

**INTERNATIONAL CENTRE FOR SETTLEMENT OF  
INVESTMENT DISPUTES**

**ECO ORO MINERALS CORP.**

Claimant

**-v-**

**THE REPUBLIC OF COLOMBIA**

Respondent

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**REQUEST FOR ARBITRATION  
8 DECEMBER 2016**

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**Freshfields Bruckhaus Deringer US LLP**

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## I. INTRODUCTION

1. Eco Oro Minerals Corp. (*Eco Oro*), a corporation constituted under the laws of Canada,<sup>1</sup> hereby requests the institution of arbitration proceedings against the Republic of Colombia (*Colombia* or *the Government*) in accordance with Article 36 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the *ICSID Convention*), to which Colombia and Canada are parties.
2. This Request for Arbitration (the *Request*) is submitted pursuant to Article 819 of the Free Trade Agreement between Canada and Colombia (the *Treaty*), signed on 21 November 2008 and which entered into force on 15 August 2011.<sup>2</sup>
3. Eco Oro has notified Colombia of its intent to submit the present claim to arbitration in its letter dated 7 March 2016 (the *Notice of Intent*).<sup>3</sup> It has taken all the necessary internal actions to authorize the submission of this Request to ICSID and has duly authorized the undersigned to institute and pursue arbitration proceedings on its behalf against Colombia pursuant to the ICSID Convention and the Treaty.<sup>4</sup> Furthermore, Eco Oro has waived its right to initiate or continue proceedings with respect to the impugned measures before any administrative tribunal or court in Colombia in accordance with Article 821 of the Treaty.<sup>5</sup>

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<sup>1</sup> See Articles of Incorporation of Eco Oro, 5 May 2005, **C-10**; Certificate of Change of Name of Eco Oro issued by the Registrar of Companies of British Columbia, Canada, 16 August 2011, **C-23**; Certificate of good standing of Eco Oro issued by the Registrar of Companies of British Columbia, Canada, 26 February 2016, **C-45**; Notice of Articles of Eco Oro issued by the Registrar of Companies of British Columbia, Canada, 13 October 2016, **C-56**. All exhibits referred to herein consist of true copies of original documents. Where exhibits consist of excerpts of documents, these excerpts constitute true and complete excerpts of the relevant parts of said documents.

<sup>2</sup> Free Trade Agreement between Canada and the Republic of Colombia, signed on 21 November 2008 (the *Treaty*), **C-22**. The Treaty entered into force on 15 August 2011. See Circular No 024 of the Directorate of Foreign Commerce of the Ministry of Commerce concerning the entry into force of the Treaty, 3 August 2011, **C-21**.

<sup>3</sup> Notice of intent to submit the claim to arbitration, 7 March 2016, **C-48**.

<sup>4</sup> Power of Attorney granted by Eco Oro to attorneys of Freshfields Bruckhaus Deringer US LLP, 7 December 2016, **C-59**; Eco Oro Board Resolution, 7 December 2016, **C-60**.

<sup>5</sup> Letter from Eco Oro to the Secretary General of ICSID, 7 December 2016, **C-58**.

4. Eco Oro brings this claim in relation to Colombia's measures that have destroyed the value of Eco Oro's investments in the Colombian mining sector, and have deprived Eco Oro of its rights under its principal mining title, Concession Contract 3452. This concession comprises the Angostura gold and silver deposit in the department of Santander in the east of the country, one of the largest in Colombia.
5. Eco Oro, then known as Greystar Resources Limited, was one of the first foreign mining companies to invest in the Colombian gold mining sector. It first invested in Permit 3452 – which was later converted into Concession Contract 3452 – in 1994.
6. Since then, Eco Oro has invested over US\$250 million to develop the Angostura mining project by completing more than 360,000 meters of drilling and approximately 3,000 meters of underground development. As a result of these investments, Eco Oro declared resources for the Angostura deposit where none existed before, and it more than doubled those resources between 1999 and 2015, declaring approximately 3.25 million ounces of gold and 13.5 million ounces of silver (comprising measured, indicated and inferred resources).<sup>6</sup>
7. These investments were made in reliance upon the specific commitments made by Colombia under Permit 3452 and subsequently Concession Contract 3452, including: (a) the exclusive right to explore and exploit mineral resources on the entirety of the concession area; (b) the right to sell the mineral resources that it extracted on the international market subject to the payment of applicable royalties and taxes; and (c) the right to a stabilized mining legal framework such that only those new, more favorable mining laws enacted after the execution of Concession Contract 3452 in 2007 would apply to its concession.
8. At the time that Eco Oro acquired its investments, Colombia was aware of the presence of páramo ecosystems in proximity to Concession Contract 3452.

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<sup>6</sup> See para 24, below.

Páramo ecosystems are high mountain ecosystems located between the upper limit of the Andean forest and the lower limit of glaciers or permanent snow, dominated by grass and shrubs. No restrictions on mining in páramo ecosystems existed in Colombia nor were there any delimited páramo ecosystems protected by law at the time of Eco Oro's investments in Permit 3452 in 1994 and its conversion into Concession Contract 3452 in 2007.

9. Throughout the years, Colombia publicly and privately supported Eco Oro's Angostura Project and took steps to uphold its stabilization commitments. For instance, at the time the first laws seeking to restrict mining in páramo ecosystems were enacted in Colombia in 2010 and 2011 (laws that should not have applied to the Angostura Project in light of the stabilization of the mining framework applicable to Concession Contract 3452), the National Mining Agency declared the Angostura Project to be a Project of National Interest – a designation reserved for projects of special importance to the State in view of their economic, social and environmental impact, entitling those projects to expedited, centralized permitting and processing. The Angostura Project was so designated in February 2011, and then again in June 2013. During that period, the national environmental licensing authority also granted Eco Oro terms of reference to carry out the Environmental Impact Assessment that was required to build and exploit the Angostura underground mine.
10. Subsequently, when the delineation of the Santurbán Páramo ecosystem in the area of the Angostura Project was carried out through a Ministry of Environment resolution in December 2014, the Government sought to respect stabilized mining rights, exempting Concession Contract 3452 from the resulting mining ban in delineated páramo areas. The Colombian Congress subsequently adopted a law enshrining this exemption in June 2015. While these exemptions provided a path forward for the Angostura Project, there remained uncertainty over the framework for exempted projects and limitations on existing rights. The stabilization provisions of the Mining Code remained in place but investors were told that

*extending* concessions beyond their initial term would no longer be possible, contrary to the terms of their concessions and existing rules; established environmental management plans could be changed; and local authorities were required to prepare their own environmental guidelines which could potentially impose more stringent environmental standards. How long this process would take, and where it might lead was unclear.

11. Then, in February 2016, the Colombian Constitutional Court issued a decision that struck down the exception to the ban on mining in páramo ecosystems that would have permitted Eco Oro to carry out its Angostura Project, consistent with Colombia's commitment to stabilize Concession Contract 3452. On the basis of this decision, in August 2016, the National Mining Agency withdrew Eco Oro's mining rights in relation to 50.73% of the area of Concession Contract 3452.
12. This decision deprived Eco Oro of vital rights under Concession Contract 3452 that severely affected the viability of the Angostura Project. Moreover, there is a significant risk that Colombia will deprive Eco Oro of further rights under Concession Contract 3452, as the reasoning set out in the Constitutional Court's decision of February 2016 and subsequent decisions of the National Mining Agency may lead to the withdrawal of rights to other areas of Concession Contract 3452. In light of this, the regional environmental licensing authority has recently informed Eco Oro that it is not in a position to process a request for and grant an environmental license for the exploitation of the Angostura Project. As a consequence of these State measures, Eco Oro has been deprived of its rights under Concession Contract 3452 and the value of its investments in the Colombian mining sector has been destroyed.
13. In this Request, Eco Oro will establish the jurisdictional and substantive bases of this treaty claim. Specifically, Eco Oro will show that:

- (a) Colombia has taken measures that interfered with Eco Oro's investments and ultimately deprived Eco Oro of the returns on its investments without paying any compensation (**Section II** below);
  - (b) Colombia's measures have breached Colombia's obligations under the Treaty and under international law (**Section III** below);
  - (c) Eco Oro is a Canadian investor with investments in Colombia that is protected by the Treaty (**Section IV** below); and
  - (d) Eco Oro is entitled to initiate these arbitration proceedings because both Colombia and Eco Oro have consented to ICSID arbitration and because all of the conditions to access ICSID arbitration under the ICSID Convention and the Treaty have been fulfilled (**Section V** below).
14. In **Section VI** below, Eco Oro proposes a method to constitute the three-member Tribunal to adjudicate this dispute, along with other procedural matters. The names and addresses of the parties are set out in **Section VII**. Eco Oro sets out its request for relief in **Section VIII**.
15. Eco Oro reserves its right to specify, supplement or amend the factual or legal claims and arguments herein, including in the event that Colombia takes additional measures that breach its international obligations.

## **II. THE FACTS RELEVANT TO THE DISPUTE**

### **A. ECO ORO'S INVESTMENTS MADE IN RELIANCE ON COLOMBIA'S COMMITMENTS**

16. Eco Oro, previously known as Greystar Resources Ltd, first invested in the mining sector in Colombia in 1994, when it acquired Mining Permit 3452,<sup>7</sup> which granted Eco Oro the right to explore and exploit mineral resources in an area of

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<sup>7</sup> Permit 3452 was granted through Ministry of Mining and Energy Resolution 707 of 29 March 1988, C-1.

250 hectares located in the Municipality of California, in Santander Department in eastern Colombia. The permit area contained a gold and silver deposit known today as the Angostura deposit.<sup>8</sup> Artisanal mining activities have been carried out in the area of the Angostura deposit since pre-Columbian times.<sup>9</sup>

17. Over the next few years, Eco Oro acquired the surface rights corresponding to Permit 3452. It also acquired several other mining titles surrounding the area, and acquired associated surface rights.<sup>10</sup>
18. In June 1997, the regional environmental authority, the Corporación Autónoma Regional Para la Defensa de la Meseta de Bucaramanga (*CDMB*),<sup>11</sup> approved Eco Oro's environmental management plan (in Spanish, "*plan de manejo ambiental*") in relation to gold and silver mining exploration activities within the area of Permit 3452.<sup>12</sup>
19. In 2001, Colombia modernized its Mining Code through Law No. 685 (the *Mining Code*).<sup>13</sup> The Mining Code was the pillar of President Andrés Pastrana's pro-mining policies that sought to grow the economy and create employment by tapping into the country's mineral resources. One of the key features and improvements of the Mining Code was the creation of unified mining concession

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<sup>8</sup> Permit 3452 was assigned to Greystar Resources Ltd on 28 October 1994. *See Contrato de Cesión de Permiso Minero*, 28 October 1994, **C-2**. The assignment was ultimately approved by the Regional Mining Division of Bucaramanga on 7 February 1996. *See* Ministry of Mines, Regional Division of Bucaramanga Resolution No 993017, 7 February 1996, **C-3**.

<sup>9</sup> Micon International Limited, *Technical Report on the Updated Mineral Resource Estimate for the Angostura Gold-Silver Deposit, Santander Department, Colombia*, 17 July 2015, **C-37**, p 24.

<sup>10</sup> Micon International Limited, *Technical Report on the Updated Mineral Resource Estimate for the Angostura Gold-Silver Deposit, Santander Department, Colombia*, 17 July 2015, **C-37**, p 14

<sup>11</sup> The CDMB is a public entity responsible for the management and conservation of the environment and renewable natural resources in the area of its jurisdiction (the Meseta de Bucaramanga). It has jurisdiction over 13 municipalities, including the Municipality of California where the Angostura deposit is located.

<sup>12</sup> Eco Oro, *Plan de manejo ambiental para la exploración de oro en el Municipio de California, Santander*, March 1997, **C-4**; CDMB Resolution No 568, 4 June 1997, **C-5**. Eco Oro updated its environmental management plan in April 2008. *See* Eco Oro, *Plan de Manejo Ambiental Para la Integración de Áreas Mineras Para Exploración en el Proyecto Angostura*, 2008, **C-17**.

<sup>13</sup> Law No 685, 8 September 2001, **C-8**.



contracts. Whereas the mining law previously in force provided for the granting of either exploration or exploitation rights, the new Mining Code unified the exploration and exploitation phases under a single mining title, the unified mining concession contract,<sup>14</sup> which granted the concessionaire the exclusive right to explore and then exploit within the concession area.<sup>15</sup> The Mining Code as subsequently amended provided for concessions to be divided into three phases: (i) the exploration phase, with an initial three-year term, which could be extended for eight more years through two-year extensions, for a total of 11 years; (ii) the construction phase, with a three-year term, which could be extended for an additional year; and (iii) the exploitation phase, comprising the remainder of the concession's term.<sup>16</sup> Concession contracts could be granted for up to 30 years and were renewable for an additional 30-year term.<sup>17</sup>

20. The objective of the new Mining Code was to provide “clear and stable rules to allow the private sector to invest in mining developments”.<sup>18</sup> To that end, Article 46 of the new Mining Code stabilized the mining laws applicable to concession contracts as of the date of their execution.<sup>19</sup> This was a significant commitment as it ensured that any mining law adopted after the execution of a concession

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<sup>14</sup> *Ibid*, Arts 14, 45.

<sup>15</sup> *Ibid*.

<sup>16</sup> See Law No 685, 8 September 2001, **C-8**, arts 70-77, as amended by Art 5 of Law 1382 of 2010, 9 February 2010, **C-18**, which was subsequently struck down by the Colombian Constitutional Court, but reenacted in material part through Art 108 of Law 1450 of 2011, 16 June 2011, **C-20**.

<sup>17</sup> Law No 685, 8 September 2001, **C-8**, Art 77.

<sup>18</sup> Beatriz Duque Montoya, Director of Mines, Ministry of Mines, “Política de Promoción del País Minero”, 2007, **C-15**, p 2. The original Spanish reads as follows: “*Esta ley, trae un importante cambio en los roles que tanto el Estado como los particulares han de realizar en la actividad minera, al tiempo que establece reglas claras y estables para que el sector privado invierta en el desarrollo de la minería, precisa el papel del Estado dentro del sector circunscribiendo sus funciones a la planeación, regulación, promoción, administración y fiscalización del recurso y la industria minera.*”

<sup>19</sup> Art 46 of the Mining Code reads as follows: “*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 Entidades Territoriales.*” Law No 685, 8 September 2001, **C-8**, Art 46.

contract would apply only insofar as the terms of such law were more favorable to the concessionaire. This provided comfort to concessionaires that the legal framework for their concessions could not subsequently be altered to their detriment, and allowed them to plan their investments based on a stable legal framework.

21. Following the enactment of the Mining Code, Eco Oro successfully applied to convert Permit 3452 into a unified concession contract that would consolidate Permit 3452 along with ten other titles, two concession contract requests, and one exploration license request. Eco Oro's application was granted and, on 8 February 2007, concession contract 3452 was executed by Eco Oro and the Colombian mining agency now known as the National Mining Agency.<sup>20</sup> Concession contract 3452 was granted for a period of 20 years (expiring in 2027), renewable for an additional 30 years,<sup>21</sup> and was formally registered with the National Mining Registry on 9 August 2007 (*Concession 3452*).<sup>22</sup>
22. The mining policies that had given life to the Mining Code continued under President Alvaro Uribe who governed Colombia from 2002 until 2010. President Uribe actively courted foreign investment in the mining sector and promoted the negotiation of investment protection treaties, including the Treaty with Canada.<sup>23</sup>

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<sup>20</sup> At the time of the execution of the concession contract 3452, it was known as the Colombian Institute of Geology and Mining (*Instituto Colombiano de Geología y Minería* or INGEOMINAS).

<sup>21</sup> Concession Contract 3452, 8 February 2007, **C-16**, clause 4. Pursuant to Art 77 of the Mining Code, requests for the extension of concession contracts are granted following the fulfillment of the requisite conditions.

<sup>22</sup> See Certificate of Registration of Concession 3452 with the National Mining Registry, 14 October 2016, **C-32**.

<sup>23</sup> See *Discurso del Presidente Uribe en la Feria Internacional Minera*, 18 November 2005, **C-11**, where President Uribe stated: “*Estamos procurando que Colombia sea, en el tiempo indefinido, un país de gran atracción inversionista, que se ponga de moda definitivamente, pero que no se ponga de moda por un breve momento, sino que se ponga de moda establemente. [...] Sé que hay un tema bastante sensible para el sector minero, que es el tema de la seguridad. Otro, que es el tema de las reglas de juego. Otro, que es el tema de la infraestructura. [...] En tema de estabilidad a las reglas de juego, Colombia ha tenido una tradición de país estable en materias de juego, pero para consolidar más eso, el Congreso de la República acaba de aprobarnos una ley que autoriza al Gobierno Nacional a firmar pactos de estabilidad con los inversionistas –en los próximos días*”

23. Eco Oro's Angostura Project was considered emblematic of the Government's drive to develop mining in Colombia. In fact, such was the Project's importance that the Government twice designated Eco Oro's investment a "Project of National Interest", in 2011<sup>24</sup> and 2013.<sup>25</sup> This designation signaled the Government's strong support for the Project. It also entitled Eco Oro to an expedited review of its permit applications at the central government level (rather than the regional level).
24. In reliance upon Colombia's specific commitments, and in view of the Government's support for and encouragement of its mining project, Eco Oro invested over US\$250 million to develop the Angostura project, *inter alia*, by completing more than 360,000 meters of drilling and 3,000 meters of underground development.<sup>26</sup> As a result of these investments, Eco Oro has declared resources for the Angostura deposit, and succeeded in increasing these resources significantly over the past 20 years. The declared resources have more than doubled since the early years of the Angostura project, from a total of

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*se firmarán los primeros pactos-, creo que eso abre un camino muy importante de confianza en Colombia. Colombia acaba de firmar el primer tratado internacional de protección de inversiones con España y estamos trabajando varios tratados con Italia, con Francia, con el Reino Unido, con Suiza, para continuar en esa tarea."* See also, Beatriz Duque Montoya, Director of Mines, Ministry of Mines, "Política de Promoción del País Minero", 2007, **C-15**.

<sup>24</sup> The designation was made pursuant to the National Mining Agency (INGEOMINAS) Resolution No DSM-28 of 22 February 2011, which noted that: "*que estudiados los criterios establecidos en la resolución DSM-955 de Noviembre de 2007, y según consta en el acta de 21 de Febrero de 2011, se concluye que dada la trascendencia social, la alta inversión económica, el impacto ambiental, las importantes reservas con destino al mercado internacional y el mineral objeto de exploración y explotación, se debe proceder a clasificar el contrato de concesión No 3452 como Proyecto de Interés Nacional.*" Instituto Colombiano de Geología y Minería (INGEOMINAS) Resolution No DSM-28 22 February 2011, **C-19**, pp 2-3. The designation was based on INGEOMINAS Resolution No 955 of 21 November 2007, which considered as projects of national interest those which met the following criteria: (i) large-scale and high levels of production; (ii) high operational, technological and financial capability; (iii) export-oriented; and (iv) generating important economic resources for the State.

<sup>25</sup> National Mining Agency Resolution No 592, 19 June 2013, **C-27**, Art 1. This designation was based on new criteria for defining Mining Projects of National Interest – including social, economic and environmental criteria. See National Mining Agency Resolution No 341, 20 May 2013, **C-26**.

<sup>26</sup> Micon International Limited, *Technical Report on the Updated Mineral Resource Estimate for the Angostura Gold-Silver Deposit, Santander Department, Colombia*, 17 July 2015, **C-37**, pp 32 and 35.

approximately 1.5 million ounces of gold and 2.8 million ounces of silver in 1999 (including indicated and inferred resources) to approximately 3.25 million ounces of gold and 13.5 million ounces of silver in 2015 (including measured, indicated and inferred resources).<sup>27</sup>

25. Eco Oro's investments have ensured that the Angostura deposit is now one of the largest gold deposits in Colombia. Moreover, throughout the years, Eco Oro has repeatedly been lauded for its social programs<sup>28</sup> and its environmental practices, receiving awards both internationally and in Colombia (including from Governmental authorities), including:

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<sup>27</sup> These resources were estimated at a cut-off grade of 2.5 grams per tonne. KD Engineering Co. Inc., Mine Development Associates and Golder Associates, *Greystar Resources - Angostura Project Preliminary Feasibility Study*, 18 May 1999, C-7, tables 4.1 (p 3) and 4.2 (p 4); Micon International Limited, *Technical Report on the Updated Mineral Resource Estimate for the Angostura Gold-Silver Deposit, Santander Department, Colombia*, 17 July 2015, C-37, p 43. In mining terms, mineral resources are classified as "measured", "indicated" or "inferred" depending on how confidently they can be estimated. A Measured Mineral Resource is that part of a Mineral Resource for which mineral content can be estimated with a high level of confidence. It is based on detailed and reliable exploration, sampling and testing information gathered through appropriate techniques. An Indicated Mineral Resource is that part of a Mineral Resource for which mineral content can be estimated with a reasonable level of confidence. The locations are too widely or inappropriately spaced to confirm geological and/or grade continuity but are spaced closely enough for continuity to be assumed. An Inferred Mineral Resource is that part of a Mineral Resource for which mineral content can be estimated with a low level of confidence. It is inferred from geological evidence, sampling and assumed but not verified geological and/or grade continuity. See CRIRSCO, *International Reporting Template for the Public Reporting of Exploration Results, Mineral Resources and Mineral Reserves*, July 2006, pp 10-11, available at: [crirSCO.com](http://crirSCO.com).

<sup>28</sup> Eco Oro's social programs in the local community included investments in areas such as physical and mental health services (e.g. donating medical equipment and setting up a scheme to provide mental health services to students and their parents), academic and professional education (including financial contributions to educational costs, the acquisition of a school bus, the provision of school supplies, the launch of academic scholarships and formal training schemes for local small businesses), infrastructure (for example, maintenance of the California-Vereda Angostura road, benefitting 1500 local inhabitants), microfinance (in 2006, for example, 17 loans were granted to local small businesses) and the protection of cultural heritage for the local Soto Norte community through the opening of the Casa Eco Oro in California, which acted as a focal point and cultural center for the local community. See Eco Oro, *La apuesta social de Eco Oro por la comunidad de Soto Norte*, C-61.

- (a) an award for “Environmental Excellence in Exploration”, granted in 2006 by the Prospectors’ and Developer’s Association of Canada (PDAC);<sup>29</sup>
- (b) an award for its social and environmental work at the national and international levels and for its economic contribution to Colombia, granted at the Second International Mining Trade Show held in 2006 in Colombia;<sup>30</sup> and
- (c) awards granted by the regional environmental authority, the CDMB, in 2015 and 2016 in recognition of Eco Oro’s environmental policies and practices.<sup>31</sup>

## **B. COLOMBIA’S MEASURES**

26. Notwithstanding the above, Colombia recently took measures establishing and implementing an arbitrary, non-transparent and inconsistent regulation of páramo ecosystems that have deprived Eco Oro of its rights under Concession 3452 and destroyed the value of its investments. While over the course of many years the Government publicly and privately supported Eco Oro’s Angostura Project, even in the face of inconsistent and unclear environmental regulations purportedly aimed at protecting páramo ecosystems at both the regional and national level, the Colombian Constitutional Court issued a decision in February 2016 the effect of which was to deprive Eco Oro of its rights under Concession 3452 and destroy the value of its investments.

### **1. Legal Framework 1994-2014**

27. While no formal delimitation of páramo ecosystems in Colombia existed until 2014, at the time Eco Oro was granted rights over the Angostura Project, Colombian environmental authorities were aware that such systems were close to the project area. Already in 1998, Colombia’s Alexander von Humboldt Institute

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<sup>29</sup> Prospectors and Developers Association of Canada (PDAC), “PDAC in Brief”, April 2006, **C-12**, p 2; Eco Oro, “Visión Minera”, undated, **C-13**.

<sup>30</sup> Eco Oro, “Visión Minera”, undated, **C-13**.

<sup>31</sup> See CDMB Resolution No 995 of 1 October 2015, **C-38**, and CDMB Resolution No 824 of 13 October 2016, **C-55**.

(*Instituto Alexander von Humboldt* or *IAVH*), a scientific institute ascribed to the Ministry of Environment, published an Ecosystems Map which showed the country's páramo ecosystems, among others, at a very large scale (1:9,000,000, such that an area the size of Luxembourg would appear as less than half a pixel on the map). This map showed the presence of a páramo ecosystem overlapping with the area of the Angostura Project.<sup>32</sup>

28. In 2002, the Ministry of Environment adopted Resolution 769 defining the term “páramo”<sup>33</sup> and requiring regional corporations, such as the CDMB, to monitor the state of the páramos. That resolution provided that it applied to páramos located in the Eastern Cordillera of the Andes, where the Angostura Project is located, from approximately 3,000 meters above sea level.<sup>34</sup> The area of Concession 3452 where the Angostura Project is located covers altitudes ranging from 2,400 to 3,500 meters above sea level.<sup>35</sup> Resolution 769 did not regulate the activities that could take place in páramo ecosystems and therefore did not affect Eco Oro's mining rights.
29. In 2007, the IAVH published a more detailed map of páramo ecosystems, known as the Páramo Atlas, which was prepared to a scale of 1:250,000.<sup>36</sup> Although more accurate than the 1998 map, its lack of precision was still such that a single pixel represented an area of 6.25 km<sup>2</sup>, or the equivalent of up to 1,500 soccer fields. The Páramo Atlas showed that a páramo ecosystem overlapped with certain areas of Concession 3452, although because of its large scale and the imprecise survey on which it was based, the actual extent of that ecosystem was

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<sup>32</sup> IAVH, *Mapa general de ecosistemas de Colombia*, 1998, **C-6**.

<sup>33</sup> Ministry of Environment Resolution No 769, 5 August 2002, **C-9**, Art 2 defined a páramo as: “*Ecosistema de alta montaña, ubicado entre el límite superior del bosque andino y, si se da el caso, con el límite inferior de los glaciares o nieves perpetuas, en el cual domina una vegetación herbácea y de pajonales, frecuentemente frailejones y pueden haber formaciones de bosques bajos y arbustivos y presentar humedales como los ríos, quebradas, arroyos, turberas, pantanos, lagos y lagunas.*”

<sup>34</sup> Ministry of Environment Resolution No 769, 5 August 2002, **C-9**, Art 1.

<sup>35</sup> Micon International Limited, *Technical Report on the Updated Mineral Resource Estimate for the Angostura Gold-Silver Deposit, Santander Department, Colombia*, 17 July 2015, **C-37**, p 1.

<sup>36</sup> Atlas de Páramos de Colombia 2007, **C-14**, p 17.

unclear. The Páramo Atlas estimated that the lower limits of the páramo in the western side of the Eastern Cordillera of the Andes, where the Angostura Project was located, began at approximately 3,600 meters above sea level – significantly above the area where Concession 3452 is located (at 2,400 to 3,500 meters above sea level<sup>37</sup>) – although it noted that páramo vegetation could be found below those levels.<sup>38</sup> Indeed shrubs and grasses from páramo ecosystems are known to migrate downward into areas where there has been deforestation, for instance due to historic agricultural and mining activities (which have been carried out for centuries in the area in and around Concession 3452).<sup>39</sup> The Páramo Atlas was prepared for academic and informational purposes. It did not regulate activities that could be carried out in páramo ecosystems and did not have any legal effect.

30. Indeed, no restrictions on mining in páramo ecosystems existed in Colombia, nor were there any delimited páramo ecosystems protected by law, at the time that Eco Oro obtained Permit 3452 in 1994 or Concession 3452 in 2007 (which was stabilized under the Mining Code). The first law seeking to restrict mining activities in páramo ecosystems, Law 1382<sup>40</sup>, was enacted as an amendment to the Mining Code in February 2010, 16 years after Eco Oro had acquired Permit 3452 and three years after Permit 3452 was converted into Concession 3452. That law was subsequently struck down by the Constitutional Court<sup>41</sup> and, in material part,

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<sup>37</sup> Micon International Limited, *Technical Report on the Updated Mineral Resource Estimate for the Angostura Gold-Silver Deposit, Santander Department, Colombia*, 17 July 2015, **C-37**, p 8.

<sup>38</sup> Atlas de Páramos de Colombia 2007, **C-14**, pp 4-5.

<sup>39</sup> *Ibid*, p 4.

<sup>40</sup> Law 1382 of 2010, 9 February 2010, **C-18**.

<sup>41</sup> Law 1382 was declared unconstitutional by the Colombian Constitutional Court in May 2011 because the Government had failed to carry out prior community consultations as required under Colombian law. Colombian Constitutional Court, Judgment C-366-2011, 11 May 2011, available at: <http://www.corteconstitucional.gov.co/relatoria/2011/C-366-11.htm>. The ruling striking down Law 1382 was deferred for two years to allow for consultations with the local indigenous communities and for the enactment of replacement legislation.

- re-enacted in June 2011 through Law 1450, Colombia's five-year National Development Plan 2010-2014.<sup>42</sup>
31. Law 1450 required the delimitation of páramo ecosystems at a scale of 1:25,000 (i.e. ten times more detailed than the Páramo Atlas of 2007) "based on technical, social, environmental and economic criteria".<sup>43</sup> It provided that mining activities would be banned in delimited páramo ecosystems.<sup>44</sup> These changes to the mining framework should not have affected Concession 3452 which had been stabilized as of 2007 under Article 46 of the 2001 Mining Code. In other words, these restrictions would only affect mining titles granted after the enactment of Law 1382 (i.e. February 2010), and only once páramo ecosystems had been formally delineated by the Ministry of Environment.
32. Throughout this period, Eco Oro advanced the development of its underground mining project and in February 2012, the national environmental licensing authority (*Autoridad Nacional de Licencias Ambientales* or *ANLA*) provided Eco Oro with terms of reference to carry out the Environmental Impact Assessment required in order to commence the construction and exploitation of the Angostura underground mine.<sup>45</sup>
33. This progress was halted, however, in September 2012, when the National Mining Agency ordered Eco Oro to temporarily suspend all mining activities in areas identified as páramo ecosystems according to the 2007 Páramo Atlas until the definitive boundaries of páramo ecosystems were determined pursuant to Law 1450.<sup>46</sup> This order prevented Eco Oro from continuing to develop its Angostura mining project. While the suspension order was in place, however, the 11-year time limit for completing the exploration phase of Concession 3452 continued to

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<sup>42</sup> Law No 1450, 16 June 2011, **C-20**, Art 202. *See also*, Law 1382, **C-18**, Art 3 (amending Art 34 of the Mining Code).

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> Letter from ANLA to Eco Oro, 27 February 2012, **C-24**.

<sup>46</sup> National Mining Agency Resolution VSC-004, 12 September 2012, **C-25**, Art 1.



- run. The project ultimately remained suspended until the páramo ecosystem in the vicinity of the Angostura Project, known as the Santurbán Páramo, was delimited in December 2014.
34. While it was temporarily suspended, the National Mining Agency again designated the Angostura Project a “Project of National Importance” based on social, economic and environmental criteria, in June 2013,<sup>47</sup> once again signaling the Government’s support for the Project.
35. While Government officials publicly and privately indicated that the delimitation of the Santurbán páramo would soon be completed, the Government repeatedly ignored its own deadlines,<sup>48</sup> and the delineation process dragged on. In the three years since the date on which the Ministry of Environment was first tasked with the delineation of the páramo in 2010, there was a succession of five Ministers of Environment.<sup>49</sup> The delays to the delineation process prompted the Colombian Attorney General to write to the Ministry of Mines, Ministry of Environment and the National Mining Agency in September 2013 deploring the legal uncertainty that this created for the mining industry.<sup>50</sup> He recommended *inter alia* that: (i) decisions be adopted based on rigorous studies rather than ideology; (ii) there be greater transparency in the delimitation process; and (iii) the Government respect existing and acquired rights so as not to subject the Colombian State to liability.<sup>51</sup>
36. Finally, on 1 April 2014, the Minister of Environment announced that the boundaries of the Santurbán Páramo had been delineated.<sup>52</sup> The next day, the Ministry of Environment published a map showing the boundaries of the

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<sup>47</sup> National Mining Agency Resolution No 592, 19 June 2013, **C-27**, Art 1.

<sup>48</sup> “Límites de Santurbán, promesa incumplida”, *El Espectador*, 22 August 2014, **C-31**.

<sup>49</sup> Carlos Costa Posada (2007-2010), Beatriz Uribe Botero (2010-2012), Frank Pearl (2011-2012), Juan Gabriel Uribe (2012-2013) and Luz Helena Sarmiento (2013-2014).

<sup>50</sup> Letter from the Attorney General to the Ministry of Environment, Ministry of Mines and National Mining Agency, 9 September 2013, **C-28**.

<sup>51</sup> *Ibid.*

<sup>52</sup> Eco Oro Press Release, 1 April 2014, **C-29**.

Santurbán Páramo on its website.<sup>53</sup> The Minister of Environment, however, told Eco Oro that the map could not be used to assess the impact of the Santurbán Páramo on its mining project.<sup>54</sup> The map was later removed from the website of the Minister of Environment. Both the Ministry of Environment and the Ministry of Mines advised Eco Oro that the official coordinates of the Santurbán Páramo, which could be used to determine any overlap with the Angostura Project pursuant to Law 1450, would be available “in the coming days”.<sup>55</sup> However, six months later, in November 2014, the coordinates had not yet been communicated to Eco Oro, and Eco Oro complained to the Ministry of Environment about the delay noting that the National Mining Agency was preventing it from developing the Angostura Project through its suspension order until the delineation process was completed.<sup>56</sup>

## 2. Resolution 2090 of December 2014 and Law 1753 of 2015

37. Finally, eight months after the April 2014 announcement, following the designation of a new Minister of Environment in late 2014 (the sixth since 2010), the Santurbán Páramo was finally delimited, with the publication of Ministry of Environment Resolution No. 2090 on 19 December 2014.<sup>57</sup> The delimitation took into account a map of the Santurbán Páramo prepared by the IAVH to a scale of 1:25,000 (the *IAVH Santurbán Páramo Map*).
38. Resolution 2090 set out the coordinates for three areas within the páramo: (i) “Preservation areas”, which should remain protected from human activity; (ii) “Restoration areas”, which have been altered through human activity and should

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<sup>53</sup> Eco Oro Press Release, 3 April 2014, **C-30**.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> See Eco Oro Letter to Minister Gabriel Vallejo López of the Ministry of Environment, 28 November 2014, **C-33**.

<sup>57</sup> Ministry of Environment Resolution No 2090, 19 December 2014, **C-34**.

- be restored; and (iii) “Sustainable use areas”, in which productive activities can be carried out.<sup>58</sup>
39. Approximately 50.7% of the area of Concession 3452 lay within the preservation area while another 3.9% lay within the restoration area. 49% of the surface area of the Angostura deposit lay beneath the preservation area, while another 16% was located beneath the restoration area.
40. Importantly, however, Resolution 2090 sought to adhere to the stabilization requirements set out in the Mining Code by respecting rights acquired prior to the adoption of Law 1382 in February 2010. Resolution 2090 provided that (retroactively from 9 February 2010, when Law 1382 was enacted) no new mining concession contracts could be concluded and no environmental licenses for mining projects could be issued in areas delineated as páramo ecosystems.<sup>59</sup> However, mining projects that had a concession contract and an associated environmental license or equivalent environmental management and control instrument issued prior to 9 February 2010 could continue operating until completion, subject to strict environmental supervision.<sup>60</sup>

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<sup>58</sup> *Ibid*, Art 3.

<sup>59</sup> *Ibid*, Art 5.

<sup>60</sup> Article 5 of Resolution No 2090 reads as follows: “**ARTÍCULO 5: DIRECTRICES ESPECÍFICAS PARA ACTIVIDADES MINERAS.** A partir del 9 de febrero de 2010 está prohibido por la ley celebrar contratos de concesión mineros, otorgar nuevos títulos mineros en el ecosistema de páramo o expedir nuevas licencias ambientales que autoricen el desarrollo de actividades mineras en estos ecosistemas.

*Las actividades mineras que cuenten con contratos de concesión o títulos mineros, así como licencia ambiental o el instrumento de control y manejo ambiental equivalente, otorgados debidamente antes del 9 de febrero de 2010, que se encuentren ubicadas al interior del área identificada en el mapa anexo como ‘Área de Páramo Jurisdicciones – Santurbán – Berlín’, podrán seguir ejecutándose hasta su terminación sin posibilidad de prórroga, sujetas a un estricto control por parte de la autoridad minera y ambiental, así como de las entidades territoriales, y aplicando además las siguientes directrices:*

*a. Las licencias ambientales o el instrumento de control y manejo ambiental existentes podrán ser sujetas a revisión y ajuste, si a criterio técnicamente motivado de la autoridad ambiental respectiva, las medidas de manejo ambiental debieran hacerse más estrictas, con el fin de garantizar la protección y conservación del ecosistema de páramo y el flujo de sus servicios ecosistémicos.*

41. It therefore appeared that Eco Oro’s Angostura Project was exempted from the application of Resolution 2090 as Concession 3452 had been granted in 2007 and had an environmental management instrument.<sup>61</sup> However, Resolution 2090 curtailed Eco Oro’s rights and generated uncertainty for a number of reasons:
- (a) Although the stabilization provisions in Article 46 of the Mining Code remained in place, concessions of mining projects “grandfathered” by Resolution 2090 could not be extended beyond their initial term, thereby precluding the extension of Concession 3452 beyond its initial 20-year term, contrary to Eco Oro’s rights and expectations;<sup>62</sup>
  - (b) Article 5 of Resolution 2090 provided that regional environmental authorities such as the CDMB should issue more detailed environmental guidelines and environmental management plans for the páramos in their locality.<sup>63</sup> It was unclear what these guidelines and plans would consist of. To this day, the CDMB, which is the responsible regional environmental authority for the Santurbán Páramo, has yet to issue these guidelines and has yet to carry out the zoning of the Santurbán Páramo or issue an environmental management plan, as required by Resolution 2090;<sup>64</sup>

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*b. Antes de la terminación del contrato de concesión minera, el concesionario deberá garantizar la ejecución de las obras y la puesta en práctica de todas las medidas ambientales necesarias para corregir cualquier daño o riesgo ambiental presente para el momento del cierre de los frentes de trabajo.*

*PARÁGRAFO. - Las Corporaciones Autónomas Regionales deberán avanzar en la definición de lineamientos más detallados, en el marco de la zonificación y determinación del régimen de sus, así como en los instrumentos de control y manejo ambiental que correspondan.”* Ministry of Environment Resolution No 2090, 19 December 2014, **C-34**, Art 5.

<sup>61</sup> See paragraph 18 and footnote 12 above. The term “associated environmental license or equivalent environmental management and control instrument” used in Resolution 2090 was evidently drafted so as to encompass more than simply environmental licenses.

<sup>62</sup> See note 21, above.

<sup>63</sup> Ministry of Environment Resolution No 2090, 19 December 2014, **C-34**, Art 5.

<sup>64</sup> See paragraph 47, below.

- (c) Article 5 of Resolution 2090 also allowed environmental authorities to amend and adjust the environmental management plans of grandfathered mining projects if in their view, environmental management measures should be stricter;
- (d) It was unclear whether the ban on mining activities within the páramo applied only to the surface or also to the ground beneath the páramo, and in such case, if there was a depth limit. This information was essential to determine the viability of the possible underground development of the Angostura Project; and
- (e) Resolution 2090 provided that mining activities could be developed in páramo “restoration areas” located in “traditional mining municipalities of Vetas, California and Suratá” – where the Angostura Project is located.<sup>65</sup> However, if mining activities could be carried out *solely* in restoration areas (and not also in preservation areas), it would not be viable to develop the mining project.

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<sup>65</sup> See Ministry of Environment Resolution 2090, December 19, 2014, **C-34**, Art 9, which reads as follows: “**ARTÍCULO 9. ÁREAS DE PROTECCIÓN Y DESARROLLO DE LOS RECURSOS NATURALES RENOVABLES Y DEL MEDIO AMBIENTE.** Las zonas identificadas como “Áreas para la restauración del ecosistema de páramo” y las “Áreas [sic] destinados para la agricultura sostenible” en el mapa anexo, localizadas en los municipios con tradición agropecuaria como Abrego, Arboledas, Bochalema, Bucarasica, Cáchira, Cécota, Chinácota, Chitagá, Cucutilla, Gramalote, La Esperanza, Labateca, Lourdes, Mutiscua, Pamplona, Pamplonita, Salazar, Silos, Toledo, Villacaro, Charta, El Playón, Matanza, Piedesuesta, Tona, Santa Bárbara y Guaca, son áreas de protección y desarrollo de los recursos naturales y del ambiente, funcionalmente vinculadas con el “Área de Páramo Jurisdicciones - Santurbán - Berlín” delimitada en el artículo primero del presente acto administrativo.

*En dichas zonas no se podrán celebrar contratos de concesión minera u otorgar títulos mineros o licencias ambientales que autoricen el desarrollo de actividades mineras, de conformidad con lo dispuesto por el artículo 34 de la Ley 685 de 2001 y el artículo 202 de la Ley 1450 de 2011. Lo anterior sin perjuicio de los títulos mineros que cuenten con licencia ambiental o instrumento de control y manejo ambiental otorgado debidamente antes del 9 de febrero de 2010.*

*Su vocación hacia la restauración del ecosistema de páramo y al desarrollo de actividades agropecuarias sostenibles son estrategias complementarias para la conservación del “Área de Páramo Jurisdicciones - Santurbán - Berlín”, de allí su importancia para la protección y desarrollo de los recursos naturales y del ambiente.*

*No obstante lo anterior, en las zonas identificadas como “Áreas para la restauración del ecosistema de páramo” en el mapa anexo, que se encuentren ubicadas en los municipios tradicionalmente mineros de Vetas, California y Suratá, se podrán autorizar y adelantar actividades mineras, sujetas al cumplimiento de las normas mineras y ambientales que rigen la materia. En todo caso deberán tomarse las medidas de manejo ambiental necesarias para garantizar que su desarrollo no ponga en riesgo la conservación de la zona delimitada como “Área de Páramo Jurisdicciones - Santurbán - Berlín” y la generación de servicios ecosistémicos.”*

42. Shortly after the issuance of Resolution 2090, the suspension of mining activities on Concession 3452 was lifted on the basis that it was no longer necessary in light of Resolution 2090.<sup>66</sup> Eco Oro was consequently free to resume the development of the Angostura Project, including in páramo areas. As Eco Oro worked to update its mineral resource assessment, it received further declarations of support from the Government which assured the company that, as a Project of National Interest, the permitting of the Angostura Project would be expedited by central permitting authorities.
43. In June 2015, the Colombian Congress enacted a new four-year national development plan for 2014-2018 through Law 1753,<sup>67</sup> abrogating Law 1450 (the previous national development plan). Article 173 of Law 1753 mirrored several provisions of Resolution 2090. Specifically, it reiterated the general ban on mining activities within delineated páramo ecosystems, with the exception of projects that had a concession contract and an associated environmental license or equivalent environmental management and control instrument issued prior to 9 February 2010.<sup>68</sup> However, like Resolution 2090, Law 1753 contained limitations and generated uncertainties. For instance, like Resolution 2090, it provided that such “grandfathered” concessions could be operated until completion, but could not be extended beyond their initial term.<sup>69</sup> It also provided that, even in the case of grandfathered projects, mining activities would not be permitted if environmental damage to the páramo ecosystem could not be avoided.<sup>70</sup>
44. Law 1753 also declared projects of national interest, such as the Angostura Project, to be of public utility and social interest, and provided that these projects would be subject to licensing and administrative processes before national (rather

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<sup>66</sup> National Mining Agency Resolution VSC 3, 6 January 2015, **C-35**, Art 1.

<sup>67</sup> Law No 1753, 9 June 2015, **C-36**.

<sup>68</sup> *Ibid*, Art 173.

<sup>69</sup> *Ibid*.

<sup>70</sup> *Ibid*, Art 173, para 1 (third sub-paragraph).

than regional) authorities. This would have the effect of centralizing, and thereby optimizing, all administrative requests before national authorities.<sup>71</sup>

45. In sum, like Resolution 2090, Law 1753 grandfathered projects with rights acquired prior to the enactment of Law 1382, thereby acknowledging their status as stabilized contracts pursuant to Article 46 of the Mining Code. Moreover, the ANM had lifted the prior suspension on mining activities in páramo areas. This provided a path forward for the development of the Angostura Project, albeit subject to lingering uncertainties and on a significantly more limited timeframe than initially contemplated. By December 2014, Eco Oro was already mid-way through its eighth year out of a possible total of eleven years for the exploration phase – as the time limit to complete exploration works continued to run notwithstanding that Eco Oro had been ordered to suspend mining activities for over two years. Moreover, without the right to an extension beyond its initial term, following the completion of the exploration phase, Eco Oro would only have nine years to complete the construction and the exploitation phase – a period that Eco Oro nevertheless considered to be sufficient.

### **3. Constitutional Court decision**

46. The uncertainties raised by Law 1753 and Resolution 2090 were exacerbated by two separate challenges brought before Colombia's Constitutional Court in 2015. Law 1753 was challenged, among other reasons, because it allegedly failed to sufficiently protect páramos by allowing mining activities to be carried out in páramo areas in certain circumstances.<sup>72</sup> Resolution 2090 was separately challenged on the basis that it was adopted without taking into account the views of certain civil society groups and that it allowed for exceptions to the general ban

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<sup>71</sup> *Ibid*, Arts 49-51.

<sup>72</sup> Constitutional Court, Judgment C-35, 8 February 2016, **C-42**, pp 104-105.

- on mining that created risks for the páramo ecosystems and diminished their protection.<sup>73</sup>
47. Notwithstanding these uncertainties, Eco Oro continued to progress the development of the Angostura Project. In July 2015, it published an updated mineral resource estimate for the Angostura Project pursuant to the guidelines set out in the Canadian National Instrument 43-101.<sup>74</sup> The estimate showed that the project's resources totaled 21.91 million tonnes of resources,<sup>75</sup> comprising 3.245 million ounces of gold and 13.554 million ounces of silver (including measured, indicated and inferred resources at a cut-off grade of 2.5 grams per tonne).<sup>76</sup> Eco Oro then requested detailed terms of reference for the preparation of the Environmental Impact Assessment for the underground Angostura mine from the central environmental licensing authority, as it was entitled to do as a Project of National Interest.<sup>77</sup>
48. This renewed momentum, however, was cut short when, on 8 February 2016, the Colombian Constitutional Court issued a press release indicating that it would issue a decision declaring certain sections of Law 1753 unconstitutional.<sup>78</sup> The

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<sup>73</sup> The *Acción de Tutela* was submitted by the “Corporación Colectivo de Abogados Luis Carlos Pérez” and representatives of the “Comité para la Defensa del Agua y del Páramo de Santurbán” before the Constitutional Court on 2 July 2015.

<sup>74</sup> Canadian National Instrument 43-101 (*NI 43-101*) (available at: [http://www.osc.gov.on.ca/documents/en/Securities-Category4/rule\\_20051007\\_43-101\\_sd-mineral-projects.pdf](http://www.osc.gov.on.ca/documents/en/Securities-Category4/rule_20051007_43-101_sd-mineral-projects.pdf)) contains the *Standards of Disclosure for Mineral Projects*, which are a set of reporting guidelines and rules for mineral properties owned or explored by companies that report on Canadian stock exchanges. As a company listed on the Toronto Stock Exchange, Eco Oro must comply with the NI 43-101.

<sup>75</sup> This comprised 15.06 million tonnes of measured and indicated resources and 6.85 million tonnes of inferred resources. See Micon International Limited, *Technical Report on the Updated Mineral Resource Estimate for the Angostura Gold-Silver Deposit, Santander Department, Colombia*, 17 July 2015, **C-37**, p 9.

<sup>76</sup> Micon International Limited, *Technical Report on the Updated Mineral Resource Estimate for the Angostura Gold-Silver Deposit, Santander Department, Colombia*, 17 July 2015, **C-37**, p 9.

<sup>77</sup> Letter from Eco Oro to ANLA, 5 January 2016, **C-39**. Eco Oro never received these detailed terms of reference since in its judgment of 8 February 2016, the Constitutional Court held that local and regional, rather than national, authorities were responsible for environmental licensing, thereby depriving the ANLA of its competence in this regard. See Constitutional Court, Judgment C-35, 8 February 2016, **C-42**.

<sup>78</sup> Constitutional Court Comunicué No 4, 8 February 2016, **C-41**.



Court's press release set out a summary of its decision, but did not enclose the decision itself. It indicated that the Court had decided: (a) to strike down the provisions relating to optimized administrative processes for Projects of National Interest, as these projects could not be removed from the competence of regional environmental authorities; (b) to strike down portions of Article 173 of Law 1753 because it failed to confer sufficient environmental protection to páramo ecosystems given that it (i) allowed 'grandfathered' projects to continue mining in páramo ecosystems; and (ii) enabled Governmental environmental authorities to deviate from the mapping of páramo ecosystems undertaken by the IAVH, without having to justify such deviations on the basis of scientific criteria, in order to delimit páramo areas on the basis of technical environmental, social and economic criteria.<sup>79</sup>

49. This press release raised many questions. A few days after it was issued, on 11 February 2016, the Minister of Environment asked the Court to clarify certain aspects of its announced decision, including: (i) whether the "scientific criteria" that the Court required the Ministry of Environment to invoke in order to justify any departure from the páramo boundaries suggested by the IAVH included "social and economic" criteria (which had not been considered by the IAVH);<sup>80</sup> and (ii) whether the Court's decision that the Ministry of Environment could justify a departure from the IAVH's proposal as long as the new delineation provided "a higher degree of protection to páramos" allowed for better environmental control measures in páramo areas – albeit in an area smaller than that proposed by the IAVH – or required that the páramo area suggested by the IAVH be enlarged.<sup>81</sup> The Court refused to provide the requested clarifications.<sup>82</sup>

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<sup>79</sup> *Ibid.*

<sup>80</sup> Letter from the Ministry of Environment to the Constitutional Court, 11 February 2016, **C-43**, p 10.

<sup>81</sup> *Ibid*, p 11.

<sup>82</sup> Colombian Constitutional Court, Auto 097/16, 2 March 2016, **C-47**.

50. The Court’s complete decision was published on 18 February 2016.<sup>83</sup> Among other things, the decision of the Constitutional Court eliminated the exception to the ban on mining in páramo ecosystems for grandfathered projects and destroyed any right to stability in accordance with the Mining Code.<sup>84</sup>
51. The Court’s decision left Eco Oro’s Angostura Project in a very uncertain legal position. First, while the Court’s decision eliminated the exceptions to the ban on mining activities contained in Law 1753 – namely the grandfathering of concessions predating the enactment of Law 1382 – it did not strike down the exceptions contained in Resolution 2090. It was unclear whether any of the exceptions in Resolution 2090 would remain in effect, including the exception allowing mining in restoration areas in traditional mining municipalities.<sup>85</sup> Second, given that the Ministry of Environment had apparently not provided “scientific criteria” to support its departure from the boundaries for the Santurbán Páramo originally proposed by the IAVH in its Santurbán Páramo Map, there was a real risk that the delineation carried out through Resolution 2090 would be deemed unconstitutional in the context of the challenge to Resolution 2090 pending before Constitutional Court, and that a new delineation would be needed. Third, while the Constitutional Court did not decide that the ban on mining in páramo ecosystems also applied to underground mining (i.e. mining that did not disturb the surface of the páramo), the Court warned about the use of underground mining in páramo ecosystems in *obiter dicta*, creating additional uncertainty for Eco Oro’s underground Angostura Project.<sup>86</sup>
52. Eco Oro was not alone in considering that the Court’s decision generated significant uncertainty and interfered with acquired rights. On 24 February 2016, the National Mining Agency requested that the Court clarify certain aspects of the

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<sup>83</sup> While the Court’s decision, Judgment No C-35, was only published on 18 February 2016, it was dated 8 February 2016.

<sup>84</sup> Constitutional Court, Judgment C-35, 8 February 2016, **C-42**, p 147, which struck down Art 173 paragraph 1, sections 1 through 3, of Law 1753 of 2015.

<sup>85</sup> See paragraph 41, above.

<sup>86</sup> Constitutional Court, Judgment C-35, 8 February 2016, **C-42**, p 144.

decision. In its clarification request, the National Mining Agency indicated that by imposing a complete ban on mining activities in páramos declared as protected areas, the decision of the Court amounted to:

“[the Constitutional Court’s decision] amounts to an absolute interference with contractual rights and affects, from a mining point of view, contracts executed, and investments made, under the regulations in force at the time, which could potentially cause unlawful damages to those who, on the basis of the contract, and legitimate expectations [confianza legítima], carried out investments which could be deemed to have been indirectly expropriated, as consequence of the unconstitutionality decision. Evidently, this situation raises national and international concerns in light of investment protection treaties...”<sup>87</sup>

53. The National Mining Agency requested that the Court provide clarification and guidelines that would allow it to protect the páramo, while at the same time reducing the potential liabilities arising from the declaration of unconstitutionality.<sup>88</sup> In particular, it requested clarification:
- (a) of the Court’s decision regarding whether mining concession contracts create the right to explore and exploit resources;<sup>89</sup>
  - (b) as to whether the holder of affected mining rights should be compensated, and in such case, which mining rights would qualify for compensation;<sup>90</sup>
  - (c) as to whether the decision of the Court only applied to the future;<sup>91</sup>

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<sup>87</sup> Letter from the National Mining Agency to the Constitutional Court, 24 February 2016, **C-44**, pp 7-8. The original Spanish reads: “... [the Constitutional Court’s decision] *adquiere la condición de interferencia absoluta en la libertad contractual y afecta, desde el punto de vista minero, contratos e inversiones celebrados y realizadas al amparo de la legislación vigente en su momento, y que representan potenciales daños antijurídicos a quienes atentos al contrato y obrando en atención al principio de la confianza legítima ejecutaron inversiones de las que ahora se podrían considerarse expropiados en forma indirecta, como efecto de la sentencia de inexequibilidad. Evidentemente la situación genera una alerta nacional e internacional en atención a los tratados de protección a la inversión extranjera...*”

<sup>88</sup> *Ibid*, p 8.

<sup>89</sup> *Ibid*, p 11.

<sup>90</sup> *Ibid*, p 12.

- (d) as to whether the ban on mining in páramos entailed the nullity of the concession contracts, and whether this would mean that the State was obliged to compensate the holder of the mining right;<sup>92</sup>
  - (e) as to whether mining concessions should now be deemed null and void, or whether they were unenforceable;<sup>93</sup> and
  - (f) as to how it should treat concession contracts over areas that only partially fell within páramo areas.<sup>94</sup>
54. As with the application for clarification lodged by the Ministry of Environment, the Constitutional Court denied the National Mining Agency's request for clarification.<sup>95</sup>
55. On 7 March 2016, Eco Oro delivered its Notice of Intent to initiate arbitral proceedings under the Treaty to Colombia, referring to the measures described above and deploring the state of uncertainty under which its Angostura Project had been plunged in breach of Colombia's commitments under the Treaty.

#### **4. Effects of the Constitutional Court decision**

56. Shortly after the publication of the Court's decision, Eco Oro applied to the National Mining Agency for the fourth and last two-year extension to the exploration phase for Concession 3452, and requested that the authority confirm that it would be entitled to pursue mining activities throughout the entire area of Concession 3452.<sup>96</sup>

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<sup>91</sup> *Ibid*, pp 13-14.

<sup>92</sup> *Ibid*, pp 14-19.

<sup>93</sup> *Ibid*, p 19.

<sup>94</sup> *Ibid*, pp 25-26.

<sup>95</sup> Decision 138/16 of the Colombian Constitutional Court, 6 April 2016, **C-49**.

<sup>96</sup> *See* National Mining Agency Resolution VSC 829, 2 August 2016, **C-53**, p 2.

57. On 26 July 2016, before the National Mining Agency had responded to Eco Oro's extension request, the National Mining Agency wrote to Eco Oro requesting an adjusted payment of the annual canon on Concession 3452.<sup>97</sup> The National Mining Agency indicated that payment should be made only in relation to 49.27% of the total area of Concession 3452 because the remainder fell within the preservation area of the Santurbán Páramo.<sup>98</sup> Eco Oro responded to the National Mining Agency's letter on 5 August 2016 noting that it did not understand the basis for the Agency's request since its rights under Concession 3452 had not been terminated or modified in any way.<sup>99</sup> Eco Oro indicated that it had paid the amounts requested by the National Mining Agency on the understanding that its rights would be fully respected, and that it remained willing and ready to pay the canon corresponding to the total area of Concession 3452.<sup>100</sup> Eco Oro fully reserved its rights under international law and the Treaty.<sup>101</sup>
58. A few days later, on 8 August 2016, Eco Oro was served with the National Mining Agency's Resolution VSC 829 dated 2 August 2016 which decided Eco Oro's application for an extension of the exploration phase of Concession 3452.<sup>102</sup> Resolution VSC 829 indicated that even concessions with environmental management documents granted prior to February 2010 were prohibited from carrying out mining activities in the preservation area of the páramo as a result of the Constitutional Court decision of February 2016.<sup>103</sup> Consequently, the ANM

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<sup>97</sup> In Colombia, holders of mining titles in the exploration phase are required to pay an annual fee (*canon superficiario*) based on the number of hectares covered by each title. See Micon International Limited, *Technical Report on the Updated Mineral Resource Estimate for the Angostura Gold-Silver Deposit, Santander Department, Colombia*, 17 July 2015, **C-37**, p 16.

<sup>98</sup> Letter from National Mining Agency to Eco Oro, 26 July 2016, **C-50**.

<sup>99</sup> Letter from Eco Oro to National Mining Agency, 5 August 2016, **C-54**.

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*

<sup>102</sup> National Mining Agency Resolution VSC 829, 2 August 2016, **C-53**.

<sup>103</sup> The ANM indicated that: "*La anterior disposición [Art 34 of the Mining Code] implica que las áreas que por su importancia estratégica en materia ambiental merecen una protección especial, dentro de las que se encuentran los ecosistemas de páramo, deben estar excluidas de pleno derecho de la realización de actividades mineras, aún sobre contratos de concesión ya otorgados y con viabilidad ambiental, tal como lo señaló la Honorable Corte Constitucional en el análisis de*

extended Concession 3452 only in relation to those areas that fell outside the preservation area of the Santurbán Páramo delineated through Resolution 2090 of December 2014.<sup>104</sup> Resolution VSC 829 effectively deprived Eco Oro of vital rights under Concession 3452 that fell within the preservation area of the Santurbán Páramo as well as the returns that would have resulted from the hundreds of millions of dollars of investments that Eco Oro had made for over a decade in reliance on those rights.

59. There is a significant risk that Colombia will deprive Eco Oro of further rights under Concession 3452. For instance, in a decision rendered by the National Mining Agency in April 2016 (but only served on Eco Oro in October 2016) in relation to a different concession belonging to Eco Oro adjacent to Concession 3452, the Agency indicated that mining activities were also prohibited in restoration areas of the páramo (one of the three areas of the páramo defined under Resolution 2090<sup>105</sup>) as a result of the Constitutional Court decision.<sup>106</sup> This decision is inconsistent with the National Mining Agency's decision of August 2016 permitting Eco Oro to pursue mining activities in all areas of Concession 3452 except for the preservation area defined under Resolution 2090.<sup>107</sup> Eco Oro subsequently learned that the technical opinion supporting the Agency's August 2016 decision also took the position that mining is prohibited in restoration areas of Concession 3452.<sup>108</sup> Eco Oro promptly sent a request for clarification to the National Mining Agency but has yet to receive a response. If mining is prohibited in páramo restoration areas overlapping with Concession 3452, it will result in a deprivation of Eco Oro's rights over an additional 16% area of the Angostura deposit.

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*constitucionalidad realizado a través de la sentencia C-035 de 2016.*" ANM Resolution VSC 829, 2 August 2016, **C-53**, p 4 .

<sup>104</sup> National Mining Agency Resolution VSC 829, 2 August 2016, **C-53**, p 6.

<sup>105</sup> See paragraph 38 above.

<sup>106</sup> National Mining Agency Resolution VSC 829, 2 August 2016, **C-53**.

<sup>107</sup> *Ibid.*

<sup>108</sup> Concepto Técnico VSC 169 of 1 August 2016, **C-51**, p 28.

60. In addition, as explained in paragraph 51 above, in light of the Constitutional Court's decision of February 2016, there is a substantial risk that the Court will strike down Resolution 2090 as unconstitutional because it sets out exceptions to the ban on mining in páramo ecosystems, and because its delineation of the páramo conflicts with the IAVH Santurbán Páramo Map. If Resolution 2090 were struck down, the boundaries of the Santurbán Páramo would likely need to be redefined. Based on past experience, this could take years to complete. In the interim, the IAVH Santurbán Páramo Map would be used as a reference for the boundaries of the Santurbán Páramo<sup>109</sup> which would entail an even greater deprivation of Eco Oro's rights under Concession 3452, as it shows that the Santurbán Páramo overlaps with 57% of the surface area of Concession 3452 and 67% of the Angostura deposit.
61. Further uncertainty was injected into the legal framework for Eco Oro's Angostura Project when, on 25 May 2016, the Constitutional Court rendered Decision C-273, which provided that municipalities have the discretionary power to ban mining activities on their territory.<sup>110</sup>
62. As a consequence of the above, on 21 November 2016, the CDMB – the regional environmental authority which now has responsibility for licensing the Angostura Project following the Constitutional Court's striking down of the provisions relating to Projects of National Interest – informed Eco Oro that, in light of the significant uncertainties regarding the regulatory framework applicable to the Angostura Project resulting from the Constitutional Court's decision of February 2016 and the pending constitutional challenge to Resolution 2090, it would not be in a position to process a request for or grant the environmental exploitation license that Eco Oro requires in order to build and exploit the Angostura mine until the Court decides the challenge to Resolution 2090 and the regulatory

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<sup>109</sup> See Law 1450, 16 June 2011, **C-20**, Art 202, paragraph 1.

<sup>110</sup> Constitutional Court Judgment C-273, 25 May 2016, available at: <http://www.corteconstitucional.gov.co/relatoria/2016/C-273-16.htm>.

framework is clarified.<sup>111</sup> Eco Oro is now in the penultimate year of the exploration phase for Concession 3452, with no possible extensions under Colombian law. Eco Oro will not be able to continue to develop the Angostura Project if it cannot obtain an exploitation license before the expiry of the exploration phase of Concession 3452.<sup>112</sup>

63. While Colombia has, through its conduct, prevented the development of the Angostura Project purportedly to protect the páramo, it has failed to take action to protect the páramo from the greatest threat to that ecosystem: the hundreds of illegal miners who have invaded the area following the suspension of industrial mining activities there. These illegal miners use mercury, cyanide and explosives to break down rocks and extract gold without any environmental or safety precautions.<sup>113</sup> In stark contrast, Eco Oro was subject to and complied with strict environmental standards. Eco Oro's numerous pleas to Government agencies for intervention to remove illegal miners from its mining properties have not been effective.<sup>114</sup>

## 5. Impact on Eco Oro's investments

64. As a result of the measures described above, Colombia has deprived Eco Oro of its rights under Concession 3452 and has destroyed the value of its investments in the Colombian mining sector. The Angostura Project has become unviable. Following the issuance of National Mining Agency Resolution VSC 829, the resources that could potentially be accessed pursuant to Concession 3452 are insufficient to justify the significant investments required to develop the underground mine. The CDMB has confirmed that it will not be in a position to process and grant an environmental license to the project until the Constitutional Court decides the challenge to Resolution 2090 and the regulatory framework

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<sup>111</sup> Letter from Eco Oro to the CDMB, 5 December 2016, **C-57**.

<sup>112</sup> Eco Oro's current environmental management instruments only relate to the exploration activities. "Minería ilegal se toma una zona de Santurbán", *Portafolio*, 6 February 2014, **C-40**.

<sup>113</sup> It is currently estimated that 88% of the gold exported by Colombia is produced illegally. See "En Colombia, el 88% de la producción de oro es ilegal", *El Espectador*, 2 August 2016, **C-52**.



applicable to the Angostura Project is clarified. Given the Constitutional Court's refusal to clarify its February 2016 decision in response to the requests of the Ministry of Environment and the National Mining Agency, and given the strong likelihood that Resolution 2090 will be struck down in light of the Constitutional Court's reasoning in that February 2016 decision, this clarity is unlikely to be achieved in the period remaining for the exploration phase of Concession 3452.

65. Colombia has therefore deprived Eco Oro of its rights under Concession 3452 and the returns that would have resulted from the hundreds of millions of dollars of investments that Eco Oro has made for over two decades in reliance upon those rights, without any compensation whatsoever.

### **C. NOTIFICATION OF THE DISPUTE**

66. On 7 March 2016, Eco Oro notified the President of the Republic of Colombia of its intent to submit the present dispute to arbitration pursuant to Article 821(2)(c) of the Treaty through its Notice of Intent.<sup>115</sup>
67. In its Notice of Intent, Eco Oro formally requested amicable consultations, triggering the amicable consultation period under Article 821(2)(b) of the Treaty. Despite Eco Oro's efforts to seek an amicable resolution, nine months later, no agreement has been reached with Colombia.

### **III. COLOMBIA'S VIOLATIONS OF THE TREATY**

68. Colombia's measures violate the Treaty and international law and trigger Colombia's state responsibility, as explained below. Eco Oro will submit detailed evidence at the appropriate stage of the proceedings to quantify the losses suffered.

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<sup>115</sup> Notice of Intent, 7 March 2016, C-48.

**A. COLOMBIA FAILED TO TREAT ECO ORO’S INVESTMENTS IN ACCORDANCE WITH THE CUSTOMARY INTERNATIONAL LAW MINIMUM STANDARD, INCLUDING FAIR AND EQUITABLE TREATMENT AND FULL PROTECTION AND SECURITY**

69. Article 805 of the Treaty provides the following protection to Eco Oro’s investment:

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

2. The obligation in paragraph 1 to provide “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process. [...].<sup>116</sup>

70. Colombia has breached this obligation by taking unfair and inequitable measures with respect to Eco Oro’s investments, as described in Section II above. In particular, but without limitation, Colombia breached its obligations pursuant to this Treaty provision by acting in an arbitrary, inconsistent, non-transparent and disproportionate manner and by frustrating Eco Oro’s legitimate expectations as a result of persistent uncertainty, an unstable and unpredictable legal framework and the deprivation of the rights and specific commitments provided to Eco Oro by Colombia, beginning with the enactment of Resolution 2090 of December 2014 which curtailed Eco Oro’s right to extend Concession 3452, and culminating in the deprivation of Eco Oro’s rights under Concession 3452.

71. Moreover, the conduct described above amounts to a failure to accord full legal protection and security to Eco Oro’s investment.

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<sup>116</sup> Treaty, C-22, Art 805.

**B. COLOMBIA EXPROPRIATED ECO ORO'S INVESTMENTS WITHOUT PROMPT, ADEQUATE AND EFFECTIVE COMPENSATION**

72. Article 811 of the Treaty, in relevant part, provides the following protection to Eco Oro's investment:

1. Neither Party may nationalize or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation"), except:

(a) for a public purpose;

(b) in a non-discriminatory manner;

(c) on prompt, adequate, and effective compensation in accordance with paragraphs 2 to 4; and

(d) in accordance with due process of law.

2. Such compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. To determine fair market value a Tribunal shall use appropriate valuation criteria, which may include going concern value, asset value including the declared tax value of tangible property, and other criteria.

3. Compensation shall be paid without delay and shall be fully realizable and freely transferable. Compensation shall be payable in a freely convertible currency and shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of payment. [...] <sup>117</sup>

73. This obligation has been breached by Colombia. Colombia has deprived Eco Oro of its rights under Concession 3452, it has frustrated its legitimate expectations, and has destroyed the value of Eco Oro's investments in the Colombian mining sector, without the payment of prompt, adequate and effective compensation.

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<sup>117</sup> *Ibid*, Art 811 (original footnote reference omitted).

Colombia's measures amount to an unlawful creeping indirect expropriation of Eco Oro's investments under the terms of the Treaty and international law.

#### **IV. ECO ORO'S INVESTMENTS ARE PROTECTED UNDER THE TREATY**

##### **A. ECO ORO IS A PROTECTED INVESTOR UNDER THE TREATY**

74. Article 838 of the Treaty defines an "*investor of a Party*" as follows:

investor of a Party means a Party or state enterprise thereof, or an enterprise or national of a Party, that seeks to make, is making or has made an investment. A natural person who is a dual citizen shall be deemed to be exclusively a citizen of the State of his or her dominant and effective citizenship. A natural person who is a citizen of a Party and a permanent resident of the other Party shall be deemed to be exclusively a national of the Party of which he or she is a citizen.<sup>118</sup>

75. Furthermore, Article 838 of the Treaty defines "*enterprise*" as:

enterprise means an enterprise as defined in Article 105 (Initial Provisions and General Definitions – Definitions of General Application), and a branch of any such entity.<sup>119</sup>

76. In turn, Article 106<sup>120</sup> of the Treaty provides:

enterprise means any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association.<sup>121</sup>

77. As a corporation constituted under the laws of Canada, Eco Oro qualifies as a protected investor under the Treaty.

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<sup>118</sup> *Ibid*, Art 838 (original footnote reference omitted).

<sup>119</sup> *Ibid*, Art 838.

<sup>120</sup> We note that there is an inconsistency in Art 838, as the reference to Art 105 should instead be to Art 106, which contains the "Definitions of General Application".

<sup>121</sup> Treaty, C-22, Art 106.

**B. ECO ORO'S INVESTMENTS ARE PROTECTED UNDER THE TREATY**

78. Article 838 of the Treaty defines an “*investment*” as follows:

- (a) an enterprise;
- (b) shares, stocks and other forms of equity participation in an enterprise;
- (c) bonds, debentures and other debt instruments of an enterprise, but does not include a debt instrument of a state enterprise;
- (d) a loan to an enterprise, but does not include a loan to a state enterprise;
- (e) an interest in an enterprise that entitles the owner to a share in income or profits of the enterprise;
- (f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution;
- (g) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under:
  - (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or
  - (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;
- (h) intellectual property rights; and
- (i) any other tangible or intangible property, moveable or immovable property, and related property rights acquired in the expectation or used for the purpose of economic benefit or other business purposes.<sup>122</sup>

79. Eco Oro holds significant investments in Colombia which are protected under the Treaty, including concessions, exploitations licenses and exploration licenses registered with the National Mining Registry, including Concession 3452, and the

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<sup>122</sup> *Ibid*, Art 838.

claims to money and performance arising thereunder.<sup>123</sup> Eco Oro has, over the course of over two decades, committed substantial capital, and other resources (hiring employees, contractors and suppliers) in order to develop the Angostura Project and declare resources in relation to the Angostura deposit. Moreover, Eco Oro's Colombian branch<sup>124</sup> would also qualify as an investment insofar as it constitutes an enterprise under Article 838 of the Treaty.

## **V. THE PARTIES' CONSENT TO ARBITRATION UNDER THE TREATY AND THE ICSID CONVENTION**

80. Eco Oro has fulfilled all the requirements for access to arbitration under the ICSID Convention and the Treaty, as explained below.

### **A. THE REQUIREMENTS UNDER THE ICSID CONVENTION HAVE BEEN FULFILLED**

81. Articles 25(1) and (2) of the ICSID Convention set out the requirements to access ICSID arbitration:

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State [...] and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) 'National of another Contracting State' means: [...]

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

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<sup>123</sup> See footnote 10, above.

<sup>124</sup> See Certificate of good standing of Eco Oro's Colombian Branch issued by the Chamber of Commerce of Bucaramanga, 26 February 2016, **C-46**.

82. Article 25 provides that ICSID has jurisdiction over (a) legal disputes; (b) that arise directly out of an investment; (c) between an ICSID Contracting State and (i) a national of another Contracting State and/or (ii) a national of the Contracting State party to the dispute that, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of the ICSID Convention; and (d) which the parties to the dispute have consented to submit to ICSID arbitration.
83. All these elements are satisfied in this case:
- (a) there is a legal dispute arising from Colombia's breach of its obligations under the Treaty, as set out in Section III above;
  - (b) the dispute arises directly out of Eco Oro's investments in Colombia, as described in Section IV above, which are qualifying investments under the Treaty and the ICSID Convention;
  - (c) the dispute has arisen between Colombia, an ICSID Contracting State<sup>125</sup> and Eco Oro, a national of Canada, an ICSID Contracting State;<sup>126</sup> and
  - (d) Colombia consented to submit this dispute to ICSID arbitration pursuant to Article 823 of the Treaty. With this Request, Eco Oro also consents to submit this dispute to ICSID arbitration in accordance with Articles 821 and 823 of the Treaty.<sup>127</sup>

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<sup>125</sup> The ICSID Convention entered into force for Colombia on 14 August 1997, following its signature of the Convention on 18 May 1993 and the deposit of its instrument of ratification on 15 July 1997.

<sup>126</sup> The ICSID Convention entered into force for Canada on 1 December 2013, following its signature of the Convention on 15 December 2006 and the deposit of its instrument of ratification on 1 November 2013.

<sup>127</sup> Letter from Eco Oro to ICSID's Secretary General, 7 December 2016, **C-126**.

**B. THE REQUIREMENTS TO ACCESS ARBITRATION UNDER THE TREATY HAVE BEEN FULFILLED**

84. Colombia's consent to submit investment disputes with foreign investors to ICSID arbitration is provided in the Treaty under Article 823, which reads, in material part, as follows:

1. Except as provided in Annex 822, a disputing investor who meets the conditions precedent in Article 821 may submit the claim to arbitration under:

(a) the ICSID Convention and the ICSID Rules of Procedures for Arbitration Proceedings, provided that both the disputing Party and the Party of the disputing investor are parties to the ICSID Convention;

(b) the Additional Facility Rules of ICSID, provided that either the disputing Party or the Party of the disputing investor, but not both, is a party to the ICSID Convention; or

(c) the UNCITRAL Arbitration Rules.<sup>128</sup>

85. Furthermore, Article 821 of the Treaty contains the conditions to the submission of a claim to arbitration:

1. The disputing parties shall hold consultations and negotiations in an attempt to settle a claim amicably before a disputing investor may submit a claim to arbitration. Consultations shall be held within 30 days of the submission of the Notice of Intent to Submit a Claim to Arbitration under subparagraph 2(c), unless the disputing parties otherwise agree. Consultations and negotiations may include the use of non-binding, third-party procedures. The place of consultations shall be the capital of the disputing Party, unless the disputing parties otherwise agree.

2. A disputing investor may submit a claim to arbitration under Article 819 or Article 820 only if:

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<sup>128</sup> Treaty, C-22, Art 822.



(a) the disputing investor and, where a claim is made under Article 820, the enterprise, consent to arbitration in accordance with the procedures set out in this Section;

(b) at least six months have elapsed since the events giving rise to the claim;

(c) the disputing investor has delivered to the disputing Party a written notice of its intent to submit a claim to arbitration (Notice of Intent) at least six months<sup>8</sup> prior to submitting the claim. The Notice of Intent shall specify:

[Footnote 8:] With a view to encouraging the review, confirmation or modification of administrative acts prior to such acts becoming final, the Parties recognize that disputing investors should make every effort to exhaust administrative recourse under Colombian law. A disputing investor that fails to exhaust administrative recourse, where applicable, shall submit its Notice of Intent nine months prior to submitting a claim to arbitration.

(i) the name and address of the disputing investor and, where a claim is made under Article 820, the name and address of the enterprise,

(ii) the provisions of this Agreement alleged to have been breached and any other relevant provisions,

(iii) the legal and the factual basis for the claim, including the measures at issue, and

(iv) the relief sought and the approximate amount of damages claimed;

(d) the disputing investor has delivered evidence establishing that it is an investor of the other Party with its Notice of Intent;

(e) in the case of a claim submitted under Article 819:

(i) not more than 39 months have elapsed from the date on which the disputing investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the disputing investor has incurred loss or damage thereby, and

(ii) the disputing investor and, where the claim is for loss or damage to an interest in an enterprise of the other Party that is a juridical person that the disputing investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 819, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the applicable law of the disputing Party, provided that the action is brought for the sole purpose of preserving the disputing investor's or the enterprise's rights and interests during the pendency of the arbitration; and

[...]

3. A consent and waiver required by this Article shall be in the form provided in Annex 821, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration. Where a disputing Party has deprived a disputing investor of control of an enterprise, a waiver from the enterprise under subparagraphs 2(e)(ii) or 2(f)(ii) shall not be required

4. An investor may submit a claim relating to taxation measures covered by this Chapter to arbitration under this Section only if the taxation authorities of the Parties fail to reach the joint determinations specified in Article 2204 (Exceptions – Taxation) within six months of being notified in accordance with those provisions.

5. An investor of a Party who is also a national of a non-Party may not initiate or continue a proceeding under this Article if, as a national of the non-Party, it submits or has submitted, directly or indirectly, an investment claim with respect to the same measure or series of measures under any agreement between the other Party and that non-Party.<sup>129</sup>

86. The requirements of the Treaty to submit the dispute to arbitration have been satisfied in this case:

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<sup>129</sup> *Ibid*, art 821 (original footnote reference omitted).

- (a) Eco Oro has consented to submit the present dispute to arbitration in accordance with Article 821 of the Treaty;<sup>130</sup>
  - (b) at least six months have elapsed since Colombia's measures giving rise to the present claim;
  - (c) more than nine months have elapsed since Eco Oro delivered on 7 March 2016 its Notice of Intent notifying Colombia of the present dispute;<sup>131</sup>
  - (d) with its Notice of Intent, Eco Oro delivered evidence establishing that it is a Canadian investor;<sup>132</sup>
  - (e) not more than 39 months have elapsed since Eco Oro first acquired, or should have acquired, knowledge of Colombia's breaches and it had incurred a loss resulting from those breaches. As explained above, the first Colombian State measures that gave rise to breach of the Treaty and a loss took place in 2014, that is, within the 39-month period prior to submitting this Request for Arbitration; and
  - (f) Eco Oro has waived its right to initiate or continue administrative or court proceedings under Colombian law in accordance with Article 821 of the Treaty.<sup>133</sup>
87. In light of the above, Eco Oro has complied with the conditions precedent to submission of a claim to arbitration under the Treaty.

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<sup>130</sup> Letter from Eco Oro to the Secretary General of ICSID, 7 December 2016, **C-58**.

<sup>131</sup> The Notice of Intent complied with the requirements of Art 821.2(c), as it specified (i) the name and address of Eco Oro (pp 7 and 9, and Annexes A and C); (ii) the provisions of the Treaty that Colombia had breached (pp 7-9); (iii) the legal and factual basis for the claim (pp 3-7); and (iv) the relief sought and the appropriate amount of damages (p 9). Notice of Intent, 7 March 2016, **C-48**.

<sup>132</sup> Notice of Intent, 7 March 2016, **C-48**, pp 7-8 and annexes C and D. *See* footnote 1, above.

<sup>133</sup> Letter from Eco Oro to the Secretary General of ICSID, 7 December 2016, **C-58**.

**VI. CONSTITUTION OF THE ARBITRAL TRIBUNAL, PLACE AND LANGUAGE OF THE ARBITRATION AND CONFIDENTIALITY OF THIS REQUEST**

88. Given that the parties have not reached an agreement on the number of arbitrators, in accordance with Article 824 of the Treaty the Tribunal to be appointed in this case shall be composed of three arbitrators.

89. Pursuant to Article 822(6) of the Treaty, Eco Oro appoints Professor Horacio Grigera Naón as its party-appointed arbitrator. Professor Grigera Naón's contact details are as follows:

5224 Elliott Road,  
Bethesda  
Maryland 20816  
USA  
Phone: 301 229 1985  
Cell: 202 436 4877  
Fax: 301 320 3136  
Emails: hgnlaw@gmail.com

90. Eco Oro proposes that Colombia appoints its arbitrator within 30 days from the registration of the Request for Arbitration and that the President be appointed by agreement of the parties within a period of 30 days after the nomination by Colombia of its party-appointed arbitrator. If the tribunal has not been constituted within 90 days of the submission of the Request for Arbitration, the President shall be appointed in accordance with Article 826 of the Treaty.

91. In accordance with Article 62 of the ICSID Convention, the arbitration proceedings shall be held at ICSID's headquarters in Washington, D.C.

92. The Treaty is silent on the question of the language of the arbitration, and the parties have not reached an agreement on this issue in accordance with Rule 22 of the ICSID Arbitration Rules. Eco Oro proposes English and Spanish as the languages of the arbitration. Eco Oro further proposes that documents, exhibits

and authorities in English or Spanish may be submitted by the parties in the course of the proceedings without translation into English or Spanish, and have adopted this practice in the present Request.

## **VII. THE PARTIES TO THE DISPUTE**

93. Eco Oro is a corporation constituted under the laws of Canada, with its registered office at:

Eco Oro Minerals Corp.  
Suite 300-1055 W. Hastings St.  
Vancouver, BC  
Canada V6E 2E9

94. All correspondence and notices relating to this case should be addressed to:

(a) Nigel Blackaby  
Caroline Richard  
Alexander Wilbraham  
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Email: nigel.blackaby@freshfields.com;  
caroline.richard@freshfields.com;  
alex.wilbraham@freshfields.com  
juan.pomes@freshfields.com

95. ICSID is respectfully requested to serve copies of this Request for Arbitration on Colombia at each of the following addresses:

(a) His Excellency Juan Manuel Santos Calderón  
President of the Republic of Colombia  
Casa de Nariño  
Carrera 8 N° 7-26  
Bogotá D.C.  
Colombia

- (b) Mr. Nicolás Palau van Hissenhoven  
Directorate of Investments and Services of the Ministry of Foreign Trade,  
Industry and Tourism  
Calle 28 N° 13 A - 15, 3rd floor  
Bogotá D.C.  
Colombia

#### **VIII. REQUEST FOR RELIEF**

- 96. On the basis of the foregoing, without limitation and reserving Eco Oro's right to supplement these prayers for relief, including without limitation in the light of further action which may be taken by Colombia, Eco Oro respectfully request that the Tribunal:
  - (a) DECLARE that Colombia has breached Articles 805 and 811 of the Treaty;
  - (b) ORDER Colombia to compensate Eco Oro for its breaches of the Treaty and international law in an amount to be determined at a later stage in these proceedings, plus interest until the date of payment;
  - (c) AWARD such other relief as the Tribunal considers appropriate; and
  - (d) ORDER Colombia to pay all of the costs and expenses of this arbitration, including Eco Oro's legal and expert fees, the fees and expenses of any experts appointed by the Tribunal, the fees and expenses of the Tribunal and ICSID's other costs and fees.

Respectfully submitted on 8 December 2016



**Freshfields Bruckhaus Deringer US LLP**

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*for the Claimant*