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Partial Dissenting Opinion

1. For the reasons that follow, based on the specific facts and applicable law in the present case, and despite certain coincidences in the legal analysis and facts considered in the decision and in this dissenting opinion in respect of or in connection with the indirect expropriation claim, I find myself unable to share the conclusions in the decision in regard to this claim.

2. Also, although I am in agreement with the decision's final adjudication of the Claimant's fair and equitable claim, I do not agree – as it should become apparent from a comparison of this dissenting opinion with the decision – with each and every finding, understanding of the evidence or analysis leading to such decision.

3. Annex 811 (2)(b) of the Canada-Colombia Free Trade Agreement (the "Treaty") is to be read against the backdrop of general international law for its understanding and interpretation. As set forth in the *Phoenix* award, the parties to a treaty cannot contract out of the system of international law. As soon as States contract with one another, they do so automatically and necessarily within the system of international law,[1] which brings into the picture general principles of law and international law doctrines.[2] Therefore, when construed or interpreted, this Treaty provisions cannot be isolated from general international law.

4. Annex 811 (2)(b) refers to "*rare circumstances*" and includes as illustration of situations in which "*rare circumstances*" would be present, "*when a measure or series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted in good faith* [or of a] *non-discriminatory* [character]".[3] If rare circumstances are present under international law, a finding of indirect expropriation may follow.

5. "*Rare circumstances*" afford large leeway for interpretation. In the corresponding interpretative exercise, the legal factors to be considered from an international law perspective include legitimate expectations created when the concession was executed on 8 February 2007 (the "Concession")[4] in respect of legal title/Concession rights of the

[1] *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009), at para. 77.

[2] Vienna Convention on the Law of Treaties, Article 31(3)(c) (Exhibit CL-3).

[3] Free Trade Agreement between Canada and the Republic of Colombia (signed on 21 November 2008 and entered into force on 15 August 2011) (Exhibit C-22; see also Exhibit R-137).

[4] Concession Contract 3452, 8 February 2007 (Exhibit C-16).

Claimant, general public international law principles of *pacta sunt servanda*, good faith (including legitimate expectations and the condemnation of abuse of rights) and the proportionality principle. Indeed, although good faith – a general principle of customary international law – encompasses all the latter which, in turn, contribute to shaping the notion of good faith and its substance, *pacta sunt servanda* is a general, stand-alone principle of customary international law.

6. The above is apposite in connection with contractual agreements like the Concession. Contractual rights thereunder are protected investments under the definition of investment in Article 838(g)(i), Section "C" of the Treaty, which expressly includes concessions. Contractual rights covered by this provision (unlike other situations which might also fall within its purview) are particularly apt to generate legitimate expectations frustrated by the retroactive or retrospective application of laws, including, without limitation, environmental laws, insofar as not accompanied by full compensation or a credible offer to fully compensate. Indeed, under Treaty Article 811(1)(c), lack of compensation as defined in the Treaty constitutes a Treaty breach rendering the taking illicit under international law.

7. The validity of the Concession under Colombian law has not been challenged, so that the necessary conclusion is that the Concession was made with the concessionaire having the legitimate expectation that its rights thereunder would be respected including, without limitation, its right to make a profit or draw economic benefit. The frustration of such rights resulting from retroactive or retrospective legislation or regulations must necessarily be taken into account to determine if Treaty guarantees have been violated, including in the analysis whether "*rare circumstances*" are present. As it will be further discussed below, a valid concession under Colombian law vests the concessionaire with acquired rights to explore and exploit the mining resource within the boundaries of the Concession as granted.

8. Further, the protection of legitimate expectations is intimately intertwined with customary international law rules, of substantial relevance when there is uncertainty in the applicable legal regime introduced through State conduct after the granting of contractual rights under a transaction to which the State is a party.

9. As the European Court of Human Rights[5] has decided, not only the protection of legitimate expectations is a component of the general good faith rule of customary international law but, indeed, such rule is a corollary of the protection of legitimate expectations as a general principle of law[6] indissolubly linked to the good faith rule under customary international law.

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[5] *Opel Austria GmbH v. Council of the European Union*, Case T-115/94 (Judgment of the Court of First Instance (Fourth Chamber) (22 January 1997) ECR II-00039.

[6] See, for example, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/01, Award (22 September 2014) (Exhibit RL-96) at para. 576 showing that the protection of legitimate expectations is a general principle of law. The International Court of Justice has not endorsed the existence of an international law principle protecting legitimate expectations (*Obligation to Negotiate Access to the Pacific Ocean (Bolivia vs Chile)* October 2018 Judgment ICJ Report 2018 page 507, at page 559 (para. 162). However, the facts giving rise to this decision

> "*The principle of good faith, codified by Article 18 of the First Vienna Convention, is a rule of customary international law whose existence is recognized by the International Court of Justice and is therefore binding on the Community. The principle is the corollary in public international law of the principle of protection of legitimate expectations, which forms part of the Community legal order and on which an economic operator to whom an institution has given justified hopes may rely*".[7]

10. Although this case concerned the application in time of a provision of the EC Agreement, it stands for a general principle of customary international law which is clearly relevant when acquired rights are exposed to the retroactive application of legal rules, therefore adversely affecting legal certainty and predictability and concomitant expectations associated with them. In this connection, the following excerpt of this decision is pertinent:

> "*The principle of legal certainty requires Community legislation to be certain and its application foreseeable by individuals and that every Community measure having legal effects must be clear and precise and must be brought to the notice of the person concerned in such a way that he can ascertain exactly the time at which the measure comes into being and starts to have legal effects. That requirement must be observed all the more strictly in the case of a measure liable to have financial consequences in order that those concerned may know precisely the extent of the obligations which it imposes on them*"[8].

11. To consider, in light of the above, whether "*rare circumstances*" in face of which, for example, not respecting a concessionaire's rights under a concession would lead to the violation of Treaty Article 811(1) and its Annex 811(2)(b), it is necessary to bear in mind that *normal circumstances* require not applying retroactively laws or regulations interfering with contractual rights and defeating acquired rights or expectations associated with such rights. It cannot be "normal" to take for granted the retroactive application of the law or legal regulations to defeat concession rights, which are prospective in nature, particularly when such application is pursued by the State party to the contract to the detriment of the private counterpart in a situation like the one at stake, in which the State played an active role in attracting investments through, *inter alia*, the enticement of a concession based on the agreement between the State and a private party the legal regime of which is unilaterally controlled by the State. In such scenario, if such interference happens, a "*rare circumstance*" is engendered, and compensation may be appropriate.

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concerned the existence or not of the obligation to negotiate maritime boundaries in an inter-State dispute, and not the enforcement of concession rights protected by a bilateral investment protection treaty. Further, the Court explicitly recognized that the legitimate expectations principle was applied in treaty investment disputes.

[7] *Ibidem*, at II-40.

[8] *Ibidem*, at II-41.

12. Colombian law leads to similar conclusions. Under Colombian law, including Colombian constitutional law, the retroactive (affecting acquired rights, Colombian Constitution Article 58) or retrospective (affecting ongoing relationships) application of national law requires compensation. Although this provision privileges the public interest over merely private ones, it does provide for compensation in case of deprivation of property rights. In this respect, not only does Article 58 preclude the retroactive application of the law as a basic constitutional guarantee, but it also provides that acquired rights are part of the property rights protected by this provision, which in the present case come into life simultaneously with the coming into life of the contract or concession constituting their source[9]. In turn, the notion of acquired rights unequivocally carries with it the principle that acquired rights may not be eroded or suppressed by a retroactive application of the law without compensating for the deprivation of such rights protected by the Colombian Constitution.

13. Also, the Colombian law principle of "*confianza legítima*" ("legitimate expectation or reliance") comes into the picture. The retroactive application of the law to the detriment of acquired rights under Colombian law would be a still more blatant violation both of the legitimate expectations principle under international law and the *confianza legítima* and acquired rights principles under Colombian law. It should be noted that under Colombian constitutional law, all of acquired rights, *confianza legítima* and legal predictability (*seguridad jurídica*) fall within the protected ambit of the good faith principle and are thus united by a common thread[10]. It would then be the "*rarest of circumstances*" not to find a violation of Annex 811(2)(b) on the basis of the facts and the law applying in the present case, considered from the perspective of both applicable domestic and international law, including the reference in this provision to the principle of good faith. Such proximity between municipal and international law evokes the kind of convergence of legal principles underlined in the European Court of Human Rights decision referred to at para. 9 above.

14. Under Colombian law, there is no limitation on the operation of these principles in respect of environmental regulations. Specifically, Council of State Advisory Opinion 2233 of

[9] (All citations to Colombian legal texts or cases in this opinion refer to their original text in Spanish). Article 58 of the Colombian Consitution (Exhibit C-65) recites as follows: "*Se garantizan la propiedad privada y los demás derechos adquiridos con arreglo a las leyes civiles, los cuales no pueden ser desconocidos ni vulnerados por leyes posteriores. Cuando de la aplicación de una ley expedida por motivos de utilidad pública o interés social, resultare en conflicto los derechos de los particulares con la necesidad por ella reconocida, el interés privado deberá ceder al interés público o social. La propiedad es una función social que implica obligaciones. Como tal, le es inherente una función ecológica. El Estado protegerá y promoverá las formas asociativas y solidarias de propiedad. Por motivos de utilidad pública o interés social definidos por el legislador, podrá haber expropiación mediante sentencia judicial e indemnización previa. Este se fijará consultando los intereses de la comunidad y del afectado. En los casos que determine el legislador, dicha expropiación podrá adelantarse por vía administrativa, sujeta a posterior acción contenciosa-administrativa, incluso respecto del precio*". The irretroactivity principle is further confirmed by Article 46 of Law 685 of 2001 (Colombian Mining Code, Exhibit C-8): "*Normatividad del contrato. Al contrato de concesión le serán aplicables durante el término de su ejecución y durante sus prórrogas, las leyes mineras vigentes al tiempo de su perfeccionamiento, sin excepción o salvedad alguna. Si dichas leyes fueren modificadas o adicionadas con posterioridad, al concesionario le serán aplicables estas últimas en cuanto amplíen, confirmen o mejoren sus prerrogativas exceptuando aquellas que prevean modificaciones de las contraprestaciones económicas previstas en favor del Estado o de las de Entidades Territoriales*".

[10] *Consejo de Estado*, Decision No. 2233 (11 December 2014), at pp. 38-39 (Exhibit R-135).

11 December 2014 provides that: a) the doctrines of acquired rights and *confianza legítima* apply (are not carved out or excluded) in connection with environmental regulations[11]; and b) both cases of retroactive application of the law in regard to acquired rights or of retrospective application of the law in connection with ongoing relationships give rise to compensation[12]. In fact, Constitutional Court Decision C-35 is an explicit acknowledgment of the retroactive effects of its determinations because it expressly states that it is purposely aimed at curing what is described as the then existing "deficient legal protection of páramo ecosystems"[13], in other words, at modifying the then existing law.

15. In the present case, notions of acquired rights and *confianza legítima* under Colombian administrative law and converging notions of international law referred to above play a central role in the evaluation of the factual and legal context of the situations that give rise to these Treaty claims, including expropriation claims.

16. Focusing now on the text of Annex 811 (2)(b), this provision requires an analysis of *pacta sunt servanda*, good faith, proportionality, legitimate expectations and abuse of rights. Such principles must be brought to bear when interpreting references to the "severity" or the "purpose" of measures concerned by the application of Annex 811(2)(b).

17. As argued by the Claimant and shown in the witness testimony of Mark Mosely Williams (unrebutted in this part), the Angostura deposit 150 hectares is the Concession's most attractive in terms of silver and gold reserves. This sector of the Concession overlaps 0.09 % of the Santurbán Páramo (assuming (*quod non*) the Páramo delimitation pursuant to Resolutions 2090 of 2014 of the *Ministerio de Ambiente y Desarrollo Sostenible*[14]and Resolution VSC 829 of 2 August 2016 of the *Agencia Nacional de Minería*[15]), but deprives the concessionaire of over 50 % of its Concession mining rights and renders mining under the Concession economically inviable[16]. However, neither the Constitutional Court Decision C-035 of 2016 nor Resolution 2090 of 2014[17], which preceded Resolution VSC 829, can be taken as the final criterion of delimitation since later Constitutional Court Decision T-361 of 2017 struck down Resolution 2090 and ordered a new delimitation of the Páramo, albeit by taking into account the criteria set forth in Resolution 2090.

18. Nevertheless, the meaning or real effects of this latter Constitutional Court Decision are less than clear, since: a) it did not delineate the Santurbán Páramo; b) in vague terms, it

[11] *Ibidem*, at pp. 36-37, no. 1.1.

[12] *Ibidem*, at 36-40. This is also the situation in international law: *infra*, fn. 36.

[13] Constitutional Court, Judgment No. C-35 (8 February 2016), paras. 166-169 at pp. 140-141 (Exhibit C-42).

[14] Ministry of Environment, Resolution No. 2090 of 2014 (19 December 2014) (Exhibit C-34).

[15] National Mining Agency, Resolution No. VSC 829 (2 August 2016) (Exhibit C-53).

[16] Witness statement of Mark Moseley-Williams (19 March 2018) at para. 59. More specifically, as a result of Resolution 2090, the Santurbán Páramo overlaps with a) 50.7 % of the Concession and 32.4 % of the Angostura deposit; and b) 3.9 % of the restoration area under the Concession and 27.6 % of such area corresponding to the Angostura deposit (*ibidem*, at paras. 25-26).

[17] Ministry of Environment, Resolution No. 2090 of 2014 (19 December 2014) (Exhibit C-34).

says that as a result of any delineation the levels of protection of the Páramo cannot be lower "as to the protection of the environment" than the one afforded under Resolution 2090; c) still, it goes on to say, the demarcation of the Páramo in such Resolution can be modified in view of errors committed in the demarcation; d) in any case, it also says, that any ensuing modification cannot adversely affect measures to protect or safeguard the Páramo "in global terms"; and e) it states that in the delimitation the classification of Páramo zones under the Alexander Humboldt Institute (IAvH) report must be taken into account[18]. At any event, the order in this Decision to the Ministry of the Environment to delimit the Páramo within one year, in the form of an administrative act, was never carried out.

19. On 24 December 2016, the Constitutional Court refused to clarify its Decision C-035 despite various indications from different sectors that its meaning and effects were unclear[19]. It should also be noted that different laws, resolutions or court decisions (e.g. Law 1930 of 2018[20] at Article 14; Resolution 769 of 2002 at Article 8[21], Constitutional Court decision T-361 of 2012 at para. 15.3.4[22]; Council of State Advisory Opinion 2233 of 2014, at 7-8)[23] impose on the State, in compliance with its constitutional duties, the unilateral obligation to acquire, on its own initiative, páramo areas, which, if complied with, would likely have avoided Colombian law and international law violations leading to the Claimant's claims in this case; however, despite the vital ecological importance of this natural resource and Colombia's constitutional duties which, since 1997 (Law 373), required Colombia to acquire páramo areas (and accordingly to delimit such areas to determine what was to be acquired) it granted instead, in 2007, a Concession to the Claimant without first establishing whether it overlapped or not with páramo area subject to Colombia páramo acquisition obligations. Colombia did not attempt either to acquire the concession rights it had granted the Claimant limited to the Concession sector comprising the Santurban Páramo, which would have been in line with the mandate set forth in Law 373 to protect the páramos.

20. No due diligence in 2007 – when the Concession was executed – could have anticipated the uncertainties and accompanying contradictions created by State conduct postdating the Concession summarized in paras. 16-19 above[24]. Further, no due diligence on the side of the Claimant could have enabled it to predict the radical impairment of its Concession rights through host State conduct or justify the State's breach of its own, constitutionally

[18] Constitutional Court, Judgment No. T-361 (30 May 2017) at pp. 261-262 (Exhibit C-244).

[19] Constitutional Court, Ruling 138/16 (6 April 2016) (Exhibit C-49).

[20] Law No. 1930 (27 July 2018) (Exhibit R-51).

[21] Ministry of Environment, Resolution No. 769 (5 August 2002) (Exhibit C-9).

[22] Constitutional Court, Judgment No. T-361 (30 May 2017) (Exhibit C-244).

[23] *Consejo de Estado*, Decision No. 2233 (11 December 2014) (Exhibit R-135).

[24] Post-Concession State conduct like conduct described, *inter alia,* at paras. 772-805 of the decision, as well as the facts and circumstances alluded to in its conclusion at para. 820, could not have been anticipated by the concessionaire when entering into the Concession.

mandated obligations to protect the páramos, reminded by the Colombian Council of State[25], which were ignored when granting the Concession. In the specific context of the transactions at stake, this situation of inequality gives rise to both legal and moral obligations on the State not to unreasonably or disproportionately exercise its unilateral regulatory or police powers[26], since the Respondent is solely responsible for failing to carry out any due diligence or conduct itself and for its lack of foresight when determining the legal entitlement vested in the private party under the Concession having in mind the social or State interests compromised by granting it.

21. Further, blanket or general statements as to environmental protection prior to the Concession could not have alerted the Claimant about specific issues regarding its concession rights and their scope or delimitation, but certainly should have alerted the State not to grant concession rights actually or potentially interfering in its laws or obligations regarding Páramo protection, including preliminary due diligence to avoid such interference, which should have included the delimitation of the Páramo through State action prior to granting the Concession. It was exclusively in the hands of the State to delimit the Páramo: the private party could not substitute itself for the State to carry out such delimitation. If the State did not have this foresight, nor could the Claimant have had it.

22. The IAvH was created pursuant to the 1993 General Environmental Law[27]. It took it 17 years to issue its 2007 Report on the páramos[28], including Santurbán, evaluating their fragility and establishing their general geographic dimension (but not the Santurbán delimitation) after the execution of the Concession. The Claimant could not have anticipated this through a due diligence, that was clearly not undertaken by the State itself in protecting a Páramo already identified in the Colombian maps since 1851[29] and – as it was of public knowledge – which had been subject to continuing – apparently destructive – mining operations since then without effective counter-action by the Colombian State despite this Páramo's seemingly obvious delicate ecosystem characteristics.

23. The radical impairment of the concessionaire's acquired rights arising out of state conduct consisting, *inter alia*, of the uncertain Angostura deposit delimitation, rooted in turn in the uncertainty of the Concession delimitation itself, cannot be dissociated from the parallel neutralization of the exercise of such rights to, for example, obtain the mining licenses, necessarily requiring the previous delimitation of the licensed area in which the exploration and exploitation activities would be carried out. In such respect (and for all legal purposes, including for assessing the existence of an indirect expropriation under the Treaty), it is not possible – unless adopting a formalistic approach – to dissociate an acquired right under applicable law from its exercise: there is no distinction between denying the existence of an acquired right and neutralizing its exercise through private or State action or conduct,

[25] *Consejo de Estado*, Decision No. 2233 of 11 December 2014, at pp. 16-99 (Exhibit R-135).

[26] J.D.B Mitchell, *The Contracts of Public Authorities, a Comparative Study* (University of London (London School of Economics), 1954), at 91.

[27] Law No. 99 of 1993 (22 December 1993), Articles 16(c) and 19, (Exhibit C-66).

[28] IAvH, Atlas of Colombia Páramos (2007) (Exhibit C-14).

[29] Article La Silla Vacía "El tal páramo de Santurbán sí existe" (8 September 2014) (Exhibit R-110).

as it has happened in this case. Acquired rights are as much ignored when their existence is rejected as when their exercise is impaired. Therefore, a holistic evaluation of the situation at stake shows that the Claimant's acquired rights have been denied in their entirety and, accordingly, that an illicit taking under the Treaty has ensued.

24. The uncertainties in the Concession delimitation were in part prompted by social strife between water users in the city of Bucaramanga and miners in the Vetas Municipality. However, the Claimant did not originate nor could predict the impact of this social strife on the delineation of the Páramo as a result of the measures. Rather, the State (in compliance with its basic political and social obligations) should have been aware of the clash of interests between different sectors of its population (as testified by Minister Luz Helena Sarmiento[30] and acknowledged by the Colombian Constitutional Court[31]) which – as accepted in the decision – in substantial part account for the State's meandering conduct regarding the Páramo before and after the adoption of the measures and the uncertainty regarding its delimitation, existing even today.

25. Therefore, a comparative evaluation of the severity of: (i) the detriment to the Páramo sought to be prevented by Resolution 2090, the Constitutional Court Decision C-35 and Resolution VSC 829 (collectively, the "Measures") in light of their purpose (as set forth in Annex 811 2 (b)), and (ii) the deprivation of the Claimant's rights caused by the Measures, must necessarily take into account that the Páramo delimitation relied upon by the Measures when adopted was, without any fault attributable to the Claimant, not accurate, was still subject to modification or review, and in any case was not final, and that the Measures, which could not have been anticipated by the Claimant when contracting, were harmful to the Claimant by substantially depriving it from its acquired rights under the Concession, particularly in connection with the Angostura deposit. The Respondent was fully responsible for such uncertainty, the very existence of which also constituted a violation of the Respondent's constitutional duties. Such evaluation must also take into account the relatively minimum effects on the Santurbán Páramo on mining the Angostura deposit, which – even if hypothetically considering the correctness of the Páramo delimitation pursuant to the Measures – only affects less than 1% of the entire Páramo.

26. In view of the foregoing, the proportionality and abuse of rights principles – which are closely linked and operate in tandem – and the good faith principle, including the notion of legitimate expectations inherent to it, referred to in Annex 811(2)(b), require a weighing and balancing exercise[32]. Such balancing and weighing exercise, also warranted under

[30] Hearing transcript, Day 2 (21 January 2020), at pp. 674-685.

[31] Constitutional Court, Judgment No. T-361 (30 May 2017) (Exhibit C-244), paras. 19-20 and dispositive part, at pp. 254-284.

[32] Not only this weighing and balancing exercise along lines of proportionality and reasonableness should be applied when construing and applying Annex 811(2) in accordance with international law, but it is also mandated under Colombian law in expropriation cases (when the constitutionality of the applicable norm is challenged, but which, *mutatis mutandis*, is set forth as a general principle (Constitutional Court, Judgment No. C-35 (8 February 2016) (Exhibit C-42), at paras. 52-53, 56-57, para. 61 at p. 64)). According to this Decision, the most stringent constitutional controls are brought to bear when applying such principle in situations in which a rule of law is applied retroactively, since in those cases, principles of legal certainty, good faith and *confianza legítima* turn the weighing exercise table in favor of the private party (*Ibidem*, paras. 74-75 at p. 71).

Colombian constitutional law, is part and parcel of a determination of the scope and limits of such principles, in light of the State public and regulatory powers[33].

27. The adverse and severe impact of the Measures on the Claimant's Concession rights is undisputed, since it is not questioned that as a result of the Measures the Concession is, for all practical effects, deprived of economic value or, in other terms, that the Claimant's investment was destroyed. In view of the uncertain nature of the delimitation exercise on which the Measures are based, it is not possible to conclude that such Measures' objectives – protecting the Páramo – were pursued or adopted in good faith or are proportionate to attaining such objective. The omission by Colombia to delimit the Páramo before granting the Concession and Colombia however later resorting to its unilateral law making power to impose on the concessionaire a Páramo delimitation the deficiencies of which have been already highlighted, thereby retroactively damaging the concessionaire's rights without compensation, is not compatible either with the principle of good faith, referred to in Treaty Annex 811(2)[34]. Absent a reliable delimitation of the Páramo, it is not possible to grasp which is the real harm (if any) posed by the rights under the Concession to the purposes of protecting the Páramo ecosystem purportedly sought by the Measures. Therefore, the severity of the harm inflicted on the Claimant is not proportionate to the protective objectives of the Measures since: a) obviously, the Measures were neither reasonable nor appropriate to such effect because the Santurbán Páramo delimitation ensuing from the Measures could not be assumed to be final or correct in view of the Constitutional Court Decision T-361 of 2017[35], and b) the Measures were anyway enforceable irrespective of any action or opposition of the Claimant to such enforcement.

28. Because of their purpose – protecting the Santurbán Páramo – the Measures qualify as measures "*designed and applied to protect legitimate public welfare objectives*" alluded to in Annex 811(2)(b), which include the protection of the environment. However, the unilateral pursuit of such objectives by the State without the payment of compensation cannot be privileged without ignoring the reference to *rare circumstances* because an interpretation of this provision ignoring such express qualification of the State's rights to protect the public welfare would be incorrect: the reference to *rare circumstances* clearly signifies that such State rights are not absolute or unbound, and that their exercise, even if hypothetically assuming its validity under the applicable national law, may require – depending on the circumstances – compensation in order not to infringe international law[36].

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[33] Constitutional Court, Judgment No. C-35 (8 February 2016) (Exhibit C-42), para. 124 at p. 117.

[34] The good faith standard under international law is an objective one. There is no need to prove bad faith intention or motivation in order to show absence of good faith. As stated at para. 161 of *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (13 November 2000) (Exhibit RL-55): "*The intent of government is a complex and multifaceted matter* [and] [e]*ach of the many persons involved in framing government policy may approach a problem from a variety of different policy objectives and may sometimes take into account partisan political factors or career concerns. The Tribunal can only characterize CANADA's motivation or intent fairly by examining the record of the evidence as a whole*".

[35] Constitutional Court, Judgment No. T-361 (30 May 2017) (Exhibit C-244).

[36] "*Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's*

29. On the other hand, the pursuit of such objectives by the State or, specifically, the purpose of the Measures, is not adversely affected, impeded, prevented or interfered with through the assertion or enforcement of the Claimant's rights under Annex 811(2)(b) seeking the payment of compensation under Treaty Article 811(1), since such payment does not preclude any action undertaken or to be undertaken by Colombia to protect the Santurbán Páramo in pursuit of the public welfare protection objectives referred to in such Annex. In *rare circumstances* – like the ones described above – the severity of imposing the payment of compensation as a result of the Measures (the enforcement of which, or the advancement of the policies underlying them, was and remains unhindered) does not outweigh the severity of the deprivation of the Claimant's acquired rights under the Concession and of the ensuing destruction of the Claimant's investment.

30. As set forth in connection with State contracts against the backdrop of the exercise of State police powers:

> "*The result of the general principle here advanced is therefore that the public authority may be exempt from performing its contract according to its strict expression, but that where this exemption results in a loss to the individual contractor compensation should be payable save where that payment would offend the principle. Such cases should arise only where the burden of payment would be such that it could not be borne by the public authority*"[37].

There is nothing in the record of this arbitration indicating or even suggesting that Colombia would not be able to bear the payment of the compensation due and payable to the investor in the present case.

31. Consequently:

(i) The Measures retroactively impose a delimitation on the Santurbán Páramo, with direct and adverse impact on the Angostura deposit, and with the effect of substantially depriving the Claimant of the economic value of its acquired rights under the Concession without compensation, and thus constitute a violation of Treaty Article 811(1) and its Annex 811(2)(b).

(ii) By retroactively imposing the Santurbán Páramo delimitation but at the same time undermining the accuracy and reliability of such delimitation, and thus creating uncertainty as to the very scope of the Measures and their effects, the Respondent has violated the concessionaire's acquired rights under the Concession, deprived

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obligation to pay compensation remains". *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica,* ICSID Case No. ARB/96/1, Award (17 February 2000) (Exhibit CL-14), at para. 72.

[37] Mitchell, cited *supra*, at 20. The exercise of overriding police power implies excluding the remedies of specific performance or injunctions or their equivalent but "*Compensation is not thereby necessarily also eliminated, since it is the performance of, or abstention from, a particular act which is obnoxious to the general rule, and not the payment of money*" (also at 20).

the concessionaire's rights of their economic value, and thus are part and parcel of the violation by the Respondent of Treaty Article 811(1) and Annex 811(2)(b).

(iii) The Measures infringe Colombian constitutional law rules precluding the retroactive application of the law without compensation, the constitutional duties of the Colombian State regarding the delimitation of the Páramo and the acquisition of Páramo covered areas, and Colombian and international law principles precluding the violation both of legitimate expectations and contractual acquired rights under the Concession covered by the investment definition of the Treaty and protected under its provisions and international law.

(iv) Even if the Measures' purposes were considered in isolation, the fulfilment of such purposes is not jeopardized since the enforcement of the Measures is not prevented nor is it rendered impossible or impracticable. For that reason, also in light of the considerations set out in paras. 5-30 above, not paying compensation as required by Treaty Article 811(1) would inflict severe and unwarranted damages to the investor, precisely in a *rare circumstance* situation pursuant to Treaty Annex 811(2)(b) in which compensation is warranted.

(v) The above is confirmed by a weighing and balancing exercise carried out by taking into account the Measure's purposes and the harm suffered by the Claimant occasioned by the Measures. As a result of this exercise, the comparative severity of the harm and deprivation suffered by the Claimant and its investment resulting from the Measures outweighs the severity of the Respondent's obligation to compensate under the Treaty.

32. Under such circumstances, the Measures are: a) neither reasonable nor proportionate to the harm to the Claimant resulting from the Measures; i.e, the destruction of its investment; b) objectively incompatible with State conduct pursued in accordance with both international customary law principles of good faith, referred to in Treaty Annex 811(2)(b) (including the principles of proportionality and protection of legitimate expectations) and *pacta sunt servanda*; c) constitute an arbitrary deprivation of the Claimant's contractual rights under the Concession the exercise of which did not and does not preclude or prevent Respondent's actions seeking the protection of the Santurbán Páramo; and (d) thus constitute an illicit indirect expropriation in violation of Treaty Article 811(1) and its Annex 811(2)(b), which finally culminated on 8 August 2016 (date of notification to the Claimant of ANM Resolution VSC 829).

9 September 2021