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ECO ORO V. COLOMBIA: DELVING INTO THE MISALIGNMENT BETWEEN NEW-GENERATION IIAS AND THEIR INTENDED OUTCOMES

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The past decade has witnessed the emergence of 'new-generation' investment treaties that are intended, inter alia, to impose meaningful substantive obligations on foreign investors, to allow the host states more latitude in their policy decision-making and, arguably, to ensure that the scope of rights that may be examined in adjudicating investor-state cases is not confined to those of investors. Nevertheless, it has been observed that the shift in treaty drafting has not generated a parallel shift in the outcomes of cases that should reflect the textual formulations of the 'new' treaties. To investigate this misalignment, this article dissects the decision rendered in Eco Oro v. Colombia litigated under the 'new-generation' Canada – Colombia Free Trade Agreement. It examines the underlying motivation for state actions, whose interests were pursued, and the behaviour of Eco Oro on the ground. The article places emphasis on the powerful citizen-empowering system model that Colombia has presented in its battle to protect the ecologically sensitive páramos. The overriding need to protect the páramos can be extrapolated from Colombia's conclusion of a new-generation treaty and its constitutional acquis and yet it felt the pinch of a finding of liability by an Investor-State Dispute Settlement (ISDS) tribunal even with an investor who had no environmental license for exploitation. The article warns against the reduction of the reasons behind such misalignment to the oft-cited problems inherent in the ISDS system. It concludes that, besides the ISDS failure to detect the disparities between good states like Colombia and states that cynically use environmental protection and indigenous rights as a tool to pursue their political goals, two issues afflicted Colombia's behaviour: misalignment between its original intent and the language used in the treaty, and the surrounding body of clauses; and the narrow, localised conceptualisation of participatory mechanisms at the national level. For these reasons, Colombia failed to reap the benefits of its people centred reforms and to bring the company's misconduct within the radar of illegality at least at the domestic level.

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TABLE OF CONTENTS

I. INTRODUCTION

This article centres on a treaty-based investment arbitration brought against one of the strongest constitutional democracies in Latin America, Colombia. Colombia is renowned as a multiethnic and multicultural country where the population is made up of three major groups: indigenous peoples (including eighty tribes), European immigrants and Afro-Colombians who fell victim to the slave trade that had pervaded at that time.[1] On top of these three groups, nomadic gypsies are also considered among Colombia's ethnic minorities.[2] The year of 1991 heralded the beginning of a transformative reform that solidified the protection of these native communities, through the promulgation of a new Constitution, who were previously considered not to fall within the spatial scope of the Constitution.[3] The 1991 Constitution states in its first article that "Colombia is a social state under the rule of law, organized in the form of a unitary republic, decentralised, with autonomy of its territorial units, democratic, participatory, and pluralistic …". Colombia has historically never wielded full control over its territory due to the ever continuing presence of illegal armed actors including guerrillas and paramilitary forces that have controlled large stretches of its national territory.[4]

This article proceeds in three parts. The first part addresses the Colombian legal framework of relevance to the acquisition and operation of Eco Oro's concession and the status of indigenous communities and their rights under Colombian law. The second part presents an overview of the dispute between Eco Oro and Colombia, and relevant domestic proceedings. It brings attention to the socio-environmental dimension of the dispute and the limits of corporate responsibility. The third part provides an analysis of the arbitral award that digs deeper into the parties' [mis]conduct, the factors that formed part of the tribunal's decision calculus and whether applicable treaty law was correctly interpreted and applied by the tribunal.

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[1] Alicia Maria Cock-Rada & Carlos Gomez, *Leveraging International Collaborations to Advance Genomic Medicine in Colombia, in* GENOMIC MEDICINE IN EMERGING ECONOMIES: GENOMICS FOR EVERY NATION 49, 51 (Catalina Lopez-Correa & George P. Patrinos eds., 1st ed. 2018).
[2] Maiah Jaskoski, *Participatory Institutions as a Focal Point for Mobilizing: Prior Consultation and Indigenous Conflict in Colombia's Extractive Industries*, 52(4) COMPAR. POL. 537, 542 (July 4, 2020) [hereinafter Jaskoski 2020].
[3] Juan Camilo Herrera, *Binding Consent of Indigenous Peoples in Colombia, in* THE PRIOR CONSULTATION OF INDIGENOUS PEOPLES IN LATIN AMERICA: INSIDE THE IMPLEMENTATION GAP 41, 42 (Claire Wright & Alexandra Tomaselli eds., 1st ed. 2019) [hereinafter Herrera].
[4] GRACE LIVINGSTONE, INSIDE COLOMBIA: DRUGS, DEMOCRACY AND WAR 59 (2004).

II. COLOMBIAN LEGAL FRAMEWORK

A. Constitutional Principles of Relevance

The Angostura mine is located in the heart of the Santurbán páramo in the municipalities of Vetas and California, Department of Santander, Colombia. The ecosystem of páramos is of significant value both as a natural heritage and as a water source for the densely populated, lower altitude areas of the Andes.[5] The páramos have been long occupied by the indigenous and peasant communities whose presence have played a vital role in conserving these lands, consequently generating a strong bond therewith.

As the 1991 Colombian Constitution was drafted while the Indigenous and Tribal Peoples Convention, 1989 (ILO 169) was being ratified, the Constitution making process had been strongly imbued with ideals proclaimed by advances in the recognition of Indigenous peoples as a distinct category of people and the consolidation of their rights in the international sphere.[6] The Constitution exhibited increased recognition of the distinct cultures of indigenous communities and their right to manage their own affairs in several provisions. Article 7 of the Constitution affirms that "[t]he state recognizes and protects the ethnic and cultural diversity of the Colombian nation."[7] According to Articles 329 and 330, the indigenous communities enjoy self-governance powers within their territories which allow them to establish their own councils to regulate different forms of their economic and social development, including the use of land and the preservation of natural resources.[8] Indigenous communities also have the right to develop their own rules and to be administered by their own structures insofar as they do not run counter to the Constitution and laws of Colombia.[9] These rights are not unfettered as they are limited by the duty of non-interference with others' rights as provided in Article 95(1).[10]

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[5] 'Learning Routes - 'Learning from the Impact of the Extractive Industries in Latin America and Southern Africa", PROCASUR-Ford Foundation, Case: Paramo Santurban, Department of Santander and North of Santander, Colombia', online: <https://issuu.com/procasurafrica/docs/english_paramo_santurban>, p. 2 [hereinafter PROCASUR-Ford Foundation].

[6] CHRIS THORNHILL, THE SOCIOLOGY OF LAW AND THE GLOBAL TRANSFORMATION OF DEMOCRACY 438 (1st ed. 2018).

[7] CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 7 [hereinafter Colombian Constitution].

[8] *Id.* arts. 329, 330.

[9] *Id.* art. 246.

[10] *Id.* art. 95, cl. 1.

The protection of indigenous communities is further shored up by the constitutional block doctrine that is deeply embedded in the Colombian judicial system, according to which 'regional/universal human rights instruments are integrated into the constitution with a special status'.[11] Although the Constitution of Colombia makes no express mention of the 'right of prior consultation', several voices have relied on the constitutional block doctrine that is deeply embedded in the domestic judicial system to argue that Articles 329 and 330[12] of the Constitution can be interpreted in light of the larger body of international law on indigenous rights and hence, can be said to create a right of prior consultation for indigenous groups before approving new projects.[13]

An important instrument that could also seep into the national legal framework through the constitutional block doctrine is the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Adopted in 2007 by the United Nations General Assembly and ratified by Colombia in 2009,[14] the UNDRIP is a widely accepted standard of Indigenous rights to which Indigenous people significantly contributed. It goes beyond the concept of 'prior consultation' under ILO 169 in that it recognises the right to self-determination,[15] which is manifested in many cases through the principle of Free, Prior and Informed Consent (FPIC). The UNDRIP's endorsement and implementation were often coupled with fear from States because of the threat it posed to their national sovereignty and territorial integrity. This can be attributed to the fundamental element that this principle brought, that the consent must be obtained, [16] through meaningful participation in the decision-making process and cannot be easily evaded by conducting a cursory consultation process as in the case of prior consultation. Its importance also lies in the recognition that it

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[11] Manuel Eduardo Góngora-Mera, *The Block of Constitutionality as the Doctrinal Pivot of a Ius Commune, in* TRANSFORMATIVE CONSTITUTIONALISM IN LATIN AMERICA: THE EMERGENCE OF A NEW IUS COMMUNE 235, 236 (Armin von Bogdandy et al. eds., 2017).

[12] They both accentuate the value of participation of indigenous communities in delimiting their territorial entities and in managing the exploitation of natural resources located in their territories.

[13] MANUEL JOSÉ CEPEDA ESPINOSA & DAVID LANDAU, *The Rights of Indigenous Peoples, in* COLOMBIAN CONSTITUIONAL LAW: LEADING CASES 241, 242 (1st ed. 2017) [hereinafter Espinosa & Landau].

[14] NICOLAS PIRSOUL, THE THEORY OF RECOGNITION AND MULTICULTURAL POLICIES IN COLOMBIA AND NEW ZEALAND 12 (1st ed. 2020).

[15] Recognised in Article 3 of the UNDRIP.

[16] The UNDRIP also obliges States to cooperate and consult with Indigenous peoples in good faith in order to obtain their free, prior, and informed consent before adopting or implementing measures that may affect them (Article 19), especially as regards projects affecting their lands (Article 32).

has gained at the international level wherein corporations hold a responsibility to respect FPIC.[17]

At the international level, the páramos are considered 'protected land' under several international conventions due to their importance, including the Ramsar Convention on Wetlands.[18] At the domestic level, protection of the páramos is grounded in the Colombian Constitution that places an obligation on the State 'to protect the natural and cultural riches of the nation'[19] and 'to protect the diversity and integrity of the environment and conserve areas of special ecological importance'.[20] These precepts find further reinforcement in Law 99 of 1993 that mandate protection and preservation of ecosystems 'considered páramo, subpáramos, springs and aquifer recharging areas' and their biodiversity.[21] These legal safeguards carried important implications for the Canadian company as will be explained in part two.

In terms of mining, two articles of the Constitution are of relevance, Articles 332 and 334. The former establishes the State ownership of the subsoil and of the natural, non-renewable resources while the latter affirms that the exploitation of natural resources will be planned and administered by the State agencies 'with the purpose of improving, in the national and local spheres, the quality of life of its inhabitants'.

B. Participatory Mechanisms in Colombia

1. Environmental Impact Assessment (EIA) Hearings as part of Environmental Licensing

Under the general environmental law of 1993, EIAs must be submitted by mining companies in order to receive approval for the exploitation phase while the exploration stage neither requires an environmental study[22] nor is a subject to

[17] FANNY PULVER, THE IMPLEMENTATION OF FREE, PRIOR AND INFORMED CONSENT AND INDIGENOUS PEOPLES' RIGHTS UNDER THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: AN ANALYSIS OF THE REGULATORY FRAMEWORK AND OECD NATIONAL CONTACT POINT CASES 139 (1st ed. 2022).
[18] PROCASUR-Ford Foundation, *supra* note 5.
[19] Colombian Constitution, *supra* note 7, art 8.
[20] *Id.* art. 79.
[21] Christiana Ochoa, *Generating conflict: Gold, Water and Vulnerable Communities in the Colombian Highlands, in* NATURAL RESOURCES AND SUSTAINABLE DEVELOPMENT: INTERNATIONAL ECONOMIC LAW PERSPECTIVES 142, 151 (Celine Tan & Julio Faundez eds., 1st ed. 2017).
[22] Douglas et al., *Socio-environmental Issues related to Mineral Exploitation in the Andes, in* ANDEAN HYDROLOGY 21, 33-34 (Diego A. Rivera et al. eds., 1st ed. 2018).

environmental oversight, with the exception of indigenous territories.[23] The environmental license encompasses a range of 'specific permits' that are required for the environmentally sensitive activities carried out in mining operations, e.g., 'permits to withdraw water, construction of infrastructure, environmental mitigation measures,' etc.[24] Environmental licenses for large-scale projects are administered at the national level,[25] and before an environmental license can be issued, an EIA public hearing may be requested by certain public officials, Non-Governmental Organisations (NGOs) or citizens.[26] Being non-mandatory, public hearings were only offered by request, turning it into a hurdle for affected people. For each EIA only one hearing may be sanctioned by public authorities,[27] and this is intended to be held in the project's area of influence unless the size of the area occupied by the project warrants more hearings. Where the project's area of influence is inhabited by native communities who enjoy the right to prior consultation, an environmental license may only be issued after consultation which as a process does not envision discussing the EIA but rather the peculiar social and cultural impacts of mining which in turn should be integrated into the EIA.[28]

2. Popular Consultation (or referenda) as a Form of Citizen Participation

The notion of popular consultation is firmly entrenched in the constitutional system of Colombia and finds its basis in Article 40 of the Colombian Constitution. Article 40,[29] obligates the State to guarantee adequate and effective participation for citizens in different forms of democratic participation. Support is also found in Article 79 which provides, "[e]very individual has the right to enjoy a healthy environment. An

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[23] The author refers to article 39 of Colombian mining code of 2001 that describes the exploration process as a 'completely free process' that can be done without environmental control and that is perceived as an essentially technical, low impact activity that doesn't warrant early environmental assessment. Juan Alvarez, *Big Industry, Small Rules: The Mining Industry in Colombia*, 5(1) OÑATI J EM'GENT SOCIO-LEGAL STUD. 100, 106, 112-114 (2013).

[24] *Id.* at 106.

[25] MAIAH JASKOSKI, THE POLITICS OF EXTRACTION TERRITORIAL RIGHTS, PARTICIPATORY INSTITUTIONS, AND CONFLICT IN LATIN AMERICA 52 (1st ed. 2022) [hereinafter Jaskoski 2022].

[26] A hearing could be requested by the attorney general or their delegate, the Defensoría del Pueblo, the environment ministry, directors of the other state environmental authorities (e.g., CARs), governors, mayors, or by petition, a group of at least one hundred individuals or three nonprofit organizations (Decree 330 of 2007, Article 5). *See also* Jaskoski 2022, *supra* note 25, at 53.

[27] *Id.*

[28] *Id.* at 63.

[29] Article 40 states in part: "[a]ny citizen has the right to participate in the establishment, exercise, and control of political power. To make this decree effective the citizen may: 2. Participate in elections, plebiscites, referendums, popular consultations, and other forms of democratic participation." *See* Colombian Constitution, *supra* note 7, art. 40.

Act shall guarantee the community's participation in the decisions that may affect it."[30] A more general framework for participatory rights is spelled out in Articles 103 to 106 of the 1991 Constitution. The incorporation of popular consultation as a tool was intended to push the State towards a less centralised model and to allow for increased public awareness and involvement in public affairs through voting on issues of local, regional, or national importance – the facilitation of which lies on the shoulders of Mayors and Governors.[31]

The principles enshrined in the new Constitution opened the way for reforming existing legal codes and issuing new laws that embrace the new Constitutional values. For example, the inclusion of Law 134 issued in 1994 to regulate citizen participation and Law 136 on decentralisation and municipal modernisation which addresses the political and fiscal autonomy of municipalities. These legislations set out the terms for organising popular consultations to participate in decision-making over the use of land in their municipality when the development of mining projects may lead to 'a significant change in the uses of the soil that may transform the traditional activities of a municipality.'[32] Conducting popular consultation is mandatory in this case and is the responsibility of the municipality.[33] Practising this right encountered strong pushback from the central government and the companies which argued that these referenda are illegal and in contradiction to mining laws and the Colombian Constitution.

The new laws No. 134 and 136 collided with Article 332 of the Constitution that affirms the state ownership of subsoil resources and entrusts the central government with regulatory control over all aspects of the exploitation of natural resources hence, popular consultations were staunchly opposed by the government.[34] The practical significance of these laws was confined to opening up possibilities for independent mobilisation rather than creating broad recognition and consistency in the implementation of the communities' right to be consulted. Nevertheless, their aversion to popular referenda can be understood when we consider the value of this tool as a mobilisation and publicity instrument often resulting in terminating or unfavourably altering the projects. The first referendum to take place was in 2013, more than twenty years after the 1991 Constitution was adopted, in the municipality

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[30] *Id.* art. 79.
[31] Helena García, *Neoliberalism as a Form of Authoritarian Constitutionalism, in* AUTHORITARIAN CONSTITUTIONALISM: COMPARATIVE ANALYSIS AND CRITIQUE 37, 51 (Günter Frankenberg & Helena Alviar García eds., 1st ed. 2019) [hereinafter García].
[32] *Id.* at 53.
[33] *Id.*
[34] *Id.*

of Piedras in Tolima province, in connection with the exploration activities by a South African company and a waste storage facility.[35]

3. The Right to Prior Consultation (for indigenous communities)

Another mechanism that is built into the regulatory system of natural resource management in Colombia is "prior consultation" which finds its roots in ILO 169. As mentioned earlier, the presence of the doctrine of constitutional block connotes that the rights established in ILO 169 as an instrument of the international human rights law regime, are transposed into the domestic legal framework. The ILO Convention establishes the consultation obligation in favour of the indigenous communities before any exploration or extraction of subsoil resources can be conducted.[36] It was ratified by Colombia through Law 21 of 1991 which was limited to giving domestic legal status to the norms embedded in the convention.[37] Colombia has no prior consultation law that provides clear procedures for the consultation process. The first instrument to regulate the process of consultation was the 1998 Decree 1320 and prior to that it was only referenced in the 1993 Environmental Law.[38] As described by a local scholar, Decree 1320 frames the consultation process as a procedure that can be rapidly concluded as a tick-box exercise, in which the government only verifies the presence of ethnic communities and participates in a prior consultation meeting.[39] The absence of indigenous organisation in the design of prior consultation institution was lamented in the literature.[40] Subsequently, the 1998 Decree was considered illegitimate by the Colombian Constitutional Court (CCC/the Court) in multiple cases for not meeting the standards of prior consultation and for failing to consult local communities regarding its content.[41]

The 1993 Environmental Law provided an important building block for codifying the right to consultation by introducing the responsibility to consult ethnic minorities as a condition for obtaining environmental permits for extractive projects

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[35] *Kristina Dietz, Politics of Scale and Struggles over Mining in Colombia, in* CONTESTED EXTRACTIVISM, SOCIETY AND THE STATE 127, 142 (Bettina Engels & Kristina Dietz eds., 2017) [hereinafter Dietz].

[36] Indigenous and Tribal Peoples Convention (No. 169) art. 15.2, June 27, 1989, U.N.T.S. 383.

[37] JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 205 (2nd ed. 2004).

[38] Jaskoski 2020, *supra* note 2.

[39] Natalia Salinas, *La Consulta Previa en Colombia*, Instituto de Investigación en Ciencias Sociales, Universidad Diego Portales, Documento de trabajo ICSO No. 3/2014 13-14 (July 2014), https://icso.udp.cl/cms/wp-content/uploads/2014/01/La-Consulta-previa-en-Colombia-Natalia-Orduz.pdf. [hereinafter Salinas].

[40] Jaskoski 2022, *supra* note 25, at 62.

[41] Salinas, *supra* note 39, at 14.

in their designated territories.[42] For extractive operations, consultation is typically held prior to the issuance of an environmental license, whereas for exploratory activities, for which no environmental license is required, local communities used the tutela action to claim their right to prior consultation.[43]

The second attempt to regulate prior consultation was made by Uribe's government in 2010 which issued the Presidential Directive 01. The 2010 directive identifies the situations that require consultation, divides the process into several stages, and declares that it is non-binding with no exceptions.[44] The same shortcomings plagued the 2010 directive,[45] however, they both continue to be in force since their nature as decrees and directives insulates them from the possibility of court review as only laws can be declared unconstitutional.[46]

Nevertheless, the move towards implementing and enforcing the norms of ILO 169 caused a lot of friction with State authorities perpetuating the long-time plight of the local communities. While the body of standards that made up prior consultation consisted of multiple decrees and directives that were promulgated in a piecemeal fashion, international law and the jurisprudence developed by the CCC played a significant role in firming up the rights enshrined in the Constitution, particularly in light of the fragility,[47] of the legal tools, namely decrees and directives, used to establish the prior consultation process. The role played by NGOs was instrumental in giving rise to the CCC's body of jurisprudence through acting as a medium between the public and the Court. The communities' concerns made their way to the Court through the NGOs whose intervention contributed to accepting prior consultation tutelas.[48] They succeeded in using the judicial system to influence the implementation of prior consultation rules which helped offset their absence in the institutional design of the prior consultation framework.

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[42] John-Andrew McNeish, *Extracting justice? Colombia's Commitment to Mining and Energy as a Foundation for Peace*, 21(4) INT'L J. HUM. RTS. 500, 506 (May 2016) [hereinafter McNeish].

[43]Tutela is an instrument enshrined in the Colombian Constitution that can be used by individuals to seek justice if their fundamental constitutional rights have been threatened or harmed by an act or omission of a public authority. *See also* Jaskoski 2020, *supra* note 2, at 543.

[44] Salinas, *supra* note 39, at 13.

[45] *Id.*

[46] Jaskoski 2022, *supra* note 25, at 65.

[47] McNeish, *supra* note 42, at 507.

[48] Jaskoski 2022, *supra* note 25, at 64.

i. Stages of CCC's Jurisprudence on Prior Consultation

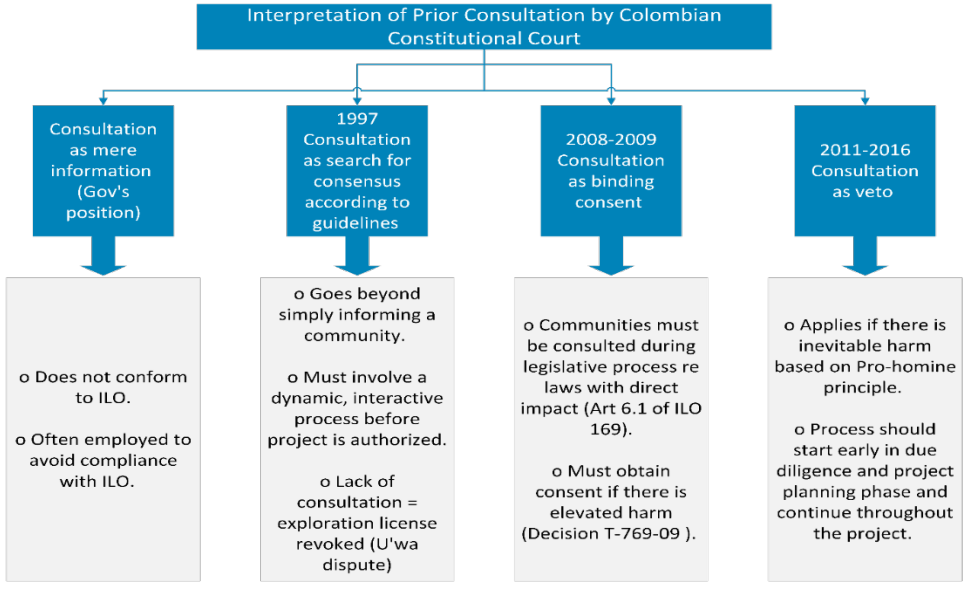

Figure 1

The CCC developed a body of standards for the implementation of prior consultation through a series of decisions between 1997 and 2016. The Court was known for its progressive stance not only in prior consultation but also in defending and concretising the full plethora of social and communal rights.[49]

Stage one – 1997 U'wa Decision (Consultation as Search for Consensus before Granting License)

The first stage is marked by the Court's decision in the dispute of the U'wa people opposing oil exploration on their traditional lands. The decision was issued during the time when prior consultation was not yet regulated which meant that Colombian law did not require the company to consult the U'wa people when it acquired exploration rights in April, 1992.[50] This explains why the Court in its finding of the invalidity of the exploration license relied heavily on ILO 169 and ruled that the

[49] KATHARINE YOUNG, CONSTITUTING ECONOMIC AND SOCIAL RIGHTS 196 (1st ed. 2012).
[50] J. TIMMONS ROBERTS & NIKKI DEMETRIA THANOS, TROUBLE IN PARADISE: GLOBALIZATION AND ENVIRONMENTAL CRISES IN LATIN AMERICA 173 (1st ed. 2003).

consultation steps taken by the company and the state failed to satisfy the requirements of the convention.[51]

As elaborated in the Court's decision,[52] approval or disapproval of the projects must be preceded by a collaborative engagement process defined by good faith and mutual trust between the community and the corporate body to demonstrate that meaningful and effective participation has taken place.[53] This process must occur before the license is granted,[54] and be driven by certain objectives, namely: ensuring full knowledge of the project, its implementation, and potential impacts on all aspects of the communities' environment and daily lives; giving them the opportunity to evaluate the pros and cons of the project and to be heard.[55] In its decision, the Court reasoned that the government-sponsored meetings held in 1995 could not qualify as prior consultation and affirmed that prior consultation is a responsibility that lies on the shoulders of the State, being the guardian of public interests.[56]

Stage two – Prior Consultation during the Legislative Process and Consultation as Binding Consent in Cases with a High Degree of Harm

Judgment C-030 of 2008 broadened the scope of consultation by clarifying the role of prior consultation in the legislative process that involves the passing of laws with a 'direct impact' on local communities. The Court made a distinction between the direct impact on indigenous people and the impact on the population as a whole.[57] Where the law or regulation bears a direct impact on indigenous people, the Court's review will extend to whether these communities were consulted during the law-making process and in the absence of consultation, the law (or certain articles) will be declared unconstitutional.[58] This elicited critique of the Court's jurisprudence under the rubric of halting development, however, it was reported that the challenged laws (or certain articles thereof) were declared unconstitutional only in 17% of the cases over 25 years.[59] Another important decision that contributed to building up the body of jurisprudence in this stage is Decision T-769-09 that established a high bar for compliance with prior consultation if the project is likely

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[51] James Anaya, *The Human Rights of Indigenous Peoples, in* INTERNATIONAL PROTECTION OF HUMAN RIGHTS: ACHIEVEMENTS AND CHALLENGES 593, 597 (Felipe Isa & Koen de Feyter eds., 1st ed. 2006).
[52] Corte Constitucional [C.C.] [Constitutional Court], Febrero 3, 1997, SU-039-97, (Colom.).
[53] Espinosa & Landau, *supra* note 13, at 256.
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] Herrera, *supra* note 3, at 44.
[58] *Id.*
[59] *Id.* at 45.

to produce a high level of harm as the state would have to obtain the communities' consent in this case and not just to consult them.[60]

Stage three - Consultation as Veto in case of Inevitable Harm – the Primacy of Communities' Rights over Mining Interests based on the Principle of Pro Homine

The third stage is characterised by the primacy of the principle of pro homine grounded in Articles 1 and 2 of the Constitution, which declares respect for human dignity as the value that transcends every other consideration and the foundation of the democratic and social state.[61] This stage concretises the process of prior consultation based on the contextual characteristics of the case at hand. Building on previous decisions, the Court reiterated the importance of the method of conducting consultation expressed by the CCC in its 1997 decision as a 'space for discourse between equals' allowing all parties to weigh in regarding the execution of the project,[62] rather than informal meetings that are conducted glibly. It is important not to overlook the distinctive features and demands of each case which will justify why the consultation should not be regarded as a monolithic process.[63]

Decision T-129 also offers an expansive interpretation of the temporal scope of prior consultation wherein the bundle of rights that underlie the concept of consultation ought not to be confined to 'the previous stage but during and after the implementation [of it]'.[64] Consultation must be contemplated way earlier than the moment immediately preceding implementation to allow sufficient time for the development of the corporate-community relationship and to nip in the bud any potential conflicts.[65]

Remarkably, the Court announced that "[t]he right to consultation includes veto power for cultural minorities in certain circumstances",[66] which would entail halting of projects. Analysing the Court's decision indicates that the veto power will not be pertinent if there is a way to avoid causing harm altogether (e.g., by relocating a road connected to the construction of a highway).[67] However, if there is direct impact in terms of displacement, toxic waste and/or other high impacts that might threaten

[60] The Court found that the state should obtain consent from communities of the Embera nation before approving the Mandé Norte mine due to the severity of the project's impacts on Embera communities.). *See also* Jaskoski 2022, *supra* note 25, at 56; Jaskoski 2020, *supra* note 2, at 548.
[61] Espinosa & Landau, *supra* note 13, at 266.
[62] *Id.* at 265.
[63] *Id.* at 266.
[64] Herrera, *supra* note 3, at 49.
[65] Espinosa & Landau, *supra* note 13, at 266.
[66] Herrera, *supra* note 3, at 50.
[67] *Id.* at 52.

the communities' existence, then the least harmful alternative must be explored with community input. Further, if during this process concrete evidence of irreversible damage arises, then by applying the pro homine rule of interpretation, the fundamental rights of the communities' involved will take precedence over mining interests.[68] It appears that the rationale underlying the Court's decision is that there is much more at stake than pecuniary benefits; that there is an obligation to preserve their physical and cultural sustenance for posterity regardless of whether they align with the dominant view of growth and development.[69]

This approach raises a conundrum for those who argue that the right to consultation does not entail a right to veto. It was seen as highly problematic by critics because the term veto weighed heavily against any kind of good faith exchange and can too readily be used as a license to abuse the right to consultation.[70] The last decision issued by the CCC in 2016, added some clarity by rejecting the term veto on the grounds that it does not align with the essence of consultation as 'a dialogue in good faith among equals' and reiterated the connotation of the 2011 decision by arguing that the 'direct and intense' impact of a measure on the rights of indigenous peoples requires the consent of potentially affected communities.[71]

C. The Colombian Mining Regulatory Framework

Mining witnessed an impressive growth in the 2000s with investment increasing from 1.9 billion USD in 2002 to 13.2 billion USD in 2008 and with more than 25% of annual international investment in the country being directed to this industry,[72] between 2000-2010. For the management of mineral resources, the Constitution gives sub-national governments, departments and municipalities, broader latitude that transforms them into key actors for the delivery and governance of social services, while the central government retains a regulatory and administrative role.[73] The royalty and compensation generated from mineral activities are distributed among the departments and municipalities where the minerals are extracted or exported, and the remaining resources go to several funds that provide public services and promote responsible and sustainable mining.[74]

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[68] Espinosa & Landau, *supra* note 13, at 266.
[69] *Id.* at 265.
[70] Herrera, *supra* note 3, at 52.
[71] *Id.* at 51.
[72] Jaskoski 2020, *supra* note 2, at 542.
[73] Anida Yupari, *Decentralization and Mining: Colombia and Peru, in* INTERNATIONAL AND COMPARATIVE MINERAL LAW AND POLICY: TRENDS AND PROSPECTS 783, 792 (Thomas W. Waelde & Janeth Warden-Fernández eds., 1st ed. 2005) [hereinafter Yupari].
[74] *Id.* at 787; *See also* Colombian Constitution, *supra* note 7, art. 361.

The central government's position gained a stronger foothold with the issuance of the Mining Code, Law 685, in 2001. The new mining code declares mining in all its phases an activity of public and social interest.[75] The substance of the mining code and the solidification of the national government's power over natural resources were a reflection of the economic liberalisation that defined the political agenda of the two Presidents,[76] who were in power during the period 2002-2018.[77] Recognising the importance of revenue from oil and mining, the fiscal regime applicable to the exploitation of natural resources was revamped in the new mining law to create a favourable and enabling climate to attract FDI.[78] Preventing and mitigating the negative impacts of mining was also given consideration in the new code by including provisions on ethnic and environmental issues and promoting the sustainability principle.[79] In line with the parallel reforms driven by the Constitution, indigenous peoples were given explicit protection under the new code, recognising their rights over their ancestral lands and banning mining activities in those areas.[80]

Mining is prohibited in certain excluded areas within Colombia for environmental protection reasons which include 'the system of national natural parks, regional natural parks, and forest reserve zones'. [81] The excluded areas must be 'geographically delimited by the environmental authority based on technical, social and environmental studies with the collaboration of the mining authority'.[82] Mining may be permitted in those areas, with the exception of national and regional parks, provided that they do not affect the objectives of the excluded zones and subject to certain conditions that may involve the use of specific extraction methods and systems.[83] It is the responsibility of the concessionaire to present the studies that demonstrate the compatibility of the mining activities with such objectives.[84] The designated ecosystems of the páramos and wetlands were incorporated into the Mining Law's excluded areas in response to a constitutional decision in a 2009 case brought by Asociacion Internacional para la Defensa del Ambiente.[85]

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[75] 685, Septiembre 8, 2001, DIARIO OFICIAL [D.O.] art. 13, 3 (Colom.) [hereinafter Law 685 of 2001].
[76] The presidency of Álvaro Uribe Vélez (2002–10) and Juan Manuel Santos (2010-2018).
[77] Dietz, *supra* note 35, at 137; *See also,* Jaskoski 2020, *supra* note 2, at 541.
[78] Dietz, *supra* note 35, at 135.
[79] Yupari, *supra* note 73 , at 792-796.
[80] *Id.* at 793.
[81] Law 685 of 2001, *supra* note 75, art. 34.
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] PROCASUR-Ford Foundation, *supra* note 5, at 6.

Certain provisions of the mining code were utilised to undercut the power of the sub-national governments. In particular, Article 37[86] of the Mining Code raises a conundrum for sub-national governments as it prohibits them from interfering with the regulation of mining in their territories devolving its regulation to the national government.[87] The first two articles of the administrative regulation of the Mining Code, Decree 0934 of 2013, clearly convey the limits placed on municipal authorities in relation to the exploitation of natural resources. According to Article 1, "the decision to establish exclusionary and restricted mining zones pertains exclusively . . . to the mining and environmental authorities" and Article 2 provides that "given that the mining activity is one of public interest and utility,[88] it is impossible to directly or indirectly change the mining development plans through local development plans."[89]

Examining the constitutionality of Article 37 has been the subject of multiple challenges heard by the Court in 2002, 2012, and 2014.[90] The practical significance of Article 37 stems from the fact that one of the grounds that triggered the judicial review of this article was the failure to conduct prior consultation with ethnic communities which occurred in the 2002 case.[91] The article, however, was found constitutional in the three cases. Contemporaneously, a new mining law, Law 1382 of 2010, which was later declared unconstitutional for having removed the requirement of prior consultation with Colombia's indigenous and afro-descendent people, was issued.[92] The finding of constitutionality in the 2012 case was heavily influenced by the absence of prior consultation in the short-lived 2010 mining law[93] prompting the Court to give absolute precedence to the unitary state principle over the autonomy of local governments.[94] The third challenge was heard in 2014, when the old mining law was revived, culminating in a nuanced interpretation that sought

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[86] Article 37 reads, 'With the exception of the powers of the national and regional authorities that are indicated in [the previous articles], no regional, sectional or local authority will be entitled to establish zones of the territory that are permanently or temporarily excluded of mining activities. This prohibition includes land use plans'.

[87] Milton Fernando Montoya, *Participation of Territorial Authorities in Mining Activities in Colombia, in* SHARING THE COSTS AND BENEFITS OF ENERGY AND RESOURCE ACTIVITY: LEGAL CHANGE AND IMPACT ON COMMUNITIES 355, 361 (Lila Barrera-Hernández et al. eds., 1st ed. 2016) [hereinafter Montoya].

[88] According to Article 13 of Law 685 and in accordance with the Constitution of 1991, all mining activities have to serve 'public utility and social interest'.

[89] García, *supra* note 31, at 54.

[90] Montoya, *supra* note 87, 364-366.

[91] Corte Constitucional [C.C.] [Constitutional Court], Octubre 22, 2002, C-891/02, (Colom.); *See also,* Montoya, *supra* note 87, at 364-365.

[92] Dietz, *supra* note 35, at 136.

[93] Montoya, *supra* note 87, at 365-366.

[94] *Id.* at 364-365.

to reconcile the principles of unitary state and the autonomy of territorial units enunciated in the Constitution. To resolve the tension between these two principles, the Court relied on the canons set out in Article 288 of the Constitution, the principles of coordination and concurrence.[95] The Court reiterated the ultimate purpose of the principle of unitary state which is to achieve economic efficiency and legal certainty for investors. It went on to elaborate that the ownership of the national State over natural resources does not mean that the sub-national governments are to be excluded from the decision-making process concerning their management and that both levels of the government should work harmoniously towards the protection of the environment, and the economic, social, and cultural development of the local communities.[96] The vexed relationship between the national and sub-national levels of the government continues to characterise the political scene in Colombia due to the lack of guidance on how to design a process that meets the parameters laid down by the Court in its 2014 decision,[97] in addition to certain loopholes identified by the environmental bodies and the local governments.[98]

A major overhaul of the industry's regulatory framework took place in 2011 under the Santos government.[99] The National Mining Agency (Agencia Nacional de Mineria) was established to replace the Colombian Institute of Geology and Mining and was in charge of granting and operating mining concessions in the country.[100] Further, territorial zoning underwent legal reform and a new system of revenues was introduced to decrease the municipal share of revenues.[101] Besides the environmental entities of the central government, local authorities retained authority over environmental matters through the regional environmental management authorities, called the Regional Autonomous Corporation (RAC).[102] The regional environmental entities are authorised to take measures to prevent environmental harm and to issue orders suspending the licenses in view of their potential impact.[103] Environmental protection became the only entry point available for local authorities to influence the regulation of mining on their lands. On the whole, the then incumbent government became more sensitised to the industry's impact on the environment and the surrounding communities, which prompted it to suspend

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[95] *Id.* at 366-368.
[96] *Id.*
[97] Dietz, *supra* note 35, at 136.
[98] Montoya, *supra* note 87, at 367-369.
[99] OXFORD BUSINESS GROUP, THE REPORT: COLUMBIA 2014 120 (2014) [hereinafter Oxford Business Group].
[100] *Id.*
[101] Dietz, *supra* note 35, at 137.
[102] Montoya, *supra* note 87, at 360.
[103] *Id.*

certain investors' mining licenses and to emphasise the process of conducting prior consultation, prior to exploration operations.[104]

III. CASE STUDY: ECO ORO V. COLOMBIA

A. Factual History

The Canadian mining company, Eco Oro, entered Colombia under the name Greystar in 1994 to explore the gold fields in the mountainous plateau of Santurban located in the department of Santander in northeastern Colombia.[105] Eco Oro, first acquired its right to explore and exploit the Angostura gold mine through an assignment agreement that transferred a mining permit (Permit 3452) to Eco Oro.[106] The environmental management plan prepared by Eco Oro for the exploratory stage was approved by the competent regional autonomous corporation in 1997.[107] The bundle of rights that Eco Oro acquired in connection to the Angostura gold deposit between 1995-2001 was ultimately consolidated in a concession contract in 2007 subjecting it to the new mining code of 2001.[108] Notably, the Construction and Works Plan (Plan de Trabajo y Obras (PTO)) submitted by Eco Oro to comply with the requirements of the mining code included a section on 'environmental and social problems' which stated that "[t]he proximity of project Angostura to the Santurbán Páramo is something to be taken into account, because the lakes are situated in the area . . ."[109] This statement was further reinforced in the EIA submitted by the company a few months after the PTO in which it affirmed 'the significant presence of páramo and subpáramo ecosystems in the Concession area'.[110] A couple of months after the passage of Law 1382, the Ministry of Environment requested that Eco Oro's EIA be revised to take into account the excluded area as stipulated in Article 3 of the new law.[111] However, the Ministry backtracked on its request and resumed its review of the EIA after Eco Oro managed to find a way to pull strings through a meeting with the Minister of Mines in May, 2010.[112]

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[104] Oxford Business Group, *supra* note 99.
[105] Eco Oro Minerals Corp. v. Republic of Colombia, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, ¶ 81 (Sept. 9, 2021) [hereinafter Eco Oro Minerals Corp. v. Republic of Colombia].
[106] *Id.* ¶ 5.
[107] *Id.* ¶ 101.
[108] *Id.* ¶ 99, 104.
[109] *Id.* ¶ 108.
[110] *Id.* ¶ 109.
[111] *Id.* ¶ 113.
[112] *Id.* ¶ 116, 117.

1. Eco Oro's EIA Hearing and the Impact of the Economic and Demographic Structure of Communities

In line with the domestic legal framework, the EIA hearing for Angostura was requested by civil society groups and members of the public.[113] The first hearing took place in the municipality of California where the project was located while the second one, held four months later, was requested by the Bucaramanga movement after the adverse weather conditions barred many people, particularly those from Bucaramanga from attending the first hearing.[114] The second hearing was attended by a large number of people and their participation displayed more vigour and energy in expressing their needs.[115] It has been reported that there was more awareness among the residents of the capital of Santander of the indispensability of the Santurban páramos as a source of drinking water given that at least one-half of the project intersected with the páramos and could possibly result in major increases in water costs.[116] Other causes for concern for the capital's residents included forced evictions and the possible emergence of new employment patterns that do not favour unskilled labour and marginalised people.[117]

On the flip side, inhabitants of California and Vetas that fall within Angostura's area of influence are known to have embraced gold mining as a source of livelihood and had been historically established within family associations.[118] Residents of these municipalities were predisposed to accept the entry of foreign mining companies and to work for them in lieu of engaging in artisanal mining after it has been eliminated in the mining code of 2001.[119] These communities succeeded in establishing a symbiotic relationship with Eco Oro that 'had invested in local employment, health, education, and environmental monitoring and management in the two municipalities'[120] in addition to wide reaching 'socialisation campaigns', in the concession's area of direct influence as dictated by the State.[121] The implementation of these campaigns was decried as divisive and having undercut

[113] Jaskoski 2022, *supra* note 25, at 103.
[114] These reasons were explicitly mentioned in a letter from the attorney general for environmental matters (Procurador Delegado para Asuntos Ambientales y Agrarios) in December 2010 asking for a second EIA hearing. *See id.* at 100, 101, 103.
[115] As described by (Jiménez Jiménez, 2016) cited in *Id.* at 104.
[116] *Id.* at 101-102.
[117] *Id.* at 102, citing (Jiménez Jiménez, 2016).
[118] Rutgerd Boelens & Bibiana Duarte-Abadía, *Disputes over Territorial Boundaries and Diverging Valuation Languages: The Santurban Hydrosocial Highlands Territory in Colombia*, 41(1) WATER INT'L 15, 24-25 (2016) [hereinafter Boelens & Duarte-Abadía].
[119] *Id.*
[120] Jaskoski 2022, *supra* note 25, at 102. *See also,* Boelens & Duarte-Abadía, *supra* note 118.
[121] Jaskoski 2022, *supra* note 25, at 102.

community bonds.[122] This elucidates the divergence in the reaction between the people of California and Vetas, on the one hand, and those of the capital of Santander, Bucaramanga on the other hand, as demonstrated by the two EIA hearings.

The environmental license for Eco Oro's open pit mine was rejected by Resolution 1015 based on, 'detailed technical reasons' as interpreted by the tribunal,[123] while no reference was made to the fact that mining was banned in the concession area. The publicly available documents from ISDS proceedings fail to capture the magnitude and intensity of the mobilisation efforts. Evidence from the literature, unlike the ICSID award,[124] shows that opposition to the mine and its environmental impacts were factors that contributed to the rejection of the environmental license.[125] The company acknowledged the presence of these problems when it underwent a restructuring phase, switched from open pit mining to underground mining and included Colombians among the board of directors.[126]

The organised opposition to the Angostura mine was in fact the story that inspired the creation of a regional environmental committee that helped conduct the first ever popular referendum in Colombia over the approval of *La* Colosa gold mine. While Eco Oro's EIA was under review in April, 2010, a group of people from diverse backgrounds, skills and ages established the 'Committee for the Defense of Water of the Paramo of Santurban.'[127] Behind the success of the committee's activities was collective decision making, non-hierarchical organizational structure, and their shared vision of protecting the páramos for their water security and livelihood.[128] During the year leading up to the rejection of Eco Oro's EIA and in parallel to EIA hearings, the committee helped plan and organise marches and demonstrations and succeeded in garnering the attention of domestic and international environmental actors who were valuable allies for the movement activists.[129]

Four marches took place,[130] in Bucaramanga with the last one drawing more than thirty thousand people and similar anti-Angostura marches had also spread to other

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[122] *Id.* at 53-54.
[123] Eco Oro Minerals Corp. v. The Republic of Colombia, *supra* note 105, ¶ 498.
[124] *Id.*
[125] Jaskoski 2022, *supra* note 25, at 100-101, 103.
[126] Eco Oro Minerals Corp. v. The Republic of Colombia, *supra* note 105, ¶ 131.
[127] PROCASUR-Ford Foundation, *supra* note 5, at 7.
[128] *Id. See also,* Jaskoski 2022, *supra* note 25, at 102.
[129] Jaskoski 2022, *supra* note 25, at 102.
[130] These marches which took place in 2010 in the period leading up to the license rejection are left out of the award; *See* Eco Oro Minerals Corp. v. The Republic of Colombia, supra

cities in Colombia, namely Bogotá and Cúcuta, the capital of Norte de Santander.[131] The last march was one week before the second EIA hearing and had been assimilated to an EIA public hearing by activists in view of the sheer number of people who participated and voiced their opinions.[132] When asked about this assimilation, one activist explained it as follows:

> I would call it this [a public hearing] to the press to emphasize that a real public hearing is when so many people come out and express themselves. [The march] was one week before the official public hearing, which was scheduled for March 4, 2011. So, there was meaning in the march about what was coming up.[133]

In the case of Angostura, there is little doubt that no prior consultation took place as the Ministry of Interior,[134] seemed to be more inclined to sidestep the process of prior consultation taking refuge behind the idea that the indigenous designation is narrowly defined.[135] No popular referendum had been conducted either because prior to 2013 it was only limited to informal popular referenda which were sparingly held by the communities.[136]

B. Organisational Context of the Mine and Compatibility of the Company's CSR: Misdrawing the Project's Area of Influence

The arrival of Eco Oro in 1994 spurred conflict among the Colombian people as they were divided over the potential impact of operating the Angostura mine. As explained above, people from urban areas took on an environmentally informed, more holistic viewpoint supported by academicians and social organisations, whereas páramo dwellers in California and Vetas paid no heed to concerns beyond their short-sighted goals. A few years down the road, Eco Oro started to witness insecurity and violence from the dominant guerrilla group, the Revolutionary Armed Forces of Colombia.[137] Two employees were abducted and held in a remote location in the Colombian mountains and their release was conditional upon a USD two

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note 105, ¶ 118. This paragraph wrongly frames the protestors as equally divided between pro and anti-mining.

131 Jaskoski 2022, *supra* note 25, at 103.

132 *Id. at 104*.

133 *Id.*

134 *Id.* at 62. (The Ministry of Interior was in charge of conducting consultations to implement prior consultation domestic laws and decrees.).

135 *Id.* at 82.

136 *Id.* at 23.

137 FRANK SHANTY & RAYMOND PICQUET, INTERNATIONAL TERRORISM: AN ANNUAL EVENT DATA REPORT,1998 413 (1st ed. 2000).

million ransom.[138] After the military had subdued the instability in the area, Eco Oro returned to pursue its gold mining project.[139] Starting from 2010 onwards, Eco Oro became embroiled in a series of legislative changes and judicial decisions that left its investment in a state of flux. Taken together, these conditions provide a window into the complex and unstable context[140] of the Angostura mine.

Oddly, Eco Oro had gained a foothold in the area surrounding Angostura by putting in place benefit sharing arrangements that were attuned to that local context. The communities saw the project as favourable to them and that it served their interests prompting them to stand up for it.[141] Drawing on Thomson and Boutilier's[142] Social License to Operate (SLO) framework, Eco Oro was mindful of the communities' socio-cultural context and employed 'managerial' CSR strategies that involved the provision of social programs and public services that squarely fitted with the communities' needs and expectations. This enabled the company to secure economic legitimacy and to develop socio-political legitimacy incrementally as it moved from 'acceptance' to 'approval.' Nevertheless, resistance to Eco Oro sprang from the capital of Santander, Bucaramanga, which lies about 70 kilometres away from the mine,[143] and its narrowly defined area of influence.

The Angostura gold mine brings out an important difference between EIA hearings and prior consultation as participatory mechanisms. In the case of prior consultation, as demonstrated by the case of the Putumayo Oil Fields in Jaskoski's research,[144] outsiders who were left out of the prior consultation process because they resided outside the project's area of influence and later protested their exclusion were, first and foremost, indigenous peoples who have the right to be consulted under ILO

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[138] *Id.*

[139] Jaskoski 2022, *supra* note 25, at 101.

[140] According to Duncan's (1972) framework, the simple-complex dimension concerns environmental complexity, which refers to the number and heterogeneity of external elements relevant to an organisation's operations, whereas the static-dynamic dimension refers to the stability and constancy of the organisational environment over a certain period of time.

[141] Eco Oro Minerals Corp. v. The Republic of Colombia, *supra* note 105, ¶ 144.

[142] Ian Thomson & Robert Boutilier, *The Social License to Operate*, *in* SME MINING ENGINEERING HANDBOOK 1779, 1786 (Peter Darling eds. 3rd ed. 2011).

[143] The Angostura Mining Project in the Paramo of Santurban, Colombia, ENV'T JUST. ORG. LIAB. TRADE (Feb. 25, 2013), http://www.ejolt.org/wordpress/wp-content/uploads/2013/02/FS_002_Angostura.pdf.]

[144] Jaskoski 2020, *supra* note 2, at 548. Jaskoski focuses on five conflicts that emerged in different resource-rich locations across Colombia in the period leading up to the environmental licensing required for the exploitation phase. The study shows that those communities reposed no trust in the efficacy or integrity of prior consultation as an institution and rather used it to act as a stumbling block to derail the licensing process for the foreign investor.

169. Whereas in the case of Angostura mine, the outsiders who reside in Bucaramanga do not belong to an indigenous community but rather live in a cosmopolitan city with access to technology, information, and transnational action networks. Angostura outsiders would not have been able to make their voices heard unless it was an inclusive participatory mechanism such as the EIA hearing. This sheds light on the importance of adequate detection and full assessment of the environmental impacts of a project as companies are often inclined to downplay the potential influence of factors lying outside the area of influence and to presume the social acceptance of people in urban centres under the rubric of economic development. The area of influence is typically determined by private consultants who work directly with the company raising serious questions about whether such duty could be discharged with integrity and impartiality. The cases examined by Jaskoski,[145] provide further evidence that misdrawing the boundaries of the area of influence has been a source of tension and division among the communities affected by development projects.

In determining whether a community is impacted by a project, the jurisprudence of the CCC on prior consultation filings may be instructive. The Court's decisions indicate that the Ministry of Interior considered a community to be impacted by a project 'if a river that was the community's only water source flowed through the project's area of direct influence; if a road that crossed into the area of direct influence was the only route connecting an Indigenous community to the nearest city.'[146] This is evocative of the lakes that are located within the project's area[147] and that constitute a significant source of drinking water for urban centres. Applying the Interior Ministry's benchmark for measuring the potential impact of a project, Angostura's area of impact should have been expanded to include Bucaramanga and its neighbouring cities that also rely on the páramos for their water supply and to consider their residents as 'insiders' for the purposes of the EIA report.[148] What further proves the narrowness of the EIA's area of influence is that the proposed benchmark is borrowed from the institution of prior consultation that comprises a set of rights afforded to narrowly defined native communities in order to be used in a licensing regime that is presumed to support inclusive and meaningful public engagement in the environmental assessment procedure.

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[145] *Id.* at 543-549.

[146] Jaskoski 2022, *supra* note 25, at 82.

[147] Eco Oro Minerals Corp. v. The Republic of Colombia, *supra* note 105, ¶ 108.

[148] As mentioned above, for each EIA only one hearing may be held within the project's direct area of influence. This means that Angostura's second EIA hearing was exceptionally approved considering the problems which arose in the first hearing.

C. Legal Proceedings before Domestic Courts and Legislative Changes

Figure 2

Although Angostura mine has not been the subject of any dispute before domestic courts as the investor waived their right to bring cases, a series of decisions and legislative changes had undercut the economic viability of the project and left it in a state of constant uncertainty. The importance of these decisions and changes derives from the fact that they capture the evolution of the protection of páramos in Colombia and the regulation of concessions located within protected areas. As explained in Part I, páramos have enjoyed special environmental status long before 2010 based on the green Constitution of 1991, the international environmental treaties signed by Colombia in the 1990s and the environmental laws that followed closely on their heels.[149]

1. Mining Laws of 2001 and 2010

Nine years after the liberalization of mining through Mining Law 685 of 2001, Law 1382 was enacted in February, 2010 to deepen such liberalisation while amending the 2001 law to expressly include 'páramos' among the areas that could be excluded from mining. Article 3 reads, in part, as follows:

> Mining exploration and exploitation works and projects may not be carried out in areas declared and delimited in accordance with the legal framework currently in force … . The aforementioned exclusion zones will be those that have been constituted or will be established in accordance with the legal provisions in force, such as areas that comprise the system of national natural parks, regional natural parks, protected forest reserve areas and other forest reserve areas, páramo ecosystems, and the wetlands indicated in the list of international importance of the Ramsar Convention. To that end, these areas should be geographically delimited by the environmental authority on the basis of technical, social and environmental studies. The páramo ecosystems shall be identified in accordance with the cartographic information provided by the Alexander Von Humboldt Investigation Institute.

[149] Eco Oro Minerals Corp. v. The Republic of Colombia, *supra* note 105, ¶ 644. (These include the Biodiversity Convention and in 1998 it ratified the Ramsar Convention.).

Both the old,[150] and new mining laws converge on the fact that two steps must be taken for an area to be excluded, to be 'declared' as such and be geographically 'delimited' on the basis of studies. Besides setting out the conditions according to which a mining exclusion zone can be created, Law 1382 can be deemed to have met the 'declaration' requirement as the parameters of 'delineation' remain underway and yet to be articulated in subsequent legal instruments. The new law however, chips away at the power of the mining authority to intervene in the delimitation of the excluded areas and to allow mining under restrictive conditions as previously prescribed.[151] Unlike other excluded areas, the new law makes a unique reference to the mapping information provided by the Research Institute Alexander Von Humboldt (IAVH) in relation to the paramo ecosystems.

2. Resolution 937

Resolution 937 was issued by the Ministry of Environment to reinforce what has been stated in Law 1382; that for the identification and delimitation of Páramo Ecosystems, the Atlas of Colombian Páramos provided by IAVH will be adopted as a minimum reference and that any attempts to delimit the páramos by regional environmental authorities within their jurisdiction shall not go below the parameters of IAVH.[152] It also provided for an outright prohibition on extractive activities in those areas.[153] A few days before the issuance of the resolution in May 2011, Law 1382 was declared unconstitutional by the Court,[154] for the formal defect of bypassing prior consultation with ethnic groups and hence, was regarded as a favourable court decision from the perspective of those who advocate the primacy of indigenous rights. The effect of unconstitutionality was suspended for two years after which Law 685 came into force anew.[155]

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[150] PROCASUR-Ford Foundation, *supra* note 5. *See also,* Law 685 of 2001, *supra* note 75, art. 34.

[151] The following paragraph is omitted from the new law:

> "However, by means of a well-founded administrative act of the environmental authority that orders the subtraction of the required area, the mining authority may authorize that in the areas referred to in this article, with the exception of parks, mining activities may be carried out in a restricted manner or only by means of specified extraction methods and systems that do not affect the objectives of the exclusion zone."

[152] Eco Oro Minerals Corp. v. The Republic of Colombia, *supra* note 105, ¶ 126.

[153] *Id.*

[154] Corte Constitucional [C.C.] [Constitutional Court], May 11, 2011, C-366-11, (Colom.).

[155] Eco Oro Minerals Corp. v. The Republic of Colombia, *supra* note 105, ¶ 124.

3. National Development Plan Laws

After the mining law had been declared unenforceable, reforms to the mining sector were incorporated in a series of national development plans, laws issued in 2011, 2015 and 2019. In June, 2011 Law 1450 (National Development Plan 2010-2014), was enacted to outline the objectives of the new administration of Santos and the responsibilities of the government.[156] This law also laid down rules that brought the domestic legal framework more in line with Colombia's duties under the Ramsar Convention. Despite being a type of wetlands, Article 202 of Law 1450 distinguishes between páramos and wetlands and devotes paragraph 1 to páramo ecosystems to unequivocally prohibit agricultural activities, and exploration and exploitation of hydrocarbons and other minerals and adopts IAVH's Atlas of Páramos as the recognized reference for delineation until mapping at a finer scale has been completed.[157] Whereas for wetlands, the government is bestowed with the power to 'restrict partially or completely' extraction activities.[158]

To be able to assess Eco Oro's claim to property rights and whether it had expectations that it would be permitted to mine in (the entirety of) the concession, it is pertinent to discuss the legal effect of Laws 1382 and 1450 and Resolution 937 on mining activities in protected areas. Both Law 1382 and Law 1450 have been almost unanimously understood in the literature, [159] as 'declaring' a general prohibition of exploration and exploitation of minerals in the paramo ecosystems. This runs counter to the position of the Ministry of Mines which decried the national development law for sweeping inroads into the enjoyment of the right to property.[160] As for Eco Oro tribunal, it was of the opinion that no law or resolution before

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[156] Patricia Vargas-Leon, *Net Neutrality: An Overview of Enacted Laws in South America, in* NET NEUTRALITY COMPENDIUM: HUMAN RIGHTS, FREE COMPETITION AND THE FUTURE OF INTERNET 109, 114 (Luca Belli & Primavera De Filippi eds., 1st ed. 2015).

[157] Eco Oro Minerals Corp. v. The Republic of Colombia, *supra* note 105, ¶ 127; NICK FROMHERZ & ERICA LYMAN, COLOMBIA FRESHWATER RESOURCE RIGHTS REPORT, 32 (2021), https://programme.worldwaterweek.org/Content/ProposalResources/PDF/2021/pdf-2021-9644-2-Colombia FWR Rights Report_FINAL_ENG.pdf.

[158] This excludes areas listed as protected wetlands in the Ramsar Convention. Eco Oro Minerals Corp. v. The Republic of Colombia, *supra* note 105, ¶ 127.

[159] As explained by lawyers working for leading Colombian law firms in cross-jurisdictional comparative law books. Luis de Brigard et al., *Colombia in* ENVIRONMENTAL RISKS FOR MAJOR PROJECTS 93 (Herbert Smith 1st ed. 2012); Bernardo Cardenas et al., *Colombia in* MINING LAW: JURISDICTIONAL COMPARISONS 175, 177 (Stewart Sutcliffe eds. 2012); Jaskoski 2022, *supra* note 25, at 35; Juliana Delgado, Environmental Perception in Colombia's Paramo Protected Areas, 63, 63-64. (2021) (LSU Master's Theses. 5381) [hereinafter Delgado].

[160] Eco Oro Minerals Corp. v. The Republic of Colombia, *supra* note 105, ¶ 128.

Resolution 2090 of 2014 created a permanent mining ban and that they had only resulted in a 'temporary suspension of mining activities in the páramo ecosystems.'[161]

In constructing its position, the tribunal relied on the fact that the environmental license rejection did not expressly refer to the ban and only set out technical reasons.[162] It chose to overlook the fact that the law which was the first ever to classify páramos as a protected area was found to be unconstitutional twenty days before the rejection. It also turned its back to the rising wave of social discontent and popular mobilisation that preceded the license rejection. It found further support for its understanding in government communications,[163] although an argument of equal weight can be found in Minambiente's request to Eco Oro in April, 2010 to adjust its EIA based on the new law and Law 1450,[164] as well as the extensions granted to Eco Oro starting from Aug 2012.[165] Finally, the tribunal also refers to Judgement C-35,[166] and to its own reading of Advisory Opinion 2233,[167] to support its understanding. It is unquestionable that these judicial pronouncements indicate that the 'final delimitation' took place by virtue of Resolution 2090, but the tribunal's line of reasoning falls short of answering these questions:

Should the mining ban apply from the passing of the law that included a minimum reference issued by a research institute (Law 1450) or the date of final delimitation? Does the lack of 'final delimitation' neutralise the effect of mining prohibition? Why are grandfathering clauses in the different laws and resolutions linked to the cut-off date of February 9, 2010 (issuance of Law 1382)?

Resolution 937 was the first legal instrument to establish the requirement of delineation to be conducted at a scale 'equal to or more detailed than 1:25,000.'[168] It was not a requirement under the 2001 Mining Code or Law 1382. Law 1450 came to confirm, given that Law 1382 had been repealed, the status of páramos as an area excluded from mining operations and to firm up the Resolution 937 requirement of 'delineation at a scale of 1:25,000 while affirming that this will not delay the coming into effect of the mining ban because the issuance of a scientifically grounded delimitation based on proper hydrological and hydrogeological studies would take at

[161] *Id.* ¶ 491.
[162] *Id.* ¶ 498.
[163] *Id.* ¶ 498.
[164] *Id.* ¶ 113.
[165] *Id.* ¶ 134.
[166] *Id.* ¶ 497.
[167] *Id.* ¶ 496.
[168] *Id.* ¶ 126.

least five years,[169] and hence, 2007 Atlas was to be adopted until a more detailed scale has been obtained.[170]

Technically, this could not pose problems because Resolution 937, in order to be operational, clarified that any prospective cartographic scale must not create an area smaller than that delineated using IAVH's 1:25,000 scale in order not to disrupt the rights and liabilities that had been created in that interval of time.[171] This construction is consistent with the fact that Eco Oro's position in the aftermath of the enactment of Law 1382 was that at least half of the open pit area came within the boundaries of the 2007 Atlas and 'this decision effectively stopped the project, causing it to be potentially unfeasible or uneconomic'.[172] After the issuance of Resolution 2090 that delineated the páramos, the company reported that '50.73% of the Concession area [fell] within the preservation zone'.[173] As stated by the tribunal, "[t]here was less than a 0.2% difference between the overlap created by the 2007 Atlas and the 2090 Atlas."[174] This defies the tribunal's suggestion that the temporary suspension was needed to safeguard the rights of those, "who work or live in areas which fall within the 2007 Atlas but may not fall within a delimitation undertaken in accordance with Article 34 and Law 1450."[175] So, the question that looms large here is: was the insertion of a minimum reference in Resolution 937 and Law 1450 intended to give the effect of a temporary suspension or to give the green light for the enforcement of the mining ban?

4. Resolution 2090

December 2014 witnessed the issuance of the much-awaited delineation that was set out in Resolution 2090 dividing the páramo into three zones: (i) the preservation zone; (ii) the restoration zone; and (iii) the sustainable use zone. The restoration zones are the only areas where mining could be authorized subject to stricter environmental controls and Eco Oro's concession happens to be, at least in part, within the restoration area.[176] Mindful of litigation risk against the state, both Law 1382,[177] and Resolution 2090 contained grandfathering provisions that allow

[169] Erwing Rodríguez-Salah, *Otra vez Delimitarán Santurbán de Forma Exprés y sin Estudios*, RAZONPUBLICA (Jan. 20, 2020), https://razonpublica.com/otra-vez-delimitaran-santurban-forma-expres-sin-estudios/?fbclid=IwAR3Kk9KveVadtZbVyMG6UPpTuT91JzeLXwj3-v0v8fWzaIy4P_O7hSNQ9Gs. [hereinafter Rodríguez-Salah].
[170] Eco Oro Minerals Corp. v. The Republic of Colombia, *supra* note 105, ¶127.
[171] *Id.* ¶ 126.
[172] *Id.* ¶ 114, 685 (b).
[173] *Id.* ¶ 154.
[174] *Id.* ¶ 685.
[175] *Id.* ¶ 491.
[176] *Id.* ¶ 154.
[177] *Id.* ¶ 111.

concessions with an environmental license ('with an environmental control and management instrument' as per Resolution 2090) [178] to continue despite their location in a páramo. Neither requirement had been satisfied by Eco Oro,[179] on account of the social and environmental challenges that it encountered which the new underground mine plan would not have necessarily solved. Assuming that Eco Oro did not qualify as a beneficiary under the grandfathering regime and that the mining ban applied retroactively, this application would be subject to certain safeguards – principle of legality, observance of due process and appropriate compensation where due.' [180] More precisely, according to Article 58 of the Constitution, holders of rights acquired with just title may be dispossessed thereof, for public interest subject to compensation.[181] A salient question here is whether the existence of a mining concession contract without an environmental license was sufficient for Eco Oro to receive compensation within the meaning of the said article?

5. Law 1753

What comes next in Figure 2 is Law 1753 and the ideal way to address this legislation is to investigate the extent of convergence and/or divergence between Law 1753 and previous Laws of 1382 and 1450 as well as Resolution 937. In terms of declaring the páramos as an excluded area from mining operations, the textual formulation of the relevant provisions of the three laws and Resolution 937 specifically point to páramos as an area where mining operations including exploitation and exploration are flatly prohibited.[182] The provisions follow the same formulation of setting out the general rule and then devote certain paragraphs (or phrases) to deal with páramos alone out of the other types of exclusion zones. While the 'declaration' requirement has been satisfied by Law 1382, the evolution of the wording of the 'delimitation' requirement, from Resolution 937 to Law 1753, regarding which cartographic scale to be used speaks of the uncertainty that surrounded this issue and their keenness on not allowing the delimitation process to throw a spanner into the implementation of the law. Regarding what innovation Law 1753 brings with respect to 'grandfathering', Law 1753 reiterates the content of the grandfathering provision included in Law 1382 and Resolution 2090 and the only difference seems to lie in the addition of the word 'exploration' in Law 1753 which entailed no practical difference for Eco Oro since grandfathering remains only available to concession

[178] Resolution 2090 required "a mining concession contract and an environmental control and management instrument" instead of an "environmental license". *Id.*, ¶ 154.
[179] As mentioned earlier, Eco Oro only held an approved environmental management plan for the exploratory stage.
[180] Eco Oro Minerals Corp. v. The Republic of Colombia, *supra* note 105, ¶467.
[181] As confirmed by the Council of State in Advisory opinion 2233 with respect to the legal effect of Section 202 of Law 1450. *Id.*
[182] *Id.* ¶ 126 (Resolution 937), ¶127 (Law 1450), ¶110 (Law 1382), ¶158 (Law 1783).

holders who held 'an environmental license with the equivalent environmental control and management instrument.'[183]

6. Constitutional Court Judgment C-35 of 2016

The grandfathering provision (Article 173) of Law 1753 was challenged in a lawsuit,[184] filed by a group of citizens and an NGO for allowing existing license holders to conduct mining operations in páramos, despite a general moratorium on mining activities in protected areas. In its decision, the Court emphasised the strategic importance of the páramo ecosystems as 'carbon sinks' and in maintaining water quality and ecological balance, noting the government's duty to protect the constitutional right to water and a healthy environment.[185] The Court further reasoned that "the protection of the environment prevails over economic rights acquired by private persons through environmental permits and concession contracts when it is proven that the activity produces harm, or when there is merit to apply the precautionary principle to avoid damage to non-renewable natural resources or to human health."[186] The Court ordered that all mining be halted immediately, and prohibited any future mining in the area.[187] The Court however, declared Section 2 of Article 173 of Law 1753 to be constitutional, which establishes the procedure for delimiting páramos, with the condition that if the Ministry of Environment diverges from the reference area established by the Alexander von Humboldt Institute for delimitation of páramos, it must explicitly base its decision upon a scientific criterion that provides a greater degree of protection.[188]

7. Constitutional Court Judgment T- 361 of 2017

Judgment T-361 was issued in a tutela action filed by the people residing in the area of influence of Santurban páramos who claimed that the delimitation process was carried out without holding open consultation with affected communities.[189] This was affirmed by the Court in its judgment which ruled that "MinAmbiente had not respected the principle of good faith by having denied protection of the rights to environmental participation, failed to provide access to information and not ensured

[183] Article 173 of Law 1753 (¶1). *Id.*, ¶ 158.
[184] Corte Constitucional [C.C.] [Constitutional Court], febrero 8, 2016, C-035/16, (Colom.) https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2016/20160208_3588_decision-2.pdf
[185] *Id.* ¶ 130-131.
[186] *Id.* ¶ 128.
[187] *Id.* ¶ 146.
[188] *Id.* ¶ 180.
[189] Ruth Zárate-Rueda et al., *Socioenvironmental Conflicts and Social Representations Surrounding Mining Extractivism at Santurban*, 12 SCI. REP. 9948, 3 (2022), https://www.nature.com/articles/s41598-022-14086-0.pdf [hereiafter Zárate-Rueda,].

the community's active and deliberative participation."[190] This judgment also provides guidance on the consultation phase in relation to the delimitation of protected areas aimed at collectively deciding the different uses of those lands, i.e., for agriculture, ecosystem restoration, etc.[191] A renowned civic leader described Resolution 2090 as technically deficient, not founded on scientific evidence, diverged from the criteria of the IAVH, and decreased the number of hectares that would have been protected in favour of facilitating and legalizing mining interests.[192] As confirmed by the judgment, the social and economic studies on which the delimitation was made were not made accessible by the Ministry of Environment.[193] Mindful of the importance of protecting páramos while the delimitation process was afoot, Resolution 2090 remained in force for one year after the judgment was delivered.[194]

8. Law 1930 of 2018

The final law of relevance here is Law 1930 which designates the páramos as 'strategic ecosystems' and reiterates the general prohibition to carry out mining exploration and exploitation activities in areas so designated.[195] The law also spells out a regulatory framework to effectively manage the sustainable use of páramos which is innovative in two aspects, in promoting the involvement of public and private actors in the strategies and plans developed under the law and incorporating the dwellers of páramos as a constituent towards which the environmental management plans should be more sensitized.[196]

IV. ANALYSIS

A. The Link between Investor/State Misconduct, Public Opposition and Loss of Investment

One thing that slowly crystallised while investigating this case is the difficulty of unequivocally identifying misconduct with a direct link to the investment loss on the part of either party to the arbitration. Public opposition essentially sprang from the conflicting perspectives between the rural inhabitants who depended on artisanal and small-scale mining activities in their territories, and the urban residents as

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[190] Eco Oro Minerals Corp. v. The Republic of Colombia, *supra* note 105, ¶ 677.
[191] Zárate-Rueda, *supra* note 189, at 2-3.
[192] On inconsistency related to the hectares that would be protected, see *Id.*, at 3; Erwing Rodríguez-Salah, *La Nueva Delimitación de Santurbán: ¿un nuevo engaño?*, (July 15, 2019), https://razonpublica.com/la-nueva-delimitacion-de-santurban-un-nuevo-engano/.
[193] Rodríguez-Salah, *supra* note 169; Eco Oro Minerals Corp. v. The Republic of Colombia, *supra* note 105, ¶ 189.
[194] Eco Oro Minerals Corp. v. The Republic of Colombia, *supra* note 105, ¶ 189.
[195] *Id.* ¶ 195.
[196] Delgado, *supra* note 159, at 65-55, 68.

consumers of the water coming from the river basins of the páramos. Insofar as Eco's Oro's liability is concerned, the company bore no obligations under both mechanisms of prior consultation and public referendum. Equally, the EIA hearing, if requested, only entailed a collaborative effort between the company and the State to deliver a hearing on the project to the public, which, as a rule, takes place in the area of direct impact, where Eco Oro garnered unanimous support.

The legal saga surrounding the delimitation of páramos was in fact the outcome of the government authorizing mining in areas known to be protected by virtue of the Colombian Constitution and international environmental treaties, to which Colombia is a signatory. This gave rise to a series of constitutional decisions that fended off the threat of extra-activism on the páramos. The availability of the tutela and the active role of the judiciary were instrumental for public opposition in this case as they gave a patina of legitimacy to the oft-seen-as-aspirational rights and helped prove that they are not relegated to a lower less important sphere – as induced by the government in many cases. It is true that there was a state of legal uncertainty. However, the driving force behind this uncertainty sprang from the persistent attempts to implement the laws on prior consultation and to forestall the grandfathering provisions, seen as a threat to the population's right to water. Even if it has contributed to the overall image of inconsistency, the judiciary's decisions were resolutely and consistently driven by the goal of protecting the environment, safeguarding the communities' active and deliberative participation even if this inadvertently frustrated the expectations of other parties and were indeed compatible with the precautionary principle which constitutes one of the fundamental tenets of Colombian environmental policy. Colombia's actions against Eco Oro were not motivated by a desire for retaliation or reprisal emanating from a regime or policy change as in other investment cases. The State had in place unambiguous safeguards for páramos long before Eco Oro had arrived in Colombia and an examination of the legal framework in place at the time could have shown that 'a mining ban on all or part of Concession 3452' was possible.[197]

It remains difficult though to defend the untenable position of Colombia in granting a concession in an environmentally sensitive area, making unfounded representations to Eco Oro and granting successive extensions, against a backdrop of social discontent and the concerted efforts to implement laws on the protection of the páramos, that once the delimitation has been completed it will be able to proceed with mining operations as originally envisioned in the concession contract.

[197] Eco Oro Minerals Corp. v. The Republic of Colombia, *supra* note 105, ¶ 765.

B. Tribunal's Findings on Expropriation and MST Claims

1. Legitimate exercise of police powers or indirect expropriation?

The tribunal underlined that with the rejection of Eco Oro's request to extend the deadline for submitting its PTO in December 2018,[198] Eco Oro had lost the opportunity to apply for an environmental license in relation to the area permitted under Resolution 2090.[199] The tribunal, however, did not explain how Eco Oro was entitled to this opportunity while not being a beneficiary under any of the grandfathering regimes. Eco Oro only held an approved 1997 environmental management plan for the exploratory stage,[200] and another one prepared in 2008 for which no evidence of approval was submitted.[201] The only provision that Eco Oro was eligible to invoke as a holder of a mining title (without an environmental license) is Article 58 of the Colombian Constitution. Compensation, in this case, would be justified insofar as it is used to offset the cost of exploration that has been incurred and not the potential benefits it would have gained if it had proceeded to exploitation. Had Eco Oro successfully obtained an EIA, evaluating its rights would have been subject to a different method of analysis.

One might ask whether Eco Oro's deprivation of this opportunity resulted from the challenged measures or the early rejection of its EIA. It may well be argued that Eco Oro exhausted this opportunity, and the project met its final fate when the EIA was rejected on environmental and social grounds that could not have been cleared up by the proposal of an underground mine. Colombia as a state had the discretionary power to reject the EIA for failure to satisfy the environmental requirements without which exploitation operations cannot be commenced.[202] The minimal prospects to get approved in environmental licensing as a result of social discontent were more influential and pronounced than the deprivation of the opportunity to exploit due to the challenged measures. The dissent's argument that the harm that Eco Oro's project could bring to the páramos could not be measured without a final, reliable delimitation is a hollow one. The considerable overlap with the páramos which has been obvious since 2010 was sufficient to deduce that operating on this site without damaging the páramos was not conceivable.[203] Eco Oro was clearly put on notice that at least a significant part of its concession land was going to be mining excluded

[198] *Id.* ¶ 197.
[199] *Id.* ¶ 633.
[200] *Id.* ¶ 101.
[201] Eco Oro could arguably benefit from Resolution 2090 since it only required an environmental control and management instrument and not an environmental license as in previous grandfathering provisions but this contention appeared to rest on tenuous evidence of an 'approved'.
[202] Law 685 of 2001, *supra* note 75, art. 197.
[203] Eco Oro Minerals Corp. v. The Republic of Colombia, *supra* note 105, ¶ 637.

and the delimitation introduced by Resolution 2090 would not have entailed a different result that could reverse the impact of the ban. The company admitted in its 2009 PTO that there was a social aspect, and its failure to contain it was evident in the popular response that preceded and followed the EIA rejection.

In its analysis of the expropriation claim, the tribunal characterized Colombia's measures as non-discriminatory, taken for legitimate public welfare objectives,[204] reasonable and non-arbitrary,[205] proportionate,[206] and taken in good faith.[207] To turn a legitimate exercise of state power into 'an actionable indirect expropriation', 'there must be a very significant aggravating element or factor in the conduct of the State and not just a bureaucratic muddle or State inefficiency'[208] which, according to the majority, was absent.[209] The tribunal ruled that no compensation is payable under international law, according to Annex 811 (2) (b) of the FTA, even if domestic legislation stipulates otherwise. [210] Remarkably, statements of support and reassurance from Colombian authorities were also dismissed by the tribunal as not significant enough to create a legitimate expectation that no mining ban would be imposed on the concession area.[211] With that, the tribunal has unequivocally ruled that the State's conduct was within its legitimate sphere of action to protect its public interest.

The tribunal also examined the extent to which the investor itself was engaged in due diligence when it first made its investment and acknowledged that imposing a mining ban for the protection of the páramos and the potential applicability of the precautionary principle were indeed easy to reveal by a due diligence process.[212] One could also add that the body of jurisprudence developed by the CCC was strongly indicative of the primacy of environmental protection and community rights over private rights, which the tribunal alluded to in its award.[213]

2. The Host State's Breach of Minimum Standard of Treatment (MST)

When ascertaining whether and to what extent the host state has violated Article 805 of Canada-Colombia FTA on MST, the tribunal strikingly reversed its characterisation of State conduct. The majority found Colombia's conduct "grossly

[204] *Id.* ¶ 641.
[205] *Id.* ¶ 662.
[206] *Id.* ¶ 655.
[207] *Id.* ¶ 678.
[208] *Id.* ¶ 643.
[209] *Id.* ¶ 698, 699.
[210] *Id.* ¶ 698.
[211] *Id.* ¶ 694.
[212] *Id.* ¶ 683, 654.
[213] *Id.* ¶ 768.

unfair, arbitrary, disproportionate, has inflicted damage on Eco Oro without serving any apparent purpose,"[214] and in flagrant contrast to its previous finding considered actions by the State and its officials as "more than just inconsistency or inadequacy."[215] It also noted that Colombia's approach to the delimitation of the páramos along with the lack of coordination between different arms of the government, [216] rendered the regulatory framework as unpredictable and uncertain.[217]

In making its conflicting finding, the majority, as explained by the dissent,[218] went beyond and stretched the plain meaning of the FTA text which clearly sets the standard of protection as that of the Minimum Standard of Treatment. The majority lowered the bar by applying the Fair and Equitable Treatment (FET) standard and reading the element of, 'legitimate expectations' into it. It maintained that Eco Oro had legitimate expectations to carry out mining operations in the entirety of the concession based on verbal, non-specific statements of support from state authorities and that these are protected under the content that they ascribe to the MST standard. Building on this fallacious premise, the majority found that although Colombia acted in good faith to protect the environment and within the contours of the State's 'right to regulate,' its behaviour fell short of the manner a State is required to treat a foreign investor in its territory under the FET.

It relied on a constitutional provision, namely Article 58, to generate a legitimate expectation of compensation in case of expropriation, [219] although another constitutionally-backed principle, the precautionary principle,[220] could give rise to a counter-argument that the existence of this principle as a fundamental tenet of Colombian environmental policy may be used to infer that the Eco Oro took on risks in entering a particular investment environment and this, in turn, limits its legitimate expectations.[221] Consequently, the tribunal found a breach of Article 805 of the FTA concerning MST and considered Eco Oro's loss compensable based on

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[214] *Id.* ¶ 820.
[215] *Id.* ¶ 821.
[216] *Id.* ¶ 815, 816.
[217] *Id.* ¶ 804, 805.
[218] Eco Oro Minerals Corp. v. The Republic of Colombia, ICSID Case No. ARB/16/41, Partial Dissent of Professor Philippe Sands QC, (Sep. 9, 2021), ¶ 36 [hereinafter Sands Partial Dissent].
[219] *Id.* ¶ 804.
[220] The tribunal had previously considered the precautionary principle as part of due diligence under expropriation.
[221] As put by the tribunal in Biwater v. Tanzania when considering the investor's conduct in its assessment of whether the host state had breached FET. Biwater Gauff (Tanzania Limited v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, ¶ 601 (July 24, 2008).

its conclusion that the general exceptions clause of 2201(3) does not preclude compensation.[222]

In its conclusion, the tribunal disregards the confluence of factors[223] that had precluded a finding of indirect expropriation as explained above. Describing Colombia's actions as 'not serving any apparent purpose,' suggests that there was a covert purpose to intentionally harm the investor by deliberately delaying the delineation rather than the consequence of two issues, the difficulty of delimiting the páramos from technical and social perspectives,[224] and the difficulty to streamline decision-making when faced with competing goals and conflicting values.[225] The latter was particularly evident in the conceptual disparity over whether mining and preservation of the paramo ecosystems can co-exist. This conceptual disparity underlay the conflicting motivations and positions revealed by the actions of the different organs of the State. The Colombian Court system took a forthright stance in protecting the environment and safeguarding the communities' rights. The judiciary, siding with the people and their right to water, was against allowing mining in the páramos under any circumstances regardless of what extraction methods are used and called for any scientific uncertainty to be interpreted in light of the precautionary principle. On the other hand, the central authorities including those in charge of mining exhibited much tolerance in regard to carrying out mining in areas that cut across environmentally sensitive ecosystems like the páramos. They internalised and promoted the rhetoric that the conservation of areas surrounding mining sites is possible as long as they are separated by dividing lines drawn on maps with no regard to the spillover effects of mining on surrounding ecosystems.

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[222] *Id.* ¶ 830.

[223] These include legitimate objectives pursued by the State, the lack of reasonable, proper due diligence by Eco Oro in making its investment, Eco Oro's failure to satisfy the environmental requirements and obtain an SLO that goes beyond the direct sphere of influence, Eco Oro's non-eligibility under any of the grandfathering regimes, and the degree of similarity between Resolution 2090 and the 2007 Atlas.

[224] As expressed by Brigitte Baptiste, a Colombian biologist and the former director of the IAVH. Daniel Henryk Rasolt, *Protecting the Páramos in Colombia*, BIODIVERSITY, COLOMBIA (May 18, 2021), https://esperanzaproject.com/2021/latin-america/colombia/protecting-the-paramos-in-colombia/.

[225] Philippe Sands elaborates on this in his partial dissent. Sands Partial Dissent, *supra* note 218, ¶ 28, 29.

3. The Tribunal's Approach to Addressing Investor's and Environmental/Indigenous Rights

The rejection of the amicus intervention by the tribunal,[226] eliminated the only entry point for the voices of local communities and their rights to be heard and turned the dispute into a set of purely legal questions leaving out socio-political considerations revealed by this research. Despite their relevance and the salience of the social unrest, the rights of local communities and/or indigenous people and the role of the investor in complying with Corporate Social Responsibility standards were completely left out of their analysis. One of the reasons that the tribunal attributed the incongruity in the State's decision-making process was the clash of interests between the rural and urban people. In constructing its argument, the tribunal lay the blame entirely on the State,[227] ruling out any role for the company in creating an environment conducive to obtaining the social license to operate. As mentioned above, it could be argued that Eco Oro enjoyed sufficient support in the vicinity of the project area and that those who objected were outside the direct area of influence which again reveals the inherent deficiency of linking the participatory mechanisms to those within the direct area of influence. The level of support received at the local level had likely overshadowed the divisive practices of Eco Oro.

The tribunal's approach to the assessment of the MST standard, which the majority considered to include FET, also appeared to be partial when it adopted an expansive interpretation and centred on the host State's actions without factoring in the investor's conduct, as frequently applied by other tribunals in their assessment of FET.[228] The dissenting opinion by Philip Sands also shed light on how the majority read the elements of an autonomous FET standard, including stability and predictability of the domestic legal framework,[229] into the minimum standard of treatment standard[230]. Another element of the FET, the duty to perform due diligence under the notion of legitimate expectations, was also addressed and found to be lacking by the tribunal in its analysis of the claim of expropriation while it

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[226] Eco Oro Minerals Corp. v. The Republic of Colombia, ICSID Case No. ARB/16/41, Procedural Order No. 6 Decision on Non-Disputing Parties' Application (Feb. 18, 2019).
[227] Eco Oro Minerals Corp. v. The Republic of Colombia, *supra* note 105, ¶ 696.
[228] YULIA LEVASHOVA, THE RIGHT OF STATES TO REGULATE IN INTERNATIONAL INVESTMENT LAW: THE SEARCH FOR BALANCE BETWEEN PUBLIC INTEREST AND FAIR AND EQUITABLE TREATMENT 22 (1st ed. 2019) [hereinafter Levashova].
[229] Sands Partial Dissent, *supra* note 218, ¶ 19, 23, 24.
[230] According to Dumberry, The MST encompasses "an obligation to prevent the denial of justice, . . . to provide due process, to prevent arbitrary conduct and to provide investors with 'full protection and security'." *See* Patrick Dumberry, *Fair and Equitable Treatment: Its Interaction with the Minimum Standard and Its Customary Status*, BRILL RES. PERSPECTIVES INT'L INV. L. & ARB. 1, 9 (2017).

chose to omit it and shied away from examining the investor's conduct under the MST section.

In terms of how the tribunal addressed the nature of investor's rights, the claimant appointed arbitrator found in his dissent,[231] that Colombia's actions were not pursued in good faith nor were they proportionate to their proclaimed objectives and hence, this characterisation renders Colombia's conduct a 'rare circumstances,' situation as provided in Annex 811(2)(b).[232] He explains that the retroactive application of laws and the uncertainty that accompanied the delimitation of páramos turns the situation from 'normal' to 'rare' circumstances which, if satisfied, could make Colombia's environmental measures an expropriatory act under Annex 811(2)(b) and compensation may be warranted.[233] Professor Naón finds support for his proposition in Article 58 of the Colombian Constitution according to which acquired rights may not be seized without compensation,[234] and the principle of good faith under customary international law and its link with the principle of legitimate expectations as acknowledged by the ECHR in its jurisprudence.[235]

While the other dissenting opinion denounced the contradicting conclusions that the majority had reached in their analysis of expropriation and MST claims,[236] and devoted some space to the difficulties faced by host states in navigating and reconciling conflicting values in the policy-making process,[237] there was no mention of any sort of hierarchy between the investor's rights and the human right to water. As suggested by Mouyal, the right to regulate turns into a 'duty' to regulate when human rights are at stake, and that the State has the 'duty to make certain minimum policy prioritizations,' for which investment obligations may be compromised.[238]

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[231] Eco Oro Minerals Corp. v. The Republic of Colombia, ICSID Case No. ARB/16/41, Partial Dissenting Opinion of Horacio A Grigera Naon (Sep. 9, 2021).
[232] *Id.* ¶ 11.
[233] *Id.*
[234] *Id.* ¶ 12.
[235] *Id.* ¶ 9.
[236] Sands Partial Dissent, *supra* note 218, ¶ 16, 17, 23, 27.
[237] *Id.* ¶ 28, 29.
[238] LONE WANDAHL MOUYAL, INTERNATIONAL INVESTMENT LAW AND THE RIGHT TO REGULATE: A HUMAN RIGHTS PERSPECTIVE 223 (1st ed. 2018).

C. Canada-Colombia FTA: A New Generation Treaty with a Standard-Specific Exception and a General Exceptions Provision

Eco Oro v Colombia was brought under a 'new generation' treaty, the 2008 Colombia-Canada FTA[239] that largely follows the 2004 Canadian model FIPA by providing for innovative substantive and procedural provisions to address the challenges that arose as a result of the ISDS legitimacy crisis. To understand whether Eco Oro's tribunal's approach is compatible with ISDS case law and the shifts in the investment treaty drafting, I start by looking at the parties' approach to treaty drafting particularly in relation to 'exceptions'.

1. The Parties' Treaty Practice

References to environmental and other public policy concerns have taken many forms in the context of investment treaties and have evolved over time. In the 1990s, Canada started its practice with inserting general clauses for reserving policy space in over twenty of its treaties including NAFTA and BITs with Latin American countries[240] that typically reads:

> "Nothing in this [Agreement/Chapter] shall be construed to prevent a Contracting Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to … ."

In many cases,[241] this general clause is followed with a more specific one modelled on GATT Article XX to elaborate on the scope of reserved policy space by explicitly referring to specific areas of regulation, e.g., human, animal or plant life or health,

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[239] WOLFGANG ALSCHNER, INVESTMENT ARBITRATION AND STATE-DRIVEN REFORM NEW TREATIES, OLD OUTCOMES XVIII, 108 (JUNE 23, 2022) (EBOOK) [HEREINAFTER ALSCHNER].

[240] Celine Lévesque, *The Inclusion of GATT Article XX Exceptions in IIAs: A Potentially Risky Policy, in* PROSPECTS IN INTERNATIONAL INVESTMENT LAW AND POLICY 363, (Pierre Sauvé & Roberto Echandi eds., 1st ed. 2013), at 363, 369.

[241] For example, Canada-Egypt BIT (1996), Can.-Egypt, art. XVII ¶ 2 and 3, (Nov 13, 1996) https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/784/canada---egypt-bit-1996; Canada-Venezuela, Bolivarian Republic of BIT (1996), Can.-Venez., art. ¶ 10 (a) and (b) annex., (July 1, 1996), https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/809/canada---venezuela-bolivarian-republic-of-bit-1996.

the conservation of living or non-living exhaustible natural resource, the protection of national treasures of artistic, historic or archaeological value, … etc[242].

Starting in 2004, a new practice of including exceptions with regard to certain treaty provisions in addition to the comprehensive exceptions emerged. As described by Alschner, "Canada seek[s] to secure a maximum of regulatory flexibilities in their treaties by stacking or layering these different mechanisms."[243] Canada's 2006 BIT with Peru for example included a general exception,[244] a specific exception on performance requirements,[245] and another one on indirect expropriation[246].

In its 2008 model BIT, Colombia also inserted a special exception on FET[247] and included a similarly drafted standard-specific exception in relation to expropriation[248]. The model BIT addressed the protection of the environment under a separate clause[249] that lacked the chapeau requirements of Article 2201 (3) of the Canada-Colombia FTA, which means that arbitrary and discriminatory government actions will not be screened out and instead contained the measure of proportionality. Another difference lies in the self-judging nature of the wording of the exception clause of the Colombia model BIT 'that it considers appropriate', thereby precluding assessment by an international tribunal. The parties however chose not to confer a self-judging effect to the general exceptions clause in the Canada-Colombia FTA which renders it more in alignment with the nature of investment arbitration as a tool for obtaining compensation for loss[250].

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[242] Kathryn Gordon & Joachim Pohl, *Environmental Concerns in International Investment Agreements: A Survey*, 14, 15 OECD Working Papers on International Investment (Jan. 2011).
[243] Alschner, *supra* note 239, at 165.
[244] Canada-Peru BIT (2006), Can.-Peru, art. 10(1), (Nov. 14, 2006) https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/793/canada---peru-bit-2006.
[245] *Id.* art. 7(2).
[246] *Id.* annex B.13(1)(C).
[247] Colombia model BIT (2008), art. III ¶ 3 (D), https://edit.wti.org/document/show/47411102-2897-4754-b877-af3afc8df3a1
[248] *Id.* art. VI ¶ 2 (C), https://edit.wti.org/document/show/47411102-2897-4754-b877-af3afc8df3a1
[249] *Id.* art. VIII, which reads:
"Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining, or enforcing any measure that it considers appropriate to ensure that an investment activity in its territory is undertaken in accordance with environmental law of the Contracting Party, provided that such measures are proportional to the objectives sought".
[250] JOSÉ ALVAREZ, THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT 304 (20 JUL 2011) (EBOOK).

Some scholars,[251] are of the view that both general and specific exceptions have the same function of increasing regulatory flexibility and avoiding international liability for their actions under certain circumstances. In the context of Eco Oro, Alschner takes issue with the tribunal's reading of the general exception clause arguing that the specific exception on indirect expropriation merely codifies the international law Doctrine of Police Power and its presence does not have a bearing on how the general exception clause should be interpreted. [252] They both operate as 'complementary lines of defence in more complete agreements' [253] intended to exempt the State from liability.

While it is logical to say that general exception clauses in new treaties signal a change in the parties' intent towards safeguarding the State's right to regulate through absolving them from liability, these clauses must be interpreted in their context, in conjunction with other provisions of the treaty and against the background of treaty practice of its signatories. One should consider the issue within the realm of international investment law and the evolution of its case law, from tribunals entirely neglecting States' regulatory authority to tribunals reluctantly giving some consideration to the host State's right to regulate, to tribunals unable to bypass the explicit stipulations on the right to regulate in treaties prompting them to carry out balancing exercises. As explained by some commentators, [254] general exception clauses emerged as expressions of the right to regulate which embodied the States' attempt to reform the ISDS system from within. Essential elements of the right to regulate can be distilled from arbitral jurisprudence and academic writing, which include being 'limited by the international obligations under general international law', the need to 'be balanced against the rights and obligations of investors', and that 'its exercise can entail different consequences'[255].

Canada's practice of the inclusion of standard-specific exceptions about a decade after the introduction of general exceptions and with substantial textual difference raises the question as to whether general exception clauses did not afford sufficient protection to the state or whether it intended to augment the regulatory capacity of the state in relation to certain standards, which could warrant discrepant interpretations. To explicitly state in Annex 811 that measures for legitimate public welfare objectives 'do not constitute indirect expropriation' under specified

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[251] Levent Sabanogullari, *The Merits and Limitations of General Exception Clauses in Contemporary Investment Treaty Practice*, INV. TREATY NEWS (May 21, 2015), https://www.iisd.org/itn/en/2015/05/21/the-merits-and-limitations-of-general-exception-clauses-in-contemporary-investment-treaty-practice/.
[252] ALSCHNER , *supra* note 239, at 159.
[253] *Id.* at 165.
[254] Levashova, *supra* note 228, at 21.
[255] Levashova, *supra* note 228, at 28, 30.

circumstances carries a more compelling connotation of exemption from liability than the language used in Article 2201(3) of Canada-Colombia FTA.

Annex 811.2 (b) explicitly negates the characterisation of a measure as a breach of IIA and enunciates this legal effect. Whereas the language used under 'general exceptions', and when read together with other provisions, suggests that they are intended to reaffirm the State's regulatory authority by guiding the tribunals to factor in the legitimate public objectives in its assessment of liability which could ultimately justify and permit the State to not comply with a primary obligation. The drafting however of Article 2201(3) fails to eliminate the interpretive uncertainty [256] surrounding the payment of compensation for an act that is 'wrong but justified' under the general exceptions.

Further, Annex 811.2(b) fits squarely into the definition of 'carve outs' as described by Vinuales, in that they 'exclud[e] certain measures from the applicable primary norm' and don't envisage the occurrence of a breach of such primary norms[257]. Vinuales further elaborates that carve-outs in that sense differ from exceptions whose operation 'assumes a prior finding of inconsistency with a primary norm' after which analysis shall consider whether such inconsistency can be justified under the exception [258] . This finds explicit support in Canada's non-disputing party submission[259]. The features of exceptions as a way to escape a rule has often warranted a restrictive interpretation[260] and relatedly been perceived as 'reduc[ing] rather than improv[ing]' states' regulatory space [261] due to enumerating specific permissible purposes, as opposed to e.g. the open-textured Police Power Doctrine, and applying a more stringent legal test than would otherwise apply[262], as will be explained below.

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[256] Andrew Newcombe, *General Exceptions in International Investment Agreements, in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 369 (Marie Claire Segger, Andrew Newcombe & Markus Gehring eds, 1st ed. 2011); also Lévesque, *supra* note 240, at 368 (noting that the wording of the general exceptions clause does not necessarily entail the non-payment of compensation).

[257] Jorge E Viñuales, *Seven Ways of Escaping a Rule: Of Exceptions and Their Avatars, in* EXCEPTIONS IN INTERNATIONAL LAW 68, 69 (Lorand Bartels & Paddeu Federica eds., 1st ed. 2020).

[258] *Id.* at 73.

[259] Procedural Order No. 6, *supra* note 226, at 4 where it states "[Annex 811.2(b)] does not constitute an exception that applies after an expropriation has been found but is a recognition that the exercise of police powers does not engage State responsibility".

[260] Viñuales, *supra* note 257, at 68, 69, 81, 82.

[261] Lévesque, *supra* note 240, at 364

[262] Caroline Henckels, *Should Investment Treaties Contain Public Policy Exceptions?*, 59 (8) Boston College Law Review 2825, 2837.

2. Did the Tribunal Err in Adopting an Interpretation of the Exception Clause that Differed from that Expressed by the Treaty Parties?

The tribunal rejected the joint interpretation put forward by the Respondent State, Colombia and Canada, Colombia's counterparty to the FTA, because it "did not comport with the ordinary meaning of the Article 2201(3) when construed in the context of the FTA as a whole and specifically in the context of Chapter Eight."[263] A few clarifications are in order.

Where a treaty is silent on joint interpretations or includes a provision on them but is silent on its legal effect, it shall be governed by the rules of interpretation set out in Vienna Convention on the Law of Treaties (VCLT).[264] Considered as 'subsequent agreements', reference should be made to Article 31(3)(a) of the VCLT which provides that any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions shall be taken into account by the tribunal when interpreting the treaty. However, this provision does not make a joint or multilateral submission on treaty interpretation binding on a tribunal, it is only meant to serve as a tool for guidance.

The right to interpret a treaty was one of the topical issues that were raised during the sessions of UNCITRAL Working Group III and several governments expressed their desire to see the use of joint interpretations and their legal effect expressly addressed in modern treaties.[265] Binding interpretations may be expressly allowed by the contracting parties or by interpretative committees or commissions. Two mega-regional trade agreements have adopted binding interpretations by interpretative committees/commissions, namely CETA (Article 8.31) and United States-Mexico-Canada Agreement (USMCA).[266]

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[263] Eco Oro Minerals Corp. v. The Republic of Colombia, *supra* note 105, ¶ 836.
[264] Joel Chow et al., *Joint Interpretation of Investment Treaties: A Study on Existing Practice, Legal Character and Strategies for Implementation*, CTR. INT'L L (2020), https://docs.wixstatic.com/ugd/50061c_b24b0f2b90364a639da2d265ef34d22c.pdf.
[265] U.N. Comm'n on Int'l Trade L., Possible Reform of Investor-State Dispute Settlement (ISDS): Interpretation of Investment Treaties by Treaty Parties, U.N. Doc. A/CN.9/WG.III/WP.191, ¶ 8 (Mar. 30 – Apr. 3 2020, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/a-cn.9-191_-_treaty_interpretation_for_submission_website.pdf.
[266] Seung-Woon Lee, *States' Right to Interpret a Treaty and Whether It Should Be Binding in a Pending Case*, KLUWER ARB. BLOG (Aug. 3, 2020), https://arbitrationblog.kluwerarbitration.com/2020/08/03/states-right-to-interpret-a-treaty-and-whether-it-should-be-binding-in-a-pending-case/#:~:text=Among various

Looking at the FTA at issue, it may be argued that the tribunal selectively chose to comply with the 'ordinary meaning' rule of interpretation under the VCLT while it passed over Article 31(3)(a) of the VCLT.[267] Apart from the advisory nature of the said VCLT provision, Canada-Colombia FTA includes a provision that entitles a 'joint commission' composed of representatives of the Parties to issue interpretations in relation to the treaty and shall be binding on tribunals established under Section B of Chapter Eight.[268] In Eco Oro, the parties utilised this tool and the Joint Commission issued an interpretation in relation to Articles 803, 804 and 805 but not the exception clause, article 2201(3). The interpretation of the exception clause was submitted by Colombia in its submissions as a Respondent and by Canada in its non-disputing party submission.

The question is whether the tribunal erred when it adopted an interpretation of the exception clause that differed from that expressed by the treaty parties. Theoretically, the tribunal is under no obligation to accept the content expressed in a party submission or a non-disputing party submission. However, assuming that the tool whereby they presented their interpretations is irrelevant, the tribunal should have accepted the parties' interpretation as binding according to Article 2001(3)(a). The treaty, however, remains silent on the time effect factor of interpretations which will be addressed in the following section.

3. Are Interpretations Issued During the Dispute Expected to Produce Effects with regard to Pending or Future Disputes?

Seeking guidance from relevant jurisprudence, the Court of Justice of the European Union held that 'interpretations determined by the CETA Joint Committee should have no effect on the handling of disputes that have been resolved or brought prior to those interpretations,'[269] even though Article 8.31 entitles the Joint Committee to set a specific date from which an interpretation shall have binding effect. Further, some BITs like the Dutch Model BIT of March 22, 2019 expressly prevent the

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incremental reform approaches submitted by member,mitigation mechanism%2C and arbitrators' appointment methods and ethics.

[267] Roopa Mathews & Dilber Devitre, *New Generation Investment Treaties and Environmental Exceptions: A Case Study of Treaty Interpretation in Eco Oro Minerals Corp. v. Colombia*, KLUWER ARB. BLOG (Apr. 11, 2022), https://arbitrationblog.kluwerarbitration.com/2022/04/11/new-generation-investment-treaties-and-environmental-exceptions-a-case-study-of-treaty-interpretation-in-eco-oro-minerals-corp-v-colombia/ [hereinafter Mathews & Devitre].

[268] Canada-Colombia Free Trade Agreement, Can.-Colom., art. 2001(3)(a) (2008).

[269] COURT OF JUSTICE OF THE EUROPEAN UNION, Opinion 1/17 on Interpretation of CETA, 30 Apr. 2019, ¶ 236, https://curia.europa.eu/juris/document/document.jsf?docid=213502&doclang=EN.

application of a joint interpretive statement to a pending dispute in Article 24(2).[270] One can surmise that unless the joint interpretations provision expressly indicates that they are meant to produce binding effect with regard to pending disputes, it is unlikely that tribunals will be predisposed to apply joint interpretations to ongoing disputes, let alone if not submitted through the mechanism prescribed in the treaty.

4. Why did the Tribunal Adopt an Interpretation of the General Exception Clause that Diverged from GATT Article XX's Interpretation on which it is Modelled?

The specific exception incorporated in Annex 811 on indirect expropriation embodies the Police Power Doctrine derived from customary international law which itself constitutes the source of many principles that apply to foreign investment.[271] The State's exemption of liability regarding indirect expropriation was a straightforward application of the specific exception and its chapeau requirements, namely to be adopted in good faith, non-discriminatory and proportionate. This takes us to the question of whether a negative finding of expropriation necessitates a finding of non-breach of other standards.

Investment disputes concern a particular investment and are known for their complex factual contexts involving multiple actors. Claims for breach of investment standards pivot on varied allegations and focus may be placed on a specific set of facts when examining a certain standard. When investigating state compliance with the standard of MST (or FET) in the context of Eco Oro, one may ask which measure gave rise to such violation, was it Resolution 2090 that delineated the páramos or the meandering process to delineate where those wetlands are? Theoretically, a positive or negative finding of expropriation does not dictate the outcome for whether there has been a breach of other standards.

In Eco Oro, under the MST the tribunal is expected to assess not the purpose of the impugned measure but rather how the foreign investor was treated. The purpose might have been a legitimate public welfare objective but involved a process that was devoid of elements that could render it 'fair and equitable.' MST (including FET) is not a shield against regulatory change but includes several elements that are associated with procedural due process, legality and consistency.[272] There is evidence

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[270] Catharine Titi, *The Timing of Treaty Party Interpretations: A Treaty-Design Perspective, Webinar on Treaty Parties Involvement and Control Mechanisms in Treaty Interpretation*, UNCITRAL WG III 23 (June 4, 2020), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/titi_treatyinterpretationwebinar_en.pdf.

[271] Barton Legum & Ioana Petculescu, *GATT Article XX and International Investment Law*, *in* PROSPECT INT INVEST LAW POLICY WORLD TRADE FORUM 340, 351 (Pierre Sauvé & Roberto Echandi eds. 1st ed. 2013).

[272] In this context, fair and equitable treatment includes

in case law that in determining whether FET has been breached by a bona fide policy it is required that such conduct 'does not manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination.'[273] In 'David Aven v. Costa Rica', the tribunal held in interpreting the limits of the State's regulatory power that this did not give Costa Rica an "absolute right" to implement its environmental laws as it desired but that it must do so in a fair, non-discriminatory fashion, following principles of due process.[274]

Putting aside all apparent defects in Eco Oro's award, it would have been more logical if the tribunal grounded its conclusion on the inapplicability of the general exception because its chapeau requirements[275] were not satisfied due to its positive finding of the FET breach,[276] instead of neutralising the effect of the general exception altogether and arguing that the "ordinary meaning," of the provision does not preclude the payment of compensation.[277] With this, the majority's decision places environmental protection and investment protection on an equal footing in contrast to David Aven's tribunal that expressly held that the rights of investors are subordinate to the right of States to regulate and qualified this statement by specifying the manner in which environmental laws must be implemented.

That said, the application of a general exception modelled on GATT Article XX in the context of an ISDS dispute reveals many practical problems. As a provision hailing from trade law, it is worth examining how Article XX is interpreted in WTO

> (1) the requirement stability and predictability of the legal framework and consistency in the host state's decision-making, (2) the principle of legality, (3) the protection of investor confidence or legitimate expectations, (4) procedural due process and denial of justice, (5) protection against discrimination and arbitrariness, (6) the requirement of transparency and (7) the concept of reasonableness and proportionality.

See Stephan Schill, *Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law* 37 Global Administrative Law Series, Working Paper 2006/6, (2006), https://iilj.org/wp-content/uploads/2016/08/Schill-Fair-and-Equitable-Treatment-under-Investment-Treaties-as-an-Embodiment-of-the-Rule-of-Law-2006-2.pdf.

[273] Saluka Investments B.V. v. Czech Republic, UNCITRAL, Partial Award of March 17, 2006, ¶ 307.

[274] Mathews & Devitre, *supra* note 267.

[275] These GATT Article XX-like provisions condition the exceptions on fulfillment of certain requirements specified in the chapeau, which are aimed at 'avoiding abuse or illegitimate use of the exceptions to substantive rules'. *See* Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, ¶ 25, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996).

[276] As previously mentioned, the tribunal found Colombia's conduct "grossly unfair, arbitrary, disproportionate, and has inflicted damage on Eco Oro without serving any apparent purpose".

[277] Eco Oro Minerals Corp. v. The Republic of Colombia, *supra* note 105, ¶ 830, 836.

case law. In addition to the chapeau requirements of Article XX (or Article 2201 (3))[278], trade panels employ the necessity test to determine whether a certain measure falls within the meaning of Article XX. To satisfy this test there should be a circumstance in which there was no other alternative way, which was less trade restrictive.[279] This indicates a far stricter test than would otherwise apply. Further, applying this approach to the context of an investment dispute in relation to the FET standard raises a conundrum, how could a bundle of allegations that form the basis for a claim of breach of FET be assessed against such test?

V. CONCLUSION

Writing this article has been driven by the need to move beyond locating the inconsistency between the new treaties and arbitral outcomes in the tribunals' application of the law and has attempted to expose external factors that may have contributed to this trend.

As the respondent State in Eco Oro, Colombia has presented a powerful example of a State that has mustered its resources to bring its legal framework in harmony with its constitutional duty to protect the environment and popular demands to preserve their lands. Its attempt to translate this venture into bright-line rules in international fora through treaty drafting had however has turned into a rocky road.

While both Canada and Colombia converged in their interpretation of the general exception they had inserted in their FTA, this was no guarantee for the tribunal established under the same FTA to follow their interpretation. The States' original intent must have been to provide greater regulatory flexibility to pursue public interest objectives but in practice the general exceptions borrowed from the trade law regime appear to not go beyond expressly articulating the exceptions for legitimate objectives already reflected in IIA jurisprudence. One may consider this a major stride toward seeing less tribunals adopt a purely economic point of view devoid of public interest justifications.

However, this brings out the limitations of the mechanism of issuing interpretations during arbitral proceedings as well as the drawbacks of implanting provisions from another regime. This was particularly evident in *Eco Oro v. Colombia*, as the tribunal encountered the application of the general exception clause to justify a measure that

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[278] Article 2201 (3) reads: " … subject to the requirement that such measures are not applied in a manner that constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, … ."

[279] Mitsuo Matsushita, *WTO Dispute Cases Relating to Food Safety Issues, in* TRADE DISPUTES AND THE DISPUTE SETTLEMENT UNDERSTANDING OF THE WTO: AN INTERDISCIPLINARY ASSESSMENT 283, 285 (James Hartigan eds., 1st ed. 2009).

was found, regardless of the merits of this decision, to be in violation of the FET standard whose content converges with the chapeau to GATT's Article XX. Hence, the fact that a measure is 'necessary' is not sufficient to activate the exception; it must satisfy the chapeau requirements and be practically feasible to apply to standards peculiar to the law of investment protection. This raises questions on whether Article XX is the appropriate general exception to use in the context of investment treaty regime.

With the existence of a clearly drafted, outcome-determinative and standard-specific exception such as Annex 811 on indirect expropriation under Canada-Colombia FTA, it is unlikely that an IIA tribunal will interpret a general exception clause as excluding the requirement to pay compensation for breach of other standards. States ought not to rely on the mechanism of issuing interpretations after a dispute has arisen; the treaty should clearly state the intention of its signatories particularly in terms of the legal effect of exceptions inserted in the treaty to preserve regulatory freedom of action. Eco Oro tribunal's characterisation of the host state's conduct may have gone off track in view of the inconsistent findings made under different standards of protection and reading an unwarranted expansion into their scope but it did not err in not allowing the exception clauses to override the proper application of the recognized rules of interpretation. One ought not to lose sight of the fact that the tribunal is conferred with the power to adjudicate disputes between the parties in an impartial and independent manner. Choosing to resolve disputes out of court does not denote that the tribunal is expected to become subservient to the parties' wishes and to sweep aside the values of legal predictability and judicial impartiality.

The other issue that may have placed Colombia in a better position in the proceedings through countering the company's claims with evidence of their misconduct is the potency of Colombia's national laws to detect corporate misconduct. The requirements of the EIA regime under the Colombian legal framework were not consonant with the rural-urban dichotomy prevalent in the project's impacted area as they cast the company as a recipient of substantial support despite the opposition that swept through the urban centre of Bucaramanga and neighbouring cities for which the páramos constitutes a primary source of drinking water. Linking the EIA regime and prior consultation to those within the direct area of influence had significantly undercut such opposing voices that could have revealed the company's failure to secure the approval of communities adversely affected by the project. To leave the delimitation of the boundaries of the area of influence in the hands of private consultants contracted by the company and to exonerate the latter from responsibility for securing support through properly carrying out procedures required by participatory mechanisms gives more veracity to the company's claims that the State's conduct was devoid of social pressure. Had the state been able to put in place adequate laws and to demonstrate non-compliance

on the part of the investor, it might have prompted the tribunal to factor in the company's conduct in its decision calculus.