second CRA Report, paras. 213-214; Second Compass Lexecon Report, para. 94(a)-(b); Compass Lexecon Updated Interest Calculation (**Exhibit CLEX-69**).

has been observed since the valuation date, and so would not even adequately compensate Eco Oro for the passing of time.[429] *The Majority Tribunal has rightly rejected Colombia's proposed interest rate.*[430]"

248. Eco Oro further submits that the 12-month London Interbank Offered Rate ("**LIBOR**") plus a 4 percent premium to account for the country risks of operating in Colombia, which equals a rate of 6.2% per year, can also be considered a reasonable commercial rate as it is comparable to the cost of borrowing for private corporations in Colombia.[431]

249. Finally, Eco Oro submits that Colombia must also pay post-award compound interest through to the date of payment.[432]

(2) Respondent's Response

250. Colombia submits that a commercially reasonable interest rate would be 3.5%, which is the cost of borrowing in Canada for corporations such as Eco Oro.[433]

251. According to Colombia, Eco Oro was at all times a Canadian corporation, is listed on the Toronto Stock Exchange and the Canadian Stock Exchange, and carried out its "corporate and commercial activities", including raising finance, in Canada, not Colombia. Colombia adds that there is no evidence on the record that Eco Oro ever borrowed funds in Colombia, and indeed none of Eco Oro's financial statements record any such borrowings.[434]

252. Colombia asserts that awarding interest at any higher rate would not be commercially reasonable and would overcompensate Eco Oro for any hypothetical costs of borrowing during the period between Colombia's breach and payment of any damages award.[435]

(3) Claimant's Reply

253. Eco Oro takes issue with Colombia's contention, for the first time and without the support of any valuation expert, that a commercially reasonable interest rate would be 3.5%. Eco Oro asserts that, although Eco Oro is a company located in Canada, its principal asset – Concession 3452 – was subject to commercial risks and market forces in Colombia, and not in Canada. Eco Oro adds that the

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429 Claimant's First Submission, para. 337(d), referring to Tr. Day 5, 1403:14 (CRA) (Eng).

430 Claimant's First Submission, paras. 337-339, referring to the Decision, paras. 912-913; Second CRA Report, paras. 213-214.

431 Claimant's First Submission, para. 336, referring to Second Compass Lexecon Report, para. 97.

432 Claimant's First Submission, para. 340.

433 Respondent's Response, paras. 230-233. Colombia makes reference to the data collected by the central bank of Canada (https://www.bankofcanada.ca/valet/observations/group/A4_RATES_EXTENDED/csv?start_date= 2013-01-01) and to an Updated Interest Calculation Spreadsheet (**Exhibit R-269**).

434 Respondent's Response, para. 232.

435 Respondent's Response, para. 233.

reasonable rate must reflect the country-specific commercial risks affecting the "target asset", which was Concession 3452. [436]

254. Eco Oro notes that Colombia's new position, which is not accompanied by the support of any valuation expert, appears to self-servingly reflect the opinion of Colombia's legal counsel. According to Eco Oro, the rate that Colombia now proposes would substantially limit its financial exposure for having withheld compensation for the damages that it caused nearly six years ago, on 8 August 2016. In Eco Oro's opinion, this rate introduces a substantial moral hazard by incentivizing Colombia to withhold compensation for its breaches of international law, as it would be provided with a significant economic benefit if it had to pay pre-award interest at a rate lower than its own cost of borrowing (approximately 4.3% at the relevant time). [437]

(4) Respondent's Rejoinder

255. Colombia asserts that the relevant rate is determined by reference to the country where the claimant raises finance, reflecting the rate at which Eco Oro could have borrowed and not the risk of the target asset in the host State. Colombia adds that this view accords with the full reparation principle: in order to compensate the claimant for the unavailability of the principal amount of damages from the date of the injury until the date of payment, interest is to be awarded at the rate the claimant could reasonably have borrowed the funds. [438]

256. With regard to Eco Oro's argument that awarding interest at the rate available in Canada would create moral hazard, Colombia points to the full reparation principle, which entails that the applicable rate stands to be assessed by reference to the circumstances and risks faced by Eco Oro, not by reference to Colombia's position. [439]

257. Finally, Colombia submits that, if any interest is awarded, Eco Oro should not be entitled to compound interest, much less compounded semi-annually, but to simple interest. [440]

M. Question M

258. In paragraph 920(4)(m) of its Decision, the Tribunal sought an answer to the following question:

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[436] Claimant's Reply, paras. 240-242, citing, with regard to country-specific commercial risks, to: *Abengoa, SA and COFIDES, SA v United Mexican States* (ICSID Case No. ARB(AF)/09/2) Award (18 April 2013) (**Exhibit CL-231**), para. 786; *Bernardus Henricus Funnekotter and Others v Republic of Zimbabwe* (ICSID Case No. ARB/05/6) Award (22 April 2009) (**Exhibit CL-57**), paras. 143-144; *Alpha Projektholding GmbH v Ukraine* (ICSID Case No. ARB/07/16) Award (8 November 2010) (**Exhibit CL-66**), para. 514; *Tenaris S.A. and Talta -Trading e Marketing Sociedade Unipessoal LDA v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/26) Award (29 January 2016) (**Exhibit CL-189**), para. 587.

[437] Claimant's Reply, paras. 242-243, referring to Second Compass Lexecon Report, para. 94(d); Colombia's Updated Interest Calculation Spreadsheet (**Exhibit R-269**) ("Summary" worksheet, column E).

[438] Respondent's Rejoinder, para. 281, citing to *Air Canada v Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/17/1) Award (13 September 2021) (**Exhibit RL-200**), para. 699; and *Stans Energy and Kutisay Mining v Kyrgyzstan (II)* (PCA Case No. 2015-32) Award (20 August 2019) (**Exhibit RL-198**), para. 850.

[439] Respondent's Rejoinder, para. 282.

[440] Respondent's Rejoinder, para. 283, referring to the Respondent's Rejoinder on the Merits (9 October 2019), paras. 537-539.

"*What is the anticipated timetable for Eco Oro to undertake remediation work?*"

(1) Claimant's First Submission

259. Eco Oro summarises its answer to this question as follows [441]:

"*82. Eco Oro has submitted a plan to the CDMB showing a three-year timetable for the completion of the relevant remediation work. Pursuant to the applicable regulations, Eco Oro submitted its plan to the CDMB on 5 July 2019.*[442] *Under the applicable regulations, the CDMB was required to verify the state of the project, the proposed remediation works, and to formally approve the closure plan within one month of its submittal.*[443] *However, more than 30 months have elapsed and the CDMB has not completed its review. Meanwhile, an influx of illegal miners continues to cause damage in the area of Concession 3452 and, although Eco Oro bears no responsibility for them, their activities are likely to make Eco Oro's compliance with its remediation obligations more challenging and costly.*[444]"

260. Eco Oro notes that the delays in the approval of its Closure Plan [445] have left Eco Oro in limbo and have required it to incur additional costs. In that context, Eco Oro makes reference to costs connected with *(i)* the hiring of private security personnel to monitor the site so as to avoid damage to infrastructure, vandalism and damage to the environment resulting from illegal mining (which Eco Oro suspended recently) [446]; *(ii)* the extension of Eco Oro's environmental performance bond [447]; and *(iii)* the operation and maintenance of the water treatment plant built by Eco Oro within Concession 3452. [448]

261. Eco Oro anticipates that, once the Closure Plan is approved, it will take three years to complete the remediation works, pursuant to the following timetable [449]:

	YEAR 1	YEAR 2	YEAR 3															
Item	Activity	COP		2	3	4	5	6	7	8	9	10	11	12		2	3	4

[441] Claimant's First Submission, para. 82. In paragraphs 341-346 of Claimant's First Submission, Eco Oro expands on these arguments.

[442] Claimant's First Submission, para. 341, referring to Letter from Eco Oro to the CDMB (5 July 2019) (**Exhibit C-459**); Eco Oro Closure Plan (5 July 2019) (**Exhibit C-458**).

[443] Claimant's First Submission, para. 342, referring to Republic of Colombia, Decree No. 1076 (26 May 2015) (**Exhibit R-60**), Article 2.2.2.3.9.2.

[444] Claimant's First Submission, para. 343, referring to Decision, paras. 816-817, 819; Minutes of the Bilateral Liquidation of Concession Contract 3452 (30 December 2020) (**Exhibit C-460**), pp. 9-10; Email from Eco Oro (Ms Arenas) to the ANM (Mr García) (2 June 2021) (**Exhibit C-461**).

[445] The Tribunal notes the Respondent's comments with regard to the labelling of the plan adopted by Eco Oro (cfr. Respondent's First Submission, para. 236), but adopts the reference to Closure Plan for convenience only.

[446] Claimant's First Submission, para. 343.

[447] Claimant's First Submission, para. 344, referring to 2001 Mining Code (Law 685) (8 September 2001) (**Exhibit C-8**), Article 209; Republic of Colombia, Decree No. 1076 (26 May 2015) (**Exhibit R-60**), Article 2.2.2.3.9.2.

[448] Claimant's First Submission, para. 344, referring to First González Aldana Statement, para. 56(b)-(c).

[449] Claimant's First Submission, para. 345, referring to Eco Oro Closure Plan (5 July 2019) (**Exhibit C-458**), p. 35.

1	SLOPE RESTORATION	$1,686,538,000
2	LANDSCAPE RESTORATION OF THE DUMP	$2,302,478,852
3	PROPAGATION OF VEGETATION MATERIAL IN GREENHOUSE. Adequacy and operation.	$195,364,000
4	STAND PIPE AND VIBRATING WIRE PIEZOMETER NETWORK UPGRADE	$82,875,000
5	STRUCTURE DEMOLITION	$112,134,750
7	DRILLING PLATFORMS	$633,753,250
8	LANDSCAPE RESTORATION OF THE ROADS TO THE DRILLING SITE	$1,973,790,000
CLOSURE PLAN TOTAL	$6,986,933,852	

Figure 4: Eco Oro Closure Plan.

262. Finally, Eco Oro cautions that this estimated timetable could differ insofar as the CDMB requires additional works, or works that are different in scope to those set out in the Closure Plan. [450]

[450] Claimant's First Submission, para. 346, referring to Republic of Colombia, Decree No. 1076 (26 May 2015) (**Exhibit R-60**), Article 2.2.2.3.9.2; 2001 Mining Code (Law 685) (8 September 2001) (**Exhibit C-8**), Article 209.

(2) Respondent's Response

263. Colombia submits that Eco Oro voluntarily undertook the obligation to pay the costs of remediation of the Concession when it entered into its PMA whether or not it succeeded in pursuing an exploitation project. This is why it has not arisen as a result of Colombia's breach of Article 805 and there is no basis for the Tribunal to order Colombia to pay for such costs. [451]

264. Colombia notes that the anticipated timetable for Eco Oro to undertake remediation work is presently unknown because the Closure Plan it submitted to the CDMB was deficient and Eco Oro has not yet rectified it. Colombia explains that the process has been delayed due to the COVID-19 pandemic as well as Eco Oro's failure to submit a revised plan to address the deficiencies identified by the CDMB. Colombia notes, in particular, that, following the receipt of Eco Oro's Closure Plan, a number of site visits and meetings took place. In that context, a technical report was issued on 16 May 2021 ("**Technical Report**"), which provided a preliminary assessment of Eco Oro's proposed Closure Plan and identified a number of issues that required significant adjustments. [452] According to Colombia, the Technical Report was later forwarded by the CDMB to Eco Oro to allow the latter to make the required changes. [453] Colombia adds that Eco Oro has provided no evidence on following up on its request to the CDMB, or using the remedies available under Colombian law to compel the CDMB to decide on Eco Oro's Closure Plan. [454]

265. So far as Eco Oro's environmental performance bond is concerned, Colombia notes that Eco Oro was, in any event, required to have such instrument in place for three years after the termination of its Concession. [455]

266. Finally, Colombia submits that Eco Oro alone is responsible for the costs it claims under this section, which were not incurred by reason of Colombia's Article 805 breach. [456]

(3) Claimant's Reply

267. Eco Oro takes issue with Colombia's refusal to accept that the remediation costs should be borne by

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[451] Respondent's Response, paras. 234-235, referring to Republic of Colombia, Decree No. 1076 (26 May 2015) (**Exhibit R-60**), p. 214, Article 2.2.2.3.9.2.

[452] Respondent's Response, para. 237, referring to CDMB, Technical Report on Site Visit to Concession 3452 (16 May 2021) (**Exhibit R-259**).

[453] Respondent's Response, para. 237, referring to Letter from the CDMB to Eco Oro (1 March 2022) (**Exhibit R-264**), p. 1.

[454] Respondent's Response, paras. 235-237, referring to the following correspondence between Eco Oro and the authorities: Letter from the ANM to the CDMB (22 January 2020) (**Exhibit R-237**); Letter from the ANM to Eco Oro (2 March 2020) (**Exhibit R-239**); CDMB, Resolution No. 200 (16 March 2020) (**Exhibit R-241**), Articles 2.4, 2.5; CDMB, Resolution No. 213 (31 March 2020) (**Exhibit R-242**), Articles 1, 2; CDMB, Resolution No. 221 (13 April 2020) (**Exhibit R-243**), Article 1; CDMB, Resolution No. 230 (27 April 2020) (**Exhibit R-244**), Article 1; CDMB, Resolution No. 238 (8 May 2020) (**Exhibit R-245**), Article 1; CDMB, Resolution No. 243 (26 May 2020) (**Exhibit R-246**), Article 1; CDMB, Resolution No. 254 (1 June 2020) (**Exhibit R-247**), Article 2; CDMB, Resolution No. 363 (30 June 2020) (**Exhibit R-249**), Articles 1, 2; Letter from the ANM to Eco Oro (13 October 2020) (**Exhibit R-253**), p. 1; Letter from the CDMB to Eco Oro (1 March 2022) (**Exhibit R-264**), p. 1; CDMB, Technical Report on Site Visit to Concession 3452 (16 May 2021) (**Exhibit R-259**). So far as the remedies available under Colombian law are concerned, Colombia asserts that Eco Oro could have challenged the failure to decide Eco Oro's Closure Plan before the administrative courts (Respondent's Response, para. 236, referring to Colombian Code of Administrative Procedure and of Administrative Disputes (**Exhibit R-268**), Article 83).

[455] Respondent's Response, para. 238.

[456] Respondent's Response, para. 238.

the latter. Eco Oro recalls that it was forced to renounce Concession 3452 as a result of Colombia's measures, which, in turn, triggered Eco Oro's obligation to undertake remediation works. [457]

268. Eco Oro reiterates that, under the full reparation standard, compensation must be sufficient to wipe out the effect of Colombia's breaches of the Treaty. Eco Oro further notes that, given that the fair market value of the rights to the Angostura Project assessed by Eco Oro has already been discounted on account of remediation costs, if Eco Oro is not compensated or indemnified for these costs, then, in effect, it will have to face these remediation costs twice. This would lead to Eco Oro being undercompensated, a result that would be inconsistent with the full reparation principle. [458]

269. Eco Oro notes that Colombia does not deny that the requisite one-month period for the CDMB to complete its review of the Closure Plan elapsed nearly three years ago without it taking the requisite actions. Eco Oro considers that the grounds invoked by Colombia in this regard are unavailing excuses, because *(i)* the pandemic cannot justify the CDMB's failure to decide on the Closure Plan [459]; *(ii)* even if Eco Oro is under no obligation to follow up with the CDMB or take any other action to compel it to comply with its legal obligations, it did in fact follow up with the CDMB on 30 June 2022 [460]; and *(iii)* the Technical Report does not set out CDMB's review of, or a formal decision regarding, the Closure Plan. [461]

270. So far as the Technical Report is concerned, Eco Oro stresses that it is difficult to comprehend why, nearly three years after it received Eco Oro's Closure Plan without having sent any communications to Eco Oro on the substance of its plan, the CDMB would forward to Eco Oro a ten-month-old Technical Report, which was clearly intended as an internal working paper. [462] Eco Oro further alleges that the CDMB appears to be acting in concert with the ANDJE and Latham & Watkins, as the CDMB has copied Colombia's counsel in communications with Eco Oro. [463] In light of this, Eco Oro has requested that the CDMB issue a formal decision clarifying its position on the Closure Plan. [464]

271. Eco Oro continues to estimate that the completion of the remediation works will take three years. However, it notes that this timeline is counted from the date on which the CDMB approves the Closure Plan and may change once the CDMB issues a formal decision in relation to the aforementioned plan. [465]

(4) Respondent's Rejoinder

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[457] Claimant's Reply, para. 245, referring to Decision, para. 849.

[458] Claimant's Reply, paras. 246-248.

[459] Claimant's Reply, paras. 251-252, noting that several authorities were holding meetings during this period (Ministry of Environment, Eighth Implementation Report of Judgment T-361 (26 June 2020) (**Exhibit R-248**), pp. 21, 38-39.

[460] Claimant's Reply, paras. 251, 253, referring to Letter from Eco Oro to the CDMB (30 June 2022) (**Exhibit C- 482**), Annex 1, pp. 28-30 (Emails from Eco Oro (Ms Arenas) to CDMB, May 2021).

[461] Claimant's Reply, paras. 251, 254, referring to CDMB, Technical Report on Site Visit to Concession 3452 (16 May 2021) (**Exhibit R-259**), p. 1. Eco Oro posits that neither the Technical Report (Exhibit R-259) nor the two-page CDMB letter notifying it (Exhibit R-264) constitute an administrative act as required by Decree 1076 of 2015. Eco Oro notes that the Technical Report references a memorandum from the CDMB's legal department which has not been disclosed to Eco Oro (Letter from the CDMB to Eco Oro (1 March 2022) (**Exhibit R-264**), p. 1.

[462] Claimant's Reply, para. 255.

[463] Claimant's Reply, para. 255, referring to E-mail from the CDMB to Eco Oro (5 April 2022) (**Exhibit C-481**).

[464] Claimant's Reply, para. 256, referring to Letter from Eco Oro to the CDMB (30 June 2022) (**Exhibit C-482**), p. 8, para. 8.

[465] Claimant's Reply, para. 257.

272. Colombia reiterates that remediation costs would have existed regardless of Colombia's breach of the FTA. Moreover, noting that Eco Oro took the decision to undertake the development of the underground version of the Angostura Project without conducting any kind of due diligence, Colombia submits that Eco Oro cannot obtain compensation for a loss that stems from an investment that lacked any reasonable basis. [466]

273. Colombia further notes that if, as Eco Oro claims, the Comparable Transactions 'bake in' the costs and liabilities associated with the development of the project, including remediation costs, then such transactions reflect the value that would be sufficient to make Eco Oro whole. Therefore, by claiming additional compensation for remediation costs, Eco Oro is effectively asking the Tribunal to order Colombia to provide compensation for a cost that the market would not have covered separately. Providing additional compensation for the remediation costs would put Eco Oro in a better position than it would have been in the absence of Colombia's breach of Article 805, which is inconsistent with the full reparation standard. [467]

274. So far as the continued delays in the completion of the remediation works are concerned, Colombia considers Eco Oro's allegations to be incorrect and inapposite. With regard to the COVID-19 pandemic, Colombia notes that it has caused a significant disruption and backlog in the CDMB's processes. It was in this context that the CDMB circulated the Technical Report, as an effort to resolve this delay and disruption. [468] With regard to the lack of follow up by Eco Oro on its request for a decision on its Closure Plan, Colombia considers that it is contrary to Eco Oro's duty to mitigate its losses. [469] With regard to the fact that CDMB's observations regarding Eco Oro's Closure Plan were not set out in an administrative act, Colombia points to the provision of Article 17 of the Colombian Code of Administrative Procedure and Administrative Disputes, which provides that administrative bodies, for reasons of efficiency, may ask petitioners to cure deficient or incomplete requests. [470]

275. Finally, with regard to Eco Oro's contention that the CDMB was acting in concert with Colombia's counsel in this arbitration, Colombia notes that Mr Ignacio Stratta was copied in a piece of correspondence to allow Colombia's counsel to keep a record of the communications exchanged in the context of the approval of the Remediation and Closure Plan. [471]

N. Question N

276. In paragraph 920(4)(n) of its Decision, the Tribunal sought an answer to the following question: "*What is the likely nature of that remediation work?*"

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[466] Respondent's Rejoinder, para. 285.

[467] Respondent's Rejoinder, para. 286.

[468] Respondent's Rejoinder, paras. 287-288.

[469] Respondent's Rejoinder, paras. 289-290.

[470] Respondent's Rejoinder, para. 291, referring to Colombian Code of Administrative Procedure and of Administrative Disputes (**Exhibit R-268**), Article 17.

[471] Respondent's Rejoinder, para. 292.

(1) Claimant's First Submission

277. Eco Oro summarises its answer to this question as follows [472]:

> "*83. According to Colombian law, Eco Oro has an obligation to correct, remediate and/or compensate the environmental impacts caused by the works that it undertook over the course of the 22 years in which it developed the Angostura Project.*[[473]] *In particular, Eco Oro's remediation plan that was submitted to the CDMB includes work for the restoration of drilling platforms, the restoration of a waste dump, the dismantling of support infrastructure and water treatment.*[[474]]"

278. Eco Oro anticipates that the remediation works will take three years to complete from the date of approval of the Closure Plan and will cost COP$6,986,933,852 (USD2,178,705.37). [475]

279. Finally, Eco Oro submits that the principle of full reparation requires that Eco Oro be made whole in respect of any remediation costs it eventually incurs, as these form part of the losses flowing from Colombia's breaches of the Treaty. [476]

(2) Respondent's Response

280. Colombia alludes to a technical report issued by the CDMB in which, *inter alia*, it identified a series of issues with Eco Oro's Closure Plan. [477] This technical report noted that [478]:

> a. The Closure Plan did not provide sufficient detail in relation to the proposed environmental management of the exploration tunnels, geological excavations, and tunnel entrances, nor specified whether the water treatment plant would be removed;
>
> b. Eco Oro's proposal did not include detailed information in connection with the activities required to ensure the restoration of the La Perezosa waste dump site;

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[472] Claimant's First Submission, para. 83. In paragraphs 347-350 of Claimant's First Submission, Eco Oro expands on these arguments.

[473] Claimant's First Submission, para. 347, referring to Eco Oro Closure Plan (5 July 2019) (**Exhibit C-458**), p. 70; Republic of Colombia, Decree No. 1076 (26 May 2015) (**Exhibit R-60**), Article 2.2.2.3.1.1; 2001 Mining Code (Law 685) (8 September 2001) (**Exhibit C-8**), Articles 84(11), 95, 204.

[474] Claimant's First Submission, para. 348, referring to Eco Oro Closure Plan (5 July 2019) (**Exhibit C-458**), Sections 3.1.2 and 6.1.1, 3.1.3, 3.1.4, and pp. 78, 79. According to Eco Oro, the Closure Plan contemplates the following four principal categories of works: *(a)* drilling platforms: restoring 308 exploration platforms by ensuring that they have been fully covered by native vegetation; *(b)* waste dump: restoring the waste dump known as La Perezosa which covers over 5,500 m2 and which was used to store and collect mining exploration waste and debris. The planned works entail the management of runoff water and geotechnical stabilization of certain mountain slopes in the vicinity of the waste dump; *(c)* support infrastructure: the dismantling and replacement of certain roads and buildings associated with the exploration activities undertaken by Eco Oro. The planned works entail the replacement of the surface for some of the roads built by Eco Oro as well as the dismantling of certain infrastructure; and *(d)* water treatment: continue with the treatment and control of water drainage flowing from the areas of mining development.

[475] Claimant's First Submission, para. 349, referring to the official exchange rate of 5 July 2019 as reported by Colombia's Central Bank: USD1/ COP$3,206.92 (available at: https://www.banrep.gov.co/es/estadisticas/trm).

[476] Claimant's First Submission, para. 350.

[477] Respondent's Response, para. 240, referring to CDMB, Technical Report on Site Visit to Concession 3452 (16 May 2021) (**Exhibit R-259**).

[478] CDMB, Technical Report on Site Visit to Concession 3452 (16 May 2021) (**Exhibit R-259**), pp. 7-41.

c. the Closure Plan did not include plans for the reforestation of the areas formerly occupied with support infrastructure;

d. Eco Oro ought to close and ensure the restoration of all the drilling and exploration platforms, as well as remove all infrastructure—aside from that relating to environmental management—from the areas overlapping with the Santurbán Páramo; and

e. Eco Oro ought to include a detailed breakdown of the "post-closure" activities planned to mitigate and prevent environmental impacts caused by tunnel drainage and sewage water, cautioning that simply dismantling the water treatment plant without the adoption of any additional measures would likely result in the contamination of the Páez creek.

281. According to Colombia, given the multiple deficiencies identified by the CDMB, the final cost of its Remediation Plan – currently set at USD2,178,705.37 – is likely to change. [479]

282. Finally, Colombia takes issue with Eco Oro's contentions with regard to additional costs associated with the alleged incursion of illegal miners. According to Colombia, there is no basis for Eco Oro to suggest that Colombia is somehow responsible for any of these costs, as *(i)* Eco Oro has not proven that the incursion of illegal miners, and any additional costs incurred by Eco Oro associated with it, has resulted from Colombia's breach of Article 805; *(ii)* Eco Oro is responsible for the ongoing delays in the process for approving a remediation plan; *(iii)* Eco Oro has always been required to manage all exploration tunnels and tunnel entrances within Concession 3452, which include the El Indio mine: hiring private security is simply a basic measure to protect the Concession Area, over which Eco Oro continues to hold surface rights for the purposes of carrying out its environmental remediation obligations; *(iv)* Eco Oro has provided no evidence that the alleged illegal mining activities would result in higher remediation costs; and *(v)* Colombia has taken measures to combat illegal mining within Concession 3452, which were contemporaneously welcomed by Eco Oro. [480]

(3) Claimant's Reply

283. Eco Oro submits that the Technical Report does not represent CMDB's final views regarding the Closure Plan, rather consisting of a "preliminary assessment". In any event, Eco Oro notes that it addressed, by letter dated 30 June 2022, the alleged "deficiencies" invoked by Colombia, either by indicating that they *(i)* had already been addressed in the Closure Plan; or *(ii)* involved impacts that had not been caused by Eco Oro; or *(iii)* were too vague or unclear to be addressed. [481]

284. So far as the incursions by illegal miners are concerned, Eco Oro stresses that it has sent numerous communications to the relevant authorities detailing the ongoing illegal mining activities in the area of Concession 3452. [482] In particular, Eco Oro highlights that, in its numerous reports to the

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[479] Respondent's Response, para. 243.

[480] Respondent's Response, para. 244, referring to Letter from Eco Oro to the Commander of the California Police Department (31 March 2017) (**Exhibit R-223**), p. 5; ANM, Resolution No. VSC 545 (3 June 2016) (**Exhibit R-221**).

[481] Claimant's Reply, para. 260, referring to Letter from Eco Oro to the CDMB (30 June 2022) (**Exhibit C-482**), Annex A.

[482] Claimant's Reply, para. 263, referring to Letter from Eco Oro to the Commander of the California Police Department (31 March 2017) (**Exhibit R-223**); Letter from Eco Oro to the CDMB (30 June 2022) (**Exhibit C- 482**), Annex 2.

CDMB, it has noted that illegal miners were using mercury, nitrogen and gunpowder to carry out their activities, and that they had stolen machinery and other property that Eco Oro would have used to carry out its remediation activities. [483]

285. Eco Oro asserts that, given Colombia's failure to issue a decision on Eco Oro's Closure Plan, the nature of the remediation works to be carried out can only be assessed on the basis of that Closure Plan. Eco Oro reiterates that the principle of full reparation requires that Eco Oro be made whole in respect of any remediation costs it eventually incurs, as these form part of the losses flowing from Colombia's breaches of the Treaty. [484]

(4) Respondent's Rejoinder

286. Colombia notes that the CDMB has yet to render a final decision on Eco Oro's Closure Plan, such that Eco Oro's allegations are unfounded and premature. In any event, Colombia submits that there is nothing arbitrary, abusive or irregular in the CDMB's rejection of Eco Oro's Closure Plan, not only because Eco Oro's Closure Plan is plainly insufficient for the CDMB to determine the scope, effectiveness and costs of the proposed activities, but also because Colombian law does not bar Eco Oro from carrying out the closure and restoration activities in the Restoration Area of the páramo. [485]

287. So far as the alleged influx of illegal miners is concerned, Colombia reiterates that Eco Oro has still not provided any evidence of such alleged added costs. Colombia further notes that it was incumbent upon Eco Oro, in its capacity as holder of surface rights and responsible for environmental remediation activities, to adopt basic security measures. Colombia submits that Eco Oro has instead abandoned its properties in the Angostura Deposit area, thereby contributing to the escalation of the problem, as illegal miners could exacerbate the area's environmental situation. [486] Moreover, Colombia argues that Eco Oro's conduct is contrary to its duty of mitigation, as it has not filed any complaint to the competent authority, i.e., the mayor, pursuant to Article 306 of the Mining Code. Colombia therefore contends that Eco Oro should not be entitled to recover any damages from the supposed additional costs of its Closure Plan. [487]

288. Finally, Colombia makes reference to a military operation conducted by the Colombian army on 22 July 2022 with a view to evicting illegal miners invading the former area of Concession 3452 and acknowledges that illegal mining is a challenge of large magnitude and that the use of force has limited effectiveness in solving this long-standing and highly complex social and economic situation. [488]

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[483] Claimant's Reply, para. 264, referring to Letter from Eco Oro to the CDMB (30 June 2022) (**Exhibit C-482**), Annex 2, pp. 2-61, 68-114, 118, 125-135, 141, 147-150, 155-156, 161-167.

[484] Claimant's Reply, para. 266.

[485] Respondent's Rejoinder, paras. 294-295, referring to Ministry of Environment Resolution No. 2090 (19 December 2014) (**Exhibit C-34**), Article 9.

[486] Respondent's Rejoinder, para. 296, underscoring that Eco Oro had admitted that it had stopped paying for private security in the area, and referring to Claimant's First Submission, para. 343; Letter from the CDMB to Eco Oro (22 July 2022) (**Exhibit R-306**), p. 4.

[487] Respondent's Rejoinder, para. 297, referring to Law No. 685 (as amended) (8 September 2001) (**Exhibit C-8**), Article 306; Letter from Eco Oro to the CDMB (30 June 2022) (**Exhibit C-482**), Annex 2.

[488] Respondent's Rejoinder, para. 298, referring to "La extraña muerte de un minero en medio de un operativo del Ejército en Santander", *El*

VI. CLARIFICATIONS WITH REGARD TO THE DECISION

289. In their submissions, the Parties have identified the following aspects in the Decision, which could be clarified:
a. definition of the "Angostura Project": according to Eco Oro, this definition should also include the Móngora deposit. [489]

b. paragraph 766, with regard to Article 16 of Law 373 of 1997. According to Eco Oro, "*Colombia did take the requisite actions to protect the páramo. In this regard, Claimant notes that Law 373 of 1997 [...] concerns an intended national plan for the efficient use of water, to be implemented by the regional and local environmental authorities. In an effort to protect water sources in the country, and thus effectively prepare and implement the plan for the efficient use of water, Article 16 of Law 373 required the acquisition of, inter alia, the páramo areas. However, Article 16 of Law 373 was amended in 2003 so as to require that Colombia 'acquire or protect', inter alia, páramo areas. Ultimately, Article 16 of Law 373 was repealed in 2007. [...] As such, Colombia was not required to actively purchase all land in páramo areas in the country (which would be a daunting and arguably unfeasible objective given that páramo areas are estimated to account for 2.55% of Colombia's continental territory (ie almost 3 million hectares)*". [490]

c. paragraph 796(b)(i): while this paragraph refers twice to Resolution 839 dated 2 August 2016, the correct reference is to Resolution 829 dated 2 August 2016. [491]

and

d. paragraph 898: Eco Oro notes that it conducted two PEAs in relation to the underground mining project at Angostura. [492]

VII. TRIBUNAL ANALYSIS AND DETERMINATION

290. Article 834 (*Interim Measures of Protection and Final Award*) of the FTA provides, *inter alia*, as follows:

"*2. Where a Tribunal makes a final award against the disputing Party, the Tribunal may award,*

Colombiano (22 July 2022) (**Exhibit R-307**); and "'Ay, hijue... lo mató, lo mató': investigan confusa muerte de minero en Santander", *Semana* (22 July 2022) (**Exhibit R-308**).

[489] Claimant's First Submission, fn. 1, referring to Golder Associates, Resource Estimation of the Móngora Gold-Silver Deposit (prepared for Eco Oro) (18 April 2012) (**Exhibit BD-22**), p. 12.

[490] Claimant's First Submission, fn. 376, referring to Law 812 (26 June 2003), Article 89 (not in the record); Law 1151 (24 July 2007), Article 160 (not in the record); IAvH, *Aportes a la conservación estratégica de los páramos de Colombia: actualización de la cartografía de los complejos de paramo a escala 1:100.000* (6 February 2014) (**Exhibit C-200**), pp. 36-37.

[491] Claimant's First Submission, fns. 134, 141, 249, 256, referring to National Mining Agency Resolution No. VSC 829 (notified to Eco Oro on 8 August 2016) (2 August 2016) (**Exhibit C-53**).

[492] Claimant's First Submission, fn. 401, referring to NCL Ingeniería y Construcción Limitada, Mineral Resources Estimate and Preliminary Economic Assessment for Underground Mining (25 April 2011) (**Exhibit CLEX- 25**); Golder Associates, Updated Preliminary Economic Assessment on the Angostura Gold-Silver Underground Project (23 March 2012) (**Exhibit CLEX-26**).

separately or in combination, only:

(a) *monetary damages and any applicable interest;*

(b) *restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution.*

The Tribunal may also award costs and attorney's fees in accordance with this Section and the applicable arbitration rules.

[...]

4. A Tribunal may not order a disputing Party to pay punitive damages." [493]

291. In the absence of any provision in the Treaty as to the appropriate standard of compensation, the Tribunal looks to customary international law as set out in the ILC Draft Articles on State Responsibility. The applicable standard of compensation, as routinely applied by investment tribunals, is the international law standard of full reparation for the damage actually suffered, as established by the Permanent Court of International Justice in the *Chorzów Factory* case, namely that "[r]*eparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed*". [494] This principle is also reflected in Article 36 of the ILC Draft Articles on State Responsibility.

292. The Parties do not dispute that this is the standard to be applied, and agree that the burden is on Eco Oro, as Claimant, to establish its loss on the balance of probabilities. The burden is thus on Eco Oro to prove, with a sufficient degree of certainty, that Colombia's breaches of Article 805 of the Treaty has caused Eco Oro loss. Eco Oro must further prove, again on a balance of probabilities, the quantum of that loss. Where the Parties disagree is on the application of this standard to the majority of the Tribunal's conclusions on liability. Eco Oro submits that the loss of its acquired right to exploit is equivalent to the destruction of the value associated with the Project. Eco Oro values this as the total value of the Project as calculated pursuant to the Comparable Transactions methodology. For its part, Colombia submits that Eco Oro's loss is limited to the lost opportunity to apply for an environmental license solely over the Remaining Area of Concession 3452 which, it argues, has a zero value.

293. Before it can consider the quantum of loss suffered, the Tribunal must first identify the measures that are in breach of Article 805. Eco Oro asserts that the measures in breach of Article 805 commence with Resolution 2090, whereas Colombia says that, given the majority of the Tribunal found the Challenged Measures were a legitimate exercise of Colombia's police powers, it was only the measures taken by Colombia after Resolution VSC 829 that comprised the breach of Article 805.

294. As explained in paragraph 821 of the Decision, the majority of the Tribunal found from a review of Colombia's actions "[...] *viewed as a whole, that Colombia's approach to the delimitation of the*

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[493] 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 834.

[494] *Case Concerning the Factory at Chorzów* (Germany/Poland) (PCIJ), Merits (1928) (**Exhibit CL-1**), p. 47.

Santurbán Páramo was one of arbitrary vacillation and inaction which inflicted damage on Eco Oro without serving any apparent legitimate purpose." These actions include "[…] *Colombia's actions in refusing to allow mining exploitation activities to take place in the entire area of Concession 3452 without payment of compensation, its inconsistent approach to the delimitation of the Santurbán páramo and its ultimate (and continuing) failure to delimit the Santurbán Páramo frustrated Eco Oro's legitimate expectations.* […]." [495] The actions further include Colombia's "[…] *failure finally to delimit the Santurbán Páramo in circumstances where Eco Oro was advised that no environmental licenses could be issued for mining projects in the vicinity of the Santurbán Páramo until the new delineation had been completed and the failure to give Eco Oro an extension to submit its PTO, comprise conduct that failed to provide Eco Oro with a stable and predictable regulatory environment.* […]." [496] Indeed, the majority of the Tribunal state in paragraph 820 of the Decision, that "[…] *Colombia's actions with respect to the delimitation of the Santurbán páramo have been grossly inconsistent and given rise to considerable confusion and uncertainty as to (i) what activities may and may not be undertaken within the páramo as currently delimited; (ii) what the final boundaries will comprise; and (iii) when the final delimitation will be announced.* […]." The majority of the Tribunal therefore held that these actions of Colombia amounted to gross unfairness or manifest arbitrariness falling below acceptable standards and further held that Colombia's failure at any stage to lawfully and finally delimit the Santurbán Páramo is a wilful neglect of Colombia's statutory duty.

295. It can be seen from the above that the breach of Article 805 is not to be found in any single act of Colombia but in the totality of its actions, culminating in its failure even now to issue a final and lawful delimitation of the Santurbán Páramo. This has resulted in a continuing suspension of mining activities leaving Concession 3452 in limbo: there is no mining ban, but equally the Concession title holder has no right or ability to continue exploration activities.

296. The majority of the Tribunal then determined that, as a result of the breach of Article 805, Eco Oro has been deprived of "[…] *its acquired right to exploit, pursuant to which right it has been deprived of the opportunity to obtain approval of a PTO and apply for an environmental licence with respect to the totality of the concession area* […]*. Without a right to exploit, albeit a right which was dependent upon an approved PTO and environmental licence, there was no possibility of exploiting the Angostura Deposit such that the Concession became valueless*." [497]

297. Paragraphs 847-849 of the Decision are noteworthy with regard to causation and the nature of Eco Oro's losses:
"*847. By a majority, the Tribunal finds that Colombia's breach of Article 805 entitles it to make a claim for damages in respect to any loss that it can show to have been caused as a result of that breach.*

848. The Tribunal has found that there was no mining ban in existence at the time the FTA came into force. The Tribunal has further found, by a majority, that Eco Oro had an acquired right to exploit, albeit such right could only be exercised upon its PTO being approved and upon obtaining an environmental licence to allow it to engage in exploitation. It is common ground that in absence of such a license Eco Oro could not engage in any exploitation. The Tribunal further does not

[495] Decision, para. 804, finding of the Majority Tribunal.
[496] Decision, para. 805, finding of the Majority Tribunal.
[497] Decision, paras. 633-634.

find, by a majority, that Eco Oro's claim is necessarily speculative; Colombia has not shown that no environmental licences were issued for mining activities in páramo areas since the General Environmental Law came into force such that the precautionary principle cannot be said to apply, or that Eco Oro had no prospect whatsoever of obtaining an environmental licence.

849. Finally, the Tribunal does not accept, to the extent it is pleaded by Colombia, that it was Eco Oro's intervening acts and omissions that caused its loss, that the casual link has been broken by Eco Oro's renunciation. To the extent that Eco Oro is able to establish that it has suffered losses as a result of the breach of Article 805, such losses will have been incurred before the renunciation of the Concession and the renunciation was effected by Eco Oro in order to mitigate its continuing losses as detailed in its letters to MinMinas and MinAmbiente.[498]"

298. The majority of the Tribunal found that Colombia's breach of Article 805 entitles Eco Oro to make a claim for damages in respect to any loss that Eco Oro could show to have been caused as a result of that breach, namely the breach of Article 805.[499] The Tribunal must therefore determine, to the best possible extent, what losses were caused by those measures which were in breach of Article 805, and what is the value of such losses.

299. In ascertaining the quantum of loss suffered by Eco Oro, it is unarguable that inherent in the reparation standard is the principle that a claimant can only recover for losses which it has established to have been caused by an internationally wrongful act. A loss caused by other factors, including any act which has been found to be lawful, is not recoverable. To this end, in identifying the losses which are caused by the acts found by the majority of the Tribunal to amount to a breach of Article 805, it is necessary to exclude those losses which would have been suffered in any event as a result of measures found by the majority of the Tribunal to be lawful. This requires the Tribunal to distinguish between the measures that have been found to be a breach of Article 805, on the one hand, and the loss that has been suffered by Eco Oro as a result of such measures, on the other. The question for the Tribunal is therefore: what losses were caused as a result of the breach of Article 805?

300. According to both the majority of the Tribunal's findings on liability and Eco Oro's own submissions, Concession 3452 became valueless as a result of the Challenged Measures, commencing with the Resolution 2090 delimitation and concluding with the deprivation created by Resolution VSC 829.[500] This can be seen from Eco Oro's assertion that it was specifically Resolution VSC 829 which deprived Eco Oro of over 50% of the area of Concession 3452 and a third of the area of the Angostura Deposit and, of critical significance, that it was this loss of resources which destroyed the economic viability of the Project.[501] Indeed, in its first submission in response to the Tribunal questions, Eco Oro explains that Resolution VSC 829 was "*the critical measure causing Eco Oro to suffer a loss*".[502]

301. The difficulty at the present stage is that the majority of the Tribunal has held that the Challenged

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[498] Letter from Eco Oro (Mr Orduz) to the Ministry of Mining and Energy (Ms Suárez) (29 March 2019) (**Exhibit C-423**); Letter from Eco Oro (Mr Orduz) to the Ministry of Environment (Mr Lozano) (29 March 2019) (**Exhibit C-424**).

[499] Decision, para. 847.

[500] Decision, para. 634; Claimant's Memorial on the Merits (19 March 2018), paras. 175-176.

[501] First Moseley-Williams Statement, para. 59.

[502] Claimant's First Submission, para. 11.

Measures were a lawful exercise of Colombia's police powers.[503] As the majority of the Tribunal found, the breach of Article 805 was not the issuance of Resolution 2090 or Resolution VSC 829 in themselves, but a series of measures continuing to the present day, being the totality of the inconsistent, arbitrary and unfair actions of Colombia with respect to the delimitation of the Santurbán Páramo. The majority of the Tribunal concluded that Resolution 2090 and Resolution VSC 829 themselves were measures that were undertaken lawfully pursuant to its police powers.

302. Given the loss of the economic viability of the Project was caused by the Resolution 2090 delimitation and the issuance of Resolution VSC 829, and given the majority of the Tribunal has found this was a lawful exercise of Colombia's police powers, it must follow that, regardless of any view taken on Article 805, the entirety of the value of Concession 3452 was lost as a result of the Respondent's legitimate and lawful exercise of its police powers. A majority of the Tribunal therefore cannot accept that Colombia's breaches of Article 805 caused the total loss in value of the Project. A majority of the Tribunal therefore finds Eco Oro's argument that it is entitled to recover the full value of Concession 3452 to be unarguable: the loss of value was caused by acts found to be lawful and not by the breach of Article 805 identified by the majority of the Tribunal.

303. In light of this, a majority of the Tribunal concludes that the only identifiable loss which does flow from the finding of the breach of Article 805 is the inability of Eco Oro to apply for an environmental licence, in respect of that part of the original Concession that remained. In its Question (d), the Tribunal specifically asked the Parties to present argument on the value of this lost opportunity at the end of its Decision on liability.[504] In response to this question, Eco Oro elected to provide no evidence or arguments in relation to the value of this loss. Instead, it provided expert evidence with regard to the market value of Concession 3452, based on the Comparable Transactions methodology.[505] Notably, the Claimant went further, arguing that to value the loss of opportunity to apply for an environmental licence would not be appropriate in this case.[506] In the view of the majority of the Tribunal, however, reliance on the Comparable Transactions methodology favoured by the Claimant is not an appropriate means to value a loss of opportunity. The Comparable Transactions methodology is useful when seeking to assess the full market value of an investment. It is perhaps for this reason that Eco Oro has favoured the use of this methodology in connection with its argument that the breach of Article 805 identified by the majority of the Tribunal had the effect of depriving the Claimant of the whole of the value of its investment. Once it is recognised, however, that the identified breach of Article 805 did not deprive the Claimant of the full value of the investment, but only the opportunity to apply for an environmental licence, it is not apparent that the Comparable Transactions methodology can have any real utility. Put simply, the methodology is premised on a state of affairs (the total loss of the investment's value) which the majority of the Tribunal has accepted does not exist in this case.

304. Eco Oro bears the burden of establishing its actual loss caused by Colombia's breach of Article 805, namely the loss of opportunity to apply for an environmental license. It has not done so. This failure means that Eco Oro has offered the Tribunal no basis on which to value the loss it has suffered, and as a consequence the majority of the Tribunal has concluded that it has no basis on which to justify awarding damages to the Claimant. In reaching this conclusion, the majority of the Tribunal notes

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[503] Decision, para. 699.

[504] Tribunal Question D.

[505] See Claimant's First Submission on the Tribunal's Questions, paras. 306-310; and Claimant's Reply Submission on the Tribunal's Questions, paras. 217-221.

[506] See Claimant's First Submission on the Tribunal's Questions, paras. 169-177.

that this approach has been adopted by the tribunal in *Infinito Gold Ltd. v Republic of Costa Rica*, and by tribunals in a number of other cases.[507]

305. Yet, even if this aspect is put to one side, it is not clear to the majority of the Tribunal that Eco Oro's inability to apply for an environmental licence has resulted in any actual quantifiable financial losses. Under the applicable domestic law, the grant of an environmental licence is subject to the discretion of the Respondent. It cannot be excluded that, absent the acts found to amount to a breach of Article 805, the Respondent could have decided, on an entirely lawful basis, to refuse to grant any environmental licence. Assuming, *arguendo*, that Colombia had issued its final delimitation in compliance with Judgment T- 361, such a delimitation could conceivably comprise the same boundaries as Resolution 2090, or indeed overlap a greater proportion of the Angostura Deposit, but this would not have been in breach of Article 805. Of course, the Tribunal also accepts the possibility that any final delimitation may not have overlapped the Angostura Deposit. However, on the basis of the evidentiary record before it, the majority of the Tribunal considers that it is not in a position to ascertain the probability of whether or not any final delimitation would overlap the Angostura Deposit. Without a crystal ball, there is simply no evidence or other basis on which the majority of the Tribunal feels it is in a position to determine the likelihood of an environmental licence being granted, or the value of the opportunity to apply for a licence which may or may not be granted. The Claimant has simply failed to provide the evidence or argument to allow the Majority to conclude otherwise. Despite the questions asked by the Tribunal (in particular, Tribunal questions D, E and F), Eco Oro has not provided the Tribunal with any guidance as to how to calculate this percentage risk. Indeed, Eco Oro accepts that "[i]*t is not possible to predict the location of the 'regulatory Santurbán Páramo' (ie the area over which the Government wishes to establish a mining ban) because its delimitation will not be based solely upon objective scientific criteria, but on policy considerations that are inherently subjective in nature.*"[508]

306. It is not in dispute that the 2090 Atlas has some inaccuracies. It was a pilot delimitation by IAvH, using the same field data as had been used to prepare the older 2007 and 2011 Atlases, relying upon "*very long-standing studies or older studies. There is material from collections. There is generic information which, moreover, is in and reported in the reports of the Institute for each páramo. We have a biodiversity information system, there you can find all the references.*"[509] The unchallenged testimony of Mr Moseley-Williams was that Resolution 2090 included almost the entirety of the town of Vetas[510] and also certain densely populated areas of the municipality of Berlin. MinAmbiente acknowledged that certain such areas should be removed from the Resolution 2090 delimitation[511] albeit that this has not been done to date. Whilst there has been an agreement reached with the Vetas community as to revising the boundary to exclude the community from the delimited area, which shows that there can be adjustments to the páramo boundary, Colombia describes this agreement as preliminary. The Tribunal further notes that the CDMB also recommended changes should be made to the 2090 Atlas. Indeed, the Constitutional Court itself

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[507] *Infinito Gold Ltd. v Republic of Costa Rica* (ICSID Case No. ARB/14/5) Award (3 June 2021) (**Exhibit RL- 197**), para. 585. See also *Pawlowski AG and Projekt Sever S.R.O. v Czech Republic* (ICSID Case No. ARB/17/11) Award (1 November 2021) (not in the record), paras. 728-737; *The AES Corporation and TAU Power BV v Republic of Kazakhstan* (ICSID Case No. ARB/10/16) Award (1 November 2013) (**Exhibit CL-79**), paras. 467-468; *Rompetrol Group N.V. v Romania* (ICSID Case No. ARB/06/3) Award (6 May 2013) (not in the record), paras. 281-288; *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* (ICSID Case No. ARB/05/22) Award (24 July 2008) (**Exhibit CL-50**), paras. 788-806.

[508] Claimant's First Submission, paras. 181-183.

[509] Tr. Day 3 (Ms Baptiste), 736:2-8.

[510] First Moseley-Williams Statement, para. 27.

[511] Ministry of Environment Presentation, "Delimitación del Páramo de Santurbán" (December 2014) (**Exhibit C- 217**), p. 43.

noted that MinAmbiente may modify the delimitation given the errors in the delimitation.

307. It is also of note that the IAvH itself accepted that there could have been a margin of error of 100 metres of altitude in the delimitation and MinAmbiente estimated that the margin of error could have been even greater, potentially as much as 150 metres in altitude in certain areas because "[…] *the quality of information has limitations* […]", stating that further field studies should have been undertaken to verify the information.[512] The Angostura Deposit is located in a mountainous location, such that this margin of error may be significant in that a 150 metre change in altitude in the area where the Angostura Deposit is located could result in a shift of up to 250 metres in the Resolution 2090 delimitation. If this is so, the Angostura Deposit would be outside the Preservation Zone of the Santurbán Páramo.

308. The difficulty seen by the majority of the Tribunal is that it has not been provided with the necessary evidence – or indeed any evidence – to allow it to calculate the probability chances that the Angostura Deposit would fall outside the páramo such that an environmental licence would be granted. Whilst Eco Oro refers to the conclusion of the ECODES Report that there is no páramo in that part of Concession 3452 where the Angostura Deposit is located, the 2090 Atlas and the ECODES Report were prepared for different purposes and the Tribunal therefore does not find it possible to apply the findings of either of the reports in considering probability chances. One of the major differences in the approaches followed by the IAvH and ECODES is whether a Transition Zone should be included and, if so, how. Eco Oro says no Transition Zone should be included whereas Colombia has included such a strip. Had the IAvH used the upper limit of the Transition Zone, almost the entirety of the Angostura Deposit would have remained outside the delimited zone; by including the Transition Zone as part of the delimited area, the overlap with the Angostura Deposit increased from 6% to 60%.

309. Ms Baptiste, who was put forward by Colombia, explains that:
"[t]*he 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, that's where the water may go in deeper or the flora now or the flora may change, and you have different ecosystems and changes and the forest is trying to crop up to the páramo, and the páramo is trying to conquer the natural areas left by the forest.*

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. It goes over the bridges, and it also connects to the forest area, so this is one of the areas that requires the most care. And that's the reason why we devote a good deal of time to work thoroughly on this scale that we were requested to submit, and that is one of the important issues.

Since the strip may vary widely, as you just mentioned, it would be a good idea to carry out – well we conducted the study of the breadth of the strip on the field that required sampling and also financial resources. Studies had been conducted to try to determine the variability, and plants and soil samples need to be collected, a large amount material, to be able to determine in that area what the behaviour is."[513]

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[512] Ministry of Environment Presentation, "Delimitación del Páramo de Santurbán" (December 2014) (**Exhibit C- 217**), p. 43.
[513] Tr. Day 3 (Ms Baptiste), 741:7-742:12.

310. Against this, Mr Aldana explains that the Transition Zone has specific features which makes it a separate ecosystem from the páramo, opining that there is no scientific evidence that says the Transition Zone is not an independent ecosystem from the páramo.[514] Mr Aldana further says that the high-Andean forest is a further separate ecosystem.[515] Mr Aldana says that the IAvH's approach to delimitation missed "*one of the most important principles of ecology which is spatial heterogeneity* […] [which is] *a principle that makes it such that evolution works, that ecosystems work or operate in tandem. Otherwise, it would be easy to delimit everything with a single line. But that is not the case. Actually, there are social and economic factors that also condition ecosystems.*"[516]

311. Colombia's position is therefore that the regulatory páramo must include a Transition Zone, whereas Eco Oro explains that no páramo overlaps the Angostura Project. The difficulty for the Tribunal is that ECODES and IAvH are undertaking different analyses. The IAvH is assisting Colombia in preparing a regulatory delimitation of the páramo, whereas ECODES is assessing whether there is any evidence of ecological páramo overlapping the Angostura Deposit. Colombia does not criticise the technical content of the ECODES Report. Ms Baptiste considers it a "*qualified and informed opinion*[] *on the subject*",[517] but she notes that "[d]*espite the value in analysing the páramo vegetation in greater detail, the ECODES' study is therefore incompatible with the IAVH's mission to determine the reference area, because (i) it does not follow the same methodology, (ii) it was not conducted at the same scale, and (iii) it only covers a minimal fraction of the total area of the Santurbán Páramo, as it is limited to the area of the Angostura project's deposit*".[518]

312. Colombia also explained that to safeguard the scientific consistency of the delimitation, the IAvH needed to follow its selected methodology homogenously. The IAvH could not simply have adopted information prepared by a private party with a direct interest in the outcome of the delimitation. Therefore, the ECODES Report was not compatible with the delimitation exercise undertaken by the IAvH as it did not analyse the transition between the páramo ecosystem and the forest. It provided an assessment of the "*State of preservation of biodiversity in the ecosystems associated with the Angosturas California sector, Santander*". Whereas, as explained by Mr Sarmiento, the IAvH's mission was not simply to assess the current conservation state of the páramo, but to delimitate the páramo ecosystem in its integrity, regardless of variations as to its current state in certain specific areas.[519]

313. In its Rejoinder submission on the Tribunal's questions, Colombia said as follows:
"*In conclusion, the ECODES Report is not a reliable source to identify the overlap of the Angostura Deposit with the Santurbán Páramo, because it adopts a minimalistic and self-serving definition of the 'scientific' or 'ecological' páramo. This definition is clearly at odds with the equally reasonable and valid precautionary definition adopted by the IAVH, as recognised by the Tribunal in its Decision. This definition was used for the preparation of the delimitation of the 'regulatory' páramo in Resolution 2090, and is also used in the 2019 Páramo Delimitation Proposal. Further, the ECODES Report is not an objective study, as it was commissioned by the mining industry as a lobbying*

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[514] Tr. Day 2 (Mr Aldana), 520:14-16.
[515] Tr. Day 2 (Mr Aldana), 521:1-8.
[516] Tr. Day 2 (Mr Aldana), 523:12-21.
[517] First Baptiste Statement, para. 51.
[518] First Baptiste Statement, para. 52; Second Baptiste Statement, para. 29.
[519] Sarmiento Pinzón Statement, para. 12.

document for the specific purpose of influencing the 'regulatory' delimitation of the páramo." [520]

314. To calculate the probability chances that Eco Oro would be awarded an environmental licence, it would be necessary to determine the probability chances that a Transition Zone would be included in the delimitation. However, as described above, the IAvH and ECODES disagree on this issue such that it is not possible for the Tribunal to make this determination. The Tribunal finds that both experts acted with integrity in performing the work they were engaged to undertake, but they were instructed to undertake different exercises. It is possible, given the conclusions of the ECODES Report, that none of the Angostura Deposit is actually overlapped by páramo. However, in delimiting the Santurbán Páramo, Colombia is not only considering the parameters of the ecological páramo, it is seeking to determine the regulatory páramo after undertaking the required consultations and ensuring consistency of approach in the delimitation of all Colombia's páramos. In application of the precautionary principle, the Tribunal concludes that it was not unreasonable for the Transition Zone to have been included when delimiting the Santurbán Páramo. [521] Further, the Tribunal does not find it can rely on the ECODES Report's conclusion that no páramo overlaps the Angostura Deposit in seeking to assess the value of Eco Oro's loss of opportunity.

315. The Tribunal therefore finds that, whilst it is clear Colombia's breaches of Article 805 caused funding difficulties for Eco Oro and, in the absence of an extension to its Licence, it was forced to give up Concession 3452, by this stage the value of the Project had already been destroyed. Accordingly, the majority of the Tribunal finds that Eco Oro has not met its burden of proof to show that Colombia's actions caused Eco Oro a quantifiable harm. The harm had already been caused by the Challenged Measures.

316. Whilst Eco Oro may question the need for a damages assessment to have been undertaken given the majority of the Tribunal's conclusion, this exercise was necessary as the Tribunal sought to understand what loss was caused by the breach of Article 805 given its finding as to Article 811 and how to value that loss. The Tribunal accepts that in its Decision it stated that it did not believe it was reasonable to expect Eco Oro to prejudge the boundaries of the final delimitation in circumstances where Colombia has itself failed to determine the boundaries. However, to quantify the damages caused by Colombia's breach, it was necessary for Eco Oro to provide some guidance to the Tribunal as to the value of Eco Oro's lost opportunity in circumstances where the value of the Project was destroyed by a lawful measure carried out by Colombia. In the absence of such guidance, the Tribunal cannot assess the likelihood that a revised delimitation would or would not permit economic exploitation of the Angostura Deposit. In the absence of any evidence or other basis on which the Tribunal can assess either the likelihood of an environmental licence being granted, or the value of the opportunity to apply for a licence which may or may not be granted, the majority of the Tribunal concludes that the only proper approach is to award no damages to Eco Oro.

317. In this regard, 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. However, Eco Oro accepts that the destruction to the value of the Concession was caused by the Challenged Measures, which the majority of the Tribunal found to be

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[520] Respondent's Rejoinder, para. 131.

[521] Decision, para. 655.

a lawful exercise of Colombia's police powers. Given that the Claimant has not been able to provide any evidence relating to the loss of opportunity which the majority of the Tribunal identified, despite being specifically asked to do so, [522] the Tribunal concludes that it cannot award damages for the breach of Article 805.

VIII. REMEDIATION COSTS

318. The principle that a Tribunal can only award damages in respect of losses which flow from an internationally wrongful act applies equally to remediation costs incurred by a claimant. In identifying such losses, the Tribunal must exclude costs that would have been incurred by the Claimant in any event.

319. In paragraph 919 of the Decision, the Tribunal requested the Parties to address two additional questions so as to assist the Tribunal in determining whether Eco Oro was entitled to an indemnity in respect of remediation costs. [523]

320. In response to those questions, the Claimant did not dispute the Respondent's argument that it would have been liable to pay remediation costs even if the internationally wrongful act identified by the majority of the Tribunal had not occurred, or if the project had gone ahead. Nor did the Claimant provide any evidence that the remediation costs it now faces are greater than the costs it would have faced in either scenario. The Claimant has argued only that the domestic law obligation to pay remediation costs was effectively triggered by the breach of Article 805. [524]

321. In such circumstances, a majority of the Tribunal concludes that the Claimant cannot recover its remediation costs. Whilst the breach of Article 805 may have brought the Claimant's remediation obligation forward in time, the existence of the obligation is plainly not the consequence of the breach of Article 805 identified by the majority of the Tribunal. Nor is there any evidence on the record to suggest that the breach of Article 805 identified by the majority of the Tribunal caused any increase in the Claimant's remediation costs. Indeed, given the early stage of the Project and the lack of any exploitation activity, it seems likely that the Claimant's remediation costs are lower than they would have been had the project been allowed to proceed.

322. The arguments advanced by the Claimant in relation to the activity of illegal miners takes the matter no further. [525] Whilst it is no doubt true that illegal mining is a significant issue in Colombia, it does not follow from this that the Respondent is somehow responsible for costs which the Claimant faces in relation to such activity as a result of the breach of Article 805. Whilst the majority of the Tribunal referred to the existence of illegal mining in its findings that there was a breach of Article 805, this was only to substantiate the view that the Colombian government had failed to reach a coherent policy on the management of the páramo. [526] As pointed out by the Respondent, the existence of

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[522] Tribunal Question D.

[523] Tribunal Questions M and N.

[524] Claimant's Reply, para. 254; Respondent's Response, para. 234, referring to Republic of Colombia, Decree No. 1076 (26 May 2015) (**Exhibit R-60**), p. 214, Article 2.2.2.3.9.2.

[525] Claimant's Reply, paras. 263-264.

[526] Decision, paras. 815-819.

illegal mining did not itself form any part of the majority of the Tribunal's conclusions on Article 805.[527] The majority of the Tribunal therefore concludes that there is no evidence that the remediation costs incurred as a result of the existence of illegal mining were the consequence of the breach of Article 805 identified.

IX. INTEREST AND COLOMBIAN TAXES

A. Interest

323. In paragraphs 912-913 of the Decision, the Tribunal noted the following:
"*912. The Tribunal accepts that, to the extent that Eco Oro has suffered loss as a result of Colombia's breach of Article 805 of the FTA, Eco Oro should receive full reparation and such reparation should include interest. The Tribunal further accepts that the appropriate interest rate should be a commercially reasonable rate.*

913. The Tribunal accepts Eco Oro's submissions that the US Treasury Bill rate is not a commercially reasonable rate. The Parties are invited to make any final submissions on what is a commercially reasonable rate."

324. Given the Tribunal's determination that there is no award of damages, this issue is moot.

B. The Award Shall Be Net of All Applicable Colombian Taxes

325. In paragraph 916 of the Decision, the Tribunal determined as follows:
"*In the absence of any submissions from Colombia, the Tribunal in principle accepts Eco Oro's submissions and holds that any award of damages will be expressly ordered to be net of all applicable Colombian taxes.*"

326. That decision was then incorporated in the dispositif set out in paragraph 920 of the Decision as follows:
"*(6)* [...] *Any award of damages will be expressly ordered to be net of all applicable Colombian taxes. Colombia will be ordered not to tax or attempt to tax the award and to indemnify Eco Oro in respect of any adverse consequences that may result from the imposition of a double taxation liability by the Colombian tax authorities if the declaration in the award recognising that the award is net of Colombian taxes is not accepted as the equivalent of evidence of payment.*"

327. As no damages are awarded, again this issue is moot.

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[527] Respondent's Response, para. 244.

X. ECO ORO'S REQUESTS FOR CLARIFICATIONS

328. The Tribunal has carefully considered those parts of the Decision that Eco Oro has identified could be clarified.

329. The first clarification relates to the definition of the "Angostura Project". Eco Oro notes in footnote 1 of its First Submission that "*For the definition of the 'Angostura Project', Eco Oro adopts the Tribunal's definition, and supplements it to also include the Móngora deposit (in addition to the Angostura deposit) in respect of which Eco Oro had also issued a NI 43-101 compliant estimate of Extractable Minerals.*" Eco Oro refers to Exhibit BD-22, p 12.

330. Paragraph 81 of the Decision states as follows:
"*Eco Oro owns 100% of the mining project located in the Eastern Cordillera of the Andean system, within the Vetas-California gold district, approximately 70 kilometres northeast of the city of Bucaramanga, Municipality of California, Department of Santander, and 400 kilometres North of Bogotá, comprising the Angostura gold-silver deposit (the "**Angostura Project**" or "**Project**").*"27

331. Footnote 27 to this paragraph details as follows:
"*The Angostura Project also includes five satellite projects: Móngora, La Plata, Armenia, Agualimpia and Violetal. See Notice of Intent to submit the claim to arbitration (7 March 2016) (**Exhibit C-48**), fn. 1. See also Ministry of Mines, Mining and Energy Planning Unit, Mining, an excellent choice for investing in Colombia: The Investor's Guide (2005) (**Exhibit C-94**), Figures 1 and 2.*"

332. It is clear from the content of footnote 27 of the Decision (as cited above) that the Angostura Project includes the Móngora satellite project but for the avoidance of doubt, the Tribunal clarifies that the definition of the "Angostura Project" includes the Móngora deposit.

333. The second clarification arises with regard to paragraph 766 of the Decision. This paragraph provides, in relevant part, as follows:
"*Colombia had the power to delimit the páramo and, pursuant to section 16 of Law 373 of 1997, it was obliged to acquire páramo areas such as the Santurbán Páramo 'as a priority' as well as to initiate a recovery, protection and conservation process to ensure protection of the páramo. However, Colombia did not take the necessary action it was legally required to take to protect the Santurbán Páramo; instead, it granted a mining concession over the area in question.*"

334. Eco Oro notes in footnote 376 of its First Submission that Colombia did take the necessary action as Colombia was not required by section 16 of Law 373 of 1997 to actively purchase all land in páramo areas. This is because the section in question was amended in 2003 to require Colombia to "*acquire or protect*", *inter alia*, páramo areas. Eco Oro says that Colombia was accordingly not required actively to acquire all land in páramo areas and Colombia did take the requisite actions to protect the páramo. Colombia has not objected to this. Accordingly, the Tribunal clarifies paragraph 766 of the Decision such that Colombia did take the requisite action under section 16 of Law 373 of 1997 to protect the páramo.

335. The third clarification relates to paragraph 796(b)(i) of the Decision. In footnotes 134, 141, 249 and 256 of the First Submission, Eco Oro notes that this paragraph refers twice to Resolution 839 dated 2 August 2016 whereas the correct reference is to Resolution 829 dated 2 August 2016. Colombia does not make any contrary submission and the Tribunal confirms that the references in paragraph 796(b)(i) of the Decision to Resolution 839 dated 2 August 2016 should instead be references to Resolution 829 dated 2 August 2016.

336. The final clarification relates to Paragraph 898 of the Decision which provides, in relevant part, as follows:
"*No Feasibility or pre-Feasibility study was undertaken for Eco Oro's underground mining project for the Angostura Deposit, the PEA it submitted to the Colombian authorities related to the open-pit mine (which it abandoned of its own volition) and there is no equivalent document in relation to the underground tunnel or underground mining.*"

337. In footnote 401 of its First Submission, Eco Oro says that it "[…] *conducted two PEAs in relation to the underground mining project at Angostura.*" Eco Oro refers to the two relevant PEAs which are exhibited at CLEX-25 and CLEX-26. Again, Colombia does not dispute this and the Tribunal accordingly clarifies that paragraph 898 of the Decision should refer to two PEAs and not to the "the" PEA.

XI. COSTS

338. Rule 28 (*Cost of Proceeding*) of the ICSID Arbitration Rules provides that:

> "*(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.*
>
> *(2) Promptly after the closure of the proceeding, each party shall submit to the Tribunal a statement of costs reasonably incurred or borne by it in the proceeding and the Secretary-General shall submit to the Tribunal an account of all amounts paid by each party to the Centre and of all costs incurred by the Centre for the proceeding. The Tribunal may, before the award has been rendered, request the parties and the Secretary-General to provide additional information concerning the cost of the proceeding.*"

339. During the Hearing,[528] the Parties agreed that no submissions on costs would be necessary. The Parties further agreed that the submission of a statement of costs reasonably incurred or borne by

[528] Tr. Day 5, 1573:16-1574:15.

each of them in the proceeding would suffice.

340. By e-mail dated 2 July 2020, the Tribunal noted the following:
"*In accordance with paragraph 23.2 of Procedural Order No. 1 and paragraph 42 of Procedural Order No. 10, the parties shall submit their respective costs statements after the closure of the proceeding.*

In view of the above provisions and that the proceeding has not yet been declared closed, please note that the issue of cost statements will be addressed with the parties promptly after the closure of the proceeding."

341. On 23 February 2024, the Tribunal invited the Parties to agree on a template for their Statements of Costs (which were not to include legal arguments) and to submit their respective Statements of Costs by 8 March 2024. The Tribunal further informed that, following receipt of the Parties' Statements of Costs, the Tribunal would proceed to close the proceedings in accordance with ICSID Arbitration Rule 38(1).

342. On 1 March 2024, the Claimant filed an application requesting the Tribunal's directions as to *(i)* the inclusion of a line item for the costs that the Claimant has incurred to obtain financing to pursue this arbitration; and *(ii)* the submission of short argumentation of up to two pages in their cost submissions to address exclusively the recoverability of arbitration finance costs.

343. On 5 March 2024, the Tribunal informed the Parties that it had decided to *(i)* allow the Claimant's application of 1 March 2024 to include details of its financing costs as a line item in its Statement of Costs; and *(ii)* allow the Parties to file short argumentation of up to two pages in their cost submissions to address exclusively the recoverability of arbitration financing costs.

344. On 8 March 2024, the Parties filed their respective Statements of Costs.

A. The Claimant's Cost Submissions

345. In its submissions, the Claimant argues that the Respondent should bear the total arbitration costs incurred by the Claimant, including legal fees and expenses. [529]

346. The Claimant has submitted the following claims for legal and other costs (excluding advances made to ICSID): [530]

		FEES AND EXPENSES ACCRUED	FEES AND EXPENSES PAID
1	Freshfields Bruckhaus Deringer	$22,787,788.05	$22,739,448.80

[529] See, e.g., Claimant's Reply, para. 267(h).
[530] See Claimant's Statement of Costs, para. 6.

	LLP		
2	Holland & Knight LLP	$482,658.90	$482,658.90
A	***SUBTOTAL COUNSEL***	***$23,270,446.95***	***$23,222,107.70***
3	Mark Moseley-Williams	$25,550.11	$25,550.11
4	Wilmer González Aldana	$8,186.00	$8,186.00
B	***SUBTOTAL FACT WITNESSES***	***$33,736.10***	***$33,736.10***
5	Compass Lexecon	$2,885,733.87	$2,885,733.87
6	Behre Dolbear	$1,417,862.01	$1,417,862.01
7	Prof. Margarita Ricaurte	$39,869.00	$39,869.00
8	FTI Consulting	$30,900.71	$30,900.71
9	Immersion Legal	$65,435.21	$65,435.21
C	***SUBTOTAL EXPERTS AND CONSULTANTS FEES AND COSTS***	***$4,439,800.80***	***$4,439,800.80***
10	Party representatives' travel expenses	$66,804.01	$66,804.01
D	***SUBTOTAL PARTY REPRESENTATIVES' TRAVEL EXPENSES***	***$66,804.01***	***$66,804.01***
SUBTOTAL – COST CATEGORIES A TO D	**$27,810,787.87**	**$27,762,448.62**	
11	Arbitration finance costs	$4,589,794.66	$4,492,899.48
E	***SUBTOTAL ARBITRATION FINANCE COSTS***	***$4,589,794.66***	***$4,492,899.48***
GRAND TOTAL	**$32,400,582.53**	**$32,255,348.10**	

347. With respect to category E (row 11), the Claimant indicates that it reflects "*a portion of the costs that Eco Oro had no option but to incur to obtain financing to enable it to pursue the arbitration.*" [531] It argues that such costs should be recovered, *inter alia*, because financing from third parties was the only means for the Claimant to bring this arbitration and maintain the company's business affairs during the pendency of the present case, and because said recovery would be consistent with the

[531] Claimant's Statement of Costs, para. 13.

principle of full reparation which requires an award of costs.[532] Accordingly, insofar as the Claimant prevails in the arbitration, it should recover the totality of its costs, including those which were required to finance the arbitration.[533] The Claimant highlights that such financing costs are "*a direct and immediate consequence of Colombia's unlawful measures*" as well as "*a reasonable and essential part of the company's costs in pursuing this arbitration*".[534]

B. The Respondent's Cost Submissions

348. In its submissions, the Respondent argues that the Claimant should bear all the costs and expenses of these proceedings, including the Respondent's legal fees and expenses.[535]

349. The Respondent has submitted the following claims for legal and other costs (excluding advances made to ICSID):[536]

	FEES AND EXPENSES ACCRUED	FEES AND EXPENSES PAID
Latham & Watkins LLP	US$ 4,437,590.00	US$ 4,370,716.00
ANDJE's In-House Costs	COP$ 415,881,680	COP$ 415,881,680
SUBTOTAL COUNSEL	***US$ 4,437,590.00 + COP$ 415,881,680***	***US$ 4,370,716.00 + COP$ 415,881,680***
Javier García	US$ 4,900.00	US$ 4,900.00
Carlos Sarmiento	EUR 1,542.60 +	EUR 1,542.60 +
	US$ 3,199.44	US$ 3,199.44
Luz Helena Sarmiento	EUR 3,162.74 +	EUR 3,162.74 +
	US$ 2,012.65	US$ 2,012.65
Brigitte Baptiste	EUR 4,338.78 +	EUR 4,338.78 +
	US$ 1,286.54	US$ 1,286.54
SUBTOTAL FACT	***EUR 9,044.12***	***EUR 9,044.12***
WITNESSES	*+*	*+*

[532] Claimant's Statement of Costs, paras. 16-21.
[533] Claimant's Statement of Costs, para. 20.
[534] Claimant's Statement of Costs, paras. 20-21.

[535] See, e.g., Respondent's Rejoinder, para. 300(b).
[536] Respondent's Submission on Costs, Part I.

	US$ 11,398.63	*US$ 11,398.63*
	FEES AND EXPENSES ACCRUED	**FEES AND EXPENSES PAID**
Christopher C. Johnson	US$ 60,500.00	US$ 60,500.00
Felipe de Vivero Arciniegas	COP$ 235,498,058	COP$ 235,498,058
Charles River Associates and Mario Rossi	COP$ 2,870,452,480.85	COP$ 2,870,452,480.85
	US$ 60,500.00	*US$ 60,500.00*
SUBTOTAL EXPERTS	*+*	*+*
	COP$ 3,105,950,538.85	*COP$ 3,105,950,538.85*
Bucaramanga and Angostura (Preparation of the Statement of Defence)	COP$ 3,732,862	COP$ 3,732,862
Paris (Preparation of the Statement of Defence)	COP$ 16,699,539	COP$ 16,699,539
Washington DC (Hearing Attendance)	COP$ 16,220,803	COP$ 16,220,803
SUBTOTAL PARTY REPRESENTATIVES' TRAVEL EXPENSES	*COP$ 36,653,204*	*COP$ 36,653,204*
	US$ 4,509,488.63	**US$ 4,442,614.63**
GRAND TOTAL	**COP$ 3,558,485,422.85**	**COP$ 3,558,485,422.85**
	EUR 9,044.12	**EUR 9,044.12**

350. In addition, the Respondent rejects the Claimant's assertion that it is entitled to recover arbitration finance costs. According to the Respondent, such costs are not recoverable under the ICSID Convention because they were not incurred "in connection with" the arbitration as required by Article 61(2) of the Convention and are outside the Tribunal's jurisdiction. Moreover, the Respondent argues that there is no precedent of an ICSID tribunal awarding arbitration finance costs to a successful claimant and, in any event, the Claimant's arbitration finance costs are not reasonable and hence not recoverable. [537]

C. The Tribunal's Decision on Costs

[537] Respondent's Submission on Costs, paras. 1-7.

351. Article 61(2) of the ICSID Convention provides:

"*In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.*"

352. This provision gives the Tribunal discretion to allocate all costs of the arbitration, including attorney's fees and other costs, between the Parties as it deems appropriate.

353. The costs of the arbitration, including the fees and expenses of the Tribunal and the Tribunal's Assistant, ICSID's administrative fees and direct expenses, amount to (in USD):

Tribunal's fees and expenses	
Juliet Blanch	401,987.18
Horacio Grigera Naón	312,570.28
Philippe Sands	177,499.78
Tribunal assistant's fees and	expenses
João Vilhena Valério	173,472.20
ICSID's administrative fees	336,000.00
Direct expenses	197,598.32
Total	**1,599,127.76**

354. The above costs have been paid out of the advances made by the Parties in equal parts.[538] As a result, each Party's share of the costs of arbitration amounts to USD 799,563.88.

355. In general, two approaches have been followed by ICSID tribunals in allocating costs: that costs 'lie where they fall', and that 'costs follow the event'.

356. In exercising its discretion, the Tribunal has carefully considered the Parties' submissions as well as the circumstances of the case, including not only the Parties' conduct in these proceedings but also their wider conduct towards each other. The Tribunal accepts that whilst Eco Oro has prevailed on jurisdiction and has been partly successful in the liability phase of these proceedings, it has been unsuccessful in its prosecution of large parts of its substantive claim, and has failed entirely in its claim for damages. Relatedly, however, the Tribunal is bound to note that Eco Oro's failure is in no insignificant part due to Colombia's failure to delimit the Santurbán Páramo, notwithstanding the ruling of the Constitutional Court. Had the delimitation been undertaken in accordance with Judgment T-361, the Tribunal may have been able properly and accurately to assess Eco Oro's claim

[538] The remaining balance will be reimbursed to the parties in proportion to the payments that they advanced to ICSID.

for damages.

357. The Tribunal further notes that the Parties and their counsel have undertaken these proceedings in a professional, efficient and courteous manner. Having regard to the totality of the elements the Tribunal is bound to take into account, the Tribunal exercises its discretion under Article 61(2) of the ICSID Convention to conclude that the costs of the proceedings should be shared equally by the Parties, and that each Party shall bear its own fees and other costs. The Tribunal so orders.

XII. AWARD

358. For the reasons set forth above, the Tribunal by majority decides as follows:
(1) The decisions made in the Decision are hereby reinstated as follows:

a. The Tribunal has jurisdiction over Eco Oro's claims (Tribunal's Decision, paragraph 920(1));

b. Colombia breached Article 805 of the Treaty (Majority Decision, paragraph 920(2));

c. Colombia shall not tax or attempt to tax the award (Tribunal's Decision, paragraph 920(6)); and

d. Colombia shall indemnify Eco Oro in respect of any adverse consequences that may result from the imposition of a double taxation liability by the Colombian tax authorities if the declaration in the award recognising that the award is net of Colombian taxes is not accepted as the equivalent of evidence of payment (Tribunal's Decision, para. 920(6));

(2) The Tribunal determines that it can award no damages from Colombia's breach of Article 805, or for any remediation costs;

(3) The Tribunal orders that each Party is to bear 50% of the costs of the proceedings, and its own legal fees and other costs; and

(4) All other claims are dismissed.

Date: 8 July 2024