

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the arbitration proceeding between

**GLENCORE INTERNATIONAL A.G. AND  
C.I. PRODECO S.A.**

(Claimants)

**and**

**REPUBLIC OF COLOMBIA**

(Respondent)

**ICSID Case No. ARB/16/6**

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**AWARD**

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***Members of the Tribunal***

Juan Fernández-Armesto, President of the Tribunal

Oscar M. Garibaldi, Arbitrator

J. Christopher Thomas QC, Arbitrator

***Secretary of the Tribunal***

Alicia Martín Blanco

***Assistant to the Tribunal***

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*Date of dispatch to the Parties: 27 August 2019*

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## **TABLE OF CONTENTS**

<b>REPRESENTATION OF THE PARTIES.....</b>	<b>1</b>
<b>TABLE OF CONTENTS .....</b>	<b>2</b>
<b>GLOSSARY OF TERMS AND ABBREVIATIONS .....</b>	<b>6</b>
<b>LIST OF CASES.....</b>	<b>13</b>
<b>I. INTRODUCTION.....</b>	<b>18</b>
(1) The Parties .....	18
(2) The Treaty.....	20
<b>II. PROCEDURAL HISTORY .....</b>	<b>22</b>
(1) Chronology of the Procedure .....	22
(2) Certain Procedural Incidents.....	32
(2.1) Procedural Order No. 2 .....	32
(2.2) Procedural Order No. 3 .....	38
(2.3) Procedural Order No. 4.....	38
(2.4) Procedural Order No. 6 .....	42
<b>III. CHRONOLOGY OF FACTS .....</b>	<b>46</b>
(1) The Mining Contract: Execution, Performance and Amendments .....	46
(2) The Eighth Amendment: Preliminary Steps .....	57
(3) The 3ha Contract.....	63
(4) The Eighth Amendment: Negotiations.....	69
(5) The Eighth Amendment: Execution .....	76
(6) Performance of the Eighth Amendment .....	86
(7) The Fiscal Liability Proceeding .....	91
(8) Filing of the Procedure for Contractual Annulment .....	119
(9) Amicable Consultations and Arbitration.....	120
(10) Criminal Complaint Against Prodeco .....	121
(11) Provisional Application of the Eighth Amendment .....	122

<b>IV. RELIEF SOUGHT BY THE PARTIES .....</b>	<b>123</b>
(1) Claimants' Request for Relief .....	123
(2) Respondent's Request for Relief .....	125
<b>V. JURISDICTIONAL AND ADMISSIBILITY OBJECTIONS .....</b>	<b>127</b>
<b>V.1. ILLEGALITY OBJECTION .....</b>	<b>128</b>
(1) Respondent's Position .....	128
(2) Claimants' Position .....	133
(3) Corruption .....	137
(3.1) Proven Facts .....	138
(3.2) The Procedural Incident .....	147
(3.3) Decision of the Arbitral Tribunal .....	151
(4) Bad Faith .....	165
(4.1) Proven Facts .....	166
(4.2) Decision of the Arbitral Tribunal .....	183
(5) Summary of the Decisions .....	188
<b>V.2. FORK IN THE ROAD OBJECTION .....</b>	<b>189</b>
(1) Respondent's Position .....	189
(2) Claimants' Position .....	192
(3) Decision of the Arbitral Tribunal .....	195
<b>V.3. UMBRELLA CLAUSE OBJECTION .....</b>	<b>204</b>
(1) Respondent's Position .....	204
(2) Claimants' Position .....	208
(3) Decision of the Arbitral Tribunal .....	212
(3.1) Relevant Provisions .....	212
(3.2) Interpretation of Art. 11(3) of the Treaty .....	213
(3.3) Competence over the "Claim against the ANM" .....	218
<b>V.4. INADMISSIBILITY OBJECTION .....</b>	<b>223</b>
(1) Respondent's Position .....	223
(2) Claimants' Position .....	225
(3) Decision of the Arbitral Tribunal .....	228
<b>VI. MERITS OF THE CLAIMS .....</b>	<b>239</b>
<b>VI.1. CLAIMANTS' POSITION .....</b>	<b>240</b>

(1) Frustration of Legitimate Expectations .....	241
(2) Failure to Provide Investment Environment Required by FET	243
(3) Denial of Due Process.....	246
VI.2. RESPONDENT’S POSITION .....	250
(1) No Breach of Legitimate Expectations .....	251
(2) Colombia Took Ordinary Legal, Regulatory and Control Measures .....	256
(3) The Fiscal Liability Proceeding Respected Due Process .....	261
VI.3. DECISION OF THE ARBITRAL TRIBUNAL .....	266
(1) Respondent’s Procedural Objections .....	266
(2) The Alleged Responsibility of Colombia Arising out of Conduct of the <i>Contraloría</i> .....	269
(2.1) Breach of the FET Standard.....	270
(2.2) Unreasonable Measures .....	292
(3) The Alleged Responsibility of Colombia Arising from the Conduct of the SGC/ANM .....	311
VII. REPARATION.....	315
(1) Claimants’ Position .....	315
(2) Respondent’s Position .....	315
(3) Decision of the Arbitral Tribunal .....	316
VIII. INTEREST.....	321
(1) Claimants’ Position .....	321
(2) Respondent’s Position .....	322
(3) Decision of the Arbitral Tribunal .....	322
IX. TAXATION .....	326
(1) The Parties’ Position .....	326
(2) Decision of the Arbitral Tribunal .....	326
X. COSTS.....	328
(1) Claimants’ Position .....	328
(2) Respondent’s Position .....	329
(3) Decision of the Arbitral Tribunal .....	329
(4) Interest.....	332

<b>XI. SUMMARY .....</b>	<b>334</b>
<b>(1) Claimants' Requests for Relief.....</b>	<b>334</b>
<b>(2) Respondent's Requests for Relief .....</b>	<b>338</b>
<b>XII. DECISION .....</b>	<b>340</b>

## **GLOSSARY OF TERMS AND ABBREVIATIONS**

<b>Additional Royalty</b>	Additional royalty agreed upon in the Third Amendment to the Mining Contract
<b>ANDJE</b>	<i>Agencia Nacional de Defensa Jurídica del Estado</i>
<b>ANM</b>	<i>Agencia Nacional de Minería</i>
<b>Annex A Documents</b>	List of documents accompanying Respondent's communication of 11 May 2018
<b>Annual PTI</b>	<i>Programa de Trabajos e Inversiones</i> for each year of the production phase, which follows the exploitation sequence defined in the main PTI and contains a production forecast for the next 10 years
<b>Annulment Procedure</b>	<i>Proceso de nulidad</i> started by Prodeco before the <i>Tribunal Administrativo de Cundinamarca</i> seeking annulment of the <i>Contraloría's</i> Decision
<b>Appeal Decision</b>	Decision of the <i>Contralor General de la República</i> of 21 August 2015 regarding Prodeco's <i>recurso de apelación</i> , by which it confirmed the <i>Contraloría's</i> Decision
<b>Arbitration Rules</b>	ICSID Rules of Procedure for Arbitration Proceedings
<b>Art.</b>	Article
<b>Assignment Contract</b>	Agreement of 4 May 2009 by which Mr. Maldonado and Mr. García assigned the 3ha Contract to CDJ, for a consideration of USD 1.75 M
<b><i>Auto de imputación</i></b>	<i>Auto de imputación de responsabilidad fiscal</i> , issued by the <i>Contraloría</i> on 30 August 2013
<b>Base Royalty</b>	Royalty provided for in the Mining Contract, which consisted of a 5% base royalty for each tonne of coal sold, which progressively increased up to 7.6% for the fifth year of production and beyond
<b>Blended Coal</b>	Coal from the Calenturitas Mine blended with coal from other mines, namely La Jagua
<b>Bn</b>	Billion
<b>Brattle I</b>	First expert report by Colombia's damages expert, the Brattle Group, of 17 July 2017
<b>Brattle II</b>	Second expert report by Colombia's damages expert, the Brattle Group, of 2 April 2018
<b>C I</b>	Claimants' Memorial, dated 16 December 2016
<b>C II</b>	Claimants' Reply Memorial, dated 29 January 2018
<b>C III</b>	Claimants' Rejoinder on Preliminary Objections, dated 4 May 2018
<b>C IV</b>	Claimants' submission on costs, dated 24 September 2018
<b>Calenturitas Mine or Mine</b>	Open-pit mine of over 6,600 hectares known as Calenturitas, located in the municipalities of La Jagua de Ibirico, El Paso and Becerril

<b>Carbocol</b>	<i>Carbones de Colombia, S.A.</i> , a state-owned company with whom Prodeco entered into the Mining Contract
<b>CDJ</b>	<i>Carbones de la Jagua, S.A.</i> , one of the Prodeco Affiliates
<b>CEO</b>	Chief Executive Officer
<b>CET</b>	<i>Carbones El Tesoro, S.A.</i> , one of the Prodeco Affiliates
<b>Claimants</b>	Glencore International A.G. and C.I. Prodeco S.A.
<b>Claimants' First Application</b>	Claimants' letter of 22 August 2017
<b>Claimants' Second Application</b>	Claimants' letter of 20 September 2017
<b>CMU</b>	<i>Consorcio Minero Unido, S.A.</i> , one of the Prodeco Affiliates
<b>Coal Reference Price</b>	Coal price for calculating compensation under the Mining Contract
<b>Conciliation</b>	Oral conciliation meeting, held on 28 March 2016
<b>Commitment to Negotiate</b>	<i>Acuerdo de Compromiso</i> executed on 21 May 2009, pursuant to which Prodeco and Ingeominas agreed to formally negotiate an eighth amendment to the Mining Contract
<b>Compass Lexecon I</b>	First expert report by Claimants' damages expert, Compass Lexecon, of 16 December 2016
<b>Compass Lexecon II</b>	Second expert report by Claimants' damages expert, Compass Lexecon, of 29 January 2018
<b>Compensation Scheme</b>	General compensation scheme that would be applied under the Mining Contract
<b>Contracting Committee</b>	Ingeominas' <i>Comité de Contratación Minera</i>
<b>Contraloría</b>	<i>Contraloría General de la República</i>
<b>Contraloría's Decision</b>	<i>Fallo no. 00482 de 30 de abril de 2015, por medio del cual se falla con responsabilidad fiscal respecto de unos implicados y sin responsabilidad fiscal en relación con otro dentro del proceso de responsabilidad fiscal CD-000244 (Doc. C-32)</i> – decision by which the <i>Contraloría</i> found Prodeco liable for the Fiscal Liability Amount
<b>COP</b>	Colombian peso
<b>Cooperation Agreement</b>	Agreement to exchange information between SIC and ANDJE, signed on 13 June 2017
<b>Costs of the Proceeding</b>	Lodging fee and advance on costs paid to ICSID by the Parties
<b>CPHB</b>	Claimants' Post-Hearing Brief, of 8 August 2018
<b>Criminal Complaint</b>	<i>"Denuncia penal en averiguación de responsables por la presunta comisión de delitos contra la administración pública,"</i> filed by the ANDJE on 10 September 2017 against Prodeco and Glencore
<b>Defense Expenses</b>	Expenses incurred by the Parties to further their position in the arbitration



<b>Definitive Price</b>	Term employed in the Seventh Amendment to the Mining Contract, in relation to the payment of Royalties and GIC
<b>Disputed Documents</b>	41 exhibits accompanying Respondent's Counter-Memorial
<b>Doc. C-#</b>	Claimants' exhibit
<b>Doc. CL-#</b>	Claimants' legal authority
<b>Doc. H-1</b>	Claimants' Opening Statement of 28 May 2018
<b>Doc. R-#</b>	Respondent's exhibit
<b>Doc. R-100</b>	Respondent's exhibit R-100 among the Disputed Documents
<b>Doc. RL-#</b>	Respondent's legal authority
<b>Ecocarbón</b>	<i>Empresa Colombiana de Carbón Ltda. – Ecocarbón</i>
<b>Eighth Amendment</b>	Eighth amendment to the Mining Contract, executed by Prodeco and Ingeominas on 22 January 2010
<b>Fenoco</b>	<i>Ferrocarriles del Norte de Colombia S.A.</i>
<b>FET</b>	Fair and equitable treatment
<b>FGN</b>	<i>Fiscalía General de la Nación</i>
<b>FGN Documents</b>	Documents gathered from FGN
<b>Fifth Amendment</b>	Fifth amendment to the Mining Contract, executed by Prodeco and Ingeominas on 15 December 2004
<b>FIR Clause</b>	Fork in the road clause contained in Article 11(4) of the Treaty.
<b>First Session</b>	First session and procedural consultation held by the Tribunal with the Parties on 28 September 2016
<b>Fiscal Liability Amount</b>	Amount of COP 60 Bn (approximately USD 25 M at the exchange rate of the time) which Prodeco was ordered to pay pursuant to the <i>Contraloría's</i> Decision
<b>Fiscal Liability Proceeding</b>	Administrative proceedings initiated by the <i>Contraloría</i> against Prodeco and other individuals
<b>Fn.</b>	Footnote
<b>FOB</b>	Free on board
<b>FOB Price</b>	The FOB Colombian port price for Colombian steam coal for the respective week as published in the ICR, adjusted for calorific value
<b>Fork in the Road Objection</b>	Respondent's objection to jurisdiction based on the FIR Clause
<b>GIC</b>	Gross income compensation ( <i>Compensación por Ingresos Brutos</i> )
<b>Glencore</b>	Glencore International A.G.
<b>Hearing</b>	Hearing on Jurisdiction and the Merits, held on 28 May – 2 June 2018
<b>HT, Day #, p. #, l. #</b>	Hearing Transcript, volume, page and line
<b>ICJ</b>	International Court of Justice

<b>ICR</b>	Platts “International Coal Report”
<b>ICSID or Centre</b>	International Centre for Settlement of Investment Disputes
<b>ICSID Convention</b>	Convention on the Settlement of Investment Disputes between States and Nationals of Other States, of 14 October 1966
<b>IFE</b>	<i>Informe Final de Exploración</i>
<b>ILC Articles</b>	International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001) (Doc. CL-24)
<b>Illegality Objection</b>	Respondent’s objection to jurisdiction in relation to the legality of the Eighth Amendment
<b>Immediate Reaction Team</b>	<i>Equipo Especial de Reacción Inmediata</i> created by the <i>Contralora General de la República</i> , Ms. Sandra Morelli, on 8 October 2010
<b>Inadmissibility Objection</b>	Respondent’s objection to jurisdiction based on the alleged inadmissibility of Claimants’ claims
<b>Ingeominas</b>	<i>Instituto Colombiano de Geología y Minería</i>
<b>Initial Version of the Eighth Amendment</b>	First version of the eighth amendment to the Mining Contract, executed between Prodeco and Ingeominas on 9 December 2009
<b>Integrated Use Agreement</b>	<i>Acuerdo de Uso Integrado de Infraestructura Minera</i> executed by the Prodeco Affiliates in January 2008, for the integrated use of mining infrastructure in the La Jagua project
<b>Investment Dispute</b>	Letter from Claimants to the President of Colombia, formally notifying a dispute under the Treaty, dated 28 August 2015
<b>M</b>	Million
<b>McManus I</b>	First Witness Statement of Mr. Mark McManus of 16 December 2016
<b>McManus II</b>	Second witness statement of Mr. Mark McManus of 29 January 2018
<b>Minercol</b>	<i>Empresa Nacional Minera Ltda., Minercol Ltda.</i>
<b>Mining Contract</b>	Contract 044/89, executed between Prodeco and Carbocol, on 21 February 1989, for the exploration, construction and exploitation of a coal project in the Calenturitas Mine
<b>Mr. Ballesteros</b>	Mr. Mario Ballesteros, <i>Director General</i> of Ingeominas between 2 March 2007 and 7 September 2010
<b>Mr. Maldonado</b>	Mr. Jorge Maldonado, ex-employee of the Ministry of Mines and of Ingeominas’ predecessors
<b>Mr. McManus</b>	Mr. Mark McManus, Prodeco’s President and CEO since April 2013
<b>Mr. Nagle</b>	Mr. Gary Nagle, Prodeco’s Director from May 2005 to July 2013 and CEO from January 2008 to April 2013
<b>MT</b>	Million tonnes
<b>MTA</b>	Million tonnes per annum
<b>Nagle I</b>	First witness statement of Mr. Nagle of 16 December 2016

<b>Nagle II</b>	Second witness statement of Mr. Nagle of 29 January 2018
<b>Nagle III</b>	Third witness statement of Mr. Nagle of 4 May 2018
<b>NPV</b>	Net present value
<b>Para.</b>	Paragraph
<b>Paredes I</b>	First witness statement of Mr. Paredes of 15 June 2017
<b>Paredes II</b>	Second witness statement of Mr. Paredes of 28 March 2018
<b>Parties</b>	Claimants and Respondent
<b>PO No. 2</b>	Procedural Order No. 2, dated 4 November 2017
<b>PO No. 3</b>	Procedural Order No. 3, dated 4 January 2018
<b>PO No. 4</b>	Procedural Order No. 4, dated 24 April 2018
<b>PO No. 5</b>	Procedural Order No. 5, dated 17 May 2018
<b>PO No. 6</b>	Procedural Order No. 6, dated 31 July 2018
<b>Preliminary Investigation</b>	<i>Indagación preliminar</i> into Ingeominas, opened by the <i>Contraloría</i> on 19 October 2010
<b>Privilege Log</b>	Privilege log accompanying Claimants' letter of 5 February 2018
<b>Privilege Log Documents</b>	Documents which were subject to legal or settlement privilege
<b>Privileged Documents</b>	Privilege Log Documents and Redacted Documents
<b>Procedure for Contractual Annulment</b>	Judicial procedure started by the ANM for the annulment of the Eighth Amendment
<b>Prodeco</b>	C.I. Prodeco S.A.
<b>Prodeco Affiliates</b>	Companies which are owned by Prodeco (CDJ, CMU, and CET)
<b>Prodeco's Port</b>	Prodeco's port facilities for the export of coal, located in Santa Marta
<b>Protocol</b>	Protocol to the Treaty
<b>PTI</b>	<i>Programa de Trabajos e Inversiones</i> (work and investment plan)
<b>R I</b>	Colombia's Objections to Jurisdiction and Admissibility and Counter-Memorial, dated 16 November 2017
<b>R II</b>	Colombia's Reply on Preliminary Objections and Rejoinder on the Merits, dated 2 April 2018
<b>R III</b>	Colombia's submission on costs, dated 24 September 2018.
<b>Reasonable Defense Expenses</b>	Defense Expenses which a standard claimant has to incur in order to properly present and defend its claim
<b>Reconsideration Decision</b>	<i>Contralora Delegada's</i> decision of July 2015 to reject Prodeco's <i>recurso de reposición</i> against the <i>Contraloría's</i> Decision
<b>Redacted Documents</b>	Redacted documents submitted by Claimants on 5 February 2018
<b>Report</b>	Technical Report on the Jerriitt Canyon Mine, prepared for Queenstake Resources Ltd., dated 20 April 2017

<b>Request for Conciliation</b>	Conciliation Request filed by Prodeco on 30 December 2015
<b>Respondent or the Republic or Colombia</b>	The Republic of Colombia
<b>Respondent's FGN Request</b>	Respondent's letter of 15 May 2018
<b>Respondent's Privilege Log Request</b>	Respondent's request for Claimants to produce Privileged Documents, dated 23 February 2018
<b>RfA or the Request</b>	Claimants' Request for Arbitration, dated 4 March 2016
<b>RPHB</b>	Respondent's Post-Hearing Brief of 8 August 2018
<b>Seized Emails</b>	Emails seized by SIC from Prodeco computers
<b>Seventh Amendment</b>	Seventh amendment to the Mining Contract, executed by Prodeco and Ingeominas on 15 February 2007
<b>SGC</b>	<i>Servicio Geológico Colombiano</i>
<b>SIC</b>	<i>Superintendencia de Industria y Comercio</i>
<b>Sixth Amendment</b>	Sixth amendment to the Mining Contract, executed by Prodeco and Ingeominas on 15 December 2005
<b>Supplementary Compensation</b>	Supplementary compensation provided for under the original Mining Contract, applicable when the price of coal rose above USD 40 per tonne
<b>Technical Support Report</b>	Report by <i>Contraloría's</i> technical support team, dated 20 May 2013
<b>Third Amendment</b>	Third amendment to the Mining Contract, executed by Prodeco and Minercol on 6 March 2001
<b>Tovar Silva Report</b>	Technical report on Prodeco, issued by one of the members of the <i>Contraloría's</i> Immediate Reaction Team, Ms. Johanna Tovar Silva, on 2 March 2011
<b>Transition Period</b>	<i>Período de transición</i> provided for in Clause 3 of the Eighth Amendment
<b>Treaty/BIT</b>	Agreement between the Swiss Confederation and the Republic of Colombia on the Promotion and Reciprocal Protection of Investments, signed on 17 May 2006, which entered into force on 6 October 2009 (Doc. C-6)
<b>Tribunal Witnesses</b>	Persons called by the Tribunal to testify as witnesses at the Hearing
<b>TRM</b>	<i>Tasa Representativa del Mercado</i>
<b>Umbrella Clause</b>	Umbrella clause contained in Art. 10(2) of the Treaty
<b>Umbrella Clause Objection</b>	Respondent's objection to jurisdiction based on the Umbrella Clause
<b>USD</b>	United States dollar
<b>Vargas I</b>	First witness statement of Dr. Soraya Vargas, Respondent's witness
<b>VCLT</b>	Vienna Convention on the Law of Treaties of 1969

<b>Viability Study</b>	Study of the “ <i>Viabilidad para la suscripción del Otrosí No. 8 modificadorio del Contrato 044-89</i> ” prepared by Ingeominas in January 2010
<b>1988 Mining Code</b>	1988 Colombian <i>Código de Minas</i>
<b>2003 PTI</b>	Long-term <i>Programa de Trabajos e Inversiones</i> delivered by Prodeco in December 2003
<b>2006 PTI</b>	Long-term <i>Programa de Trabajos e Inversiones</i> delivered by Prodeco in November 2006
<b>2010 PTI</b>	Long-term <i>Programa de Trabajos e Inversiones</i> delivered by Prodeco in June 2010
<b>3ha Contract</b>	Contract for 3 hectares of land, granted to Messrs. Jorge Isaac Maldonado Mestre and César Augusto García Varga

## **LIST OF CASES**

<b>AES</b>	<i>AES Summit Generation Limited and AES- Tisza Erőmű Kft. v. Republic of Hungary</i> , ICSID Case No. ARB/07/22, Award of 23 September 2010 (Doc. RL-68).
<b>Alghanim &amp; Sons</b>	<i>Fouad Alghanim &amp; Sons Co. for General Trading &amp; Contracting, W.L.L. and Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan</i> , ICSID Case No. ARB-13-38, Award of 14 December 2017 (Doc. RL-176).
<b>Al Warraq</b>	<i>Hesham Talaat M. Al-Warraq v. Indonesia</i> , UNCITRAL, Award of 15 December 2014 (Doc. RL-41).
<b>Ampal-American Israel Corp</b>	<i>Ampal-American Israel Corp. and others v. Arab Republic of Egypt</i> , ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss of 21 February 2017 (Doc. RL-158).
<b>Apotex</b>	<i>Apotex Holdings Inc. and Apotex Inc. v. United States of America</i> , ICSID Case No. ARB(AF)/12/1, Award of 25 August 2014 (Doc. CL-140).
<b>Arif</b>	<i>Mr. Franck Charles Arif v. Republic of Moldova</i> , ICSID Case No. ARB/11/23), Award of 8 April 2013 (Doc. CL-93).
<b>Azinian</b>	<i>Robert Azinian, Kenneth Davitian, &amp; Ellen Baca v. United Mexican States</i> , ICSID Case No. ARB (AF)/97/2, Award of 1 November 1999 (Doc. RL-60).
<b>Azurix</b>	<i>Azurix Corp. v. Argentine Republic</i> , ICSID Case No. ARB/01/12, Award of 14 July 2006 (Doc. CL-44).
<b>Bayindir</b>	<i>Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan</i> , ICSID Case No. ARB/03/29, Award of 27 August 2009 (Doc. RL-52).
<b>Bureau Veritas</b>	<i>Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay</i> , ICSID Case No. ARB/07/9, Decision on Objections to Jurisdiction of 29 May 2009 (Doc. RL-8).
<b>Cargill</b>	<i>Cargill, Incorporated v. United Mexican States</i> , ICSID Case No. ARB(AF)/05/2, Award of 18 September 2009 (Doc. RL-65).
<b>Cervin</b>	<i>Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica</i> , ICSID Case No. ARB/13/2, Award of 7 March 2017 (Doc. RL-177).
<b>Chorzów Factory</b>	<i>Factory at Chorzów</i> (Germany v. Poland), PCIJ, Claim for Indemnity (Jurisdiction), 26 July 1927, Series A, No. 9 (1927).
<b>CMS</b>	<i>CMS Gas Transmission Company v. Republic of Argentina</i> , ICSID Case No ARB/01/8, Award of 12 May 2005 (Doc. CL-41).
<b>Clayton et al.</b>	<i>William Ralph Clayton and others v. Government of Canada</i> , PCA Case No. 2009-04, Award on Jurisdiction and Liability of 17 March 2015 (Doc. CL-141).

<b>Convial Callao</b>	<i>Convial Callao S.A. and CCI - Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru</i> , ICSID Case No. ARB/10/2, Award of 21 May 2013 (Doc. CL-135).
<b>Crystallex</b>	<i>Crystallex International Corporation v. Bolivarian Republic of Venezuela</i> , ICSID Case No. ARB(AF)/11/2, Award of 4 April 2016 (Doc. CL-95).
<b>Deutsche Bank</b>	<i>Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka</i> , ICSID Case No. ARB/09/02, Award of 31 October 2012 (Doc. CL-92).
<b>ECE</b>	<i>ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH &amp; Co v. Czech Republic</i> , PCA Case No. 2010-5, Award of 19 September 2013 (Doc. RL-59).
<b>EDF</b>	<i>EDF (Services) Limited v. Romania</i> , ICSID Case No. ARB/05/13, Award of 8 October 2009 (Doc. CL-113).
<b>Eli Lilly and Co.</b>	<i>Eli Lilly and Company v. Government of Canada</i> , ICSID Case No. UNCT/14/2, Final Award of 16 March 2017 (Doc. RL-62).
<b>ELSI</b>	<i>Elettronica Sicula S.p.A. (ELSI)</i> , Judgment of 20 July 1989, I.C.J. Reports 1989 (Doc. CL-10).
<b>EnCana</b>	<i>EnCana Corporation v. Republic of Ecuador</i> , LCIA Case No. UN3481, UNCITRAL, Award of 3 February 2006, para. 194 (Doc. CL-131).
<b>Feldman</b>	<i>Marvin Roy Feldman Karpa v. United Mexican States</i> (ICSID Case No. ARB(AF)/99/1), Award of 16 December 2002, para. 197 (Doc. CL-30).
<b>Flughafen</b>	<i>Flughafen Zurich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela</i> , ICSID Case No. ARB/10/19, Award of 18 November 2014 (Doc. RL-42).
<b>Frontier Petroleum</b>	<i>Frontier Petroleum Services Ltd. v. Czech Republic</i> , UNCITRAL, Final Award of 12 November 2010 (Doc. CL-134).
<b>Gabčíkovo-Nagymaros Project</b>	<i>Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)</i> , ICJ, Decision, ICJ Reports 1997 of 25 September 1997, para. 79 (Doc. RL-17).
<b>Garanti Koza</b>	<i>Garanti Koza LLP v. Turkmenistan</i> , ICSID Case No. ARB/11/20, Award, 19 December 2016 (Doc. RL-73).
<b>Generation Ukraine</b>	<i>Generation Ukraine Inc. v. Ukraine</i> , ICSID Case No. ARB/00/9, Award of 16 September 2003, para. 20.30 (Doc. RL-172).
<b>Glamis</b>	<i>Glamis Gold Ltd. v. United States of America</i> , UNCITRAL, Award of 8 June 2009 (Doc. RL-18).
<b>Grynberg et al.</b>	<i>Rachel S. Grynberg and others v. Grenada</i> , ICSID Case No. ARB/10/6, Award of 10 December 2010 (Doc. RL-159).
<b>Hamester</b>	<i>Gustav F W Hamester GmbH &amp; Co KG v. Republic of Ghana</i> , ICSID Case No. ARB/07/24, Award of 18 June 2010 (Doc. RL-9).
<b>H&amp;H Enterprises</b>	<i>H&amp;H Enterprises Investment Inc. v. Arab Republic of Egypt</i> , ICSID Case No. ARB/09/15, Award of 6 May 2014 (Doc. RL-2).
<b>Impregilo</b>	<i>Impregilo S.p.A. v. Argentine Republic</i> , ICSID Case No. ARB/07/17, Award of 21 June 2011 (Doc. CL-84).



<b><i>Inceysa</i></b>	<i>Inceysa Vallisoletana S.L. v. Republic of El Salvador</i> , ICSID Case No. ARB/03/26, Award of 2 August 2006 (Doc. RL-13)
<b><i>Invesmart, B.V.</i></b>	<i>Invesmart, B.V. v. Czech Republic</i> , UNCITRAL case, Award of 26 June 2009 (Doc. CL-150)
<b><i>Jan de Nul</i></b>	<i>Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt</i> , ICSID Case No. ARB/04/13, Award of 6 November 2008. (Doc. RL-70).
<b><i>Lauder</i></b>	<i>Ronald S. Lauder v. Czech Republic</i> , UNCITRAL, Award of 3 September 2001.
<b><i>Lemire</i></b>	<i>Joseph Charles Lemire v. Ukraine</i> , ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability of 14 January 2010 (Doc. CL-74).
<b><i>Lemire (Award)</i></b>	<i>Joseph Charles Lemire v. Ukraine</i> , ICSID Case No. ARB/06/18, Award of 28 March 2011 (Doc. CL-83).
<b><i>LG&amp;E</i></b>	<i>LG&amp;E Energy Corp, LG&amp;E Capital Corp., and LG&amp;E International, Inc. v. Argentine Republic</i> (ICSID Case No. ARB/02/1), Decision on Liability of 3 October 2006 (Doc. CL-46).
<b><i>Loewen</i></b>	<i>Loewen Group Inc and Raymons L. Loewen v. United States of America</i> , ICSID Case No. ARB(AF)98/3, Award of 26 June 2003.
<b><i>Mamidoil Jetoil Greek Petroleum</i></b>	<i>Mamidoil Jetoil Greek Petroleum Products Société Anonyme S.A. v. Republic of Albania</i> , ICSID Case No. ARB/11/24, Award of 30 March 2015 (Doc. CL-125).
<b><i>Metalclad</i></b>	<i>Metaclad Corporation v. United Mexican States</i> , ICSID Case No. ARB(AF)/97/1, Award of 30 August 2000 (Doc. CL-19).
<b><i>Metal-Tech</i></b>	<i>Metal-Tech Ltd. v. Republic of Uzbekistan</i> , ICSID Case No. ARB/10/3, Award of 4 October 2013 (Doc. RL-122).
<b><i>Methanex</i></b>	<i>Methanex Corporation v. United States of America</i> , NAFTA-UNCITRAL, Final Award on Jurisdiction and the Merits of 3 August 2005 (RL-126).
<b><i>Mondev</i></b>	<i>Mondev International Ltd v. United States of America</i> , ICSID Additional Facility Case No. ARB(AF)/99/2, Award of 11 October 2002 (Doc. CL-28).
<b><i>MTD</i></b>	<i>MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile</i> , ICSID Case No. ARB/01/7, Award of 25 May 2004 (Doc. CL-36).
<b><i>Murphy II</i></b>	<i>Murphy Exploration and Production Company International v. Republic of Ecuador [II]</i> , PCA Case No. 2012-16 (formerly AA 434), Partial Final Award of 6 May 2016 (Doc. CL-145).
<b><i>Noble Ventures</i></b>	<i>Noble Ventures, Inc. v. Romania</i> , ICSID Case No. ARB/01/11, Award of 12 October 2005 (Doc. CL-130).
<b><i>Occidental</i></b>	<i>Occidental Exploration and Production Company v. Republic of Ecuador</i> (UNCITRAL), Final Award of 1 July 2004 (Doc. CL-37).
<b><i>OI European</i></b>	<i>OI European Group B.V. v. Bolivarian Republic of Venezuela</i> , ICSID Case No. ARB/11/25, Award dated 10 March 2015 (Doc. RL-61).



<b><i>Pantechniki</i></b>	<i>Pantechniki S.A. Contractors &amp; Engineers v. Republic of Albania</i> , ICSID Case No. ARB/07/21, Award of 30 July 2009, (Doc. RL-3).
<b><i>Parkerings</i></b>	<i>Parkerings-Compagniet AS v. Republic of Lithuania</i> , ICSID Case No. ARB/05/8, Award of 11 September 2007 (Doc. RL-57).
<b><i>Philip Morris (Jurisdiction)</i></b>	<i>Philip Morris Brands Sarl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Republic of Uruguay</i> , ICSID Case No. ARB/10/7, Decision on Jurisdiction of 2 July 2013 (Doc. RL-4).
<b><i>Philip Morris</i></b>	<i>Philip Morris Brand Sarl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay</i> , ICSID Case No. ARB/10/7, Award of 8 July 2016 (Doc. RL-179).
<b><i>Phoenix</i></b>	<i>Phoenix Action, Ltd. v. Czech Republic</i> , ICSID Case No. ARB/06/5, Award of 15 April 2009 (Doc. RL-37).
<b><i>Plama</i></b>	<i>Plama Consortium Limited v. Republic of Bulgaria</i> , ICSID Case No. ARB/03/24, Award of 27 August 2008 (Doc. RL-36).
<b><i>PSEG</i></b>	<i>PSEG Global Inc. Et al. v. Republic of Turkey</i> , ICSID Case No. ARB/02/5, Award of 19 January 2007 (Doc. CL-48).
<b><i>Rompetrol</i></b>	<i>The Rompetrol Goup N.V. v. Romania</i> , ICSID Case No. ARB/06/3, Award of 6 May 2013, para. 152 (Doc. RL-173).
<b><i>Roussalis</i></b>	<i>Spyridon Roussalis v. Romania</i> , ICSID Case No. ARB/06/1, Award of 7 December 2011 (Doc. RL-58).
<b><i>Rusoro</i></b>	<i>Rusoro Mining Limited v. Bolivarian Republic of Venezuela</i> , ICSID Case No. ARB(AF)/12/5, Award of 22 August 2016 (Doc. CL-147).
<b><i>Rumeli</i></b>	<i>Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan</i> , ICSID Case No. ARB/05/16, Award of 29 July 2008 (Doc. CL-60).
<b><i>Salini</i></b>	<i>Salini Impregilo S.p.A. v. Argentine Republic</i> , ICSID Case No. ARB/15/39, Decision on Jurisdiction and Admissibility of 23 February 2018 (Doc. RL-156).
<b><i>Saluka</i></b>	<i>Saluka Investments BV v. Czech Republic (UNCITRAL)</i> , Partial Award, 17 March 2006 (Doc. CL-43).
<b><i>SAUR</i></b>	<i>SAUR International SA v. Republic of Argentina</i> , ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability of 6 June 2012 (Doc. RL-14).
<b><i>S.D. Myers</i></b>	<i>S.D. Myers v. Canada</i> , Partial Award of 13 November 2000 (Doc. RL-63).
<b><i>Sempra</i></b>	<i>Sempra Energy International v. Argentine Republic</i> , ICSID Case No. ARB/02/16, Award of 28 September 2007.
<b><i>SGS</i></b>	<i>SGS Société Générale de Surveillance S.A. v. Republic of the Philippines</i> , ICSID Case No. ARB/02/6, Decision on Exceptions to Jurisdiction of 29 January 2004 (Doc. RL-6).
<b><i>SGS v. Paraguay</i></b>	<i>SGS Société Générale de Surveillance SA v. Republic of Paraguay</i> , ICSID Case No ARB/07/29, Decision on Jurisdiction of 12 February 2010 (Doc. CL-115).

<b>Spentex</b>	<i>Spentex Netherlands B.V. and Republic of Uzbekistan</i> , ICSID Case No. ARB/13/26, Award of 27 December 2016.
<b>Suez (Separate opinion by Judge Nikken)</b>	<i>Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic</i> , ICSID Case No. ARB/03/19, Separate Opinion of Arbitrator Pedro Nikken of 30 July 2010 (Doc. RL-55).
<b>Supervisión y Control</b>	<i>Supervisión y Control, S.A. v. Republic of Costa Rica</i> , ICSID Case No. ARB/12/4, Award of 18 January 2017 (Doc. RL-43).
<b>Swisslion</b>	<i>Swisslion DOO Skopje v. Former Yugoslav Republic of Macedonia</i> , ICSID Case No. ARB/09/16, Award of 6 July 2012 (Doc. RL-74).
<b>Tecmed</b>	<i>Técnicas Medioambientales Tecmed, S.A. v. United Mexican States</i> , ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003 (Doc. CL-32).
<b>TECO Guatemala</b>	<i>TECO Guatemala Holdings, LLC v. Republic of Guatemala</i> , ICSID Case No. ARB/10/23, Award of 19 December 2013 (CL-136).
<b>Thunderbird</b>	<i>International Thunderbird Gaming Corporation v. Mexico</i> , NAFTA, Award of 26 January 2006 (Doc. CL-107).
<b>Tokios Tokelès</b>	<i>Tokios Tokelès v. Ukraine</i> , ICSID Case No. ARB/02/18, Award of 26 July 2007 (Doc. RL-69).
<b>Total</b>	<i>Total S.A. v. Argentine Republic</i> , ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010 (Doc. CL-82).
<b>Toto Costruzioni</b>	<i>Toto Costruzioni Generali S.p.A. v. Republic of Lebanon</i> , ICSID Case No. ARB/07/12, Award of 7 June 2012 (Doc. CL-130).
<b>UAB</b>	<i>UAB E energija (Lithuania) v. Republic of Latvia</i> , ICSID Case No. ARB/12/33, Award of 22 December 2017 (Doc. RL-174).
<b>Unglaube</b>	<i>Marion and Reinhard Unglaube v. Republic of Costa Rica</i> , ICSID Case Nos. ARB/08/1 and ARB/09/20, Award of 16 May 2012 (Doc. CL-87).
<b>Urbaser</b>	<i>Urbaser S.A. and others v. Argentine Republic</i> , ICSID Case No. ARB/07/26, Award of 8 December 2016 (Doc. RL-175).
<b>Vivendi</b>	<i>Compañía de Aguas del Aconquija SA and Vivendi Universal v. Argentine Republic</i> , ICSID Case No. ARB/97/3, Decision on Annulment of 3 July 2002 (Doc. CL-99).
<b>Waste Management II</b>	<i>Waste Management, Inc. v. United Mexican States ("Number 2")</i> , ICSID Case No. ARB(AF)/00/3, Award of 30 April 2004.
<b>World Duty Free</b>	<i>World Duty Free Company Limited v. Republic of Kenya</i> , ICSID Case No. ARB/00/7, Award of 4 October 2006 (Doc. RL-11).

## I. INTRODUCTION

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes [“**ICSID**” or the “**Centre**”] on the basis of (i) the Agreement between the Swiss Confederation and the Republic of Colombia on the Promotion and Reciprocal Protection of Investments, signed on 17 May 2006, which entered into force on 6 October 2009 [the “**Treaty**” or the “**BIT**”], and (ii) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, dated 14 October 1966 [the “**ICSID Convention**”], which entered into force for Switzerland and for Colombia on 6 October 2009.

### (1) THE PARTIES

#### A. Claimants – Glencore International A.G. and C.I. Prodeco S.A.

2. The Claimants are (i) Glencore International A.G. [“**Glencore**”], a company constituted under the laws of and having its seat in the Swiss Confederation, and (ii) C.I. Prodeco S.A. [“**Prodeco**”], a wholly-owned subsidiary of Glencore, incorporated under the laws of the Republic of Colombia. Glencore and Prodeco are jointly referred to as “**Claimants**”. Glencore is one of the largest global diversified natural resource companies, engaged in the trade and mining of commodities.<sup>1</sup>
3. Claimants are represented in this arbitration by:

Mr. Nigel Blackaby  
Ms. Caroline Richard  
Mr. Alex Wilbraham  
Mr. Gustavo Topalian  
Ms. Ankita Ritwik  
Ms. Jessica Moscoso  
Ms. Amy Cattle  
Mr. Diego Rueda  
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<sup>1</sup> C I, para. 22.

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**B. Respondent – The Republic of Colombia**

4. The Respondent is the Republic of Colombia [**“Colombia”**, the **“Republic”** or **“Respondent”**].
5. Respondent is represented in this arbitration by:

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6. The Claimants and the Respondent shall be jointly referred to as the “**Parties**”.

**(2) THE TREATY**

7. Art. 11 of the Treaty regulates the settlement of disputes between a Party and an investor of the other Party to the Treaty.<sup>2</sup>

“(1) If an investor of a Party considers that a measure applied by the other Party is inconsistent with an obligation of this Agreement, thus causing loss or damage to him or his investment, he may request consultations with a view to resolving the matter amicably.

(2) Any such matter which has not been settled within a period of six months from the date of the written request for consultations may be referred to the courts or administrative tribunals of the Party concerned or to international arbitration. In the latter event the investor has the choice between either of the following:

(a) the International Centre for Settlement of Investment Disputes (ICSID) provided for by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on March 18, 1965; and

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<sup>2</sup> Doc. C-6.

(b) an ad-hoc arbitral tribunal which, unless otherwise agreed upon by the parties to the dispute, shall be established under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).

(3) Each Party hereby gives its unconditional and irrevocable consent to the submission of an investment dispute to international arbitration in accordance with paragraph 2 above, except for disputes with regard to Article 10 paragraph 2 of this Agreement.

(4) Once the investor has referred the dispute to either a national tribunal or any of the international arbitration mechanisms provided for in paragraph 2 above, the choice of the procedure shall be final.

(5) An investor may not submit a dispute for resolution according to this Article if more than five years have elapsed from the date the investor first acquired or should have acquired knowledge of the events giving rise to the dispute.

(6) The Party which is party to the dispute shall at no time whatsoever during the process assert as a defence its immunity or the fact that the investor has received, by virtue of an insurance contract, a compensation covering the whole or part of the incurred damage.

(7) Neither Party shall pursue through diplomatic channels a dispute submitted to international arbitration unless the other Party does not abide by and comply with the arbitral award.

(8) The arbitral award shall be final and binding for the parties to the dispute and shall be executed without delay according to the law of the Party concerned.”

## II. PROCEDURAL HISTORY

8. This proceeding has been riddled with procedural incidents. In order to present a proper account of the history of this arbitration the Tribunal will first present a chronology of the procedure (1.) and will then recount in detail the main procedural incidents (2.).

### (1) CHRONOLOGY OF THE PROCEDURE

9. On 4 March 2016, ICSID received a request for arbitration of the same date from Glencore International A.G. and C.I. Prodeco S.A. against the Republic of Colombia, together with Exhibits C-1 through C-66 [**“Request”**].
10. On 16 March 2016, the Secretary-General of ICSID registered the Request in accordance with Art. 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID’s Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.
11. The Parties agreed to constitute the Tribunal in accordance with Art. 37(2)(a) of the ICSID Convention as follows: the Tribunal would consist of three arbitrators, one to be appointed by each Party and the third, presiding arbitrator to be appointed by agreement of the Parties.
12. On 4 May 2016, Claimants appointed Mr. Oscar M. Garibaldi, a national of the United States of America as well as a national of the Argentine Republic, as arbitrator in this case. Mr. Garibaldi accepted his appointment on 6 May 2016.
13. On 3 June 2016, Respondent appointed Mr. Christopher Thomas, a national of Canada, as arbitrator in this case. Mr. Thomas accepted his appointment on 7 June 2016.
14. On 29 July 2016, the Parties appointed Prof. Juan Fernández-Armesto, a national of the Kingdom of Spain, as President of the Tribunal. Prof. Fernández-Armesto accepted his appointment on 3 August 2016.
15. On 4 August 2016, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings [**“Arbitration Rules”**], notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Alicia Martín Blanco, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.
16. On 28 September 2016, in accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session and preliminary procedural consultation with the Parties by teleconference [**“First Session”**].

17. On 4 November 2016, following the First Session, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters and the decisions of the Tribunal on disputed issues. Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural languages would be English and Spanish, that the place of proceeding would be Washington, D.C., and that Mrs. Krystle M. Baptista would act as Assistant to the Tribunal. Procedural Order No. 1 also sets out three procedural calendars envisaging three different scenarios for the written phase.
18. On 16 December 2016, Claimants filed their Memorial on the Merits, together with:
  - Witness Statements of:
    - o Mr. Gary Nagle
    - o Mr. Mark McManus
  - Expert Report of Compass Lexecon
  - Exhibits C-67 through C-184
  - Legal Authorities CL-1 through CL-95
19. The submission was transmitted to Respondent and the Tribunal on 2 January 2017, in accordance with paragraph 15.2 of Procedural Order No. 1.
20. On 2 February 2017, Respondent filed its Request for Bifurcation, together with Exhibits R-1 through R-25, and Legal Authorities RL-1 through RL-34.
21. On 2 March 2017, Claimants filed their Response to Respondent's Request for Bifurcation, together with Exhibits C-185 through C-194, and Legal Authorities CL-96 through CL-127.
22. On 3 April 2017, the Tribunal issued its decision on Respondent's Request for Bifurcation. The Tribunal decided not to bifurcate the proceedings, and to address the jurisdictional objections raised by Respondent together with the merits, following the procedural calendar established as Scenario 3 in Procedural Order No. 1.
23. On 17 July 2017, Respondent filed its Objections to Jurisdiction and Admissibility and Counter-Memorial, together with:
  - Witness Statements of:
    - o Mr. Oscar Paredes
    - o Ms. Soraya Vargas
  - Expert Report of Messrs. Frank Graves and John Dean of the Brattle Group, together with Exhibits BR-1 through BR-124



- Exhibits R-26 through R-203
  - Legal Authorities RL-35 through RL-114
24. By letter of 26 July 2017, Claimants noted that 41 of the exhibits accompanying Respondent's Counter-Memorial were private and internal email chains exchanged internally between Claimants' management and their in-house and external counsel [**"Disputed Documents"**]. Claimants requested *inter alia* that the Tribunal order Colombia to provide information regarding the time and manner in which these documents had been obtained, as well as a full log of Prodeco's private communications, documents and data in possession of Colombia, its internal and external counsel, and its witnesses and experts, indicating the chain of custody as well as the dates of access. Claimants further requested an order "declaring inadmissible all documents irregularly obtained or produced by Colombia in breach of its duty of good faith and rules of privilege, and an order striking out any statements in Colombia's Counter-Memorial and/or witness statements and expert report that rely on such documents."
25. On 3 August 2017, Respondent submitted its response, together with Exhibits R-204 through R-214, and Legal Authorities RL-115 through RL-120. Respondent(i) explained that the Disputed Documents had been legally obtained by the *Superintendencia de Industria y Comercio* [**"SIC"**] in the context of a preliminary investigation into unfair practices by Prodeco and its affiliates and (ii) requested that the Tribunal declare the Disputed Documents admissible.
26. By letter of 22 August 2017, Claimants' submitted their reply to Respondent's letter, together with Exhibits C-195 through C-228, and slightly amended their request for relief [**"Claimants' First Application"**]. On 11 September 2017, Respondent filed a rejoinder letter, reiterating its initial request.
27. On 20 September 2017, Claimants submitted a new letter [**"Claimants' Second Application"**] addressing the following issues:
- the filing on 11 September 2017 of a criminal complaint by the *Agencia Nacional de Defensa Jurídica del Estado* [**"ANDJE"**] with the office of the *Fiscalía General de la Nación* requesting *inter alia* de deposition of two of Claimants' employees;
  - the apparent leaking of the Disputed Documents to the Colombian press; and Colombia's intention to seek orders from the Tribunal for the production of communications between Prodeco and its former external counsel as well as an order compelling the latter to appear as a witness at the hearing.
- Pending the Tribunal's consideration of their first application, in Claimants' Second Application, they requested an urgent measure to protect the *status quo*.
28. On 2 October 2017, Respondent submitted its response to Claimants' Second Application, together with Exhibits R-214 through R-230, and Legal Authorities RL-121 through RL-143, requesting that the Tribunal reject it.

29. On 26 September 2017, following exchanges between the Parties, the Centre transmitted the Parties' respective requests for production of documents. On 11 October 2017, the Tribunal postponed its decision on the disputed document production requests, pending the full review and deliberations on Claimants' applications.
30. On 4 November 2017, the Tribunal issued Procedural Order No. 2, deciding *inter alia* that the Disputed Documents should be excluded from the record of this arbitration, directing Respondent to re-submit its Objections to Jurisdiction and Admissibility and Counter-Memorial without attaching or referring to the Disputed Documents, giving the Parties an opportunity to file new requests for document production that would supersede and replace the original requests still pending before the Tribunal, and proposing a new procedural calendar. The new procedural calendar was agreed to by the Parties on 10 November 2017.
31. By letter of 14 November 2017, Respondent filed observations on Procedural Order No. 2, together with Exhibits R-231 through R-235, and Legal Authorities RL-145 through RL-147. The Tribunal invited Claimants to comment on Respondent's letter in their Reply Memorial.
32. On 16 November 2017, Respondent filed its Amended Counter-Memorial on the Merits and Memorial on Jurisdiction, together with:
  - Amended Witness Statement of Mr. Oscar Paredes
  - Amended Expert Report of Messrs. Frank Graves and John Dean of the Brattle Group, together with Amended Exhibit BR-118
  - New Exhibits R-236 and R-237
33. In accordance with the revised procedural calendar, on 14 December 2017, the Parties submitted their respective requests for production of documents for decision by the Tribunal, including the corresponding responses and replies thereto.
34. On 4 January 2018, the Tribunal issued Procedural Order No. 3 concerning its decision on the Parties' request for production of documents in their respective Redfern Schedules. On 11 January 2018, following a request by Claimants and Respondent's comments, the Tribunal granted Claimants an extension of time to submit the documents subject to a production order under Procedural Order No. 3.
35. On 30 January 2018, Claimants filed their Reply on the Merits, together with:
  - Second Witness Statements of:
    - o Mr. Gary Nagle
    - o Mr. Mark McManus

- Second Expert Report of Compass Lexecon
  - Exhibits C-229 through C-294, and resubmitted Exhibits C-50, C-56, and C-103
  - Legal Authorities CL-127.1 through CL-149
36. On 23 February 2018, Respondent submitted a letter, together with Exhibits R-238 through R-240, asking the Tribunal *inter alia*:
- to order Claimants to produce unredacted copies of the documents that had been produced in redacted form,
  - to produce the documents included in the privilege log submitted by Claimants with redactions only in the documents exchanged with external counsel in the relevant portions where legal advice had been sought or given,
  - to complete their production of documents in accordance with Procedural Order No. 3 and to confirm as much.
37. On 2 March 2018, Claimants submitted their response to Respondent's letter, in which they requested that the Tribunal dismiss Respondent's request of 23 February 2018, and confirmed that they had produced and/or logged all the documents in their possession, custody or control responsive to the Tribunal's orders and that they would produce any other documents that might subsequently come into their possession, custody or control.
38. On 6 March 2018, the Tribunal replied to the Parties' communications of 23 February and 2 March 2018, stating that the challenge to the relevant documents had to be done on a document-by-document basis and that the Tribunal could not entertain Colombia's general request for relief. In order to solve this incident in the most efficient manner, the Tribunal suggested that the Parties confer and try to reach an agreement on any disputed document. If an agreement could not be reached, the Tribunal would resolve any requests on a document-by-document basis.
39. By letter of 9 March 2018, Respondent submitted comments on the Tribunal's decision and requested the Tribunal's instructions to gather and marshal into the record evidence collected from the SIC by the General Prosecutor in the context of a domestic criminal investigation into the illegalities surrounding the Eighth Amendment. By letter of 12 March 2018, Claimants submitted observations on the Respondent's letter, and asked the Tribunal to decline Respondent's proposed procedure to address its request.
40. On 17 March 2018, the Tribunal wrote to the Parties instructing Respondent on the steps to follow in order to gather the evidence collected by the General Prosecutor and marshal it into the record, and recommending that the Parties try to reach an agreement on the marshalling of all or a part of the documents before any application was presented to the Tribunal.

41. On 26 March 2018, following communications from the Parties, the Tribunal notified them of its decision to grant a 4-day extension to Respondent to submit its Reply on Preliminary Objections and Rejoinder on the Merits, and stated that Claimants would also be granted a 4-day extension of their deadline to present their Rejoinder on Preliminary Objections.
42. By letter of 27 March 2018, Respondent informed the Tribunal of the Parties' inability to reach an agreement with regard to the production of the unredacted documents and privilege log documents and, according to the Tribunal's communications of 6 and 17 March 2018, requested that the Tribunal order Claimants to produce the documents included in its document-by-document request, sent to Claimants on 12 March 2018.
43. On 2 April 2018, Respondent submitted its Rejoinder on the Merits and Reply on Jurisdiction, together with:
  - Second Witness Statements of:
    - o Mr. Oscar Paredes
    - o Ms. Soraya Vargas
  - Second Expert Report of Messrs. Frank Graves of The Brattle Group, John Dean of JD Energy and Landy Stinnet of FGM Consulting Group, Inc., together with Exhibits BR-125 through BR-190
  - Exhibits R-241 through R-348
  - Legal Authorities RL-148 through RL-186
44. By letter of 3 April 2018, Claimants submitted their observations on Respondent's letter of 27 March 2018 asking the Tribunal to reject Respondent's request.
45. By letter of 20 April 2018, Claimants requested the Tribunal's intervention regarding a notice that Prodeco had received from the National Mining Agency ["ANM"] stating that a commission composed of Colombia's international external counsel in this arbitration, Colombia's economic experts, Colombia's internal counsel for this arbitration (ANDJE) and several ANM officers would visit the Calenturitas mine between 30 April and 2 May 2018. Claimants alleged that the visit had no *bona fide* regulatory purpose but was rather aimed at gathering additional information for this arbitration, and requested that the Tribunal order Colombia to refrain from imposing a unilateral site visit for the purposes of this arbitration and to refrain from visiting the mine site without the Tribunal's authorization.
46. On 24 April 2018, the Tribunal issued Procedural Order No. 4 concerning the production of the redacted documents and the privilege log documents initially requested by Respondent in its communication of 23 February 2018. The Tribunal determined *inter alia* that while Claimants had not strictly complied with the

Tribunal's instructions in Procedural Order No. 2 concerning privilege-based objections, this departure from the established procedure had not caused Respondent irreparable harm. As a consequence, the Tribunal decided not to dismiss Claimants' objections based on privilege *in limine*. As to the merits of the objections, the Tribunal found that legal privilege extends not only to outside counsel, but also to in-house lawyers and found no evidence suggesting that Claimants had waived legal or, to the extent relevant, settlement privilege. The Tribunal also directed Claimants' lead counsel to submit an affidavit confirming that each of the relevant documents met all of the privilege requirements identified by the Tribunal in the order and to produce all the relevant documents that did not. In light of the proximity of the hearing, the Tribunal also took the opportunity to call a number of persons to testify as witnesses at the hearing.

47. On 25 April 2018, Respondent submitted its comments on Claimants' letter regarding the site visit and requested that the Tribunal reject Claimants' allegations and not to intervene in any way in relation to the visit planned to the Calenturitas mine.
48. On 27 April 2018, the Tribunal issued its decision regarding the site visit. The Tribunal found no reason to deny the visit, so long as the precise dates were properly agreed between the Parties in order to facilitate Respondent's access and minimize the inconvenience to Claimants.
49. On 30 April 2018, and further to the Tribunal having called certain persons to testify as witnesses at the hearing [**"Tribunal Witnesses"**] in Procedural Order No. 4, the Parties submitted an agreed proposal concerning those witnesses.
50. On 30 April 2018, Claimants' lead counsel submitted a certification and affidavit in accordance with Procedural Order No. 4 and produced, in unredacted form, the documents that did not meet the privilege requirements established by the Tribunal in the order. On 1 May 2018, the Parties agreed that Mr. Blackaby's affidavit of 30 April 2018 should be submitted to the Tribunal without its annexes, pursuant to Procedural Order No. 2.
51. On 4 May 2018, Claimants submitted their Rejoinder on Jurisdiction, together with:
  - Third Witness Statement of Mr. Gary Nagle
  - Exhibits C-295 through C-327, and resubmitted Exhibits C-90 and C-260
  - Legal Authority CL-150
52. On 9 and 10 May 2018, respectively, the Parties confirmed the witnesses and experts that they wished to cross-examine at the hearing.
53. On 11 May 2018, Claimants sought leave to include a technical report as a new document into the record.

54. On 11 May 2018, Respondent requested that the documents that had been gathered from the *Fiscalía General de la Nación* [**“FGN”**] and filtered by Mr. Camilo Enciso in accordance with the Tribunal’s directions be admitted into the record [**“FGN Documents”**]. Respondent further referred to a list of documents in Annex A to said communication [**“Annex A Documents”**] as responsive to Colombia’s document production requests and not protected by either legal or settlement privilege, and asked that the Tribunal review these documents, order Claimants to produce them and admit them into the record. In the alternative, Respondent indicated that it would not object to the Tribunal appointing a conflicts counsel to analyse said documents.
55. On 14 May 2018, Claimants filed its response to Respondent’s 11 May request and asked the Tribunal to deny the application to admit the FGN Documents as they did not amount to evidence garnered by the Colombian criminal courts and/or because Colombia had failed to demonstrate their relevance and materiality to the outcome of the dispute. Claimants further requested that the Tribunal reject Colombia’s request to admit the Annex A Documents as they were not responsive to its document requests or were subject to legal or settlement privilege.
56. On 15 May 2018, Respondent wrote to the Tribunal elaborating on its 11 May request concerning the FGN Documents and Annex A Documents and requesting that the Tribunal reject Claimants’ 11 May application to include a new document into the record. Claimants responded to this communication on 18 May 2018. On the same day, Respondent submitted the memorandum sent to Mr. Enciso on 5 April 2018 in connection with the FGN Documents as well as Colombia’s communication to Mr. Enciso of 3 May 2018.
57. On 14 May 2018, the Tribunal held a pre-hearing organizational meeting with the Parties by telephone conference.
58. On 17 May 2018, the Tribunal issued Procedural Order No. 5 concerning the organization of the hearing.
59. On 18 May 2018, the Tribunal notified the Parties regarding its decision not to admit into the record any of the documents requested by the Parties and indicated that a full decision would follow. In particular, the Tribunal declined to admit the following documents: (i) the technical report identified by Claimants in their email of 11 May 2018; (ii) the FGN Documents; and (iii) the Annex A Documents.
60. A hearing on jurisdiction and the merits was held in Washington, D.C. from 28 May to 2 June 2018 [the **“Hearing”**]. The following persons were present at the Hearing:

*Tribunal:*

Prof. Juan Fernández-Armesto	President
Mr. Oscar M. Garibaldi	Arbitrator
Mr. J. Christopher Thomas QC	Arbitrator



*Assistant to the Tribunal:*

Ms. Krystle M. Baptista

Assistant to the Tribunal

*ICSID Secretariat:*

Ms. Alicia Martín Blanco

Secretary of the Tribunal

*For Claimants:*

*Counsel:*

Mr. Nigel Blackaby  
Ms. Caroline Richard  
Mr. Alex Wilbraham  
Mr. Gustavo Topalian  
Ms. Ankita Ritwik  
Ms. Jessica Moscoso  
Ms. Amy Cattle  
Mr. Diego Rueda  
Ms. Brianna Gorence  
Ms. Roopa Mathews  
Ms. Sandra Diaz  
Mr. Israel Guerrero  
Mr. Joe Arias Tapia  
Mr. Reynaldo Pastor  
Mr. Jose Manuel Alvarez Zárate

Freshfields Bruckhaus Deringer US LLP  
Freshfields Bruckhaus Deringer US LLP  
Freshfields Bruckhaus Deringer US LLP  
Freshfields Bruckhaus Deringer US LLP  
Freshfields Bruckhaus Deringer US LLP  
Freshfields Bruckhaus Deringer US LLP  
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Freshfields Bruckhaus Deringer US LLP  
Freshfields Bruckhaus Deringer US LLP  
Freshfields Bruckhaus Deringer US LLP  
Freshfields Bruckhaus Deringer US LLP  
Alvarez Zárate & Asociados

*Parties:*

Mr. Jonathan Vanderkar  
Mr. Oscar Gómez  
Ms. Natalia Anaya  
Mr. Jader Yubrán

Glencore International A.G.  
C.I. Prodeco S.A.  
C.I. Prodeco S.A.  
C.I. Prodeco S.A.

*For Respondent:*

*Counsel:*

Prof. Eduardo Silva Romero  
Prof. Pierre Mayer  
Mr. José Manuel García Represa  
Mr. Juan Felipe Merizalde  
Mr. David Attanasio  
Mr. Luis Miguel Velarde Saffer  
Mr. Javier Echeverri Díaz  
Ms. Ana María Duran  
Ms. Clara Francisca Peroni

Dechert (Paris) LLP  
Pierre Mayer  
Dechert (Paris) LLP  
Dechert LLP  
Dechert LLP  
Dechert (Paris) LLP  
Dechert (Paris) LLP  
Dechert LLP  
Dechert (Paris) LLP

*Parties:*

Mr. Luis Guillermo Vélez Cabrera  
Ms. Ana María Ordóñez Puentes  
Ms. María Camila Rincón Escobar  
Ms. Angélica Perdomo  
Mr. Nicolás Palau van Hissenhoven  
Mr. Juan Diego Díaz Echeverri  
Mr. Javier García

*Agencia Nacional de Defensa Jurídica del Estado*  
*Agencia Nacional de Defensa Jurídica del Estado*  
*Agencia Nacional de Defensa Jurídica del Estado*  
*Agencia Nacional de Defensa Jurídica del Estado*  
*Ministerio de Comercio, Industria y Turismo*  
*Ministerio de Comercio, Industria y Turismo*  
*Agencia Nacional de Minería*

*Court Reporters:*

Mr. Dante Rinaldi  
Mr. David Kasdan  
Mr. Randy Salzman

D-R Esteno  
Worldwide Reporting, LLP  
Worldwide Reporting, LLP

*Interpreters:*

Mr. Daniel Giglio  
Mr. Charles Roberts  
Mr. Luis Eduardo Arango

61. During the Hearing, the following persons were examined:

*On behalf of the Claimants:*

*Witnesses:*

Mr. Gary Nagle  
Mr. Mark McManus

Glencore International A.G.  
C.I. Prodeco S.A.

*Experts:*

Mr. Pablo T. Spiller  
Mr. Santiago Dellepiane  
Mr. Mark Sheiness  
Mr. Arun Parmar

Compass Lexecon  
Compass Lexecon  
Compass Lexecon  
Compass Lexecon

*On behalf of the Respondent:*

*Witnesses:*

Mr. Oscar Paredes Zapata  
Ms. Soraya Vargas Pulido

*Servicio Geológico Colombiano*  
*Contraloría General de la República de Colombia*

*Experts:*

Mr. Frank Graves  
Mr. Florin Dorobantu  
Mr. Marty Turrin  
Mr. Peter Cahill  
Mr. John Dean  
Mr. Landy Stinnet

The Brattle Group  
The Brattle Group  
The Brattle Group  
The Brattle Group  
JD Energy, Inc.  
FGM Consulting Group, Inc.

*Tribunal witnesses:*

Mr. Hernán Martínez Torres

Former Minister of Mines

62. On 8 June 2018, the Tribunal circulated a number of questions to the Parties and invited them to indicate any agreements that they might have reached concerning the submission of the post-hearing briefs. The Parties informed the Tribunal of their agreements concerning post-hearing briefs and costs submissions on 26 June 2018. In the same communication, the Parties further agreed that “the Award may be issued only in English, provided that an official Spanish translation is delivered to the parties a few months later.”



63. On 31 July 2018, the Tribunal issued Procedural Order No. 6 containing its full decision and reasoning on the admissibility of (i) the technical report identified by Claimants in their email of 11 May 2018; (ii) the FGN Documents and (iii) the Annex A Documents, as advanced in the Tribunal's communication to the Parties of 18 May 2018.
64. On 8 August 2018, the Parties filed a single round of simultaneous post-hearing briefs together with their respective Legal Authorities RL-187 through RL-236 and CL-151 through CL-173.
65. Further to the Tribunal's confirmation of its costs instructions, the Parties submitted a new agreement on the parameters of the costs submissions on 18 and 19 September 2018, and filed their respective costs submissions on 24 September 2018.
66. On 7 March 2019, the Tribunal asked Claimants to provide further information in the interest of completeness and indicated when Respondent should file any comments it might have to the data provided by Claimants. Claimants filed the requested information on 14 March 2019.
67. Further to the Parties' agreement of 26 June 2018 concerning, *inter alia*, the language of the Award and to the Parties' respective communications of 16 July 2019 noting their diverging interpretations thereof, on 30 July 2019, the Tribunal decided that the Parties' agreement of 26 June 2018 had superseded the relevant provision in Procedural Order No. 1, such that the Award would be rendered in English only and the Tribunal would request that the Centre prepare and deliver to the Parties an official Spanish translation. The Tribunal clarified that "[f]or all intents and purposes under the ICSID Convention and Rules, the date of dispatch of the certified copies of the Award in English shall be the date when the Award is deemed to have been rendered." On 15 August 2019, the Tribunal declared the proceeding closed pursuant to ICSID Arbitration Rule 38(1).

## **(2) CERTAIN PROCEDURAL INCIDENTS**

68. The following sections of the award summarize and provide context to certain procedural incidents:
  - PO No. 2 (2.1);
  - PO No. 3 (2.2);
  - PO No. 4 (2.3);
  - PO No. 6 (2.4).

### **(2.1) PROCEDURAL ORDER NO. 2**

69. In order to understand the context of PO No. 2, the Tribunal will first recount the procedural and factual history that led to its issuance (A.), will then briefly

summarize the decision (B.) and will explain its consequences (C.). The Tribunal will add a final section on the Parties' comments to PO No. 2 (D.).

**A. The Road to PO No. 2**

70. The road to PO No. 2 began with Respondent's request for an extension of the deadline for filing its Counter-Memorial. Respondent's Counter-Memorial was scheduled to be filed not later than 3 July 2017.
71. On 7 June 2017, Respondent requested a one-month extension of the time limit to submit the Counter-Memorial on account of:
  - an administrative reorganization of Colombia's State Attorney Office (ANDJE), and
  - health issues affecting counsel for Colombia.
72. After hearing Claimants, on 12 June 2017 the Arbitral Tribunal granted Respondent a two-week extension to file its Counter-Memorial.
73. One day thereafter, on 13 June 2017, Colombia's Antitrust Agency (SIC), the administrative agency that enforces antitrust law in Colombia<sup>3</sup> and ANDJE, the public agency in charge of the legal defense of the State and its agencies, signed an agreement to exchange information [the "**Cooperation Agreement**"]:<sup>4</sup>

***"PRIMERA. - OBJETO DEL CONVENIO:** Aunar esfuerzos técnicos, administrativos y de apoyo logístico entre la Agencia Nacional de Defensa Jurídica del Estado y la Superintendencia de Industria y Comercio para contribuir de manera eficaz y oportuna en el intercambio de información relacionada con la defensa jurídica de Colombia, de conformidad con las competencias de cada entidad".* [Emphasis added]
74. In compliance with the Cooperation Agreement, at some unspecified date in June or July 2017 the SIC delivered to ANDJE certain documents it had seized from Prodeco three years earlier, in August 2014. At that time the SIC had raided Prodeco's premises in the context of a preliminary antitrust investigation relating to Puerto Nuevo. Using its regulatory powers, the SIC seized certain documents<sup>5</sup> and downloaded in bulk all the emails lodged in the computers of certain Prodeco managers [the "**Seized Emails**"].
75. After delivery of the Seized Emails, ANDJE and/or counsel to the Republic reviewed such documents, and identified certain documents unrelated to antitrust matters, but allegedly relevant to the adjudication of the present dispute.

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<sup>3</sup> Doc. C-216, Art. 6.

<sup>4</sup> Doc. R-221.

<sup>5</sup> Doc. R-205, pp. 2-3.

Submission of Respondent's Counter-Memorial

76. On 17 July 2017, Respondent filed its Counter-Memorial. Included amongst the attached exhibits were some of the Seized Emails.
77. Ten days thereafter, on 26 July 2017, Claimants filed a submission in which they averred that 41 of the exhibits were private and internal email chains exchanged internally between Claimants' management and their in-house and external counsel [previously defined as the "**Disputed Documents**"]. In that submission, Claimants requested *inter alia* that the Tribunal:
- Order Colombia to provide:
    - o information regarding the time and manner in which these documents had been obtained,
    - o a full log of Prodeco's private communications, documents and data in possession of Colombia, its internal and external counsel, and its witnesses and experts, indicating the chain of custody as well as the dates of access.
  - Issue an order declaring inadmissible all documents irregularly obtained or produced by Colombia in breach of its duty of good faith and rules of privilege, and striking out any statements in Colombia's Counter-Memorial and/or witness statements and expert reports that rely on such documents.
78. On 3 August 2017, Respondent submitted its response. Respondent explained that the Disputed Documents had been legally obtained by SIC in the context of a preliminary investigation into unfair practices by Prodeco and its affiliates and requested that the Tribunal declare the Disputed Documents admissible.
79. By letter of 22 August 2017, Claimants submitted their reply to Respondent's response and slightly amended their request for relief [previously defined as "**Claimants' First Application**"].

Criminal Complaint

80. On Sunday, 10 September 2017, ANDJE filed a criminal complaint with the office of the *Fiscalía General de la Nación*, based on the Disputed Documents [the "**Criminal Complaint**"].
81. The Criminal Complaint, which was registered by the *Fiscalía* the following day, reported that certain named persons related to the execution of the Eighth Amendment may have committed the following crimes:
- bribery,
  - conclusion of a contract lacking legal requirements,

- conspiracy to commit a crime, and
- undue interest of a public servant in the conclusion of contracts.<sup>6</sup>

82. The Criminal Complaint included a request that the *Fiscal* depose (*inter alia*):

- Mr. Nagle, Prodeco's CEO from 2008 to 2013, and Claimants' witness in this arbitration, and
- Ms. Anaya, one of Claimants' in-house counsel.

**B. The Decisions in PO No. 2**

83. On 4 November 2017, the Tribunal issued Procedural Order No. 2, in which it made the following decisions:

84. First, that the Disputed Documents should be excluded from the record of this arbitration.<sup>7</sup> Consequently, the Tribunal directed Respondent to re-submit its Counter-Memorial without attaching or referring to the Disputed Documents.<sup>8</sup>

85. Second, the Tribunal gave the Parties the opportunity to file new requests for document production that would supersede and replace the original requests still pending before the Tribunal.<sup>9</sup>

86. Third, as regards the filing of the Criminal Complaint by ANDJE, the Tribunal refused to take any actions, but:

- Clarified that decisions adopted by Colombian criminal courts, which could potentially have an impact on the present procedure, could be freely marshalled by the Parties, subject to the rule established in para. 17(3) of Procedural Order No. 1;<sup>10</sup>
- On the issue of marshalling of criminal evidence, the Tribunal found that it had not been sufficiently briefed but, as a precautionary measure, instructed the Parties to ask permission from the Tribunal before submitting any evidence gathered in a criminal procedure in Colombia;<sup>11</sup> and
- Instructed Colombia to implement appropriate measures to guarantee that Colombia's counsel in this arbitration (including ANDJE's officials) did not

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<sup>6</sup> Annex A to Claimants' Second Application, 20 September 2017, pp. 23-24.

<sup>7</sup> PO No. 2, para. 70.

<sup>8</sup> PO No. 2, para. 109.

<sup>9</sup> PO No. 2, para. 113.

<sup>10</sup> PO No. 2, para. 89.

<sup>11</sup> PO No. 2, para. 89.

have access to confidential attorney communications emanating from the criminal investigations.<sup>12</sup>

87. Finally, the Tribunal proposed a new procedural calendar, which was agreed by the Parties on 10 November 2017.

The Tribunal's Rationale for Excluding the Disputed Documents

88. The Arbitral Tribunal decided the incident based on international law, and only turned to municipal law to confirm its findings.<sup>13</sup> This is consistent with the Parties' arguments,<sup>14</sup> the BIT and the ICSID Convention.<sup>15</sup>
89. The Tribunal found that the obligation to arbitrate fairly and in good faith and the principle of equality of arms precluded Respondent from coercing evidence from Claimants through its administrative powers, and to marshal it thereafter in an investment arbitration.<sup>16</sup> The Tribunal made reference to the general imbalance between claimants, which are normally private companies, and respondent States and explained that if States were allowed to use their wide powers to coerce evidence from claimants, it would create a perverse incentive: States would initiate all types of administrative proceedings against potential claimants in order to improve their litigation positions.<sup>17</sup>
90. Under Colombian law, the Tribunal confirmed that SIC was authorized to seize the Disputed Documents for the sole purpose of an antitrust/unfair competition investigation – but not for any other purpose, including the use of the Disputed Documents as evidence in these proceedings. The Tribunal found that SIC had failed to prove that the delivery of the Disputed Documents to ANDJE was done for the sole purpose for which they had been obtained: to ensure compliance with antitrust or unfair competition law:<sup>18</sup> by handing over the Disputed Documents to ANDJE, even if in compliance with the Cooperation Agreement, the SIC could have incurred in an administrative irregularity known as *desviación de poder*.<sup>19</sup>

**C. The Consequences of PO No. 2**

91. PO No. 2 had two major consequences for the procedure.
92. The first consequence was that on 16 November 2017, Respondent filed its Amended Counter-Memorial, eliminating all references to the Disputed Documents. It also resubmitted all its evidence and eliminated the Disputed Documents from the record.

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<sup>12</sup> PO No. 2, para. 92.

<sup>13</sup> PO No. 2, para. 52.

<sup>14</sup> PO No. 2, para. 50.

<sup>15</sup> PO No. 2, para. 51.

<sup>16</sup> PO No. 2, paras. 66-70.

<sup>17</sup> PO No. 2, para. 69.

<sup>18</sup> PO No. 2, paras. 70-73.

<sup>19</sup> PO No. 2, paras. 73-74.

93. The second consequence of PO No. 2 was that the Parties were provided with a new opportunity to obtain and submit evidence through a new document production process. In particular, Respondent was allowed to request that Claimants deliver the Disputed Documents in a context which preserved the equality of arms.
94. The Parties exercised this right extensively: Respondent made 39 requests for production of documents and Claimants seven.

**D. Parties' Observations on PO No. 2**

95. By letter of 14 November 2017, Respondent made observations on PO No. 2 and submitted that the Tribunal was:
- Exceeding its powers;<sup>20</sup>
  - Failing to state the reasons for its decisions;<sup>21</sup>
  - Seriously departing from a fundamental rule of procedure, by infringing Colombia's due process rights.<sup>22</sup>
96. Claimants answered Respondent's letter in their Reply Memorial. Claimants disagreed with Respondent's allegations and submitted the following main arguments:
- First, that in issuing PO No. 2 the Tribunal acted fully within its powers under Arts. 44 and 46 of the ICSID Convention and 19 and 34(1) of the Rules to protect the integrity of the proceedings;<sup>23</sup>
  - Second, that even if the Tribunal's decision was flawed as a matter of Colombian law (*quod non*), Respondent did not and could not argue that the Tribunal's reasoning based on the international principles of fairness and equality of arms was erroneous;<sup>24</sup>
  - Finally, that the exclusion of documents obtained in violation of international law by Colombia could not violate the rights of the party which had acted unlawfully; and, in any case, PO No. 2 provided Respondent with the means to obtain and present evidence in accordance with international law through the document production exercise.<sup>25</sup>

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<sup>20</sup> Respondent's letter of 14 November 2017, p. 2.

<sup>21</sup> Respondent's letter of 14 November 2017, p. 3.

<sup>22</sup> Respondent's letter of 14 November 2017, p. 3.

<sup>23</sup> C II, para. 363.

<sup>24</sup> C II, paras. 364-367.

<sup>25</sup> C II, paras. 368-370.

**(2.2) PROCEDURAL ORDER NO. 3**

97. In PO No. 3, the Arbitral Tribunal decided on the Parties' contested document production requests.
98. The Tribunal analysed each of the requests:<sup>26</sup>
- The Tribunal first analysed whether each request complied with the ordinary requirements of:
    - o identification of each document or description of a narrow and specific category of documents;
    - o relevance and materiality; and
    - o not in possession of the requesting party;
  - The Tribunal then reviewed whether each request was affected by one of the following objections, if raised by the Parties:
    - o legal or settlement privilege;
    - o production results in unreasonable burden;
    - o loss or destruction;
    - o technical or commercial confidentiality;
    - o political or institutional sensitivity;
    - o production would affect the fairness and equality of the procedure.
99. The Tribunal accepted (wholly or partially)<sup>27</sup> 23 out of Respondent's 39 requests and four out of Claimants' seven requests.

**(2.3) PROCEDURAL ORDER NO. 4**

100. PO No. 4 was prompted by Respondent's failure to obtain through document production all of the Disputed Documents. The Tribunal will first explain the road that led to the decision (A.), will briefly summarize it (B.), and finally explain its consequences (C.).

**A. The Road to PO No. 4**

101. A few days after the issuance of PO No. 3, which ruled on the Parties' document production requests, Claimants requested that the Tribunal extend the deadline for production of documents responsive to Colombia's requests. The Tribunal granted

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<sup>26</sup> PO No. 2, paras. 110-138.

<sup>27</sup> PO No. 3, Annex B.

the extension, ordering that delivery be performed as the documents became available and, in any case, no later than 5 February 2018.

102. On 5 February 2018, Claimants produced to Respondent:

- 366 documents, comprising more than 1GB of information in response to Colombia's document requests; and
- a letter accompanied by a privilege log [the "**Privilege Log**"], identifying documents responsive to Respondent's requests which were subject to legal or settlement privilege [ "**Privilege Log Documents**"], as well as
- redacted documents [ "**Redacted Documents**"],
- [the Privilege Log Documents and the Redacted Documents will be jointly referred to as the "**Privileged Documents**"].

103. On 23 February 2018, Respondent requested [ "**Respondent's Privilege Log Request**"] that the Tribunal order Claimants to produce the Privileged Documents in the following terms:

"To order Claimants to produce, within 48 hours, un-redacted copies of the Redacted Documents;

To order Claimants to produce, within 48 hours, the Privilege Log Documents, redacting only in those documents exchanged with external counsel the relevant portions where legal advice was sought or given;

Should any of the Documents be available in a native format (such as .msg for email communications), to order production in such format;

To complete their production of documents in accordance with Procedural Order No. 3 and to confirm that they have completed production of all documents responsive to Colombia's requests; and

To order Claimants to reimburse Colombia for the costs and expenses incurred because of this incident (as quantified when this incident is resolved)."

104. On 2 March 2018, Claimants answered Respondent's Privilege Log Request:

- explaining that they had produced 366 documents, comprising more than 1GB of information in response to Colombia's document requests, and
- confirming that they had "produced and/or logged all documents responsive to the Tribunal's orders in Claimant's possession, custody and control".<sup>28</sup>

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<sup>28</sup> Claimants' letter dated 2 March 2018, p. 2.



Claimants requested that the Tribunal dismiss Respondent's Privilege Log Request.<sup>29</sup>

105. On 6 March 2018, the Arbitral Tribunal provided guidance as to how to proceed:

“[...] The challenge to any Redacted Document or to any Privilege Log Documents must be done on a document-by-document basis. Thus, the Tribunal cannot entertain Colombia's general Request for Relief either for all the Redacted Documents or for all the Privilege Log Documents.

In order to solve this incident in the quickest and most efficient way possible, the Tribunal suggests that the Parties confer and try to reach an agreement on any disputed document. If, having made the appropriate good faith efforts to find a solution, it cannot be reached, the Tribunal will gladly solve any requests on a document-by-document basis. [...]”

106. On 9 March 2018, Respondent submitted a letter to the Arbitral Tribunal noting that at least two of Colombia's arguments in its communication of 2 March 2018 did not require the Tribunal to rule on a “document-by-document basis”. In particular, according to Colombia, a decision on a document-by-document basis was not required in order to rule that:

- Claimants openly disregarded the Tribunal's directions in PO No. 2, and
- Documents sent or received by in-house counsel are not privileged.

107. Colombia reserved all of its rights.<sup>30</sup> It stated that, notwithstanding the foregoing, it undertook to comply with the Tribunal's directions and confer, in good faith, with Claimants in regard to their Privilege Log. Nevertheless, on the basis that it was likely that it would not obtain the Privileged Documents before the submission of its Rejoinder, Colombia reserved its rights to submit the evidence as soon as it came into its possession, custody or control.<sup>31</sup>

108. Claimants presented a letter on 12 March 2018 *inter alia* denouncing:

- Respondent's new attempt to reintroduce in the record the Disputed Documents through Respondent's Privilege Log Request;
- Respondent's mischaracterization of the Tribunal's email of 6 March 2018.

109. In its communication of 17 March 2018, the Tribunal thanked the Parties for their efforts in trying to reach an agreement and clarified that it had not taken any decision with regard to the admissibility of the Privileged Documents:

“The Arbitral Tribunal appreciates the Parties' good faith efforts to reach an agreement on the production of the Documents (as defined in Respondent's letter dated March 9, 2018). Should the Parties prove unable to reach an

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<sup>29</sup> Claimants' letter dated 2 March 2018, p. 12.

<sup>30</sup> Colombia's letter of 9 March 2018, p. 1.

<sup>31</sup> Colombia's letter of 9 March 2018, p. 4.

agreement with regard to the production of some (or the totality) of such Documents, the Tribunal repeats its willingness to adjudicate the issue on a document-by-document basis. For the avoidance of doubt, the Tribunal reiterates that it has not taken any decision with regard to the admissibility of such Documents.”

110. After approximately two weeks, on 27 March 2018, Respondent presented a new letter to the Tribunal explaining the steps taken to comply with the Tribunal’s guidance. Colombia requested that the Tribunal order Claimants to produce the Privileged Documents without delay, and in any event, by 2 April 2018.<sup>32</sup>
111. On 2 April 2018, Claimants responded, arguing that Colombia’s comments simply reiterated the same two allegations already set forth in its letter of 23 February 2018, namely that:
- Claimants’ assertions of privilege were belated, and
  - Privilege does not attach to communications sent or received by Prodeco’s in-house counsel.

**B. The Decision in PO No. 4**

112. On 24 April 2018, the Tribunal issued PO No. 4.
113. There were three main issues before the Tribunal:
- Whether Claimants had failed to follow the appropriate proceedings for filing their Privilege Log;
  - Whether the attorney-client privilege extended to in-house counsel; and
  - Whether Claimants properly asserted settlement privilege over the Privileged Documents.
114. To decide such issues, the Arbitral Tribunal applied international law and, alternatively municipal law, as pleaded by the Parties.<sup>33</sup>
115. The Tribunal adopted the following decisions:
116. First, it decided that while Claimants had not strictly complied with the Tribunal’s instructions in PO No. 2 concerning privilege-based objections, this departure from the established procedure had not caused Respondent irreparable harm.<sup>34</sup> The Tribunal found that Respondent had been given ample opportunity to contest Claimants’ objections by submitting comments on Claimants’ Privilege Log, which

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<sup>32</sup> Colombia’s letter of 27 March 2018, p. 2.

<sup>33</sup> PO No. 4, paras. 37-41.

<sup>34</sup> PO No. 4, paras. 42-46.

the Tribunal had analysed in order to reach its decision.<sup>35</sup> As a consequence, the Tribunal decided not to dismiss *in limine* Claimants' objections based on privilege.<sup>36</sup>

117. Second, as to the merits of the objections, the Tribunal found that legal privilege extended not only to communications with outside counsel, but also to communications with in-house lawyers and found no evidence suggesting that Claimants had waived legal or, to the extent relevant, settlement privilege.<sup>37</sup>
118. Third, the Tribunal directed Claimants' lead counsel (i) to submit an affidavit confirming that each of the Privileged Documents met all of the privilege requirements identified by the Tribunal and (ii) immediately to produce all the relevant documents that did not.<sup>38</sup>

### **C. The Consequences of PO No. 4**

119. On 30 April 2018, Claimants' lead counsel submitted an affidavit declaring that:
- He had reviewed all of the documents over which Claimants had asserted privilege, as identified in the Privilege Log;
  - He confirmed that all of the documents over which Claimants had asserted privilege fulfilled the requirements provided for in para. 54 of PO No. 4, except for two;
  - He attached the two documents that did not comply with the requirements.
120. Summing up, Claimants delivered to Respondent all documents identified in Respondent's requests, except for certain documents which met the requirements for claiming privilege as set forth in para. 54 of PO No. 4. Compliance with these requirements was proven by an affidavit signed, under his personal responsibility, by Claimants' lead counsel.

### **(2.4) PROCEDURAL ORDER NO. 6**

121. Respondent made further attempts to marshal certain Disputed Documents and certain Seized Emails attached to the Criminal Complaint.
122. The Tribunal will first explain the road that led to PO No. 6 (A.), will briefly summarize it (B.), and finally explain its consequences (C.).

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<sup>35</sup> PO No. 4, para. 46.

<sup>36</sup> PO No. 4, para. 47.

<sup>37</sup> PO No. 4, paras. 48-76 and 92-94.

<sup>38</sup> PO No. 4, para. 95.

**A. The Road to PO No. 6**

123. In PO No. 4, the Arbitral Tribunal established a cut-off date for introducing further evidence or filing further submissions in this proceeding:

“98. After May 11, 2018 no new submissions and no additional evidence shall be admitted into the file, except as provided in the following paragraph.

99. If in exceptional circumstances and for unexpected reasons any of the Parties considers that it is of paramount importance that an exception to the rule be made, it shall file a motion, asking for authorization, stating the grounds therefor, and without attaching the new submission or evidence. After hearing the other Party the Tribunal will decide. Any submission made or evidence marshalled in breach of this provision will be disregarded.”

124. On 11 May 2018, Claimants requested that a new document be introduced in the record: NI 43-101 Technical Report on the Jerritt Canyon Mine prepared for Queenstake Resources Ltd., dated 20 April 2007 [the “**Report**”].

125. On the same day, Respondent presented a letter requesting that the following documents be included in the file:

- Two sets of documents specified in Annex A of the letter: (i) Documents which Colombia claimed to be responsive to its requests for production ordered in PO No. 3 and (ii) Documents which Colombia alleged do not meet the cumulative requirements set forth in PO No. 4 for legal privilege, and are not protected by settlement privilege [the “**Annex A Documents**”]<sup>39</sup>; both sets of documents (i) and (ii) were part of the documents excluded by PO No. 2, *i.e.* the Disputed Documents;
- Certain documents [the “**FGN Documents**”], specified in Annex C of the letter, which had been gathered by the *Fiscalía General de la Nación* (and filtered by Mr. Camilo Enciso, Colombia’s designated special counsel, in accordance with the Tribunal’s directions).

126. On 14 May 2018, Claimants submitted a letter to the Arbitral Tribunal requesting that the Tribunal reject Respondent’s request, and in the alternative order Colombia to provide Claimants with copies of the FGN Documents for Claimants properly to comment on Respondent’s request.

127. On the same day, the Tribunal and the Parties held the pre-hearing conference call, in which Respondent agreed to provide Claimants with the FGN Documents. The Tribunal and the Parties further agreed that:

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<sup>39</sup> The Parties referred to these documents as the Disputed Documents, however, both Parties agreed that all of the documents comprised within such category had been excluded by the Tribunal in PO No. 2 (Letter from Colombia to the Tribunal of May 11, 2018, p. 1; Letter from Claimants to the Tribunal of 14 May 2018, p. 1).

- Respondent would submit its comments on Claimants' request by 15 May 2018;
- Claimants would submit their comments on Respondent's request to include the FGN Documents by 17 May 2018;
- Given the time sensitive nature of the Parties' requests, the Tribunal would issue a decision by Friday, 18 May, and communicate the full decision and reasoning to the Parties afterwards.

128. Hence, on 15 May 2018, Respondent submitted a letter [**“Respondent's FGN Request”**]:

- Reiterating its request of 11 May 2018; and
- Requesting that the Tribunal dismiss Claimants' request.

129. On 17 May 2018, Claimants submitted a letter to the Tribunal requesting that the Tribunal reject Respondent's FGN Request.

**B. The Decision in PO No. 6**

130. The Tribunal deliberated and decided to reject the Parties' applications to introduce further documents into the file. This decision was communicated by letter dated 18 May 2018:

“The Arbitral Tribunal has decided not to admit into the record any of the documents requested by the Parties for the following reasons:

1. Claimants' petition to admit the technical report identified in its email of May 11, 2018 is belated since Claimants were the last to file a main submission.

2. Respondent's petition to admit the FGN Documents: the FGN Documents did not make it into the record through Document Production and are not part of a formal *acusación* in a Colombian criminal court proceeding. Thus, the Tribunal sees no reason to admit them into the record.

3. Respondent's petition to admit Annex A Documents: there are two types of documents that Respondent wishes the Tribunal to admit into the record:

a. documents that Claimants' counsel has confirmed are subject to privilege and

b. documents which – according to Claimants' counsel – are not responsive to the Tribunal's decisions in PO3.

It falls within the responsibility of Claimants' counsel to determine which documents are responsive to Respondent's petitions (as narrowed down by the Tribunal) and which are subject to privilege. The Tribunal has no reason to second guess these decisions.

A full decision will follow in the next days”.

131. On 31 July 2018, the Tribunal issued PO No. 6 containing its full decision and reasoning.

**C. The Consequences of PO No. 6**

132. In PO No. 6, the Arbitral Tribunal directed the Parties to make allegations if they wished the Tribunal to draw adverse inferences based on the counterparty’s decisions regarding responsiveness and privilege of ordered documents.
133. In its Rejoinder,<sup>40</sup> Respondent asked the Arbitral Tribunal to draw adverse inferences from Claimants’ failure to produce responsive evidence. In particular, Respondent requested that the Tribunal draw eight specific adverse inferences from Claimants’ conduct. To the extent that such requests are relevant, the Tribunal will address them in later sections of this Award.
134. In the course of the Hearing, Respondent made one further request to marshal certain Disputed Documents into the record. That request led to the filing of Doc. R-100. The procedural incident is analysed in detail in section **V.1.(3.3).C** *infra*.

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<sup>40</sup> R II, paras. 983-1002. The request was reiterated in the RPHB, paras. 163-177.

### III. CHRONOLOGY OF FACTS

135. The dispute between the Parties stems from the execution of the eighth amendment to the Mining Contract [the “**Eighth Amendment**”] and the facts that surrounded such execution.
136. The Tribunal will start by describing the execution of the Mining Contract and the ensuing period, during which the parties made seven amendments to the Mining Contract **(1)**.
137. The Tribunal will then turn to the negotiations that surrounded the Eighth and most relevant amendment to the Mining Contract **((2), (4) and (5))**. The Tribunal will also describe the facts concerning Prodeco’s acquisition of a mining concession, which, according to Respondent’s version of the facts, served as a bribe for the State’s execution of the Eighth Amendment **(3)**.
138. Finally, the Tribunal will examine the events that occurred after the execution of the Eighth Amendment, namely the parties’ performance of the Eighth Amendment **((6) and (11))** and the proceedings which form the basis of Claimants’ claims in this arbitration:
- The investigation by the *Contraloría General de la República* [“**Contraloría**”] into whether the Eighth Amendment was detrimental to the Colombian State, which led to a decision holding Prodeco liable for damages to the State’s finances [the “**Fiscal Liability Proceeding**”] **(7)**; and
  - The claim filed by the mining agency responsible for the Mining Contract before the Colombian administrative courts seeking to have the Eighth Amendment declared null and void [the “**Procedure for Contractual Annulment**”] **(8)**.
139. After the failure of amicable consultations, Claimants started the present arbitration against Colombia **(9)**. The Tribunal will also briefly address the criminal complaint filed by Colombia after the start of this arbitration **(10)**.

#### **(1) THE MINING CONTRACT: EXECUTION, PERFORMANCE AND AMENDMENTS**

140. Colombia is one of the world’s largest coal producers. As Colombia’s second largest export, coal is a major source of revenues and employment for the country.<sup>41</sup>
141. In the late 1970s, Colombia’s Ministry of Mines and Energy granted *Carbones de Colombia, S.A.* [“**Carbocol**”], a state-owned company,<sup>42</sup> mineral rights over a large

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<sup>41</sup> Nagle I, para. 13. See also HT, Day 1, p. 62, 6-9.

<sup>42</sup> Carbocol was an *Empresa Industrial y Comercial del Estado*. As Respondent explains, the State agency in charge of coal mining contracts underwent several reorganizations and name changes throughout the years: Carbocol was replaced by the *Empresa Colombiana de Carbón, Ltda.*, which was replaced by the *Empresa Nacional Minera Ltda.*, *Minercol Ltda.*, which was replaced by the *Instituto Colombiano de*



area,<sup>43</sup> which comprised an open-pit mine of over 6,600 hectares known as Calenturitas,<sup>44</sup> located in the municipalities of La Jagua de Ibirico, El Paso, and Becerri<sup>45</sup> [the “**Calenturitas Mine**” or the “**Mine**”].

142. At present, the Mine is one of the largest thermal coal mines in Colombia. It is traversed by the Calenturitas River and is divided into four sectors, A to D:<sup>46</sup>



#### A. 1989: Execution of the Mining Contract

143. In 1988, Colombia adopted Decree 2655 by which it enacted the *Código de Minas* [“**1988 Mining Code**”].<sup>47</sup> Pursuant to Art. 3 of said Code, and in accordance with Colombia’s *Constitución Política*, all non-renewable natural resources belong, inalienably and indefeasibly, to the Colombian Nation; in the exercise of its property right, Colombia may explore and exploit these resources through decentralized agencies, or grant private individuals or entities the right to do so.<sup>48</sup>

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*Geología y Minería – Ingeominas*. The latter was eventually liquidated and transformed into the *Servicio Geológico Colombiano* and the *Agencia Nacional de Minería* (R I, fn. 15).

<sup>43</sup> Doc. C-2, Clause 2: “[...] *el Área Contratada descrita en la Cláusula Tercera de este contrato, la cual hace parte de un área mayor otorgada a CARBOCOL por el Ministerio de Minas y Energía, a título de Aporte, mediante la Resolución No. 002857 de fecha 10 de octubre de 1977, Aporte No. 871*”.

<sup>44</sup> Doc. C-2, Clauses 2 and 3.

<sup>45</sup> Nagle I, para. 14; R I, para. 19.

<sup>46</sup> Doc. R-55. See also Nagle I, paras. 14-15; HT, Day 1, p. 62, l. 10 – p. 63, l. 5.

<sup>47</sup> Doc. C-1; Doc. R-16.

<sup>48</sup> Doc. C-1, Art. 3: “**Propiedad de los recursos naturales no renovables.** De conformidad con la Constitución Política, todos los recursos naturales no renovables del suelo y del subsuelo pertenecen a la Nación en forma inalienable e imprescriptible. En ejercicio de esa propiedad, podrá explorarlos y explotarlos directamente a través de organismos descentralizados, o conferir a los particulares el derecho



144. In accordance with Art. 3 of the 1988 Mining Code, the Respondent, through Carbocol, chose to explore and exploit the resources in the Calenturitas area by means of a contract with a private entity. Prodeco, a Colombian mining company incorporated in 1974,<sup>49</sup> was chosen for that purpose.
145. To this effect, on 21 February 1989, Prodeco and Carbocol executed a contract for the exploration, construction, and exploitation of a coal project in the Calenturitas Mine [defined as the “**Mining Contract**”].<sup>50</sup>
146. The Mining Contract was initially entered into for a period of 30 years<sup>51</sup> comprising three stages: exploration, construction, and exploitation of the Calenturitas Mine.
147. In the exploration phase, Prodeco had to produce geological and engineering studies, at its own cost and risk, to evaluate the potential of the Calenturitas Mine, and submit a feasibility study for a coal-mining project.<sup>52</sup> Once Carbocol approved this feasibility study, Prodeco could start construction<sup>53</sup> and, subsequently, operation of the Mine.<sup>54</sup>
148. From the beginning of the production phase and until the expiration of the Mining Contract, Prodeco had the right to carry out activities of extraction, processing, transport, and commercialization of the coal from the Mine.<sup>55</sup> Prodeco could produce up to three million tonnes [“**MT**”] of coal per year [“**MTA**”], which would become its exclusive property. Prodeco could dispose of such coal as it deemed fit, subject to the Colombian laws and regulations on the commercialization and transformation of minerals.<sup>56</sup>
149. As consideration for the granting of production and commercialization rights, Prodeco had to pay a defined compensation to Carbocol. The terms agreed in 1989 were as follows:
- A 5% base royalty for each tonne of coal sold, which progressively increased up to 7.6% for the fifth year of production and beyond<sup>57</sup> [“**Base Royalty**”];
  - A supplementary compensation<sup>58</sup> amounting to a percentage of revenue and a fixed amount per tonne of coal sold, if the price of coal rose above USD 40 per

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*de hacerlo, o reservarlos temporalmente por razones de interés público, todo de acuerdo con las disposiciones de este Código”.*

<sup>49</sup> Doc. CLEX-15, p. 9 of the *Estados Financieros* for 2015-2014.

<sup>50</sup> Doc. C-2, Clause 1. The Mining Contract is numbered 044/89.

<sup>51</sup> Doc. C-2, Clause 24.

<sup>52</sup> Doc. C-2, Clauses 5.1, 5.2, and Annex 3.

<sup>53</sup> Doc. C-2, Clauses 5.3, 8 and 9.1.

<sup>54</sup> Doc. C-2, Clause 13.

<sup>55</sup> Doc. C-2, Clause 11.

<sup>56</sup> Doc. C-2, Clauses 18 and 19.

<sup>57</sup> Doc. C-2, Clause 21.1: “*Regalía Básica*”.

<sup>58</sup> This supplementary compensation will later become the Gross Income Compensation or GIC. See para. 164 *infra*.

tonne.<sup>59</sup> At that time, the price of Colombian thermal coal was approximately USD 25 per tonne;<sup>60</sup> if this price rose above USD 40 per tonne, Prodeco would receive extraordinary profits, and would have to pay the supplementary compensation.<sup>61</sup>

150. Other considerations included Prodeco's obligation to contribute to the social-economic development of the region of the Calenturitas Mine<sup>62</sup> and to grant Carbocol access to Prodeco's port facilities [**"Prodeco's Port"**]<sup>63</sup> for the export of coal.<sup>64</sup>
151. Between 1991 and 2007, the parties to the Mining Contract executed seven "*Otrosías*", or amendments, to the Mining Contract, which altered the initial basis of this agreement.

### **B. 1991-2002: First, Second, Third and Fourth Amendment**

#### First Amendment

152. In July 1989, Prodeco began to explore the Mine and to work on the preparation of a feasibility study.<sup>65</sup>
153. Two years later, in 1991, Prodeco and Carbocol executed the First Amendment to the Mining Contract, which increased the size of the area of the Calenturitas Mine and defined the rules for trial production.<sup>66</sup>
154. In 1992, Carbocol approved the feasibility study prepared by Prodeco. That same year Prodeco started construction at the Mine.<sup>67</sup>

#### Second Amendment

155. In 1993, Carbocol became the *Empresa Colombiana de Carbón Ltda. – Ecocarbón* [**"Ecocarbón"**]. On 6 December 1995, Ecocarbón and Prodeco executed the Second

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<sup>59</sup> Doc. C-2, Clause 22.1: "*Regalía Adicional*".

<sup>60</sup> Doc. C-183. See also HT, Day 1, p. 21, ll. 11-14.

<sup>61</sup> Art. 84(b) of the 1988 Mining Code provided that the compensation paid by producers could include a share of the producer's extraordinary profits due to rising mineral prices (Doc. C-1, Art. 84(b)).

<sup>62</sup> Doc. C-2, Clause 23.1.

<sup>63</sup> Prodeco's Port was located at approximately 200 kilometres north of the Calenturitas Mine, in Santa Marta, on the Atlantic coast of Colombia, and was used to export coal (Nagle I, para. 19). Prodeco originally obtained the Port concession in 1979, for a term lasting until 2013 (Doc. CLEX-15, pp. 10-11 of the *Estados Financieros* for 2012). In 2010 Prodeco began building a new port, which it now operates, known as Puerto Nuevo. Puerto Nuevo's concession belongs to the Sociedad Portuaria Puerto Nuevo S.A., in which Prodeco has a 94.9% share (Doc. CLEX-15, pp. 10-11 of the *Estados Financieros* for 2014; Doc. CLEX-11, p. 17).

<sup>64</sup> Doc. C-2, Clause 23.2.

<sup>65</sup> Doc. R-63, p. 1.

<sup>66</sup> Doc. C-67.

<sup>67</sup> Doc. R-63, p. 1; RfA, para. 13; Nagle I, para. 18.

Amendment to the Mining Contract,<sup>68</sup> which established new rules regarding Prodeco's right to hire subcontractors.<sup>69</sup>

156. The exploitation phase of the Mine officially started in October 1995, but in reality, the mining activities were halted for several years,<sup>70</sup> in part because of a lack of sufficient infrastructure to transport coal from the Mine to Prodeco's Port, in part because of low coal prices in the international market.<sup>71</sup>

### Third Amendment

157. In 1995, Prodeco was acquired by Glencore,<sup>72</sup> a multinational commodity trading and mining company.<sup>73</sup>
158. Three years later Prodeco submitted to Ecocarbón a revised feasibility study, which envisioned a production of 5 MTA, and a new timeline for the project. Ecocarbón found that the revised feasibility study did not comply with the terms of the Mining Contract, and gave Prodeco two alternatives: either to comply with the Contract and the already approved feasibility study, or to negotiate a further amendment.<sup>74</sup>
159. Accordingly, in 1999, the parties started negotiations,<sup>75</sup> which led to the third amendment to the Mining Contract [**"Third Amendment"**]<sup>76</sup> being executed two years later, on 6 March 2001. The Third Amendment was signed by the new *Empresa Nacional Minera Ltda., Minercol Ltda.* [**"Minercol"**], which in the meantime had succeeded Ecocarbón.<sup>77</sup>
160. Importantly, the Third Amendment:
- Created new obligations for Prodeco regarding the production phase (i), and
  - Modified the existing compensation regime (ii).
161. (i) Within a term of six months, Prodeco was required to submit to Minercol's approval a final report on exploration (*Informe Final de Exploración* [**"IFE"**]).<sup>78</sup> Following Minercol's approval of the IFE, Prodeco had to prepare and deliver a long-term work and investment plan (*Programa de Trabajos e Inversiones* [**"PTI"**]), concerning exploitation of the Mine.<sup>79</sup> In addition, Prodeco agreed to submit a PTI for each year of the production phase [**"Annual PTI"**]. Each Annual

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<sup>68</sup> Doc. C-70.

<sup>69</sup> Doc. C-70, pp. 1-2.

<sup>70</sup> Doc. R-63, p. 1; Doc. R-64, p. 2.

<sup>71</sup> Doc. C-5, p. 1, point 2. See also Doc. C-74, p. 18.

<sup>72</sup> Doc. CLEX-11, p. 12. See also RfA, para. 14; C I, para. 28; Nagle I, para. 19; Doc. H-1, p. 39; R I, fn. 16.

<sup>73</sup> C I, para. 22.

<sup>74</sup> Doc. R-57.

<sup>75</sup> Docs. R-58, R-59, R-60 and R-61.

<sup>76</sup> Doc. C-5.

<sup>77</sup> Doc. C-5, p. 1. Minercol was constituted in December 1998.

<sup>78</sup> Doc. C-5, Clause 7.

<sup>79</sup> Doc. C-5, Clause 8.

PTI had to follow the exploitation sequence defined in the main PTI and contain a production forecast for the next 10 years.<sup>80</sup>

162. (ii) The Third Amendment envisaged a production of between “5 or 6 MTA” of coal per year.<sup>81</sup> This expansion led to changes in the compensation regime.
163. The Base Royalty continued to apply, as defined in the original Mining Contract, as long as production did not exceed 3 MTA. Once production exceeded that threshold, a newly defined “**Additional Royalty**” became applicable: the royalty rate would increase by 1% for every 1 MTA increase in production. In effect, this implied that after the fifth year of production – which was when the Base Royalty attained 7.6% – if annual production was, for instance, 4, 5, or 6 MTA, Prodeco would pay Royalties at a rate of 8.6%, 9.6%, and 10.6% on the entire price of the coal sold.<sup>82</sup> For each 1 MTA of additional coal production, the rate of Royalties would increase by 1%.<sup>83</sup>
164. The Third Amendment also created a *Compensación por Ingresos Brutos* (Gross Income Compensation [“**GIC**”]), derived from the Supplementary Compensation initially provided for in Clause 22.1 of the Mining Contract. The GIC was an additional compensation, based on a sliding scale according to coal prices, which became applicable if the coal price exceeded USD 40 per tonne.<sup>84</sup>
165. Thus, after the execution of the Third Amendment, Prodeco had to pay three types of compensation depending upon the amount of production of the Mine and the price of coal:
- A Base Royalty of 7.6%, which applied irrespectively of the amount of coal produced;
  - An Additional Royalty, when coal production exceeded 3 MTA, calculated applying an increasing percentage scale;
  - A GIC, which applied when the price of coal exceeded USD 40 per tonne.
166. The Third Amendment also defined the reference price which should be used to calculate the amount of Royalties and GIC, as the higher of:<sup>85</sup>
- The weighted average free on board [“**FOB**”] Colombian port price for the current quarter for coal exported from the Calenturitas Mine, as published in the “Coal Week International” magazine; and

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<sup>80</sup> Doc. C-5, Clause 8.9.

<sup>81</sup> Doc. C-5, recital 4 and Clause 14.

<sup>82</sup> Doc. C-5, Clause 14.

<sup>83</sup> See Doc. C-5, recital 4.

<sup>84</sup> Doc. C-5, Clause 15.1. See also C I, para. 32; R I, para. 31.

<sup>85</sup> Doc. C-5, Clauses 14.3 and 15.1.1.

- The weighted average FOB Colombian port price for Colombian steam coal exported during the same quarter, proportionally adjusted by calorific value, as published in “Coal Week International” magazine.

#### Fourth Amendment

167. Later that same year (2001), Prodeco and Minercol executed the Fourth Amendment to the Mining Contract,<sup>86</sup> which clarified certain aspects of the Third Amendment, namely:<sup>87</sup>

- The duration of each of the stages of the Mining Contract;
- The terms for Prodeco’s social-economic investments in the Calenturitas region; and
- The start date for the 30-year duration of the Mining Contract, which was set at 3 July 1990.

#### **C. 2002-2004: The 2003 PTI and start of production**

168. On 16 December 2002, Minercol approved Prodeco’s IFE.<sup>88</sup> One year later,<sup>89</sup> Prodeco submitted to Minercol a long-term PTI, in which it laid out its plan to produce up to 4 MTA, for a total life-of-mine production of approximately 55 MT of coal [“**2003 PTI**”]. According to Prodeco, maximum production was capped by transport restrictions: coal had to be trucked to the Port and Prodeco stated that this was the maximum quantity which could be transported given the poor condition of roads and the limited availability of trucks.<sup>90</sup>

169. In January 2004, the Colombian Ministry of Mines and Energy designated the *Instituto Colombiano de Geología y Minería, INGEOMINAS* [“**Ingeominas**”], an institute created in 1916 for geoscientific research,<sup>91</sup> as Minercol’s successor, and delegated the functions of mining authority to this agency.<sup>92</sup>

170. It was Ingeominas that on 6 April 2004 approved the 2003 PTI.<sup>93</sup>

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<sup>86</sup> Doc. C-73.

<sup>87</sup> Doc. C-73, Clause First and Clause Fourth.

<sup>88</sup> Doc. C-74, p. 21.

<sup>89</sup> Prodeco submitted a first version of the PTI on 9 September 2003 (Doc. R-65) and a revised version in December 2003 (Doc. C-74), at the request of Minercol (Doc. R-66, p. 2).

<sup>90</sup> Doc. C-74, p. 18.

<sup>91</sup> Paredes I, para. 20. By a Decree of 28 January 2004, the *Instituto de Investigación e Información Geocientífica, Minero Ambiental y Nuclear* was restructured and its name was changed to *Instituto Colombiano de Geología y Minería* (Doc. R-10, p. 1).

<sup>92</sup> Doc. R-56.

<sup>93</sup> Doc. R-66; Nagle I, para. 24.

171. In July 2004, the Calenturitas Mine finally entered into production.<sup>94</sup> By the end of that year the Mine had produced 0.6 MT of coal; production increased to 1.5 MTA in the following year, 2005.<sup>95</sup>

**D. 2004: Fifth Amendment**

The Contracting Committee

172. In June 2004, Ingeominas created by internal resolution a *Comité de Contratación Minera* [**“Contracting Committee”**], comprising Ingeominas’ *Secretario General*, the *Director del Servicio Minero*, the *Subdirectores de Contratación y Titulación Minera* and *Fiscalización y Ordenamiento Minero*, and an *Asesor de la Dirección General*.

173. This Committee was responsible for advising the *Director del Servicio Minero inter alia* on contracts of *gran minería* for areas historically granted to Ecocarbón. In particular, the Contracting Committee had the following function:<sup>96</sup>

*“Recomendar al Director del Servicio Minero la aprobación o desaprobación de las solicitudes presentadas por los concesionarios relacionadas con modificación, prórroga, cesión, subcontratación, suspensión y renuncia de los contratos”.*

174. The Contracting Committee thus became responsible for evaluating and making any recommendation to the *Director del Servicio Minero* regarding Prodeco’s requests to modify the Mining Contract.

175. In September 2004, the scope of the Contracting Committee’s functions was slightly altered by another resolution of Ingeominas:<sup>97</sup>

*“Recomendar a la Dirección del Servicio Minero o a las Subdirecciones de Contratación y Titulación Minera y Fiscalización y Ordenamiento Minero la aprobación o rechazo de las peticiones presentadas por los beneficiarios de los títulos mineros, relacionadas entre otros, con la modificación, prórroga, suspensión, integración de operaciones mineras y renuncia de los contratos de concesión y demás títulos mineros”.*

Fifth Amendment

176. On 15 December 2004, following the recommendation of the Contracting Committee,<sup>98</sup> Prodeco and Ingeominas executed a fifth amendment to the Mining

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<sup>94</sup> Doc. CLEX-11, p. 14; Doc. CLEX-15, p. 8.

<sup>95</sup> Doc. CLEX-15, “*Informe de Gestión 2006*”, p. 348 of the PDF; Nagle I, para. 24; Doc. H-1, p. 50.

<sup>96</sup> Doc. R-10, Arts. 1 and 3.

<sup>97</sup> Doc. R-11, Art. 4(2).

<sup>98</sup> Doc. C-76, recital 16. See also Doc. R-68; Doc. R-69.

Contract,<sup>99</sup> which clarified the calculation of the Base and Additional Royalties [**“Fifth Amendment”**].

**E. 2005: Sixth Amendment**

177. It will be recalled that, in 1995, through the acquisition of Prodeco,<sup>100</sup> Glencore became the indirect owner of concession rights over the Calenturitas Mine and Prodeco’s Port.<sup>101</sup>

Acquisition of Carbones de la Jagua S.A.

178. In 2005, Glencore acquired Carbones de la Jagua S.A. [**“CDJ”**], a company that held rights over some mining properties within the La Jagua coal mining project, located approximately 20 kilometres east of the Calenturitas Mine. Glencore was later able to consolidate ownership of the La Jagua coal project by acquiring Consorcio Minero Unido S.A. [**“CMU”**] in 2006 and Carbones El Tesoro [**“CET”**] in 2007.<sup>102</sup> The Tribunal shall refer to CDJ, CMU, and CET jointly as the **“Prodeco Affiliates”**.

Sixth Amendment

179. One of the advantages of this acquisition was the blending of coal from the Calenturitas and La Jagua Mines-<sup>103</sup> a procedure which called for an amendment of the Mining Contract.<sup>104</sup> Accordingly, on 15 December 2005, Prodeco and Ingeominas executed the sixth amendment to the Mining Contract [**“Sixth Amendment”**]. This Amendment clarified how the Royalties and GIC payments should be calculated when the coal volume exported consisted of coal from the Calenturitas Mine blended with coal from other mines [**“Blended Coal”**].<sup>105</sup>
180. The Sixth Amendment also changed the reference price for calculating Royalties and GIC, from the “Coal Week International” price to the price of Colombian thermal coal published by the Platts “International Coal Report” [**“ICR”**], adjusted for calorific value. The Amendment specified that:<sup>106</sup>
- If the coal exported by Prodeco came exclusively from the Mine, the reference price would be the higher of (i) the FOB Colombian port price for Colombian steam coal for the respective week as published in the ICR, adjusted for calorific value, and (ii) the shipment price estimated by Prodeco;

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<sup>99</sup> Doc. C-76.

<sup>100</sup> Doc. CLEX-11, p. 12. See also RfA, para. 14; C I, para. 28; Nagle I, para. 19; Doc. H-1, p. 39; R I, fn. 16.

<sup>101</sup> Doc. CLEX-11, p. 12; Doc. CLEX-11, p. 249 of the PDF.

<sup>102</sup> Doc. CLEX-11, pp. 12-13; RfA, para. 5.

<sup>103</sup> Nagle I, paras. 25-26.

<sup>104</sup> Doc. R-75.

<sup>105</sup> Doc. C-77, recital 6, Clause 1 and Annex 9A.

<sup>106</sup> Doc. C-77, Annex 9A.



- If the coal exported by Prodeco was Blended Coal, the reference price would simply be the FOB Colombian port price for Colombian steam coal, for the respective week as published in the ICR, adjusted for calorific value.

#### Railway

181. In March 2006, Prodeco, CDJ and CMU, the two mining companies recently acquired by Glencore, entered into an association contract with other coal producers, with the aim of sharing the use of a railway under concession to *Ferrocarriles del Norte de Colombia S.A.* [**“Fenoco”**]. Prodeco eventually indirectly acquired a 39.76% ownership interest in Fenoco.<sup>107</sup>
182. This railway linked the Mine region with ports situated in the Atlantic coast, specifically with Prodeco’s Port, and solved Prodeco’s transport difficulties: rail transport permitted the shipping of higher quantities of coal, at lower costs, and an increase in the capacity of the Calenturitas Mine.

#### **F. 2006: The 2006 PTI**

183. Production at the Calenturitas Mine continued to grow in 2006. In that year the Mine produced 2.9 MTA, almost twice the 2005 production.<sup>108</sup>
184. In addition, in 2006, Prodeco realized that it was possible to divert a section of the Calenturitas River that ran through the Mine, thereby increasing the amount of exploitable resources.<sup>109</sup>
185. Consequently, in November 2006, Prodeco submitted a revised long-term PTI to Ingeominas, with new coal production objectives [**“2006 PTI”**]. Prodeco proposed to expand total coal production from the Mine to 116 MT between 2007 to 2019 (more than doubling the 55 MT envisioned in the 2003 PTI), initially at a rate of 4.4 MTA starting in 2007, and gradually increasing to 10 MTA from 2010 onwards.<sup>110</sup>

Año	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Total Estimi (Mtpm)	31.7	36.0	52.98	53.0	53.6	69.9	69.9	69.9	69.9	69.9	80.0	80.0	80.0
Carbon Minado (Mt)	4.4	4.2	8.8	10.0	10.0	10.0	10.0	10.0	10.0	10.0	10.0	10.0	10.0
Relación Descapete (Bcm/t)	7.0	8.5	6.6	5.3	5.3	6.99	6.99	6.99	6.99	6.0	8.0	8.0	8.0
Poder Calorífico (kbtu/lb)	11.03	10.97	10.97	11.0	10.9	10.9	10.8	10.8	10.8	10.8	10.9	11.0	11.3

**Tabla No 3-10 Resumen de Cantidades. Secuencia Minera**

<sup>107</sup> Doc. CLEX-15, “*Nota a los Estados Financieros*” for 2007, p. 11; Doc. CLEX-11, p. 12; Doc. CLEX-13, p. 15. See also Compass Lexecon I, para. 25.

<sup>108</sup> Doc. CLEX-15, “*Informe de gestión 2006*”, p. 348 of the PDF.

<sup>109</sup> Doc. C-78, pp. 17-19 and 42.

<sup>110</sup> Doc. C-78, pp. 17-19, 51 and 55.



186. The 2006 PTI also foresaw an investment of USD 500.1 million [“M”] being made in the years 2007-2010 (broken down as USD 196.4 M for equipment, USD 114.6 M for railway, USD 85.2 M for infrastructure, and USD 103.9 M for port and sundry investments), and an additional investment of USD 684.4 M for the remaining life of the project.<sup>111</sup>
187. The net present value of the project was estimated at USD 98 M (applying a discount rate of 15%), assuming costs of USD 24.79 per tonne of coal<sup>112</sup> and a coal sales price of USD 42.58 per tonne.<sup>113</sup>
188. Mine-life Royalties to be paid to Ingeominas were estimated at USD 671 M.<sup>114</sup>
189. The 2006 PTI also provided for additional exploratory drilling in Sectors B and D of the Mine.<sup>115</sup>
190. On 7 February 2007, Ingeominas approved the 2006 PTI, finding that this plan was more favourable than the original PTI, taking into account that it would generate a significantly higher compensation for the State. Ingeominas demanded, however, that in 2009 Prodeco submit an updated PTI, incorporating the results of the additional exploratory drilling in Sectors B and D.<sup>116</sup>

**G. 2007: Seventh Amendment**

191. While Prodeco awaited the approval of the 2006 PTI, it consulted Ingeominas regarding the potential execution of a seventh amendment to the Mining Contract, with the goal of increasing the duration of the Contract and changing the existing Royalties regime, in particular for sales of coal in the Colombian domestic market. Prodeco explained that in order to be able to extract the maximum amount of coal resources and to profit from the significant investments it would make in the Calenturitas project – estimated at USD 1,184 M – the exploitation phase would need to be extended for a period of 20 years.<sup>117</sup>
192. After lengthy negotiations and upon the Contracting Committee’s recommendation, on 15 February 2007, Prodeco and Ingeominas executed the Seventh Amendment to the Mining Contract [“**Seventh Amendment**”].<sup>118</sup>
193. The main thrust of the Seventh Amendment was to extend the duration of the Mining Contract by 15 years, until 3 July 2035.<sup>119</sup> The justification given was that the 2006 PTI provided for the mining of an additional 60 MT of coal, and an

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<sup>111</sup> Doc. C-78, pp. 170 and 173.

<sup>112</sup> Doc. C-78, p. 175.

<sup>113</sup> Doc. C-78, p. 170.

<sup>114</sup> Doc. C-78, p. 177.

<sup>115</sup> Doc. C-78, pp. 35-36.

<sup>116</sup> Doc. C-80.

<sup>117</sup> Doc. C-79.

<sup>118</sup> Doc. C-9.

<sup>119</sup> Doc. C-9, Clause 1.

increase of the capacity of the Mine to 10 MTA. The *Considerando* 6 of the Seventh Amendment concludes:<sup>120</sup>

*“En consecuencia los recursos que generará el proyecto por contraprestaciones económicas a favor del Estado se incrementan sustancialmente frente a lo previsto en el PTI original [...]”.*

194. The Seventh Amendment also allowed Prodeco to allocate up to 15% of its annual coal production to local sales; in such a case, Royalties would be calculated pursuant to the base price defined by the *Unidad de Planeación Minero Energética*.<sup>121</sup>
195. The basic system for quantifying Royalties and GIC was not changed, but a few clarifications and amendments were added. The Seventh Amendment provided:
- That if the coal exported by Prodeco came exclusively from the Mine, the reference price for payment of Royalties and GIC would be the higher of (i) the FOB Colombian port price for Colombian steam coal for the respective week as published in the ICR, adjusted for calorific value [**“FOB Price”**], and (ii) the actual sale price;<sup>122</sup>
  - That Royalties and GIC would be calculated and paid within ten days of the shipment of coal, but would be subject to a quarterly readjustment “based on the definitive prices”<sup>123</sup> (as will be explained later, the interpretation of this provision would become the subject of a debate between the Parties).
196. Finally, the Seventh Amendment required Prodeco to submit a revised long-term PTI in January 2009, detailing its plans to exploit the Mine until 2035 and incorporating the results of the additional exploration conducted in Sectors B and D.<sup>124</sup>

## **(2) THE EIGHTH AMENDMENT: PRELIMINARY STEPS**

197. Claimants argue that by signing the Eighth Amendment:

- Ingeominas agreed to amend the Mining Contract and to change the system for calculating the Royalties and the GIC, and
- In exchange, Prodeco undertook a massive additional program of investment, increasing the productive capacity of the Mine.

198. The result was a ‘win-win’ situation: Ingeominas would earn a higher remuneration (albeit by applying lower Royalties and GIC to a much higher production) and

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<sup>120</sup> Doc. C-9, *Considerando* 6, p. 2.

<sup>121</sup> Doc. C-9, Clause 2.

<sup>122</sup> Doc. C-9, Annex 9A.

<sup>123</sup> In fact, a similar provision already existed in the Sixth Amendment, with a different wording (see Doc. C-77, Annex 9A, paras. A)(4) and B)(5)).

<sup>124</sup> Doc. C-9, Clause 1.

Prodeco would be able to make the necessary investments and develop the Mine to its full capacity.

199. Respondent contests Claimants' version of the facts and argues that Claimants concealed and misrepresented crucial information in order to mislead the State into accepting an unjustifiable renegotiation of the Mining Contract, to the sole benefit of Claimants and to the detriment of the State. According to Respondent, Claimants made wilful misrepresentations, colluded with public servants, and engaged in corrupt practices, all in order to execute the Eighth Amendment.<sup>125</sup>
200. The Tribunal will carefully analyse the evidence and establish the proven facts, starting with the preliminary steps which eventually led to the execution of the Eighth Amendment.

**A. May 2008: Prodeco's First Approach**

201. In February 2007, Prodeco and Ingeominas executed the Seventh Amendment, and in October 2007 Prodeco delivered an Annual PTI for the year 2008. This PTI detailed the operations planned for 2008 and envisioned a production of 5 MTA.<sup>126</sup>
202. The Seventh Agreement did not change the basic structure of the remuneration which Prodeco had to pay to Ingeominas:
- On the one side, progressive Royalties were calculated on the basis of an increasing scale, which added a 1% for every additional MTA produced by the Mine above; if the estimated production of 10 MTA was reached, the applicable Royalties rate would amount to 14.6%, to be applied to the totality of the coal sold; should production reach 11 MTA, the rate would rise to 15.6%, again to be applied to the totality of production;
  - On the other side, the GIC reference price of USD 40 per tonne had not been changed since 1989; and as a result of inflationary increases in Prodeco's mining costs, Prodeco had to pay Colombia a share of its gross revenues at price levels that barely covered its production costs.
203. Six months after executing the Seventh Amendment, Prodeco decided to approach Ingeominas regarding a potential new amendment to the Mining Contract.<sup>127</sup>
204. On 23 May 2008, Prodeco's representatives met with Ingeominas' *Director General*, Mr. Mario Ballesteros ["**Mr. Ballesteros**"], and made a presentation, based on an extensive PowerPoint, suggesting a revision of the economic conditions of the Mining Contract.<sup>128</sup> A few days thereafter, on 28 May, Prodeco submitted a 9-page formal request.<sup>129</sup> Prodeco argued that the existing compensation

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<sup>125</sup> R I, paras. 5, 9. See also HT, Day 2, p. 305, l. 22 – p. 307, l. 6.

<sup>126</sup> Doc. BR-2, p. 13.

<sup>127</sup> Doc. C-82.

<sup>128</sup> Doc. C-82.

<sup>129</sup> Doc. C-83.

arrangement compromised the potential expansion and even the viability of the Calenturitas mining project.<sup>130</sup>

205. Accordingly, Prodeco proposed that, in order to guarantee the sustainability of Colombia's returns and the viability of the mining project, certain conditions agreed upon in the Mining Contract should be amended:<sup>131</sup>

- Replacing the ICR index by the API2-BCI7 indexes;<sup>132</sup>
- Calculating Royalties and GIC based on the value of coal at the pithead of the Mine;
- Capping Royalties at 10%;
- Updating the value of the GIC and introducing a formula for indexation.

206. Prodeco proposed the creation of a committee to analyse these potential modifications and, in the meantime, the execution of a memorandum of understanding.<sup>133</sup>

#### Ingeominas' reaction

207. A few days thereafter,<sup>134</sup> Ingeominas' *Subdirector de Fiscalización y Ordenamiento Minero*, Mr. Edward Franco, prepared an extensive legal and economic report, analysing Prodeco's proposal. The report was delivered to Mr. Ballesteros, for submission to Ingeominas' *Consejo Directivo*.<sup>135</sup> Mr. Franco's proposal to the *Consejo Directivo* was the following:<sup>136</sup>

*"En cuanto a la modificación propuesta se recomienda no acceder a la misma por ser poco favorable para los intereses de la Nación".*

208. Despite this initial analysis, Prodeco and Ingeominas held further meetings to discuss the changes proposed by Prodeco.<sup>137</sup>

#### **B. July 2008: Prodeco's second approach**

209. On 15 July 2008, Prodeco sent to Ingeominas a second formal request for the revision of the economic conditions of the Mining Contract and the reduction of Royalties and GIC. That extensive request further developed Prodeco's original

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<sup>130</sup> Doc. C-83. See also Doc. C-82 and Nagle I, paras. 41-45.

<sup>131</sup> Doc. C-82; Doc. C-83.

<sup>132</sup> Monthly arithmetic average of the export prices CIF ARA published by Argus/McCloskey in the index known as API2, minus the monthly average price of the maritime freight costs between Puerto Bolivar and Rotterdam published by SSY in the index known as BCI7 (see Doc. C-96, pp. 1-2).

<sup>133</sup> Doc. C-82, p. 25; Doc. C-83, p. 10.

<sup>134</sup> The precise date is difficult to establish, because the copy in the file is undated (Doc. R-79; Doc. R-80).

<sup>135</sup> Doc. R-80. See also Doc. R-79.

<sup>136</sup> Doc. R-80, p. 13.

<sup>137</sup> Doc. C-86, p. 1.

proposal and added a new supporting argument: if Ingeominas were prepared to reduce the compensation, Prodeco would increase its investments and increase the capacity of the Mine.<sup>138</sup>

210. Prodeco submitted a precise calculation of two scenarios – one, if the Mining Contract was not amended, and the other, if Prodeco’s proposals were accepted.<sup>139</sup>
211. In essence, Prodeco was proposing to Ingeominas what Prodeco considered to be a ‘win-win’ deal: if Ingeominas agreed to a reduction of its Royalties, Prodeco would commit to making additional investments, production of the Mine would increase, costs would be cut, sales would be higher, and at the end of the life of the Mine, Prodeco would have earned higher profits and Colombia would have received significantly higher Royalties and taxes.

**C. July 2008 – April 2009: The Dispute over the Definitive Price**

212. In its letter dated 15 July 2008, Prodeco also raised for the first time an interpretative issue regarding the definition of the so-called “**Definitive Price**” provision in the Seventh Amendment to the Mining Contract.<sup>140</sup>
213. *Pro memoria*, the Seventh Amendment had established that the reference price for payment of Royalties and GIC would be the higher of (i) the FOB Price<sup>141</sup> and (ii) the actual sale price. Royalties and GIC would initially be calculated and paid within ten days of the shipment of coal, but they would be subject to a quarterly readjustment – upward or downward – “based on the definitive prices.”<sup>142</sup>
214. In the letter Prodeco asserted that there were two possible interpretations of the term “Definitive Price:”<sup>143</sup>
- The first interpretation would equal Definitive Price with the actual sale price received by Prodeco, evidenced in the invoices issued to the buyers;
  - Under an alternative interpretation, Definitive Price would be the higher of (i) the FOB Price in the week when the coal was shipped and (ii) the actual sale price obtained by Prodeco.
215. Prodeco acknowledged that hitherto it had calculated the Definitive Price on the basis of the second alternative; but Prodeco now submitted that this interpretation failed to take into account that the market situation had drastically changed.

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<sup>138</sup> Doc. C-84, p. 19. See also p. 20.

<sup>139</sup> Doc. C-84, Annex 8.

<sup>140</sup> C I, para. 51; R I, paras. 61-62. See also Doc. C-84, paras. 1.3-1.15. The Tribunal notes that a similar provision already existed in the Sixth Amendment (see Doc. C-77, Annex 9A, paras. A)(4) and B)(5)).

<sup>141</sup> Defined as the FOB Colombian port price for Colombian steam coal for the respective week as published in the ICR, adjusted for calorific value.

<sup>142</sup> Doc. C-9, Annex 9A.

<sup>143</sup> Doc. C-84, para. 1.4.

216. Prodeco proposed to Ingeominas that the Mining Contract be modified, so that Royalties and GIC be calculated on the basis of Prodeco's actual sale price.<sup>144</sup>
217. In late August and early September 2008, Prodeco held meetings with the *Ministro de Minas y Energía*, Mr. Hernán Martínez Torres, and with Mr. Ballesteros to discuss the revision of the Mining Contract.<sup>145</sup> The evidence shows that the Minister agreed that it would be fair and reasonable for the Royalties to be calculated using the actual price received by Prodeco.<sup>146</sup>

No negative inference

218. Respondent says that given Claimants' failure to produce documents responsive to Colombia's request, the Tribunal must conclude that Prodeco actively sought to fabricate a dispute over payment of royalties to force Ingeominas into negotiating what would become the Eighth Amendment.<sup>147</sup>
219. The Tribunal disagrees.
220. There is no evidence that Prodeco "fabricated" a dispute, *i.e.* that it pursued a request knowing that it was not entitled to the rights claimed. To the contrary: the Minister of Mines agreed with the reasonableness of Prodeco's position, which proves that Prodeco at least had a *prima facie* case.

Prodeco unilaterally construes the Mining Contract

221. On 8 September 2008, Prodeco sent a letter to Ingeominas, stating that as of 30 September 2008 it would start readjusting the amount of Royalties and GIC based on a Definitive Price equal to that paid by the end consumer.<sup>148</sup>
222. One month later, Prodeco did as it had anticipated: it paid the adjustment amount corresponding to the Royalties and GIC of the third quarter of 2008, applying the new interpretation of Definitive Prices. This led to an underpayment of USD 6 M in favour of Prodeco.
223. This interpretation, and consequent adjustment, was not accepted by Ingeominas. On 17 October 2008, Ingeominas replied to Prodeco saying that it was still evaluating the viability of the proposed contractual modification. According to Ingeominas, the reference price for the calculation of Royalties and GIC was the one published by the ICR, and any unilateral modification was without effect.

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<sup>144</sup> Doc. C-84, para. 1.5-1.15.

<sup>145</sup> Doc. R-83; Doc. R-85, p. 2.

<sup>146</sup> Doc. C-86, p. 1 and Nagle I, para. 51. See also the *Versión Libre y Espontánea* rendered by Minister Martínez Torres in Doc. R-81, pp. 1-2: "*Les recordé que el precio que debían incluir en el acuerdo para liquidar las regalías debía ser el precio del consumidor final y no el precio con que normalmente se registraba como de exportación*".

<sup>147</sup> R II, para. 988.

<sup>148</sup> Doc. C-86.

Hence, Ingeominas demanded that Prodeco comply with the terms of the Mining Contract.<sup>149</sup>

224. Prodeco responded ten days later, stating that it was aware that any modification of the Mining Contract had to be bilaterally agreed, but that it was not seeking an amendment of the Definitive Price clause, given that its meaning was clear.<sup>150</sup>

Ingeominas' *Requerimiento bajo apremio de caducidad*

225. On 23 January 2009, Ingeominas formally demanded payment of the amount in dispute through a *Requerimiento bajo apremio de caducidad*. Ingeominas asserted that Prodeco's unilateral interpretation of the Mining Contract amounted to a contractual breach. Through the *Requerimiento*, Ingeominas threatened Prodeco with a declaration of *caducidad* of the Contract if payment was not effected or an appropriate justification provided within one month.<sup>151</sup>
226. Prodeco replied to the *Requerimiento* on 13 February 2009, restating the reasons for its interpretation of the Definitive Price term used in the Contract, and pointing out that Ingeominas had not explained why it disagreed with such interpretation.<sup>152</sup>
227. In April 2009, Prodeco approached Ingeominas regarding the outstanding royalty payments and proposed paying all the disputed amounts into an escrow account, until the dispute on the proper interpretation of the term Definitive Price had been settled.<sup>153</sup> Ingeominas ultimately rejected this proposal, insisting that Prodeco pay the disputed amounts directly to Ingeominas in cash, before negotiations could progress.<sup>154</sup>

**D. November 2008: Annual PTI for 2009**

228. In November 2008, Prodeco delivered to Ingeominas the Annual PTI for the year 2009, which envisaged a production of almost 7.2 MTA, and the start of the works for diverting the Calenturitas River, which would lead to an increase in the total Mine production of 80 MT of coal.<sup>155</sup>
229. Pursuant to the Seventh Amendment, in January 2009, Prodeco was due to submit its revised long-term PTI, detailing its plans to exploit the Mine until 2035 and accounting for the results of the additional exploration in Sectors B and D.<sup>156</sup> Nevertheless, since Prodeco had not completed its exploration program, it requested

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<sup>149</sup> Doc. R-84.

<sup>150</sup> Doc. R-85.

<sup>151</sup> Doc. C-88 / C-243.

<sup>152</sup> Doc. C-244.

<sup>153</sup> Doc. C-90.

<sup>154</sup> Doc. R-101, p. 3. See also Nagle I, para. 56; Nagle II, para. 25; HT, Day 3, p. 658, ll. 7-11 and p. 661, ll. 10-22.

<sup>155</sup> Doc. BR-3, pp. 1-1 to 1-3.

<sup>156</sup> Doc. C-9.



that the time to submit the PTI be extended until 30 May 2009,<sup>157</sup> a request which Ingeominas granted.<sup>158</sup> In fact, because of the parties' parallel negotiations, Prodeco would not submit such PTI until June 2010.<sup>159</sup>

**E. March 2009: Sale of Prodeco to Xstrata**

230. In March 2009, Glencore sold Prodeco to the Australian mining company Xstrata, for a net consideration of USD 2 Bn; Glencore, however, retained a call option to repurchase Prodeco – which it eventually exercised.<sup>160</sup>

**(3) THE 3HA CONTRACT**

231. Before continuing with its description of the negotiation and execution of the Eighth Amendment, the Tribunal must address a highly relevant averment of Colombia: namely, that Claimants obtained the Eighth Amendment through corruption. This is the factual predicate of Colombia's argument that the Tribunal lacks jurisdiction to decide this case.
232. Respondent alleges that Claimants bribed Mr. Ballesteros, Ingeominas' *Director General*, in order to secure his support for the execution of the Eighth Amendment, and that it paid the bribe through a complex scheme: Prodeco bought for a price of USD 1.75 M a concession contract [the "**3ha Contract**"] for the exploration and production of coal in a parcel of three hectares located in the middle of the La Jagua mine from a former employee of the Ministry of Mines and his partner.<sup>161</sup> Respondent says that these individuals were strawmen of Mr. Ballesteros, who ultimately benefitted from the consideration paid by Prodeco, and the payment was the *quid pro quo* for the execution of the Eighth Amendment.
233. The Tribunal will establish the proven facts, and in order to do so it will recount the full story of the 3ha Contract, starting in 2006.

**A. November 2006: A Coveted Concession Contract**

234. On 29 November 2006, Mr. Jorge Maldonado [**"Mr. Maldonado"**] – a former employee of the Ministry of Mines and of Ingeominas' predecessors – and his partner, Mr. César García, filed a request with Ingeominas to obtain a concession contract for the exploration and production of coal in a parcel of 3 hectares.<sup>162</sup>
235. These 3 hectares were located in the middle of several concessions which formed part of the La Jagua project and were exploited by Glencore through the Prodeco

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<sup>157</sup> Doc. R-104.

<sup>158</sup> Doc. R-105.

<sup>159</sup> Doc. CLEX-28.

<sup>160</sup> Doc. R-77, p. 62; Doc. R-78, p. 2; Doc. R-278.

<sup>161</sup> R I, paras. 67-69.

<sup>162</sup> Doc. C-197; Doc. R-93. See also R I, para. 71 and C II, para. 38(b).



Affiliates (at the time only CDJ and CMU, since CET would be acquired in 2007).<sup>163</sup>

236. Four months after Mr. Maldonado's application, Ingeominas issued on 2 March 2007 a technical report concluding that the 3ha Contract would partially overlap with other nearby concessions and that it was too small for a stand-alone mining operation.<sup>164</sup> A week thereafter, on 17 March 2007, Ingeominas formally rejected Mr. Maldonado's application for the 3ha Contract.<sup>165</sup>
237. In January 2008, after Glencore's acquisition of CET, the Prodeco Affiliates submitted an agreement for the integrated use of mining infrastructure (*Acuerdo de Uso Integrado de Infraestructura Minera*) to Ingeominas, in order to conduct joint operations in the mining areas of the La Jagua project [**"Integrated Use Agreement"**].<sup>166</sup> Ingeominas approved this Agreement on 28 January 2008.<sup>167</sup>
238. On 10 March 2008, the Prodeco Affiliates submitted to Ingeominas a formal opposition to the 3ha Contract, requesting that Ingeominas:<sup>168</sup>
- Correct the errors in the coordinates of the titles granted to the Prodeco Affiliates, which had created the three-hectare gap; or
  - Alternatively, reject the request for the 3ha Contract, because it would be technically impractical to exploit such a small area.

Ingeominas backtracks and awards the 3ha Contract

239. In June 2008, Ingeominas backtracked on its original decision, finding that the 3ha Contract area did not overlap with other mining concessions, and rejecting the objections of the Prodeco Affiliates.<sup>169</sup> In July 2008, the Prodeco Affiliates filed a request for reconsideration,<sup>170</sup> which Ingeominas rejected on 19 August 2008.<sup>171</sup>

**B. August 2008 - November 2008: Prodeco Complains to Authorities**

240. Prodeco was now faced with the situation that Ingeominas was about to grant the 3ha Contract to Mr. Maldonado and his partner – a concession which threatened to disrupt the development of the La Jagua mine. In this situation, Prodeco decided to complain in writing to various Colombian authorities – including the *Ministro de Presidencia*.

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<sup>163</sup> Doc. R-90, p. 6. See also R I, para. 69 and C II, para. 38(b).

<sup>164</sup> Doc. C-199, pp. 1-2. See also R I, para. 72 and C II, para. 38(c).

<sup>165</sup> Doc. C-200. See also R I, para. 72 and C II, para. 38(c).

<sup>166</sup> Doc. C-234.

<sup>167</sup> Doc. C-202, p. 2, para. 11.

<sup>168</sup> Doc. C-202, pp. 3-4.

<sup>169</sup> Doc. C-206. See also R I, para. 73 and C II, para. 38(j).

<sup>170</sup> Doc. C-207.

<sup>171</sup> Doc. C-208.

241. First, on 26 August 2008, Ms. Margarita Zuleta, a lawyer acting on behalf of the Prodeco Affiliates, filed a formal complaint regarding the anomalies surrounding the 3ha Contract with Colombia's *Procurador General de la Nación*.<sup>172</sup> Ms. Zuleta also forwarded this complaint to the *Ministro de Minas y Energía*, to the *Ministro de la Presidencia*, to Mr. Ballesteros (Ingeominas' General Director), and to the *Contraloría*,<sup>173</sup> the Republic's supervisory agency.
242. Second, on 22 September 2008, Ms. Zuleta approached the *Procurador General* again, saying that Ingeominas' rejection of the Prodeco Affiliates' request for reconsideration constituted a violation of due process and of the applicable mining provisions. Ms. Zuleta emphasised that the *Procurador General* should investigate the fact that the 3ha Contract had been awarded to an ex-employee of the agency, since there had been clear irregularities and an undue use of insider information.<sup>174</sup> This letter was, once again, forwarded to the *Ministro de Minas y Energía*, to the *Ministro de la Presidencia*, and to the *Contraloría*.<sup>175</sup>
243. Third, on 6 October 2008, the Prodeco Affiliates sent a complaint to Mr. Ballesteros and Mr. Edward Franco (with a copy to the *Procurador General*, the *Ministro de Minas y Energía*, the *Ministro de la Presidencia* and the *Contraloría*), asking Ingeominas to review the 3ha Contract and to refrain from granting, or at least from registering, the 3ha Contract.<sup>176</sup>
244. Fourth, on 10 October 2008, the Prodeco Affiliates asked the *Jefe del Registro Minero Nacional* (with a copy to the *Procurador General*, the *Contraloría*, the *Ministro de Minas y Energía* and the *Ministro de la Presidencia*) to refrain from registering the 3ha Contract, claiming that he had a duty to defend the national interest.<sup>177</sup>

#### Execution of the 3ha Contract

245. Notwithstanding the Prodeco Affiliates' appeals and complaints, on 16 October 2008, Ingeominas (represented by Mr. Franco Gamboa) and Mr. Maldonado and his partner executed the 3ha Contract, and the latter thus became owners of the 3ha mining concession.<sup>178</sup>
246. Prodeco quickly reacted: on 21 November 2008, Ms. Zuleta asked Ingeominas' *Coordinador del Grupo de Control Interno Disciplinario* to open a disciplinary investigation against the employees involved in awarding the 3ha Contract (with a copy to the *Procurador General*, the *Ministro de Minas y Energía*, the *Ministro de Presidencia*, the *Director del Programa Presidencial de Lucha contra la*

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<sup>172</sup> Doc. C-209.

<sup>173</sup> Doc. C-210.

<sup>174</sup> Doc. C-211.

<sup>175</sup> Doc. C-211, "C.c. Doctor Julio Cesar Turbay Quintero – Contralor General de la República; Doctor Hernán Martínez – Ministro de Minas y Energía; Doctora Cecilia Álvarez – Ministro de la Presidencia".

<sup>176</sup> Doc. C-212, pp. 1 and 5.

<sup>177</sup> Doc. C-213.

<sup>178</sup> Doc. C-214.

*Corrupción*, and the *Contraloría*).<sup>179</sup> And in February 2009 Prodeco's external counsel filed a citizen's suit (*acción popular*) against Ingeominas and Messrs. Maldonado and García based on the irregularities surrounding the 3ha Contract.<sup>180</sup>

**C. May 2009: CDJ Buys the 3ha Contract**

247. In the meantime, in December 2008, Messrs. Maldonado and García approached Prodeco through an intermediary, offering to sell the 3ha Contract for USD 11 M.<sup>181</sup>
248. At the end of March 2009,<sup>182</sup> the Prodeco Affiliates made a last complaint to the *Ministro de Presidencia* about the irregularities surrounding the 3ha Contract. Prodeco warned that the lack of a solution to the 3ha Contract situation would leave Prodeco with no option other than to engage in direct negotiations with Messrs. Maldonado and García.<sup>183</sup>
249. Once again faced with the silence and inaction of the Colombian authorities, Prodeco decided to pursue the option of buying the 3ha Contract from Messrs. Maldonado and García.
250. The transaction took place on 4 May 2009:<sup>184</sup> Ms. Elsa Aragón Barrera, acting on behalf and in representation of Mr. Maldonado, and Mr. García signed an agreement assigning the 3ha Contract to CDJ, one of the Prodeco Affiliates, which paid USD 1.75 M as consideration [the "**Assignment Contract**"].<sup>185</sup>

**Approval by Ingeominas**

251. Prodeco and Messrs. Maldonado and García submitted the Assignment Contract to Ingeominas for approval.<sup>186</sup> In that version of the Contract, the price paid was unspecified:<sup>187</sup>

3. <b>Precio y Forma de Pago.</b> El CESIONARIO deberá pagar al CEDENTE la suma de US\$xxxx pagaderos en pesos colombianos a la tasa representativa del mercado vigente el día del pago. Este pago deberá hacerse el día hábil siguiente a aquel en el cual la cesión del CONTRATO sea inscrita en el Registro Minero y en consecuencia haya constancia de que el CONTRATO está en cabeza del CESIONARIO.
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<sup>179</sup> Doc. C-239. See also Doc. C-222, p. 14.

<sup>180</sup> Doc. C-215.

<sup>181</sup> Doc. R-280, pp. 1 and 2: "He told me that the US \$10 for ton was a starting point, but that price could be negotiated" and "Gary, total coal tones are 1'114.000 aprox.". The value of multiplying 1.14 MT by USD 10/tonne, would amount to approximately USD 11 million (See Nagle III, para. 6).

<sup>182</sup> The letter erroneously reads 31 March 2008. There is no doubt that it is from 2009, since it describes facts which are posterior to 31 March 2008 (Doc. C-300).

<sup>183</sup> Doc. C-300, p. 4.

<sup>184</sup> The assignment contract is erroneously dated 4 May 2008 (Doc. C-301). There is no doubt that it is actually dated May 2009, as also proved by the draft submitted to Ingeominas for approval (Doc. R-95).

<sup>185</sup> Doc. C-301. See also Nagle II, para. 22; Paredes I, para. 17.

<sup>186</sup> Doc. R-94.

<sup>187</sup> Doc. R-95.

252. Ingeominas approved the Assignment Contract on 8 May 2009, and the transaction was registered on 27 May 2009.<sup>188</sup>

Payment of the purchase price

253. The Assignment Contract provided that CDJ should make the payments due in Colombian Pesos, in two designated accounts opened in two Colombian banks (*Banco Davivienda* and *Banco Occidente*):<sup>189</sup>

- 3.1 La suma de cien mil dólares de los Estados Unidos (US\$100.000) pagadera en pesos colombianos liquidados a la tasa representativa del mercado del día del pago, el día hábil siguiente a aquel en el cual el Anexo 2 sea entregado y debidamente radicado en INGEOMINAS. Esta valor será depositado de la siguiente manera (i) la suma de cincuenta mil dólares (US\$50.000) será depositado en la cuenta de ahorros 006301113939 del Banco Davivienda cuyo titular es Elsa Marina Aragón y (ii) la suma de cincuenta mil dólares (US\$50.000) será depositado en la cuenta de ahorros del Banco de Occidente 235-828118 cuyo titular es Germán Vargas Navarrete ✓
- 3.2 La suma de un millón seiscientos cincuenta mil dólares de los Estados Unidos (US\$1.650.000), pagadera en pesos colombianos liquidados a la tasa representativa del mercado del día del pago, el día hábil siguiente a aquel en el cual la cesión del CONTRATO sea inscrita en el Registro Minero y en consecuencia haya constancia de que el CONTRATO está en cabeza del CESIONARIO. Este valor será depositado de la siguiente manera (i) la suma de ochocientos veinticinco mil dólares de los Estados Unidos (US\$825.000) será depositado en la cuenta de ahorros 006301113939 del Banco Davivienda cuyo titular es Elsa Marina Aragón y (ii) la suma de ochocientos veinticinco mil dólares de los Estados Unidos (US\$825.000) será depositado en la cuenta de ahorros del Banco de Occidente 235-828118 cuyo titular es Germán Vargas Navarrete.

254. CDJ made the payments by transferring funds to the accounts located in Colombia and identified in the Contract, as evidenced by these transfer receipts:<sup>190</sup>

<sup>188</sup> Doc. R-97. See also R I, para. 80 and C II, para. 38(p).

<sup>189</sup> Doc. C-301, pp. 1-2.

<sup>190</sup> Docs. C-303, C-307 and C-308. See also Doc. R-281; Doc. R-322.





CERTIFICADO ANUAL DE RETENCION EN LA FUENTE		
CARBONES DE LA JAGUA S.A.	NIT. 802.024.439-2	
CARRERA 54 No. 72 - 80 PISO 4. BARRANQUILLA		
C E R T I F I C A M O S		
Que durante el año gravable de 2009 practicamos retención en la fuente		
a :		
MALDONADO MESTRE JORGE ISAAC	con C.C. o N.I.T.	19,205,602
Por concepto de	Base Gravable	Valor Retenido
COMPRAS	1935961,750.00	67758,661.00

256. The transaction was also reflected in CDJ's audited financial statements of February 2010.<sup>192</sup> On 1 February 2010, CDJ informed Ingeominas that it had acquired the 3ha Contract from Messrs. Maldonado and García, this time disclosing the consideration of USD 1.75 M.<sup>193</sup>

19205602	MALDONADO MESTRE JORGE ISAAC	1.935.961.750.00	899.067.36	La Jagua	Concesión tierras
31147808	ARAGON BARRERA ELSA MARINA	1.935.961.750.00	899.067.36	La Jagua	Concesión tierras

#### D. May 2011: Further Developments

257. There is evidence that even after the Assignment Contract had been executed, Prodeco continued to complain about the irregular character of the grant of the three-hectare concession to Messrs. Maldonado and García.
258. Mr. Paredes, Respondent's witness in this arbitration, who replaced Mr. Ballesteros as *Director General* of Ingeominas, recalls that Dra. Zuleta personally raised the issue with him.<sup>194</sup>
259. In a press conference of May 2011, the newly, appointed *Ministro de Minas y Energía*, Mr. Carlos Rodado, acknowledged the irregularities behind the 3ha Contract.<sup>195</sup> In June 2011, Mr. Rodado asked the *Procuraduría General de la Nación*, the *Contraloría*, and the *Fiscalía General de la Nación* to start formal investigations into irregularities within Ingeominas.<sup>196</sup>

#### (4) THE EIGHTH AMENDMENT: NEGOTIATIONS

260. *Pro memoria*: while the facts concerning the 3ha Contract were developing, Prodeco was involved in a dispute with Ingeominas, regarding the proper interpretation of the term "Definitive Price" as used in the Mining Contract.
261. The dispute, which had arisen in 2008, had escalated because Prodeco had unilaterally applied its own interpretation, and had failed to pay to Ingeominas an amount of more than USD 6 M. Ingeominas had reacted by requiring Prodeco to

<sup>192</sup> Doc. C-313, pp. 5-6.

<sup>193</sup> Doc. C-312, p. 2. The stated amount in USD (899,067.36) is slightly higher than USD 875,000 (*i.e.* USD 1.75 m divided by two) due to exchange rates.

<sup>194</sup> Paredes I, para. 17.

<sup>195</sup> Doc. R-237, video of the press conference, min. 00:00-02:42.

<sup>196</sup> Doc. R-245, Doc. R-246; Doc. R-247.

pay within one month *bajo apremio de caducidad*, and had rejected Prodeco's conciliatory proposal of depositing the disputed amounts in an escrow account.

**A. May 2009: The Commitment to Negotiate**

262. The negotiations between Prodeco and Ingeominas continued, and on 21 May 2009 (a few days after CDJ's purchase of the 3ha Contract from Mr. Maldonado), both parties finally executed an *Acuerdo de Compromiso* [**"Commitment to Negotiate"**], in an attempt to solve their dispute.

**B. June – November 2009: Negotiations**

263. Once the Commitment to Negotiate was signed, Ingeominas and Prodeco started formal negotiations. The negotiation period was extended three times, in September, October, and November 2009, before finally expiring on 9 December 2009.<sup>197</sup>

264. The negotiations revolved around two main issues:

- The general compensation scheme that would be applied under the Mining Contract [**"Compensation Scheme"**];
- The coal price to be used for calculating the compensation [**"Coal Reference Price"**].

**a. The Meeting of the *Consejo Directivo* of 1 June 2009**

265. On 1 June 2009, Mr. Ballesteros, Ingeominas' *Director General*, informed its *Consejo Directivo* of the latest developments in the Prodeco negotiation: he explained that Ingeominas had notified Prodeco that it was in contractual breach, and that Prodeco had offered to pay USD 6 M into an escrow account while discussions were pending. He added that Ingeominas had rejected this proposal, and in order to move forward, Ingeominas and Prodeco had executed a document, in which Prodeco agreed to pay the disputed sum by 4 June 2009. The *Ministro de Minas*, Mr. Hernán Martínez Torres, then stated that holders of mining titles must comply with the terms of their concession agreements, and that it was Ingeominas' task to guarantee that this happened.<sup>198</sup>

**b. Negotiations Start**

266. On 3 June 2009, Prodeco made the agreed payment of more than USD 6 M, and consequently the 90-day negotiation period started to run.<sup>199</sup> Ingeominas scheduled

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<sup>197</sup> Doc. C-99; Doc. C-105; Doc. C-109.

<sup>198</sup> Doc. R-101, p. 3.

<sup>199</sup> Doc. R-109.

a kick-off meeting for 12 June 2009 and sent a letter to Prodeco in preparation for that meeting.<sup>200</sup>

267. The kick-off meeting took place on 12 June 2009. Prodeco submitted an extensive PowerPoint presentation explaining its position.<sup>201</sup> Claimants proposed to replace the existing Compensation Scheme (Royalties and GIC) with a single flat royalty rate based on Prodeco's actual sale prices. According to Prodeco, this modification would ultimately generate higher revenues for the State, without impairing the net present value ["NPV"] of the project for Claimants.<sup>202</sup>
268. In response, on 23 June 2009, Ingeominas requested that Prodeco provide a numerical, detailed and concrete proposal of the requested changes to the Compensation Scheme, and the analyses, valuations and commitments with respect to future investments, expansion, and production.<sup>203</sup>
269. Prodeco presented its proposal at a meeting scheduled for 2 July 2009.<sup>204</sup> Prodeco used a PowerPoint presentation,<sup>205</sup> in which it offered a single compensation payment of 10% based on the higher of:
- the actual coal sales price, and
  - USD 42.43 per tonne (which was the base price of the 2006 PTI).
270. According to Prodeco, the proposal, by guaranteeing a minimum price per tonne, shielded Ingeominas from the risk of potential decreases in coal prices. In a letter sent two days thereafter, Prodeco again represented to Ingeominas that the proposal would permit a further expansion of the Mine and would also be advantageous for Ingeominas and for the Nation.<sup>206</sup>
271. On 13 July 2009, Ingeominas acknowledged receipt and declared that it was evaluating Prodeco's proposal "*bajo la salva guarda [sic] de los intereses de la Nación y por ende de todos los Colombianos*".<sup>207</sup>

**c. The Meeting of the *Consejo Directivo* of 27 July 2009**

272. On 27 July 2009, Adolfo Enrique Alvarez González, Technical Director of Ingeominas briefly informed its *Consejo Directivo* that it was studying a review of the remuneration owed under the Prodeco Mining Contract.<sup>208</sup>

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<sup>200</sup> Doc. R-110.

<sup>201</sup> Doc. C-93; Doc. R-111 (contains a full resolution version of the PowerPoint presentation, in which it is possible to read on the first page "*Junio 12, 2009*").

<sup>202</sup> Doc. C-93, pp. 26-29.

<sup>203</sup> Doc. R-112 / BR-5, p. 1.

<sup>204</sup> Doc. R-114.

<sup>205</sup> Doc. C-95.

<sup>206</sup> Doc. R-115.

<sup>207</sup> Doc. R-116.

<sup>208</sup> Doc. C-252, p. 4.



273. It is noteworthy that the minutes of the meeting do not properly reflect the scope of the negotiations. The Tribunal considers it established that in fact Prodeco and Ingeominas were discussing not only the Coal Reference Price, but a much wider range of topics affecting the Compensation Scheme.

**d. Continuation of the Negotiations**

274. The next meeting took place on 31 July 2009.<sup>209</sup> Mr. Gary Nagle [**“Mr. Nagle”**], Prodeco’s Chief Executive Officer at the time,<sup>210</sup> has testified as his recollection of the topics that were discussed at that meeting: Ingeominas had in the meantime analysed the proposal submitted by Prodeco, and accepted the application of a flat rate, albeit at a higher rate of 13%, with the possibility of increasing it to 15% if prices rose and Prodeco made windfall profits.<sup>211</sup>
275. Since Mr. Nagle’s “main takeaway” from the meeting was that Ingeominas expected an improved offer, on 10 August 2009, Prodeco submitted a revised proposal.
276. On 27 August 2009, Ingeominas replied to Prodeco’s revised proposal. Ingeominas explained that its officials were assessing Prodeco’s revised proposal and hoped to come back with a response at the following meeting.<sup>212</sup>
277. Prodeco answered on 1 September 2009, explaining that its improved offer was simply aimed at reflecting the parties’ latest discussions. Prodeco declared that it was open to discussing Ingeominas’ proposals at the following meeting, which should also address the fact that the Commitment to Negotiate was about to expire.<sup>213</sup>
278. As foreseen by Prodeco, the 90-day agreed period for negotiations expired, and on 3 September 2009, Ingeominas officially notified Prodeco that it would resort to mediation, as envisaged in the Commitment to Negotiate.<sup>214</sup> But on that same day Prodeco and Ingeominas reached an agreement to extend the negotiation period until 30 October 2009, and no mediation was initiated.<sup>215</sup>
279. On 1 October 2009, the *Consejo Directivo* met again. The minutes show that the Prodeco negotiation was discussed in detail, and that Ingeominas’ letter dated 23 September 2009 had in fact been issued at the suggestion of the *Consejeros*.<sup>216</sup>

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<sup>209</sup> Doc. R-118. This meeting was initially programmed for 22 July 2009, but it was postponed by Ingeominas (Doc. R-117).

<sup>210</sup> Mr. Nagle served as Prodeco’s CEO from January 2008 to April 2013 (Nagle I, para. 3), after which he was replaced by Mr. Mark McManus [**“Mr. McManus”**] (McManus I, para. 5).

<sup>211</sup> Nagle I, para. 60.

<sup>212</sup> Doc. C-97, p. 3.

<sup>213</sup> Doc. R-124.

<sup>214</sup> Doc. C-98.

<sup>215</sup> Doc. C-99.

<sup>216</sup> Doc. R-129, p. 3.

**e. Prodeco Submits an NPV Model**

280. Ingeominas and Prodeco held a further meeting on 5 October 2009,<sup>217</sup> and a few days thereafter, on 9 October, Prodeco submitted a new letter, with additional explanations.<sup>218</sup>
281. Prodeco started by justifying why, under the existing Compensation Scheme, it was not economically feasible to expand the Mine, in terms of NPV. Applying the then current system, the maximum NPV was achieved at 8 MTA, and for higher production, the NPV started to decrease, as a result of the progressive Compensation Scheme agreed upon in the Mining Contract.<sup>219</sup> Prodeco thus averred that beyond 8 MTA it would be uneconomical further to increase the capacity of the Mine.
282. In the letter, Prodeco then submitted its alternative proposal, which it said had been discussed at the meeting with Ingeominas held on 5 October.
283. Under this proposal, the then current Compensation Scheme would be retained for production up to 8 MTA; but for higher production a unified compensation rate of 13% would be applied.
284. In that case an annual production of 15 MTA would become economical, even if the increase in production required a capital investment of USD 1.6 Bn. Prodeco would be prepared to assume such investment, since the NPV of the project increased to slightly more than USD 200 M. And Ingeominas would also benefit: the NPV of its take would increase to USD 600 M (again at 12% discount rate).<sup>220</sup>

Analysis by Ingeominas

285. Ingeominas asked two of its officers – Mr. Giovanni Balcerro and Ms. Luz Mireya Gómez, to analyse Prodeco’s latest proposal.
286. Mr. Balcerro and Ms. Gómez prepared a three-page memorandum, dated 20 October 2009, which reached the following conclusions:<sup>221</sup>
- NPV was a proper financial tool to evaluate long term investment projects; if the NPV was higher than the required investment, the investment was feasible;
  - The model submitted by Prodeco had a positive NPV for annual production between 8 and 15 MTA and consequently a project foreseeing production in that range would be financially viable;
  - Certain aspects of Prodeco’s model required further clarification;

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<sup>217</sup> Doc. R-130, p. 3. See also Nagle I, para. 66.

<sup>218</sup> Doc. C-102.

<sup>219</sup> Doc. C-102, p. 1.

<sup>220</sup> Doc. C-102, p. 2.

<sup>221</sup> Doc. R-134; Doc. R-135.

- Prodeco should submit a sensitivity analysis to confirm the financial viability of the project.
287. The report did not address Prodeco's argument that the NPV of the project was maximized at a production of 8 MTA, and that for higher production (which required higher investments) the NPV decreased – and that for Prodeco the best alternative, with the existing Compensation Scheme, was to limit production at 8 MTA.
288. On 26 October 2009, Ms. Gómez met with Mr. Johnny Campo, Prodeco's Projects Financial Analyst, to discuss her memorandum. On that same day, as requested, Mr. Campo sent to Mr. Balceró of Ingeominas a sensitivity analysis,<sup>222</sup> reflecting the impact of the variation of certain factors (discount rate, coal prices, labour costs, fuel costs, explosive costs) on the NPV of the project at different production levels,<sup>223</sup> supporting the conclusion that “*a partir de 8Mtpy la expansión es inviable ya que el VPN del proyecto se reduce a partir de este nivel de producción*”.
289. Thereafter, officers from Prodeco and Ingeominas met several times and jointly ran different sensitivity models.<sup>224</sup>

**f. The Meeting of the *Consejo Directivo* of 26 October 2009**

290. On 26 October 2009, Ingeominas' *Consejo Directivo* held a meeting, at which Prodeco's proposal was discussed. Ms. Luz Aristizábal, an officer of Ingeominas, who would later be involved in the *Contraloría* proceeding, submitted a report and gave a detailed explanation of the ongoing negotiations between Prodeco and Ingeominas. In essence,<sup>225</sup>
- She acknowledged that under the existing Compensation Scheme an expansion of the mine beyond 8 MTA was not viable, because if production was geared up to (say) 12 MTA the Base Royalty of 7.6% would increase by an Additional Royalty of 9%, making the expansion not feasible;
  - She proposed a new deal, whereby the percentage of Royalties should progressively increase, until the Mine reached its optimum production level; if production exceeded that level, the percentage of Royalties should remain fixed;
  - She added that if this amendment were not accepted, the Nation would lose the additional royalties deriving from the expansion of the Mine;
  - Finally, she discussed various alternative methods of calculating the Coal Reference Price on which the Royalties were to be applied.

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<sup>222</sup> Doc. R-134; Doc. C-103.

<sup>223</sup> Doc. C-103. See also Nagle II, para. 58; Brattle I, para. 39.

<sup>224</sup> Doc. C-103; Doc. C-134, pp. 5-6.

<sup>225</sup> Doc. R-138.

291. The *Ministro de Minas y Energía*, who was present at the meeting, suggested using the price of sale to the final consumer, instead of indexes, as the Coal Reference Price for the calculation of royalties. He further questioned why some projects applied a royalty rate based on FOB Prices, while others used pithead prices. The Minister concluded that there was a need to conduct a comparative analysis of prices and levels of production for each contract of *Gran Minería*.<sup>226</sup>

**g. Second Extension of the Commitment to Negotiate**

292. On 29 October 2009, Prodeco and Ingeominas agreed to a new extension of the Commitment to Negotiate until 30 November 2009.<sup>227</sup>

Additional NPV Information

293. On that same day, Prodeco's Mr. Campo sent further information to Ingeominas' official Mr. Balcerio, at the latter's request. The information took the form of a graph indicating the impact of an expansion of the project on its NPV.<sup>228</sup> The graph confirms that the NPV is maximized at a production of 8 MTA, and that at higher production rates expenses rise faster than income, resulting in lower NPVs.

Prodeco's Revised Proposal

294. On 4 November 2009, Prodeco presented yet another revised proposal to Ingeominas, on the basis of the information and projections reviewed jointly by Ingeominas and Prodeco.<sup>229</sup>
295. On 11 November 2009, Prodeco submitted two proposed *formulae* to calculate the GIC payments. Prodeco also drew Ingeominas' attention to the fact that it had been almost six months since the execution of the Commitment to Negotiate, and that despite Prodeco's repeated proposals, Ingeominas had not yet presented any counter-proposals.<sup>230</sup>

The Meeting of 17 November 2009

296. Prodeco and Ingeominas representatives met again on 17 November 2009 and Ingeominas provided Prodeco with some feedback:<sup>231</sup>
- Ingeominas recognised the need to update the GIC threshold;
  - But insisted on using the ICR index as the Coal Reference Price to calculate Royalties and GIC – a point which Prodeco accepted;

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<sup>226</sup> Doc. C-104, pp. 3-4. See also Doc. R-138, with Ingeominas' presentation to the *Consejo Directivo*.

<sup>227</sup> Doc. C-105.

<sup>228</sup> Doc. C-255.

<sup>229</sup> Doc. C-106. See also Nagle I, para. 70 and Brattle I, para. 40.

<sup>230</sup> Doc. C-107.

<sup>231</sup> Doc. R-145. See also Nagle I, para. 71.

- It proposed that a flat 12.6% royalty rate apply to all production when production exceeded 8 MTA.

#### Further Analyses

297. On 25 November 2009, Prodeco's Mr. Campo sent Ingeominas two charts showing the impact of Ingeominas' proposals on NPV.

#### **h. The Meeting of the *Consejo Directivo* of 23 November 2009**

298. Ingeominas held a further meeting of its *Consejo Directivo* on 23 November 2009. Ms. Aristizábal again made a presentation to the *Consejo*<sup>232</sup> and summarized the status of the negotiations with Prodeco:

- Ingeominas was proposing to keep the present Compensation Scheme for production of up to 8 MTA and to apply a fixed rate of 12.6% for production above that threshold;
- Ingeominas acknowledged that the costs on which the GIC was based had to be updated, to take into account inflation; there was however no agreement on the identification of the proper indexes.<sup>233</sup>

299. The Directors did not express any opposition to these proposals; they simply asked to be kept informed of the progress in the negotiations.<sup>234</sup>

#### **i. Third Extension of the Commitment to Negotiate**

300. On 27 November 2009, Prodeco and Ingeominas executed a third, and last, extension of the Commitment to Negotiate, until 9 December 2009.<sup>235</sup>

### **(5) THE EIGHTH AMENDMENT: EXECUTION**

#### **A. December 2009: Execution of the Initial Version**

301. The negotiations continued at a meeting held on 3 December 2009. In the course of that meeting, agreement seemed within reach. Prodeco accepted Ingeominas' proposals:<sup>236</sup>

- A 12.6% flat royalty rate would apply on all production in excess of 8 MTA;
- The ICR reference prices should be weighted to determine a Coal Reference Price to calculate Royalties and GIC;

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<sup>232</sup> Doc. R-145.

<sup>233</sup> Doc. R-146, p. 3.

<sup>234</sup> Doc. R-146, p. 3.

<sup>235</sup> Doc. C-109.

<sup>236</sup> Nagle I, para. 74.

- The GIC tables should be indexed to the Colombian consumer price index and not to international indexes;
  - Prodeco's proposal that GIC payments be due only where production costs exceed 75% of sales prices was rejected.
302. Having apparently reached an accord, on 9 December 2009 – the last day of validity of the Commitment to Negotiate – Prodeco and Ingeominas met and executed an eighth amendment to the Mining Contract [**“Initial Version of the Eighth Amendment”**], which:<sup>237</sup>
- Maintained the existing Compensation Scheme for production volumes up to 8 MTA;
  - Established a 12.6% flat royalty rate on all coal produced in excess of 8 MTA, applied on the FOB reference price at the Colombian port;
  - Determined that the FOB reference price was to be calculated applying a formula which consisted of the weighted average of ICR prices in force 3, 6, 9, 12, 15, and 18 months before the date of each shipment (the so-called lags), adjusted by calorific power;
  - Set a table with updated thresholds to calculate GIC payments based on the FOB reference prices; these thresholds would be updated according to Colombian inflation.
303. The Initial Version of the Eighth Amendment also provided that Prodeco had to pay approximately USD 20.8 M to Ingeominas, to settle outstanding payments derived from the Definitive Price provision, but that such payment should not be understood as Prodeco's acknowledgement of Ingeominas' interpretation.<sup>238</sup>
304. The Initial Version would enter into force upon its registration at the National Mining Registry, and would be deemed to take effect on 1 January 2010.<sup>239</sup>
305. Prodeco and Ingeominas initialled and signed three copies of the Initial Version of the Eighth Amendment.<sup>240</sup> Mr. Ballesteros requested, however, that Prodeco leave its signed copy with Ingeominas, so that, as a courtesy, he could explain the contents of the agreement at the *Consejo Directivo* meeting scheduled for the following day, and Prodeco complied with that request.<sup>241</sup>

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<sup>237</sup> Doc. C-111.

<sup>238</sup> Doc. C-111, Clause Seventh.

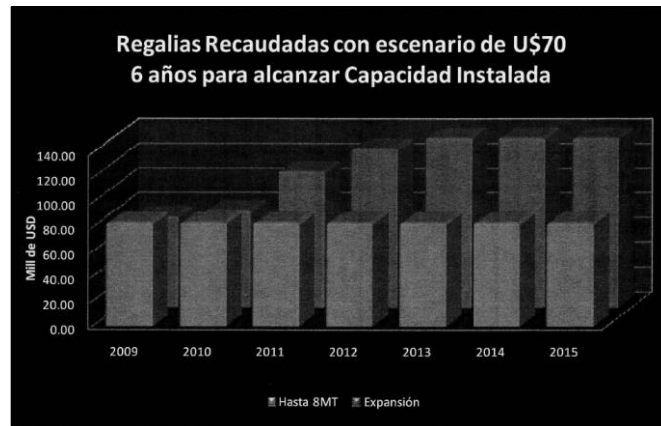
<sup>239</sup> Doc. C-111, Clauses Ninth and Tenth.

<sup>240</sup> Doc. C-111 shows the initials and signatures; the document shows a stamp saying “*Sin vigencia por falta de inscripción en el Registro Minero al considerarse lesivo para el Estado*”.

<sup>241</sup> Doc. C-112. See also Nagle I, para. 78.

**B. The Meeting of the *Consejo Directivo* of 10 December 2009**

306. On 10 December 2009, Ingeominas held a meeting of its *Consejo Directivo*,<sup>242</sup> and Ms. Aristizábal again appeared and submitted a report summarizing the terms of the Initial Version of the Eighth Amendment.<sup>243</sup> She attached a chart, which compared the level of Royalties in an 8 MTA and in an expansion scenario, assuming a USD 70 coal price:<sup>244</sup>



307. In accordance with this chart, in the 8 MTA scenario the Royalties collected by Ingeominas would remain stable at USD 80 M per year between 2009 and 2015. In the alternative expansion scenario, applying the new Royalties foreseen in the Initial Version of the Eighth Amendment, Ingeominas' income would dip in 2009 (to approximately USD 70 M) and in 2010 (to approximately USD 75 M), but would then rise to USD 105 M in 2011 and to more than USD 120 M in 2012-2015.
308. It is unclear what exactly happened next at the meeting of the *Consejo Directivo*.
309. Minister Hernán Martínez Torres has testified in the *Contraloría* proceeding that he disagreed with the signed Initial Version of the Eighth Amendment, that he asked that his disagreement be included in the minutes of the meeting, and that it was agreed to create a task force to analyse whether the changes were in the interest of the Nation.<sup>245</sup> The official minutes simply say that the Minister and the remaining members requested that the issue be re-examined with more detail taking into account the national interest.<sup>246</sup>
310. Summing up, what seems to have happened is that, although legally speaking the authorization of the *Consejo Directivo* was not necessary for the execution of an amendment to the Mining Contract, Director Ballesteros did not feel comfortable going forward without the support of his Board, and consequently agreed to review

<sup>242</sup> Doc. R-150.

<sup>243</sup> Doc. R-149.

<sup>244</sup> Doc. R-149, p. 5.

<sup>245</sup> Doc. C-157; Doc. R-81, p. 1.

<sup>246</sup> Doc. R-150, p. 3.



the Initial Version of the Eighth Amendment, to satisfy the Board that the amendment was in the best interest of the Nation.

**C. December 2009: Ingeominas Denies Registration at the Mining Registry**

311. Faced with Ingeominas' silence for a week, on 16 December 2009 Prodeco sent a letter demanding that Ingeominas return Prodeco's signed copy of the Initial Version of the Eighth Amendment.<sup>247</sup>
312. Ingeominas replied to Prodeco on 21 December 2009, saying that, in coordination with the *Ministro de Minas y Energía*, Ingeominas was making a final review of the Initial Version of the Eighth Amendment. Ingeominas noted that the *Consejo Directivo* was the entity in charge of running and managing Ingeominas, and of defining its policies, plans and programs, together with the *Director General*. Hence, Ingeominas informed that it would communicate its decision regarding the Initial Version of the Eighth Amendment in the second half of January 2010.<sup>248</sup>
313. On 30 December 2009, Prodeco paid Ingeominas USD 20.8 M, as required under the Initial Version of the Eighth Amendment.<sup>249</sup> A few days later, Prodeco once again requested its signed copy of the Initial Version of the Eighth Amendment.<sup>250</sup>
314. On 18 January 2010, Ingeominas finally delivered to Prodeco a signed copy of the Initial Version of the Eighth Amendment, but with multiple stamps stating:<sup>251</sup>
- “SIN VIGENCIA POR FALTA DE INSCRIPCIÓN EN EL REGISTRO  
MINERO NACIONAL AL CONSIDERARSE LESIVO PARA EL ESTADO”.*
315. In the cover letter, Ingeominas explained that the Initial Version of the Eighth Amendment was contrary to the interests of the Nation and that registration at the Mining Registry had been denied.<sup>252</sup>
316. Ingeominas added that it would promptly reimburse Prodeco the USD 20.8 M already paid.
317. Finally, Ingeominas invited Prodeco to an immediate and joint review of the pending aspects of the negotiations.<sup>253</sup>

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<sup>247</sup> Doc. C-112.

<sup>248</sup> Doc. C-113.

<sup>249</sup> Doc. R-15.

<sup>250</sup> Doc. R-18; Doc. R-19.

<sup>251</sup> Doc. C-115. See also Doc. R-17, with an internal memorandum of Ingeominas dated 14 January 2010.

<sup>252</sup> Doc. C-115, p. 1.

<sup>253</sup> Doc. C-115, p. 2.

**D. January 2010: Execution of the Eighth Amendment**

318. Upon receipt of Ingeominas' letter dated 18 January 2010, negotiations between the parties resumed.
319. Ingeominas suggested minor adjustments to the royalty scheme. Namely, Ingeominas proposed maintaining the existing Royalty rate up to 8 MTA (*i.e.*, a maximum flat 12.6% rate at 8 MTA), but that each additional MTA be subject to an additional 1% rate (*i.e.* the 9<sup>th</sup> MTA only would be subject to a 13.6% royalty rate, the 10<sup>th</sup> MTA only to a 14.6% royalty rate, and so on).<sup>254</sup>
320. Prodeco acquiesced to Ingeominas' proposed modifications.<sup>255</sup>
321. Hence, four days later, on 22 January 2010, Prodeco and Ingeominas executed the final version of the Eighth Amendment,<sup>256</sup> which was registered with the National Mining Registry three days later.
322. The Parties agree that, save for the change to the new Royalty schedule suggested by Ingeominas, the Initial and final versions of the Eighth Amendment are practically identical.<sup>257</sup>

**E. Content of the Eighth Amendment**

323. The Eighth Amendment changed the Compensation Scheme and the Coal Reference Price.

**Considerandos**

324. The Eighth Amendment starts with six extensive *Considerandos*.
325. *Considerando 3* explains that on 21 May 2009 Prodeco and Ingeominas signed the Commitment to Negotiate regarding the Definitive Price dispute and “*otros temas mencionados en dicho acuerdo de compromiso*”.
326. *Considerando 5* then describes the negotiations which took place and itemises the five areas where agreement had been reached:<sup>258</sup>
- The first agreement was the decision not to change the Compensation Scheme in the Mining Contract for production, up to 8 MTA;
  - The second was to establish a limit on the percentage of Royalties to be applied for production above 8 MTA “*de manera que sea factible la expansión del proyecto*”;

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<sup>254</sup> Nagle I, para. 81.

<sup>255</sup> Nagle I, para. 81.

<sup>256</sup> Doc. C-15.

<sup>257</sup> Nagle I, para. 82; Brattle I, para. 43.

<sup>258</sup> Doc. C-15, p. 1.

- The third was to update the values used to calculate GIC payments;
- The fourth was to clarify the formula used in the determination of the Additional Royalty;
- And the fifth was to determine the Coal Reference Price using ICR, with a formula to introduce time lags reflecting Prodeco's actual sales price.

327. The final *Considerando* sets out the goals of the Eighth Amendment:<sup>259</sup>

*“6. Que con el presente acuerdo se garantizan los intereses del Estado y la viabilidad de la expansión del proyecto minero, lo cual ha sido el fundamento de la negociación entre las partes”.*

Clauses<sup>260</sup>

328. **Clause 1** of the Eighth Amendment modifies clause 14.1 of the Mining Contract regarding the calculation of Royalties.

329. Under the Eighth Amendment, Prodeco undertakes to pay a Base Royalty of 7.6% for production up to 3 MTA, and an Additional Royalty of 1% for every 1 MTA increase in production, up to 8 MTA (*i.e.* 12.6%), on the totality of the coal sold.<sup>261</sup> This was the scheme originally agreed upon in the Mining Contract.

330. Once production exceeds 8 MTA, the Additional Royalty ceases to be levied on all the annual production. Instead, the 1% incremental royalty is applied only to the incremental MTA of production:

- an additional 1% for production between 8 and 9 MTA,
- an additional 2% for production between 9 and 10 MTA,
- an additional 3% for production between 10 and 11 MTA, and so on.

331. This means that if total production is 9 MTA, a 12.6% royalty rate applies to the first 8 MTA and a 13.6% royalty rate applies to the 9<sup>th</sup> MTA only.

332. Although the parties did not establish a limit on production, no production beyond 15 MTA was envisaged.

333. In addition, the Eighth Amendment also slightly modifies the provision of clause 14.1 related to the royalties applicable to the coal sold in the Colombian national market.

334. **Clause 2** of the Eighth Amendment modifies clause 14.2 of the Mining Contract. It provides that the Base Royalty shall be paid monthly, within ten days of the end of

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<sup>259</sup> Doc. C-15, p. 2.

<sup>260</sup> Doc. C-15, pp. 2-9.

<sup>261</sup> Doc. C-15, new Clause 14.1.

the month, at the applicable exchange rate. As to the Additional Royalty, applicable when production exceeds both 3 MTA and 8 MTA, it shall be paid annually, within one month of the end of each year.

335. **Clause 3** modifies clause 14.3 of the Mining Contract, which relates to the Coal Reference Price for the payment of royalties.
336. *Pro memoria*: The Seventh Amendment had established that if the coal exported by Prodeco came exclusively from the Mine, the Coal Reference Price for payment of Royalties and GIC would be the higher of (i) the FOB Colombian port price for Colombian steam coal for the respective week as published in the ICR, adjusted for calorific value [defined as the “FOB Price”], and (ii) the actual sale price.<sup>262</sup>
337. The Eighth Amendment introduces two relevant changes:
- First, it does away with the “higher of”; consequently the Coal Reference Price is based only on the FOB Price in Colombian Port;
  - Second, it creates a new formula, which introduces a time lag; in essence the formula takes into account the FOB Prices in the 18 months preceding the calculation date, weighted by Prodeco’s sales in the respective periods, on the basis of annual weighing coefficients, established *ex ante* (before 15 January of each year) by an independent auditor appointed by Ingeominas on 31 October of each year; these same coefficients are then also used to correct the compensation paid in the year in question.

#### Transition Period

338. Under the new pricing formula, on each given date the Coal Reference Price is established by taking in consideration not only the FOB Price on such date, but also the FOB Prices which were applicable in the previous 18 months. This system of calculation creates a difficulty: how to calculate the weighing coefficient for the first year of application of the Eighth Amendment? Indeed, no independent auditor had yet been appointed who could have established the coefficients *ex ante*.
339. Just as in the Initial Version, the Eighth Amendment came up with a solution called the *período de transición* [“**Transition Period**”]: during the first year of application of the Eighth Amendment, the weighing coefficients were already set by Prodeco and Ingeominas at 0.333. These coefficients were to be applied to the FOB Price which was applicable three, six, and nine months before each determination date.
340. This transitory regime was to be applied in the period between 1 January 2010 and 31 December 2010; for this reason, this period was defined as the Transition Period.

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<sup>262</sup> Doc. C-9, Annex 9A.

341. As will be explained below, the Transition Period would become highly relevant, because in the *Contraloría's* Fiscal Liability Proceeding the damage caused to the State is calculated using the Transition Period as the yardstick.
342. **Clause 4** modifies clause 14.4 of the Mining Contract and defines the information regarding the payment of royalties that Prodeco has to provide to Ingeominas on a monthly basis.
343. **Clause 5** modifies clause 43 of the Third Amendment to the Mining Contract, and eliminates Annexes 9 and 9A, which had been included in the Mining Contract by virtue of the Sixth Amendment.
344. **Clause 6** modifies clauses 15.1.1 of the Mining Contract:
- Clause 15.1.1 establishes new FOB price thresholds to calculate the GIC payments, as follows:

A Precio FOB US\$/t	B Precio Base US\$/t	C % Aplicable a diferencia	D Monto Fijo US\$/t
59.94 ≤ FOB < 67.43	59.94	1.0%	\$0.00
67.43 ≤ FOB < 74.93	67.43	1.5%	\$0.10
74.93 ≤ FOB < 82.42	74.93	7.5%	\$0.25
82.42 ≤ FOB < 89.91	82.42	11.0%	\$0.55
FOB > 89.91	89.91	12.5%	\$1.05

- Clause 15.1.2 provides that Prodeco and Ingeominas agree that these thresholds shall be adjusted quarterly by indexing to the Colombian consumer price index, as published by the DANE, the Colombian State entity in charge of statistics;<sup>263</sup> even though the GIC thresholds are expressed in USD;<sup>264</sup>
  - Clause 15.1.3 establishes that the GIC shall be paid quarterly, within ten days of the end of the quarter;
  - Clause 15.4 determines that the GIC shall be paid on the basis of the Coal Reference Price set out in the new clause 14.3.
345. Pursuant to **Clause 7**, Prodeco agrees to pay approximately USD 20.8 M<sup>265</sup> to Ingeominas to settle the outstanding amounts resulting from Ingeominas' interpretation of the Definitive Price term – without agreeing to such interpretation.
346. In turn, in **Clause 8**, Ingeominas declares that:<sup>266</sup>

*“Habida cuenta que con los acuerdos consagrados en los numerales anteriores se soluciona y por ende deja de existir la controversia que dio origen a la suscripción del Acuerdo de Compromiso y del presente otrosí, y*

<sup>263</sup> Doc. C-15, new Clause 15.1.2.

<sup>264</sup> It seems that Prodeco and Ingeominas were not able to find another suitable index (see Doc. C-132, p. 6; Doc. C-133, p. 2).

<sup>265</sup> USD 9,713,947.49 and USD 11,085,718.06.

<sup>266</sup> Doc. C-15, p. 9.

*teniendo en cuenta que EL CONTRATISTA pagará las sumas indicadas en la cláusula anterior, la AUTORIDAD MINERA declara subsanada cualquier causal de aplicación de multas, caducidad o cualquier otra medida sobre la liquidación de contraprestaciones económicas por razón de dicha controversia*". [Emphasis added]

347. **Clause 9** provides that the Eighth Amendment shall be deemed to have entered into effect on 1 January 2010.
348. In **Clause 10**, Prodeco and Ingeominas undertake to review the Coal Reference Price formula within a year, to consider applying the API2-BC17 indexes.
349. Finally, **Clause 11** determines that the Eighth Amendment shall enter into force upon its registration at the National Mining Registry.
350. The Eighth Amendment was duly registered in the Mining Registry on 25 January 2010,<sup>267</sup> and consequently entered into force on that date, with retroactive effects as of 1 January.

**F. The Meeting of the *Consejo Directivo* of 26 January 2010**

351. On 26 January 2010, Ingeominas again held a meeting of its *Consejo Directivo*. This time it was Mr. Ballesteros himself who informed the board members that the Eighth Amendment had been signed "*teniendo en cuenta las sugerencias emitidas por ellos en consejos anteriores*". He then provided detailed information on the agreed changes.<sup>268</sup>

**G. January 2010: The Viability Study**

352. At some point in January 2010, Ingeominas prepared a study of the "*Viabilidad para la suscripción del Otrosí No. 8 modificadorio del Contrato 044-89*" [the "**Viability Study**"], which summarized the arguments which Ingeominas had taken into consideration when negotiating with Prodeco.<sup>269</sup>
353. The 8-page document was signed by Ms. Luz Aristizábal, Ms. Luz Mireya Gómez, Ms. Melida Cabezas and Mr. Giovanni Balcer and was dated "*el mes de enero de 2010*".<sup>270</sup> It is likely that the Viability Study was signed after the execution of the Eighth Amendment.

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<sup>267</sup> Nagle I, para. 83.

<sup>268</sup> Doc. C-257, pp. 4-5.

<sup>269</sup> Doc. R-13.

<sup>270</sup> Doc. R-13, p. 8.

354. The main conclusion of the Viability Study is the following:<sup>271</sup>

*“Con la suscripción del otrosí descrito, se garantizan los intereses del Estado y la viabilidad de la expansión del proyecto minero, lo cual ha sido el fundamento de la negociación entre las partes”*. [Emphasis added]

355. And this conclusion is explained thus:<sup>272</sup>

*“La razón de ser de la negociación dentro del Contrato 044-89 con PRODECO S.A, en términos prácticos radica en que de no negociar con el titular minero, la interpretación de algunas de las cláusulas contractuales que se relacionan con las modificaciones por ellos solicitadas, se asumiría un alto riesgo en donde la Nación podría perder cuantiosas sumas de dinero, frente a posibles litigios que se adelantarán ante la justicia contenciosa administrativa, por la falta de toma de decisiones en el presente caso, con lo cual de no llegarse a un acuerdo, además se impediría el desarrollo probable de una expansión minera que traería consigo desarrollo económico y social para el país y sus diferentes regiones, sin dejar de lado las obras de infraestructura que sin ella se dejarían de realizar”*. [Emphasis added]

356. The Viability Study explained that Prodeco had asked to review, *inter alia*, the following elements of the Mining Contract:

- the price index for compensation,
- FOB price vs. pithead prices,
- the Additional Royalty, and
- GIC.

The Viability Study acknowledged that Prodeco had presented several proposals and summarized these proposals in broad terms. The Viability Study also noted that the clauses of mining contracts could be freely negotiated between the mining authority and the contractor.<sup>273</sup>

357. The Viability Study found that the negotiations with Prodeco had the following benefits for the State:<sup>274</sup>

- The clause regarding the Additional Royalty, which could give rise to a legal dispute, was no longer ambiguous: it was now clear that from 3 to 8 MTA, the Additional Royalty was applicable to all the coal sold and that the Coal Reference Price for the calculation of the Additional Royalty was not the price of the invoices;

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<sup>271</sup> Doc. R-13, p. 2.

<sup>272</sup> Doc. R-13, p. 3.

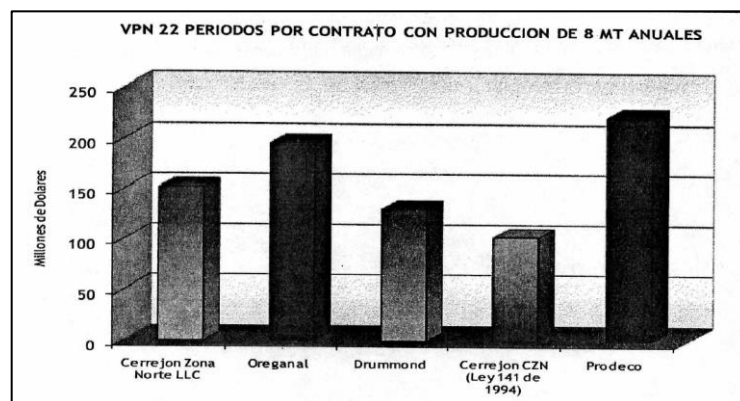
<sup>273</sup> Doc. R-13, pp. 2-4.

<sup>274</sup> Doc. R-13, pp. 4-5.



- For production in excess of 8 MTA, the increase in Royalties was capped, but such limitation was necessary to guarantee the expansion of the Calenturitas Mine and, consequently, the economic development of the region;
- The GIC thresholds had to be updated to take into consideration inflation, since production costs exceeded USD 42 per tonne of coal, surpassing the GIC threshold; the threshold had to be indexed towards the future, and for this purpose, after extensive analysis, the Colombian consumer price index was selected;
- Any doubts regarding the Coal Reference Price for the payment of Royalties and GIC were cleared up; the new Coal Reference Price was now based on the ICR index.

358. The Viability Study also explained that Ingeominas had compared all the mining projects with production exceeding 8 MTA in the past 22 months and had found that Prodeco would always generate more revenues for the State than other projects. The Study contained the following chart in support of this finding:<sup>275</sup>



## (6) PERFORMANCE OF THE EIGHTH AMENDMENT

### A. February 2010: Payment Under the Eighth Amendment

359. On 16 February 2010, Prodeco for the second time paid to Ingeominas USD 20.8 M, as required by the Eighth Amendment (the first payment due under the Initial Version of the Eighth Amendment had in the meantime been returned by Ingeominas).<sup>276</sup>

### B. March 2010: Glencore Repurchases Prodeco

360. In March 2010, Glencore exercised its call option and repurchased Prodeco from Xstrata.<sup>277</sup>

<sup>275</sup> Doc. R-13, p. 7.

<sup>276</sup> Doc. C-116.

<sup>277</sup> Doc. R-77, p. 62; Doc. R-78.

**C. June 2010: The 2010 PTI**

361. In the meantime, Prodeco was preparing an updated long-term PTI, which was due in May 2009,<sup>278</sup> but had been delayed due to the negotiations between the Parties.<sup>279</sup>

**The 2006 PTI**

362. *Pro memoria*: The 2006 PTI had been prepared before execution of the Seventh Amendment (which extended the life of the Mining Contract until 2035)<sup>280</sup> and of the Eighth Amendment (which changed the Compensation Scheme). The exploration in Sectors B and D of the Mine and the diversion of the Calenturitas River also took place after 2006.<sup>281</sup>
363. In the 2006 PTI Prodeco had planned to expand the Mine's total coal production to 116 MT. Annual production would gradually increase from 4.4 MTA in 2007 to 10 MTA from 2010 through 2019.<sup>282</sup>
364. The 2006 PTI also foresaw an investment of USD 500.1 M in the period 2007-2010 (broken down as USD 196.4 M for equipment, USD 114.6 M for railway, USD 85.2 M for infrastructure and USD 103.9 M for port and sundry investments).
365. By 2010, these investments had mostly been carried out: the stock of investment had increased between 2006 and 2010 from USD 162.5 M<sup>283</sup> to USD 644.2 M,<sup>284</sup> *i.e.* by USD 481.7 M.

**The 2010 PTI**

366. In June 2010, Prodeco delivered to Ingeominas an updated long-term PTI [the "**2010 PTI**"],<sup>285</sup> pursuant to which it expected to achieve the following objectives:
367. Annual production: Annual production would reach 6.4 MTA in 2010, rise to 7.6 MTA in 2011 (2006 PTI: 4.4 MTA), and progressively increase until reaching a maximum of 14.2 MTA in 2019 (2006 PTI: 10 MTA), and then progressively decrease until 2032 (2006 PTI: no production after 2019).<sup>286</sup>
368. Mine-life production: Prodeco expected to produce approximately 254 MT of coal from 2010 through 2032<sup>287</sup> (more than doubling the 2006 PTI estimation of 116 MT between 2007 and 2019).

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<sup>278</sup> See section **III.(2).D** *supra*.

<sup>279</sup> Doc. R-25, p. 3.

<sup>280</sup> See sections **III.(1).F** and **III.(1).G** *supra*.

<sup>281</sup> Doc. C-117 / CLEX-28, pp. 52-53.

<sup>282</sup> See section **III.(1).F** *supra*.

<sup>283</sup> Doc. C-78, p. 174.

<sup>284</sup> Doc. C-117, p. 195.

<sup>285</sup> Doc. C-117.

<sup>286</sup> Doc. C-117, pp. 59, 61 and 199.

<sup>287</sup> Doc. C-117, p. 61.

369. Investment 2010-2015: USD 654 M was to be invested in the development of the Mine, including in railway and port infrastructure, in the five-year period<sup>288</sup> between 2011 and 2015<sup>289</sup> (2006 PTI: USD 684.4 M spread-out over the 13-year period 2007-2020).<sup>290</sup>
370. Mine-life investment: USD 1,477 M<sup>291</sup> (2006 PTI: USD 1,184 M).<sup>292</sup>
371. Net present value: the Mine offered a NPV of USD 116 M (2006 PTI: USD 98 M) (both at a 15% discount rate), assuming costs of USD 47.26 per tonne (2006 PTI: USD 24.79) and a coal price of USD 55 per tonne<sup>293</sup> (2006 PTI: USD 42.58).
372. Mine-life Royalties: estimated at USD 1,782 M<sup>294</sup> (2006 PTI: 671 M).
373. The 2010 PTI was approved by Ingeominas on 6 December 2010, after asking Prodeco to make minor modifications.<sup>295</sup>

**D. 2010-2015: Promised Investments**

374. As enshrined in its preamble, the Eighth Amendment had two main goals:
- To guarantee that the Mine expansion was viable, and
  - To maximize the income for the State.
375. The Preamble expresses this idea with the following words:<sup>296</sup>
- “[...] con el presente acuerdo se garantizan los intereses del Estado y la viabilidad de la expansión del proyecto minero, lo cual ha sido el fundamento de la negociación entre las partes”.* [Emphasis added]
376. In other words: under the Eighth Amendment, Prodeco accepted the commitment to carry out significant investments in the Mine and to expand its production capabilities; the increased production would generate additional Royalties, with the end result that Colombia would receive a higher revenue.
377. As Mr. Nagle said in his testimony, the investments and production levels projected in the 2010 PTI were “negotiation commitment(s)” that “led to them [Ingeominas]

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<sup>288</sup> The 2010 PTI is not very clear as to the initial date of the five-year period; the PTI, proposed in June 2010 and approved in December 2010, simply says that the amounts are to be invested “*en los próximos 5 años*” (p. 191). The Tribunal assumes this to mean in the period 2011 through 2015.

<sup>289</sup> Doc. C-117, pp. 173 and 176.

<sup>290</sup> Doc. C-78, p. 173.

<sup>291</sup> Doc. C-117, p. 191.

<sup>292</sup> Doc. C-78, p. 173.

<sup>293</sup> Doc. C-117, pp. 191 and 204.

<sup>294</sup> Doc. C-117, p. 200.

<sup>295</sup> Doc. C-122.

<sup>296</sup> Doc. C-15, *Considerando* 6.

agreeing and us [Prodeco] agreeing to this *Otrosí*’.<sup>297</sup> And Minister Martínez Torres confirmed that through the Eighth Amendment, Prodeco committed to increase production beyond 8 MTA.<sup>298</sup>

378. What were the concrete levels of investment and production promised by Prodeco?
379. The quantified objectives were not set forth in the Eighth Amendment, but rather in the 2010 PTI – a semi-contractual document proposed by Prodeco and approved by Ingeominas in June 2010.
380. According to the 2010 PTI, Prodeco undertook to invest USD 654 M in the five-year period 2011 through 2015, broken down in:<sup>299</sup>
- USD 243 M for mining equipment,
  - USD 7.6 M for railways,
  - USD 40 M for infrastructure,
  - USD 301 M for port, and
  - USD 62.4 for sundry investments.
381. Claimants say that in fact they invested much higher amounts: USD 465 M in 2011, USD 300 M in 2012, USD 75 M in 2013 and USD 45 M in 2014,<sup>300</sup> totaling USD 885 M. These figures are not challenged by Respondent.<sup>301</sup> Prodeco consequently invested in the period 2011-2014 some USD 231 M more than anticipated in 2010.

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<sup>297</sup> HT, Day 3, (Mr. Nagle’s deposition), p. 875, l. 22 – p. 876, l. 2.

<sup>298</sup> HT, Day 4, p. 1129, l. 5 – p. 1130, l. 7.

<sup>299</sup> Doc. C-117, p. 194.

<sup>300</sup> McManus I, fn. 18.

<sup>301</sup> R II, para. 211.

382. The Tribunal concludes that Prodeco indeed complied with its investment commitments under the Eighth Amendment and the 2010 PTI.

### **E. 2010-2018: Coal Production and Royalties**

383. Under the 2010 PTI the production of the Mine for the years 2010-2018 was planned to reach certain levels; in reality, production was for most of the years lower:<sup>302</sup>

Year	2006 PTI (MTA)	2010 PTI (MTA)	Actual production (MTA)	Royalties paid (including GIC) (COP Million)	FX Rate (Avg)	Royalties paid (including GIC) (USD Million)
	[1]	[2]	[3]	[4]	[5]	[6]
2006	-	-	2.9	22,638	2,359	9.6
2007	4.4	-	3.2	37,215	2,076	17.9
2008	4.2	-	4.7	100,329	1,967	51.0
2009	8.0	-	5.7	140,698	2,153	65.3
2010	10.0	6.4	5.2	63,391	1,899	33.4
2011	10.0	7.6	7.6	135,571	1,847	73.4
2012	10.0	11.5	10.2	250,819	1,798	139.5
2013	10.0	11.5	11.6	236,466	1,869	126.5
2014	10.0	12.5	12.6	230,769	2,000	115.4
2015	10.0	13.8	11.0	223,052	2,743	81.3
2016	10.0	13.8	11.1	225,327	3,051	73.9
2017	10.0	13.8	9.8	248,513	2,951	84.2
2018	10.0	13.8	7	216,127	3,216	67.2
<b>TOTAL</b>	<b>106.6</b>	<b>104.7</b>	<b>102.5</b>	<b>2,113,464</b>	<b>n.a.</b>	<b>938.6</b>

Sources on the record for years 2006-2017:

[1] 2006 PTI: CLEX-23 - C.I. Prodeco S.A., Proyecto Calenturitas, Contrato No. 044-89, Programa de Trabajos e Inversiones (PTI), Version Revisada, November 2006, p. 36 (p. 54/176 of pdf)

[2] 2010 PTI: C-0117 - 2010 PTI, p. 43 (p. 61/204 of pdf)

[3] Production: CLEX-31 - Calenturitas Coal Production from 2004 to 2015.pdf (2006-2015); CLEX-79 - 2016 B1 Opex Statement.pdf (2016); CLEX-88 - 2017 Calenturitas Cost Data.pdf (2017)

[4] Royalties (COP): CLEX-40 - C.I. Prodeco S.A. Annual Financial Data (2006-2014); CLEX-100 - Updated C.I. Prodeco S.A. Annual Financial Data (2006-2014)

[5] FX rate: CLEX-57 - Spiller and Dellepiane Retroactive Royalty Model (FX Rate Tab, annual average)

[6] Royalties (USD): [5] / [4]

Figures for 2018 have been provided by C.I. Prodeco S.A. based on data submitted to the Colombian authorities. There are no sources on the record for this data. If Colombia questions any of the figures above, Claimants can, with the Tribunal's leave, provide additional supporting documents.

### **Coal production**

384. Actual production for the period 2010-2018 was thus only 86.1 MT, while the 2010 PTI had foreseen production of more than 100 MT.

385. One reason for this decrease in production is that in 2016 Prodeco performed a geological reappraisal of the Mine, with negative results. In accordance with the

<sup>302</sup> Table of actual production and royalties paid between 2006 and 2017, sent by Claimants on 14 March 2019.

new studies, the available reserves had to be reduced from 254 MT (the amount foreseen in the 2010 PTI) to 170 MT. This reduction in available coal was reflected in the 2016 PTI, which was approved by Ingeominas.<sup>303</sup>

386. Production in 2015 and 2016 was also disincentivized by very low international prices for coal, and the years 2016 and 2017 turned out to be extremely wet, thus impairing mining activities.<sup>304</sup>

#### Royalties

387. Royalties paid in the period 2006-2018 amounted to USD 938.6 M, more than half of the total estimated in the 2010 PTI for the period 2010-2035 (USD 1.782 M)<sup>305</sup> but largely surpassing the 2006 PTI estimation for the period 2006-2019 (USD 671 M).<sup>306</sup>

### **(7) THE FISCAL LIABILITY PROCEEDING**

388. The *Contraloría* is an autonomous agency of the Colombian State, entrusted with the supervision and control of the use of public funds.<sup>307</sup> The main task of the agency is to establish what the law calls “*responsabilidad fiscal*”, i.e. the responsibility of civil servants and private individuals for the mismanagement of public funds or assets.<sup>308</sup>
389. Fiscal responsibility is established through an administrative procedure, which is initiated, conducted, and decided by the *Contraloría* itself.
390. Ms. Soraya Vargas, who acted as *Contralora Delegada Intersectorial de Regalías adscrita a la Unidad de Investigaciones Especiales contra la Corrupción* from 2013 to 2016<sup>309</sup> and approved the *Contraloría*’s Decision, has provided the following diagram, explaining how a preliminary investigation and a fiscal liability proceeding unfold:<sup>310</sup>

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<sup>303</sup> HT, Day 6, (Prof. Spiller’s deposition), p. 1441, l. 17 – p. 1442, l. 21. See also Compass Lexecon II, paras. 62-63.

<sup>304</sup> Doc. CLEX-84, pp. 6-7; Doc. CLEX-5, pp. 7-8; Doc. CLEX-59, pp. 18-20; Doc. H 5, slide 14; Compass Lexecon II, para. 61; HT, Day 6, (Prof. Spiller’s deposition), p. 1435, l. 20 – p. 1442, l. 20.

<sup>305</sup> Doc. C-117, p. 200.

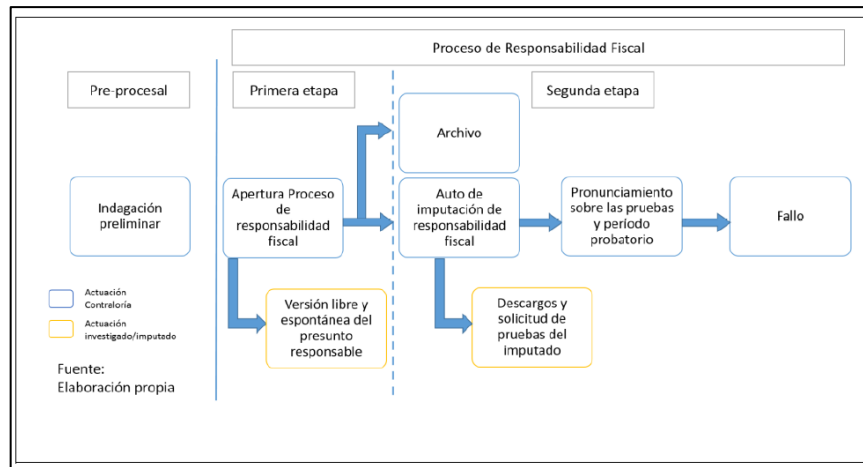
<sup>306</sup> Doc. C-78, p. 177.

<sup>307</sup> Doc. C-68, Art. 267: “*El control fiscal es una función pública que ejercerá la Contraloría General de la República, la cual vigila la gestión fiscal de la administración y de los particulares o entidades que manejen fondos o bienes de la Nación*”.

<sup>308</sup> Doc. C-71, Art. 1. Art. 268(5) of the *Constitución Política* provides that the *Contralor General de la República* is competent to “*establecer la responsabilidad que se derive de la gestión fiscal, imponer las sanciones pecuniarias que sean del caso, recaudar su monto y ejercer la jurisdicción coactiva sobre los alcances deducidos de la misma*” (Doc. C-68).

<sup>309</sup> Doc. R-26. See also Vargas I, para. 9.

<sup>310</sup> Vargas I, para. 21.



391. This fiscal liability proceeding may be preceded by a preliminary investigation (*indagación preliminar*), although this is not mandatory.<sup>311</sup> The proceedings are divided into two phases: the first one is preceded by a formal decision (“*decision de apertura*”) and requires that the allegedly responsible civil servants or private persons be heard. Thereafter the *Contraloría* may decide to close the file, or to issue an “*Auto de imputación*” against certain persons. In the second phase evidence is marshalled, leading to the *fallo*, either absolving or declaring the fiscal liability of those imputed and ordering those found responsible to indemnify the Republic for the damage caused to it.

#### Nature of the Proceso de Responsabilidad Fiscal

392. The *Proceso de Responsabilidad Fiscal* is a purely administrative and inquisitorial procedure, in which the *Contraloría* investigates the facts and then issues a decision (*fallo*). The *Contraloría* itself has described it in the following words:<sup>312</sup>

“[...] *el proceso de responsabilidad fiscal es un procedimiento administrativo de carácter patrimonial que persigue la reparación de un daño causado al patrimonio del Estado por un servidor público o un particular en ejercicio de gestión fiscal o con ocasión de esta como consecuencia de una conducta dolosa o gravemente culposa*”.

393. An important trait of the *Proceso de Responsabilidad Fiscal* is that the *Contraloría* acts simultaneously as prosecutor and as judge *vis-à-vis* the civil servant or private individual who is being investigated. In one of its decisions, the *Contraloría* has acknowledged this fact and has provided the following description of how the *Proceso* develops:<sup>313</sup>

<sup>311</sup> Doc. C-71, Art. 39: “*Si no existe certeza sobre la ocurrencia del hecho, la causación del daño patrimonial con ocasión de su acaecimiento, la entidad afectada y la determinación de los presuntos responsables, podrá ordenarse indagación preliminar por un término máximo de seis (6) meses, al cabo de los cuales solamente procederá el archivo de las diligencias o la apertura del proceso de responsabilidad fiscal*”.

<sup>312</sup> Doc. C-32, p. 113.

<sup>313</sup> Doc. C-26, p. 8.



“[...] en el proceso de responsabilidad fiscal no opera el concepto de partes que aparece cabalmente diseñado en el proceso judicial, en el cual existe un juez, que es el encargado de dirimir la controversia, y unas partes con intereses opuestos. En la actuación administrativa, la administración funge como juez y como parte frente a un administrado que es el sujeto que puede resultar afectado con la decisión que se adopte dentro de la respectiva actuación”. [Emphasis added]

394. Notwithstanding the fact that this is an administrative procedure, the law authorizes the *Contraloría* to order the preliminary attachment of assets belonging to the civil servant or private person under investigation (without requiring judicial approval).<sup>314</sup>
395. The *Proceso* will eventually lead to a decision (*fallo*), in which the *Contraloría* (by itself, and without the participation of a judge) decides whether the indicted person is to be absolved or to be found guilty. In this latter situation, the *fallo* will order the person declared *fiscalmente responsable* immediately to pay the amount required to compensate the Republic for the damage it suffered.<sup>315</sup>
396. It is important to bear in mind that the *fallo* is an administrative act, taken by a civil servant. As the *Contraloría* acknowledged in one of its decisions:<sup>316</sup>

“[...] ni el Contralor General de la República, ni los contralores delegados intersectoriales administran justicia en nombre de la República de Colombia, no ejercen funciones jurisdiccionales, esto es, no son jueces, y los procesos de responsabilidad fiscal se adelantan en ejercicio de sus funciones de control [...]”.

397. After its issuance by the *Contralor Delegado* (and its appeal to the *Contralor General*)<sup>317</sup> the *fallo* becomes final. If the civil servant or particular that has been found laible disagrees with the *Contraloría*'s findings, the *fallo* may then be challenged before the Colombian Courts through a *procedimiento contencioso administrativo*,<sup>318</sup> but this review of the *fallo* by the Colombian Courts occurs *ex post*.

#### **A. The Preliminary Investigation**

398. A few months after the execution of the Eighth Amendment, a scandal erupted concerning allegedly corrupt practices in Ingeominas.<sup>319</sup>
399. In light of the scandal, but also of audits which the *Contraloría* had been conducting in Ingeominas,<sup>320</sup> on 8 October 2010, the newly appointed *Contralora General de*

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<sup>314</sup> Doc. C-71, Art.12.

<sup>315</sup> Doc. C-71, Arts. 53 and 54.

<sup>316</sup> Doc. C-35, p. 35.

<sup>317</sup> Doc. C-71, Art. 64.

<sup>318</sup> Doc. C-71, Art. 59.

<sup>319</sup> Paredes I, para. 26. See also Doc. R-42; Doc. R-170.

<sup>320</sup> Doc. R-28, p. 2.

la República, Ms. Sandra Morelli, decided to constitute an *Equipo Especial de Reacción Inmediata* [**“Immediate Reaction Team”**], with the goal of:<sup>321</sup>

“[...] analizar la situación que comporta un especial interés nacional y que eventualmente podría comprometer el patrimonio público del Estado en lo referente a las presuntas irregularidades en el manejo contractual que INGEOMINAS le ha dado a los contratos con la Sociedad CERRO MATOSO S.A., Sociedad DRUMMOND y Sociedad C.I PRODECO S.A.”.

400. Consequently, on 19 October 2010, the *Contraloría* opened an *indagación preliminar* into Ingeominas [**“Preliminary Investigation”**].<sup>322</sup> The Investigation would start with a visit to the offices of Ingeominas, to examine all the documents related to the contracts of Cerro Matoso and Drummond (also suspected mining companies), and of Prodeco.<sup>323</sup>
401. On 20 October 2010, the Immediate Reaction Team visited the offices of Ingeominas and asked for the files regarding Drummond, Cerro Matoso, and Prodeco, and particularly documents post-dating 2006.<sup>324</sup> Ingeominas delivered a series of documents, as requested.<sup>325</sup>
402. On 27 October 2010, the *Contraloría* interviewed two Ingeominas officers who had been involved in the negotiations of the Eighth Amendment, Ms. Luz Aristizábal and Mr. Giovanni Balcero.<sup>326</sup> *Pro memoria*, these individuals had signed the Viability Study; Ms. Aristizábal had been in charge of making presentations to Ingeominas’ *Consejo Directivo*, and Mr. Balcero had prepared a memorandum in October 2009 regarding Prodeco’s NPV.
403. Over the following months, Ingeominas replied to several requests for information from the Immediate Reaction Team.<sup>327</sup>
404. In March 2011, the Immediate Reaction Team finalized its report,<sup>328</sup> which was divided into three sub-reports, for each of the mining projects. Ms. Johanna Tovar Silva was in charge of the report on Prodeco [the **“Tovar Silva Report”**].<sup>329</sup>
405. The Tovar Silva Report recounted the history of the Mining Contract and the amendments thereto. It also summarized the negotiations between Prodeco and Ingeominas regarding the Eighth Amendment.

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<sup>321</sup> Doc. C-118 / R-27. See also Vargas I, paras. 34-37.

<sup>322</sup> Doc. C-120.

<sup>323</sup> Doc. C-120, Second Resolution, p. 6.

<sup>324</sup> Doc. R-30, p. 1.

<sup>325</sup> Doc. R-167.

<sup>326</sup> Doc. C-121. See also C I, para. 74 and R I, para. 232.

<sup>327</sup> Doc. C-124; Doc. C-125.

<sup>328</sup> Doc. R-32.

<sup>329</sup> Doc. C-125.

406. The Tovar Silva Report concluded that:

- Prodeco had not marshalled evidence proving that the mining project would be unviable without the Eighth Amendment;<sup>330</sup>
- There had been no juridical, technical, or financial reasons to modify the economic conditions of the Mining Contract;
- Ingeominas had failed to properly analyse the impact of the Eighth Amendment;<sup>331</sup>
- The modifications to the compensation scheme under the Eighth Amendment were detrimental for Colombia, since in 2010 Colombia had received less revenues than it would have received under the previous compensation scheme.

407. The Tovar Silva Report based its finding on the so-called Transition Period contemplated in the Eighth Amendment, which was the period between 1 January and 31 December 2010.

408. Ms. Tovar Silva's analysis draws attention to one of the main issues confronted in the *Contraloría's* analysis: how to calculate the damage caused in a long-term contract. As Ms. Tovar Silva explains, in this type of contract there is a possibility that losses in one year are offset by gains in succeeding years – thus making the calculation of the damage caused more uncertain. To resolve this difficulty, Ms. Tovar Silva decided to focus on the one-year “*período de transición*” foreseen in the Eighth Amendment, which in her opinion “*se ha consolidado plenamente*”, and then to calculate the damage as the loss of income suffered by the Republic in that period – disregarding all possible events in subsequent years.

409. Prodeco would not be notified of the Tovar Silva Report until August 2012<sup>332</sup> (more than a year later).

**B. The *Contraloría* Initiates the Fiscal Liability Proceeding**

410. On 10 May 2011, the *Contraloría* closed the Preliminary Investigation<sup>333</sup> and decided to start Fiscal Liability Proceeding against:<sup>334</sup>

- Prodeco, and
- Mr. José Fernando Ceballos, Ingeominas' *Director del Servicio Minero*, who had signed the Eighth Amendment on behalf of Ingeominas.

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<sup>330</sup> Doc. C-125, p. 21.

<sup>331</sup> Doc. C-125, p. 22.

<sup>332</sup> Doc. C-146, p. 4.

<sup>333</sup> Doc. R-36. The *Contraloría* officially closed the visits to Ingeominas' facilities on 14 April 2011 (Doc. R-31).

<sup>334</sup> Doc. C-17.

411. The *Contraloría* based this decision on the conclusions of the Tovar Silva Report.<sup>335</sup> The *Contraloría* found that all the audited mining contracts (including those of Drummond and Cerro Matoso) contained irregularities, but that only Prodeco's contract had actually caused damage to the State's finances and could give rise to fiscal responsibility.<sup>336</sup>
412. The Proceedings sought to collect COP 51.35 billion (approximately USD 29 M at the exchange rate of the time),<sup>337</sup> which was calculated as the difference between the Royalties and GIC that Prodeco would have paid during the Transition Period under the old regime, and those actually paid under the Eighth Amendment.<sup>338</sup>
413. The *Contraloría* explained that it was pursuing Mr. Ceballos because Ingeominas was in charge of collecting royalties and compensation, which, according to the Colombian *Constitución Política*, are resources of the State.<sup>339</sup>
414. The *Contraloría* also found that it could pursue Prodeco for two reasons:<sup>340</sup>
- Because Prodeco was the “*orientador*” of the Eighth Amendment, and
  - Because it provided information to Ingeominas, which Ingeominas used in its “*evaluación técnica y económica*”.
415. According to the *Contraloría*, Prodeco was not simply a third party, whose actions were limited to paying compensation to Ingeominas; on the contrary, Prodeco had a close and necessary relation with Ingeominas' fiscal management and hence should be made responsible through the Fiscal Liability Proceeding.<sup>341</sup>
416. A few days later, Prodeco was notified of the start of the Fiscal Liability Proceeding.<sup>342</sup>

### **C. Depositions**

417. Because the *Contraloría* must ensure due process rights in its Fiscal Liability Proceeding, including *inter alia* the right to present a defence and to be heard,<sup>343</sup> the *Contraloría* called Mr. Ceballos and a representative of Prodeco to depose.

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<sup>335</sup> Doc. C-17, pp. 13 *et seq.*

<sup>336</sup> Doc. C-17, pp. 8 and 43.

<sup>337</sup> C I, para. 79.

<sup>338</sup> Doc. C-17, p. 41: “[...] *de no haberse modificado la fórmula para el cálculo y de la compensación por ingresos brutos y la del cálculo de regalías, el Estado habría recibido –tan solo en el período de transición– la suma de \$51.353.629.267,07, valor que para efectos del Proceso de Responsabilidad Fiscal, se entiende como la cuantía estimada del daño*”. See also Doc. C-17, p. 38.

<sup>339</sup> Doc. C-17, p. 11.

<sup>340</sup> Doc. C-17, pp. 41-42.

<sup>341</sup> Doc. C-17, pp. 42-43.

<sup>342</sup> Doc. C-127. Ingeominas was also notified of the start of the Fiscal Liability Proceeding (Doc. R-51).

<sup>343</sup> Doc. C-71, Art. 2: “*En el ejercicio de la acción de responsabilidad fiscal se garantizará el debido proceso y su trámite se adelantará con sujeción a los principios establecidos en los artículos 29 y 209 de*

418. On 9 June 2011, Mr. Ceballos declared to the *Contraloría* that:<sup>344</sup>

- He had worked as *Director del Servicio Minero* from November 2009 to August 2010 and by the time he joined the process, Prodeco and Ingeominas had already conducted extensive negotiations (*pro memoria*, the Commitment to Negotiate was signed in May 2009 and the Eighth Amendment in January 2010);
- Both Mr. Ballesteros and the *Consejo Directivo*, including the *Ministro de Minas y Energía*, had always been informed about Prodeco's proposals and the analyses that were being conducted;
- The employees of the *Subdirección de Fiscalización y Ordenamiento Minero*<sup>345</sup> in charge of the Eighth Amendment were competent to interpret the mining legislation and to conduct the necessary analysis; in January 2010, these employees had prepared a Viability Study supporting the viability of the Eighth Amendment;
- The Eighth Amendment had been the object of a detailed analysis and there had been no rushed decisions:<sup>346</sup>

“[...] el otrosí No. 8 no fue un documento que apareció de un momento a otro, ni que lo hubiera firmado de manera aislada sino que fue el producto de una acción previamente analizada discutida al interior de Ingeominas, teniendo en cuenta las diferentes propuestas presentadas por Prodeco y siempre teniendo en la mira buscar condiciones más favorables para el Estado”.

- Prodeco's proposed expansion of the Calenturitas Mine and the new compensation scheme would, in the long-run, generate much higher revenues to the State, compared to the previous regime.

419. In addition, Mr. Ceballos delivered the January 2010 Viability Study and asked that the *Contraloría* call the four Ingeominas employees in charge of the Eighth Amendment to testify.<sup>347</sup>

420. Two days later, Ms. Margarita Zuleta, an officer of Prodeco, who had signed the Eighth Amendment on the company's behalf, was also called to give her statement to the *Contraloría*. Ms. Zuleta described the negotiations between Prodeco and

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*la Constitución Política y a los contenidos en el Código Contencioso Administrativo*”. See also Vargas I, para. 20.

<sup>344</sup> Doc. C-128, pp. 1-2.

<sup>345</sup> Mr. Ceballos said that these employees were Ms. Luz Marina Aristizábal (engineer), Ms. Luz Mireya Gómez Ríos (economist), Ms. Mélida Andrea Cabezas (legal counsel) and Mr. Giovanni Balcerio (engineer).

<sup>346</sup> Doc. C-128, pp. 4-5.

<sup>347</sup> Doc. C-128, p. 3.

Ingeominas and explained the rationale behind the Eighth Amendment.<sup>348</sup>  
Ms. Zuleta explained:<sup>349</sup>

*“Finalmente creo que es importante tener en cuenta que el proyecto Calenturitas iba a producir Carbón solo hasta 8 millones de toneladas y que el otrosí No. 8 permitió a Prodeco expandir su operación por encima de 8 millones de toneladas, lo cual requiere de importantes inversiones en equipo y personal las cuales nunca hubieran sido efectuadas si el VPN de la expansión hubiera sido inferior a cero. En consecuencia, la Nación con el otrosí No. 8 tiene un ingreso adicional en regalía y contraprestaciones consistente en las contraprestaciones aplicables a los tonelajes superiores a 8 millones de toneladas al año. Por lo cual Prodeco considera que el otrosí No. 8 en ningún caso implica un detrimento para la Nación por el contrario implica unos ingresos adicionales derivados de la explotación adicional a 8 millones de toneladas al año. Una vez el otrosí No. 8 fue perfeccionado, Prodeco presentó a Ingeominas un plan de trabajo de inversiones para explotar hasta 15 millones de toneladas al año”.* [Emphasis added]

421. Ms. Zuleta concluded that the *Contraloría* should employ financial advisors to study the case in detail and that Prodeco’s team was available to answer any questions of the *Contraloría*.<sup>350</sup>
422. In August 2011, Prodeco sent a letter to the *Contraloría*, explaining in detail the negotiation process between Prodeco and Ingeominas and the motivations behind the Eighth Amendment. Prodeco argued that it had not caused damage to the State and requested that the *Contraloría* close the Fiscal Liability Proceeding.<sup>351</sup>

**D. Statements by Officers of Ingeominas and the Ministry of Mines**

423. In light of Mr. Ceballos’ request for further evidence, in late September 2011 the *Contraloría* summoned several officers of Ingeominas and the Ministry of Mines and Energy to testify.<sup>352</sup> The *Contraloría* also ordered the production of a technical report by an economics specialist with knowledge of the energy sector.<sup>353</sup>
424. Between 24 and 26 October 2011, the *Contraloría* deposed the Ingeominas officials who had signed the Viability Study (as explained in detail below, a. to d.) and an employee of the Ministry of Mines (e.). Before testifying, these witnesses were required to swear to tell the truth and the *Contraloría* informed them of the consequences of perjury.<sup>354</sup> Counsel for Prodeco and Mr. Ceballos, and Mr. Ceballos himself, were present at these depositions.<sup>355</sup>

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<sup>348</sup> Doc. C-129; Doc. R-171.

<sup>349</sup> Doc. R-171, p. 3.

<sup>350</sup> Doc. R-171, p. 4.

<sup>351</sup> Doc. C-130.

<sup>352</sup> Doc. R-39 and Doc. C-131.

<sup>353</sup> Doc. R-39, p. 4.

<sup>354</sup> C I, para. 85; R I, para. 240. See also Docs. C-132 to C-136.

<sup>355</sup> Docs. C-132 to C-136.



425. (a) Ms. Aristizábal – who had already given a statement during the Preliminary Investigation – declared that there had been numerous meetings between Prodeco and Ingeominas, although not all were documented, to discuss an amendment to the Mining Contract. She further confirmed that Prodeco’s costs had significantly increased between 2003 and 2008 and that under the previous compensation scheme it would not have been possible to expand the Mine. Ms. Aristizábal also noted that Prodeco was paying the highest royalties in comparison with other projects. Finally, she said that she had handed several documents to the Immediate Reaction Team that were not part of the file of the Fiscal Liability Proceeding.<sup>356</sup>
426. (b) Ms. Luz Mireya Gómez – who together with Mr. Balceró had prepared Ingeominas’ memorandum of October 2009 – declared that there had been weekly meetings between Prodeco and Ingeominas to discuss Prodeco’s proposals and that Mr. Ballesteros and Ingeominas’ *Consejo Directivo* had always been kept informed of the negotiations. Ms. Gómez also confirmed that there had been a significant increase in coal production costs in the past ten years. Ms. Gómez explained that Prodeco and Ingeominas had agreed that the GIC threshold would be adjusted quarterly by reference to the Colombian consumer price index, because it resulted in lower increases in prices than other indexes. Finally, she said that:<sup>357</sup>
- “En el momento en que se realizó la negociación del otrosí no existía un procedimiento en el Instituto para adelantar este tipo de negociaciones y con ocasión de un plan de mejoramiento (posterior a la fecha de suscripción del otrosí No. 8), se implementó el procedimiento respectivo”.*
427. (c) Mr. Balceró – who also had given a statement during the Preliminary Investigation – explained that he had made a technical analysis of Prodeco’s proposal; he had found that Prodeco’s proposal was justified by the need to expand the Mine, and that this would ultimately benefit Colombia. Mr. Balceró stated that he had run several economic models, upon the request of Ingeominas’ *Consejo Directivo*. Mr. Balceró confirmed, as did Ms. Aristizábal and Ms. Gómez, that Mr. Ballesteros and Ingeominas’ *Consejo Directivo* had always been informed of the negotiation process and that production costs had increased in the past 10 years. Mr. Balceró also directed the *Contraloría* to the Viability Study. Finally, Mr. Balceró declared that the Eighth Amendment had prompted Prodeco to make significant investments in the Calenturitas Mine in 2010.<sup>358</sup>
428. (d) Ms. Melida Cabezas – who had been in charge of the legal aspects of the negotiation with Prodeco – stated that in mid-2009 Ingeominas’ officials had found that Prodeco’s proposal was not technically or legally viable. However, Mr. Ballesteros had asked them to come up with a counter-proposal to offer Prodeco. After conducting further studies, Ingeominas’ officials found that an expansion of the Mine would benefit the Colombian State. Ms. Cabezas also

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<sup>356</sup> Doc. C-132.

<sup>357</sup> Doc. C-133, p. 2.

<sup>358</sup> Doc. C-134.



confirmed that Mr. Ballesteros and the *Consejo Directivo* had been fully informed of the negotiations.<sup>359</sup>

429. (e) Ms. Maria Díaz López, Chief Legal Advisor to the Ministry of Mines and Energy, declared that Ingeominas' officers had kept the *Consejo Directivo* informed of Prodeco's requests for an amendment to the Mining Contract. Ms. Díaz López explained that the *Ministro de Minas y Energía* had given several recommendations to Ingeominas and that the aim of the negotiation was to increase royalty payments for the State and to expand the Mine.<sup>360</sup>

**E. The Contraloría Extends the Indictment and Attaches Assets**

430. On 26 April 2012, the *Contraloría* ordered the production of further evidence in the Fiscal Liability Proceeding, including, *inter alia*, all the documents and calculations that had served as the basis for the Viability Study.<sup>361</sup>
431. As a result of this new evidence, on 11 July 2012, the *Contraloría* decided to extend the indictment to additional civil servants. In addition to Mr. Ceballos and Prodeco, previously indicted, the *Contraloría* indicted the former *Ministro de Minas y Energía*, Mr. Ballesteros, and the four Ingeominas officers who had been involved in the negotiation of the Eighth Amendment, to wit:
- Mr. Hernán Martínez Torres, who was the *Ministro de Minas y Energía* at the relevant time; the *Contraloría* considered that Mr. Martínez Torres' action as member of Ingeominas' *Consejo Directivo* had been passive or careless, whereas it should have been active and decisive;<sup>362</sup>
  - Mr. Ballesteros, Ingeominas' *Director General* at the relevant time; the *Contraloría* found that Mr. Ballesteros had failed to comply with the appropriate controls and procedures, and to conduct the appropriate analysis;<sup>363</sup>
  - Ms. Aristizábal, Ms. Cabezas, Mr. Balcerro, and Ms. Gómez, as officers of Ingeominas' *Subdirección de Fiscalización y Ordenamiento Minero*, involved in the process of the Eighth Amendment; the *Contraloría* considered them suspect because they had signed the Viability Study, although they had previously declared that a modification of the Mining Contract was not warranted.<sup>364</sup>

**Preliminary Attachment**

432. On 17 July 2012 the *Contraloría* decided, as precautionary measures, to attach assets belonging to each of the civil servants indicted in the Fiscal Liability

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<sup>359</sup> Doc. C-135.

<sup>360</sup> Doc. C-136.

<sup>361</sup> Doc. R-40.

<sup>362</sup> Doc. C-18, pp. 5-6.

<sup>363</sup> Doc. C-18, pp. 7-9.

<sup>364</sup> Doc. C-18, pp. 9-12.

Proceeding.<sup>365</sup> These attachments were aimed at guaranteeing the State's right to be compensated for the damage caused – which had been estimated at USD 29 M for the Transition Period.<sup>366</sup>

433. In addition, the *Contraloría* attached three of Prodeco's bank accounts,<sup>367</sup> and, two months later, Prodeco's shares in Fenoco.<sup>368</sup>

#### **F. New Technical Reports**

434. On 24 August 2012, the *Contraloría* notified the Tovar Silva Report to Prodeco.<sup>369</sup>

435. On 5 September 2012, Prodeco challenged the Tovar Silva Report (*infra*, i) and once again requested that the *Contraloría* close the Fiscal Liability Proceeding (ii). This request was accompanied by an expert report by KPMG (iii).<sup>370</sup>

436. (i) In the challenge, Prodeco said that the Tovar Silva Report had made legal considerations which were beyond its scope and had ignored all the documents submitted by Prodeco to Ingeominas explaining the benefits of the Eighth Amendment for the State. Furthermore, Prodeco took issue with the fact that the Tovar Silva Report had limited its economic analysis to the Transition Period, disregarding the long-term impact of the Eighth Amendment.<sup>371</sup>

437. (ii) Prodeco also argued that the Eighth Amendment had not caused any damage to Colombia and that Prodeco had always acted in good faith. Prodeco explained that the Eighth Amendment had to be examined as a whole, and that it would only be possible to ascertain if the State had suffered damage once the Mining Contract had expired. Prodeco also submitted that it could not be subject to the Fiscal Liability Proceeding because it did not have any public fiscal responsibility.<sup>372</sup>

438. (iii) The KPMG report analysed the economic and financial aspects underlying the Eighth Amendment and the benefit it generated for the State's finances. The report found that an expansion of the Calenturitas Mine would not have been possible

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<sup>365</sup> It is worth mentioning that the *Contraloría* did not attach any assets of Mr. Ceballos (Doc. C-19).

<sup>366</sup> Doc. C-19, p. 5 and Doc. C-20, p. 5: “*Para hacer efectiva la función que desarrolla este órgano de vigilancia y control, cuando se examina la gestión fiscal y determina la responsabilidad fiscal del servidor público y/o particular que administra bienes o fondos del Estado, se hace imperioso practicar las medidas cautelares como instrumento eficaz, sin las cuales no se materializaría el resarcimiento del daño patrimonial al Estado Colombiano y nos encontraríamos frente a un fallo ilusorio, además de que no se estaría logrando el fin esencial del Proceso de Responsabilidad Fiscal, cual es el resarcimiento patrimonial del daño causado al erario*”.

<sup>367</sup> Doc. C-19.

<sup>368</sup> Doc. C-20.

<sup>369</sup> Doc. C-146, p. 4.

<sup>370</sup> Docs. C-141 to C-143.

<sup>371</sup> Doc. C-142.

<sup>372</sup> Doc. C-143.

without the Eighth Amendment. The report also explained that the Eighth Amendment had resulted in a much higher benefit for the State than for Prodeco.<sup>373</sup>

Clarifications by Tovar Silva

439. As a consequence of Prodeco's challenge to the Tovar Silva Report, on 29 October 2012, the *Contraloría* asked Ms. Tovar Silva to provide clarifications.<sup>374</sup> Accordingly, on 9 November 2012, Ms. Tovar Silva explained that she had examined the impact of the Eighth Amendment on the State's finances only during the Transition Period because this was the only period for which there was actual data.<sup>375</sup>

Valenzuela/Riveira Report

440. On 14 November 2012, Messrs. Luis Valenzuela and Felipe Riveira, who had respectively served as Minister and Vice-Minister of Mines and Energy,<sup>376</sup> submitted an expert opinion, commissioned by Prodeco, analysing whether the Eighth Amendment had benefitted Colombia.<sup>377</sup> The report came to the following conclusions:<sup>378</sup>
- Under the original compensation scheme Prodeco would not have expanded production, since this would have generated a reduction in its NPV;
  - The benefits or disadvantages of the Eighth Amendment on the State's finances could only be established by examining the entire life of the Mining Contract, not just its first year in isolation;
  - Colombia would only see the benefits of the Eighth Amendment once Prodeco's programmed expansion actually took place – a process that required several years; this meant that in 2010-2011 the Eighth Amendment would not yet be generating higher yields for the State;
  - The Eighth Amendment did not cause a damage to Colombia; on the contrary, it would bring an additional USD 205 M in compensation payments.

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<sup>373</sup> Doc. C-141. In particular, the KPMG report found that: "*La Nación obtiene un incremento de sus beneficios en casi tres veces el aumento de los beneficios que recibe Prodeco con la realización de la expansión y el Otrósí 8. Con la ejecución del Proyecto de Expansión y con la suscripción del Otrósí 8, el incremento el VPN de las regalías es de un 57% mayor al Proyecto de Producción Anterior al Otrósí 8. Sin embargo el aumento del VPN de la mina que tiene Prodeco es del 23%*" (Doc. C-141, p. 11).

<sup>374</sup> Doc. C-146.

<sup>375</sup> Doc. C-147.

<sup>376</sup> Doc. R-173, p. 2.

<sup>377</sup> Doc. C-148. See also Doc. R-173, by which Prodeco submits the report into the record of the Fiscal Liability Proceeding.

<sup>378</sup> Doc. C-148, pp. 2-3.

441. Faced with contradictory information, on 10 April 2013, the *Contraloría* decided to commission a technical support team to produce a report on the Eighth Amendment.<sup>379</sup>

“[...] *para determinar si se desvirtúan los fundamentos del presente proceso de responsabilidad y el daño causado a la Nación por la disminución en las regalías y compensaciones a su favor*”.

### **G. New Depositions**

442. Between April and May 2013, the *Contraloría* heard the depositions of the new defendants in the Fiscal Liability Proceeding, Mr. Ballesteros, Mr. Martínez Torres, Ms. Aristizábal, Ms. Cabezas, Ms. Gómez and Mr. Balceró (*infra*, a. to f.).<sup>380</sup> Given that these individuals were no longer witnesses, but indicted defendants in the Fiscal Liability Proceeding, they were not required to swear to tell the truth lest they might incriminate themselves – thus they presented what in Colombian practice is known as a “*versión libre y espontánea*”.<sup>381</sup>
443. (a) Mr. Ballesteros declared that the officials of the Deputy Mining Direction had performed a technical, legal and economic analysis of Prodeco’s proposals. Mr. Ballesteros noted that the negotiation between Ingeominas and Prodeco had been long, and Ingeominas had never accepted Prodeco’s proposals at face value. Finally, Mr. Ballesteros insisted that the Eighth Amendment would generate higher revenues for the State than the previous regime.<sup>382</sup>
444. (b) Mr. Martínez Torres testified that he had always acted to make sure that the State’s interests were protected. He argued that the Eighth Amendment was beneficial to the State and that he understood that the analysis had been correctly performed.<sup>383</sup>
445. (c) Ms. Aristizábal asked that her previous sworn deposition be taken into account. She noted that she was not competent to decide whether or not the Eighth Amendment had to be signed, and that Ingeominas had chosen not to hire external experts to conduct economic analysis. Ms. Aristizábal explained that Ingeominas’ officers had tried to be as diligent as possible, to avoid any future disputes regarding the Eighth Amendment.<sup>384</sup>
446. (d) Ms. Cabezas confirmed that there had been numerous meetings with Prodeco, with the participation of Mr. Ballesteros, who was adamant that the Eighth

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<sup>379</sup> Doc. C-151, p. 3.

<sup>380</sup> Docs. C-152, C-153, C-154 / R-23, C-155 / R-22, C-156 / R-81, C-157 / R-25.

<sup>381</sup> Doc. C-152, p. 1: “[e]l artículo 33 de la Constitución Política de Colombia [...] señala que no está obligado a declarar contra sí mismo [...]”.

<sup>382</sup> Doc. C-152.

<sup>383</sup> Doc. R-81.

<sup>384</sup> Doc. C-153.

Amendment should be executed. She deposed that she had felt pressured by Mr. Ballesteros:<sup>385</sup>

*“De acuerdo a las proyecciones presentadas por PRODECO se hacia [sic] el estudio económico y técnico de los mismos como la negociación no avanzaba por cuanto el análisis que de los cuadros nosotros hacíamos de las propuestas presentadas por PRODECO al Dr. Mario no le gustaban porque iban en contravía de su querer el cual era dar viabilidad a la suscripción de la modificación del contrato 0044/89 Esta circunstancia generó que el Dr. Mario Ballesteros nos exigiera la sustanciación a Luz Marina, Luz Mireya a Giovanni y a mí que teníamos que elaborarle un cuadro y un escrito en el que se viera reflejada la mejor posibilidad presentada por PRODECO para que se pudiera dar la viabilidad del otrosí. Siguiendo estas instrucciones y la furia del Dr. Ballesteros porque no hacíamos el cuadro conforme a su querer se elaboraron otros conforme a sus instrucciones porque el Dr. Mario estaba muy interesado en presentarle dicho cuadro al Ministro Hernán Martínez y a todo el Consejo Directivo en Pleno para que según él tomaran las decisiones correspondientes”.*

447. Ms. Cabezas also affirmed that the Viability Study had been prepared after the execution of the Eighth Amendment:<sup>386</sup>

*“Igualmente quiero agregar que el denominado escrito viabilidad para la suscripción del otrosí número 8 no fue lo que originó la suscripción del mismo por cuanto y reitero el otrosí numero 8 ya había sido suscrito lo que generó realmente la suscripción de este otrosí fue la determinación por parte del Dr. Mario Ballesteros Mejía y el Ministro Hernán Martínez y fueron ellos los que no se [sic] con que [sic] intereses decidieron modificar el contrato 044/89”.*

448. (e) Ms. Gómez described the analysis she had performed before the execution of the Eighth Amendment:<sup>387</sup>

*“Básicamente lo que yo hice fue las estimaciones matemáticas de lo que estaba cancelando PRODECO por concepto de regalías y cuánto pagaría si aumentaba su volumen de producción a diez millones de toneladas”.*

449. Ms. Gómez did not mention any pressure exercised by Mr. Ballesteros.

450. She explained that Mr. Ceballos had asked her and other colleagues to prepare the Viability Study after the Eighth Amendment had been signed. The report was meant to serve as an “*aide-mémoire*” which described all the parameters which Ingeominas had taken into account when deciding to execute the Eighth Amendment.<sup>388</sup>

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<sup>385</sup> Doc. R-22, p. 2.

<sup>386</sup> Doc. R-22, p. 4.

<sup>387</sup> Doc. R-23, p. 3.

<sup>388</sup> Doc. R-23.

451. (f) Mr. Giovanni Balceró also confirmed that there had been a number of meetings between Ingeominas and Prodeco. He recalled that Prodeco had offered to increase the capacity of the mine to 14 MTA, but that the restriction which made such expansion unviable was the compensation provided for in the Mining Contract. His task consisted in preparing financial models of the production of the Mine.<sup>389</sup>
452. Mr. Balceró also confirmed that the Viability Study had been prepared after the execution of the Eighth Amendment, and was meant to be a sort of *aide-mémoire*, compiling all the information reviewed and all the analyses performed by the Deputy Mining Direction. Finally, Mr. Balceró stated that Mr. Ballesteros showed an interest in the execution of the Eighth Amendment, that no external experts were hired, and that he breached internal procedures by not consulting the *Subdirectora de Fiscalización*, Ms. Gloria del Socorro Arias.<sup>390</sup>

#### H. The Technical Support Report

453. On 20 May 2013, the *Contraloría*'s technical support team delivered a report with its findings [**"Technical Support Report"**]. The Report mainly commented on KPMG's report of September 2012.<sup>391</sup>
454. As in the case of the Tovar Silva Report, the Technical Support Report focused exclusively on the year 2010, and found that the Eighth Amendment had resulted in a reduction of Royalties and GIC paid to the State in an amount of COP 52.21 billion (equivalent to USD 27.28 M):<sup>392</sup>

En el cuadro a continuación se presentan las diferencias encontradas en la cuantificación de los ítems de regalía básica, regalía adicional y compensación por Ingresos brutos, para el año 2010 (considerado como período de transición dentro del otrosí 8), antes y después de implementar los cambios consagrados mediante el otrosí 8.

REGALÍAS Y COMPENSACIONES	ANTES DE OTROSÍ 8	CON OTROSÍ 8	DIFERENCIA
REGALIA BASICA	\$ 66.998.703.286,21	\$ 53.710.098.396,69	\$ 13.288.604.889,53
REGALIA ADICIONAL	\$ 28.144.639.205,52	\$ 23.434.944.406,00	\$ 4.709.694.799,52
COMPENSACION INGRESOS	\$ 34.369.147.636,72	\$ 153.053.343,60	\$ 34.216.094.293,12
TOTAL	\$ 129.512.490.128,46	\$ 77.298.096.146,28	\$ 52.214.393.982,17

455. The Technical Support Report said that the KPMG report of September 2012 had been based on projections, instead of taking into account the actual data available after the execution of the Eighth Amendment for the years 2010 and 2011.<sup>393</sup>

<sup>389</sup> Doc. R-25, p. 3.

<sup>390</sup> Doc. R-25, p. 5.

<sup>391</sup> Doc. C-159. This report is sometimes referred to in correspondence as the "García Alarcón - García Olaya Report".

<sup>392</sup> Doc. C-159, p. 14.

<sup>393</sup> Doc. C-159, p. 14.



Finally, the Technical Support Report recommended that the calculation performed for the Transition Period should be repeated for 2011 and 2012.<sup>394</sup>

#### Further Reports

456. In June 2013, Prodeco presented a challenge to the Technical Support Report,<sup>395</sup> which was accompanied by a new expert report by KPMG.<sup>396</sup>
457. And in July 2013, the technical support team issued yet another report, challenging KPMG's methodology of projecting future production scenarios and insisting that any analysis of the damage suffered by the State should only take into account the year 2010.<sup>397</sup>

#### Prodeco's Request for Closure of the Proceedings

458. On 28 August 2013, Prodeco once again requested that the *Contraloría* close the Fiscal Liability Proceeding. Prodeco argued that the facts did not lead to the conclusion that the State had suffered damage, or that Prodeco had acted deceitfully or with gross negligence.<sup>398</sup>

#### I. The Contraloría Issues the *Auto de Imputación*

459. Despite Prodeco's submissions and requests, on 30 August 2013, the *Contraloría* issued an *Auto de imputación de responsabilidad fiscal*, [*"Auto de Imputación"*] formally charging Prodeco, Mr. Ceballos, Mr. Ballesteros, Mr. Martínez Torres, and Ms. Aristizábal. Prodeco, Mr. Ceballos and Mr. Ballesteros were accused of acting with *dolo*, whereas Mr. Martínez Torres and Ms. Aristizábal were accused of acting with *culpa grave*.<sup>399</sup>
460. The *Auto de Imputación* is a lengthy document, totalling more than 200 pages.
461. The *Auto* first analyses whether the State has suffered damages.<sup>400</sup> Its general thrust is that the Eighth Amendment has resulted in damage to the Colombian State, due to a reduction in the Royalties to be paid by Prodeco.<sup>401</sup>
462. The *Contraloría* dismisses Prodeco's argument that the fiscal analysis of the Mining Contract could be made only upon its expiration in 2035.<sup>402</sup>

*"[...] en el ejercicio de sus funciones las contralorías tienen conferida la atribución de verificar la existencia cierta y actual de un daño fiscal, con*

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<sup>394</sup> Doc. C-159, p. 17.

<sup>395</sup> Doc. R-174.

<sup>396</sup> Doc. C-161.

<sup>397</sup> Doc. C-163.

<sup>398</sup> Doc. C-164.

<sup>399</sup> Doc. C-24.

<sup>400</sup> Doc. C-24, p. 111.

<sup>401</sup> Doc. C-24, p. 112.

<sup>402</sup> Doc. C-24, p. 119.



*ocasión de la ejecución de un contrato, y de adelantar la acción dirigida a su resarcimiento, sin esperar a su liquidación, ni menos a la extinción de las acciones contencioso administrativas”.*

463. As regards the quantum of the damage suffered by the State, the *Auto de Imputación* draws from the Tovar Silva Report and the Technical Support Report, and concludes that the damage amounts to COP 51 billion, which is the reduction in earnings suffered during the year 2011.<sup>403</sup>

464. The *Contraloría* also declares that although Prodeco was a private entity, it had assumed responsibility towards the assets of the State when it executed the Mining Contract, because it gave direction to the negotiations:<sup>404</sup>

*“Así las cosas, es evidente que C.I. PRODECO participó activamente en el resultado objeto de reproche fiscal, como quiera que la Firma, tal como lo señaló el auto de apertura orientó la cuestionada modificación y cada uno [sic] de las propuestas presentadas a INGEOMINAS”.* [Emphasis added; spelling errors in the original]

465. The *Contraloría* also concludes that Prodeco has wilfully caused damage to the State:<sup>405</sup>

*“A lo largo de todo el material probatorio obrante en el proceso, se evidencia una clara intención por parte de Prodeco de modificar el contrato 044-89 a sabiendas de que con esta modificación se disminuirían los ingresos para el [sic] Nación Colombiana, por lo cual se califica su conducta como DOLOSA”.* [Emphasis added and capitalisation in the original]

466. In the same *Auto de Imputación*, the *Contraloría* decided to dismiss the indictment and close the Fiscal Liability Proceeding with respect to Ms. Cabezas, Mr. Balcerro, and Ms. Gómez, on the ground that their functions within Ingeominas did not involve any decision-making powers.<sup>406</sup>

## **J. Prodeco’s Defence and Requests for Submission of New Evidence**

467. Pursuant to Art. 50 of the Law 610 of 2000, regarding Fiscal Liability Proceeding:<sup>407</sup>

*“Los presuntos responsables fiscales dispondrán de un término de diez (10) días contados a partir del día siguiente a la notificación personal del auto de imputación o de la desfijación del edicto para presentar los argumentos de*

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<sup>403</sup> Doc. C-24, p. 135.

<sup>404</sup> Doc. C-24, p. 184.

<sup>405</sup> Doc. C-24, pp. 176-187.

<sup>406</sup> Doc. C-24, pp. 206-221: “*las funciones asignadas al profesional especializado [Mr. Balcerro], otorgan ninguna [sic] tipo de decisión o disposición*” (p. 211); “*La doctora Gómez según las funciones a su cargo, no tenía ningún poder de decisión en el asunto*” (p. 216); “*De igual forma es claro que las obligaciones contratadas [por la Dra. Cabezas] no comportaban ningún poder decisorio [...]*” (p. 221). See also Vargas I, para. 67.

<sup>407</sup> Doc. C-71, Art. 50.

*defensa frente a las imputaciones efectuadas en el auto y solicitar y aportar las pruebas que se pretendan hacer valer [...]*. [Emphasis added]

468. Accordingly, in October 2013, Prodeco and the remaining defendants in the Fiscal Liability Proceeding submitted their arguments of defence against the *Auto de Imputación*.<sup>408</sup>
469. Prodeco's defence submitted that the *Auto de Imputación* was groundless for several reasons:
- Colombia had not suffered a certain and actual damage: Prodeco recognized that the *Contraloría* could exercise a fiscal control at all times; however, it took issue with the fact that the *Contraloría* had chosen to disregard the overall economy of the Mining Contract and had based its analysis on the Transition Period.<sup>409</sup>
  - The evidence on the record did not lead to the conclusion that Prodeco had acted with the intent of causing damage to the State's financial interests; the *Contraloría* seemed to mistake Prodeco's legitimate intention of executing the Eighth Amendment with an alleged intent of causing a damage to the State;<sup>410</sup>
  - The *Contraloría* seemed to confuse Ingeominas' irregular conduct with that of Prodeco; the *Contraloría* failed to consider that Ingeominas was a specialized State agency and that Prodeco could not have influenced its decision-making process;<sup>411</sup>
  - Prodeco could not be held fiscally liable because it was not responsible for the management of public resources.<sup>412</sup>
470. Prodeco also marshalled additional evidence: an expert report produced by Inverlink<sup>413</sup> and a request that the *Contraloría* call several witnesses to testify.<sup>414</sup>
471. In their defences, Mr. Ballesteros, Mr. Martínez Torres, and Ms. Aristizábal also asked to introduce more evidence in the record.<sup>415</sup>

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<sup>408</sup> Doc. C-166 (Ms. Aristizábal), Doc. C-167 (Mr. Ballesteros), Doc. C-169 (Mr. Martínez Torres), Doc. C-171 (Mr. Ceballos), Doc. C-173 (Prodeco).

<sup>409</sup> Doc. C-173, pp. 7-10.

<sup>410</sup> Doc. C-173, pp. 11-17 and 35.

<sup>411</sup> Doc. C-173, pp. 18-19.

<sup>412</sup> Doc. C-173, pp. 35-37.

<sup>413</sup> Doc. C-165.

<sup>414</sup> Doc. C-173, pp. 37-40. Prodeco asked that the *Contraloría* hear the testimonies of: Ms. Margarita Zuleta; Mr. Ballesteros; two of Prodeco's employees who had participated in the negotiation process; several officials of the *Contraloría*, including Ms. Tovar Silva; and the experts who had produced reports in the course of the Fiscal Liability Proceeding.

<sup>415</sup> Doc. C-166, pp. 30-31 (Ms. Aristizábal); Doc. C-167, p. 22 (Mr. Ballesteros); Doc. C-169, p. 6 (Mr. Martínez Torres).

472. On 14 January 2014, the *Contraloría* rejected most of Prodeco's requests to submit new evidence,<sup>416</sup> on the ground that the majority of the new evidence was either superfluous or useless.<sup>417</sup>

- The Inverlink report did not bring a new perspective on the negotiations between Ingeominas and Prodeco compared with the KPMG reports;
- Ms. Margarita Zuleta, as legal representative of Prodeco; had already given her statement on the facts in question;
- Mr. Ballesteros was a defendant in the Fiscal Liability Proceeding and as such it would not be appropriate to have his testimony; in addition, he had already given a statement;
- The testimonies of two of Prodeco's employees who had participated in the negotiation process were superfluous, because the events on which they would testify were already covered in the record;
- The experts who had produced reports were not witnesses, but rather independent experts, who had already submitted their views in the course of the investigation.

473. The *Contraloría* decided to hear only Ms. Natalia Anaya, an officer of Prodeco who had taken part in the negotiation of the Eighth Amendment.<sup>418</sup>

474. It is worth noting that the *Contraloría* also accepted the request by Ms. Aristizábal (an officer of Ingeominas who was among the defendants) to give a new statement,<sup>419</sup> although she had already been heard three times before, whereas it denied Prodeco's request that Ms. Margarita Zuleta be heard again.

475. On 23 January 2014, Prodeco challenged the *Contraloría*'s decision. According to Prodeco:<sup>420</sup>

- An *in limine* rejection of evidence could only take place when the evidence was manifestly and flagrantly irrelevant, useless, or inopportune;
- All the evidence it had requested to submit was necessary to establish the economic rationale behind the Eighth Amendment and the negotiation process, which were at the heart of the Fiscal Liability Proceeding;
- If the *Contraloría* found itself "judge and party", there was no guarantee of impartiality;

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<sup>416</sup> Doc. C-26.

<sup>417</sup> Doc. C-26, pp. 8-11.

<sup>418</sup> Doc. C-26, p. 13.

<sup>419</sup> Doc. C-26, p. 18.

<sup>420</sup> Doc. C-174.

- The *Contraloría* had disregarded Prodeco's due process rights.

476. On 13 February 2014, the *Contralora Delegada* confirmed its initial decision and denied Prodeco's challenge.<sup>421</sup> Prodeco appealed the *Contralora Delegada*'s decision. On 17 March 2014, the *Contralora General* confirmed the first instance decision.<sup>422</sup>

#### Further Appeals

477. On 6 May 2014, Prodeco presented a request for annulment of the *Contraloría*'s decision that had barred Prodeco from producing additional evidence, and all subsequent procedural decisions. According to Prodeco, the Proceedings had violated Prodeco's due process rights, in particular Prodeco's right to defend itself.<sup>423</sup>

478. This led Prodeco to file a constitutional injunction (*acción de tutela*) with the *Tribunal Superior del Distrito Judicial de Bogotá*.<sup>424</sup> This court dismissed Prodeco's action, whereupon Prodeco lodged an appeal with the *Corte Suprema de Justicia*.<sup>425</sup>

479. On 22 October 2014, the *Corte Suprema* dismissed Prodeco's request.<sup>426</sup> The *Corte Suprema* noted that an *acción de tutela* was not applicable to a Fiscal Liability Proceeding, which had their own mechanisms for challenging a decision and were subject to the jurisdiction of administrative courts.<sup>427</sup> In addition, the *Corte* found that the *Contraloría* had not acted arbitrarily and had properly justified its decisions.<sup>428</sup> The *Corte Suprema* concluded that:<sup>429</sup>

“[...] dentro del proceso de responsabilidad fiscal no se ha vulnerado el derecho al debido proceso y a la defensa de la accionante; máxime que la actuación aún se encuentra en curso y, como anteriormente se expresó, contra la decisión administrativa que ponga fin al proceso, en caso de que le sea desfavorable, tiene la posibilidad de impetrar la acción de nulidad y restablecimiento del derecho”.

480. On 18 December 2014, the Colombian *Corte Constitucional* decided not to review the decision of the *Corte Suprema*.<sup>430</sup>

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<sup>421</sup> Doc. C-27.

<sup>422</sup> Doc. C-28, p. 20.

<sup>423</sup> Doc. C-176.

<sup>424</sup> Doc. R-250, pp. 8348-8356. See also Doc. C-31, p. 1 and Doc. C-32, p. 10.

<sup>425</sup> Doc. C-31.

<sup>426</sup> Doc. C-31.

<sup>427</sup> Doc. C-31, p. 6.

<sup>428</sup> Doc. C-31, p. 7.

<sup>429</sup> Doc. C-31, p. 9.

<sup>430</sup> Doc. C-32, p. 10.

**K. Ms. Aristizábal's Third Statement**

481. On 24 April 2014, the *Contraloría* heard Ms. Aristizábal's new statement.<sup>431</sup> Ms. Aristizábal explained in more detail her mission in Ingeominas and her participation in the negotiation of the Eighth Amendment.
482. Departing from her three earlier statements, Ms. Aristizábal declared that Mr. Ballesteros had exercised undue pressure over her and that the other Ingeominas officers who were working on the Eighth Amendment had violated the applicable internal procedures. Ms. Aristizábal made clear that she was not responsible for the execution of the Eighth Amendment.<sup>432</sup>

*“Con lo anterior quiero reiterar que frente a acuerdos e imposiciones, previamente establecidas, primó la subordinación y el temor al desobedecimiento de unas órdenes que en forma directa venían siendo dadas por el mismo Director General”.*

**L. Public Interview by the *Contralora General***

483. In December 2013, the *Contralora General*, Ms. Morelli Rico, gave an interview to the newspaper *Semana Sostenible*. In that interview she stated her opinion that Prodeco was not properly paying the royalties due under the Mining Contract, in an amount of almost COP 50 billion, adding that there was “*un principio de prueba*”, to be properly defined in the procedure. She also expressed surprise that Prodeco was threatening a claim under the BIT.<sup>433</sup>

**M. The *Procuraduría* Closes the Investigation into Mr. Ceballos**

484. In November 2013, the *Procuraduría* had initiated a disciplinary investigation against Mr. Ceballos, the Ingeominas' officer who had actually signed the Eighth Amendment.
485. Six months thereafter, on 13 May 2014, the *Procuraduría* decided to close the file, without finding any responsibility.
486. After reviewing the documentation surrounding the negotiation of the Eighth Amendment, the *Procuraduría* found that the the Eighth Amendment was approved by Ingeominas applying reasonable technical and financial criteria:<sup>434</sup>

*“Al estudiar los antecedentes descritos y las explicaciones contenidas en los distintos documentos aportados por la Agencia Nacional de Minería, a petición de este despacho, es dable colegir que no existe conducta constitutiva de falta disciplinaria atribuible a JOSÉ FERNANDO CEBALLOS ARROYAVE”.* [Emphasis added]

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<sup>431</sup> Doc. C-175 / R-9.

<sup>432</sup> Doc. R-9, p. 5.

<sup>433</sup> Doc. C-266.

<sup>434</sup> Doc. R-250, p. 8783.

**N. The Contraloría's Decision**

487. On 30 April 2015, the *Contralora Delegada*, Ms. Vargas, issued the *Contraloría's* Decision, a 234-page-long *fallo* closing the *Procedimiento de Responsabilidad Fiscal*. The main finding was that, by executing the Eighth Amendment,

- Prodeco,
- Mr. Ballesteros (the Director of Ingeominas),
- Mr. Martínez Torres (the Minister of Mining), and
- Mr. Ceballos (the Ingeominas officer who signed the Eighth Amendment, and who had been acquitted in the disciplinary proceedings),

had incurred in fiscal liability. The *fallo* sentenced the convicted defendants to pay to the State, jointly and severally, compensation for the damage caused which amounted to COP 60 Bn.<sup>435</sup>

488. The *Contraloría's* Decision, however, absolved Ms. Aristizábal of liability, after finding that there was no causal link between her conduct and the damage to the State's finances.<sup>436</sup>

**Summary**

489. The Tribunal will highlight some aspects of the *Contraloría's* Decision.<sup>437</sup> In general terms, the Decision accepted the same line of reasoning as the *Auto de Imputación*, and its principal thrust is to reinforce the arguments already announced in the *Auto*.<sup>438</sup>

490. The *Contraloría* first found that, contrary to Prodeco's argument, although the Mining Contract is a long-term contract, the *Contraloría* was entitled to evaluate its fiscal effects at any time, without having to wait for its termination.<sup>439</sup>

491. The *Contraloría's* main conclusion was that the Eighth Amendment did not properly defend the interests of Colombia: the Amendment failed to formalize Prodeco's obligation to increase production of the Mine, and how and when such increase would result in an increase in the compensation received by the State. In accordance with Prodeco's argumentation, the increase of production had been formalized in the 2010 PTI – but the Eighth Amendment lacks any reference to such document.<sup>440</sup>

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<sup>435</sup> Doc. C-32, p. 231. Approximately USD 25 million at the exchange rate of the time (McManus I, fn. 20).

<sup>436</sup> Doc. C-32, pp. 171 and 232.

<sup>437</sup> The decision regarding Prodeco can be found on pp. 68-115 of the *Contraloría's* Decision (Doc. C-32).

<sup>438</sup> Doc. C-32, p. 68.

<sup>439</sup> Doc. C-32, p. 69.

<sup>440</sup> Doc. C-32, pp. 78-79.

Dolo

492. The *Contraloría* explained that Prodeco had wilfully permitted damage to the State's financial interests, in order to obtain greater benefits, thereby acting with *dolo*.<sup>441</sup> Although the *Contraloría* recognised that any private contractor had the right to receive benefits from its economic activity, it found that it was improper for a contractor to try to receive higher benefits to the detriment of the State's interests.<sup>442</sup>
493. The *Contraloría* found that Prodeco had put in place a series of manoeuvres to pay a lower compensation to the State,<sup>443</sup> in particular:<sup>444</sup>

*“El grado de culpabilidad que se le ha endilgado a PRODECO no se basa en la intención legítima de impedir o detener pérdidas, ni en la obtención de mayores ingresos, circunstancias que por sí solas no constituyen irregularidad alguna, como bien lo ha dicho el apoderado. Se fundamenta en la serie de maniobras desplegadas por PRODECO que se materializan, en cómo rechazadas sus propuestas por INGEOMINAS, planteaba diferentes escenarios, cómo [sic] pasó entre otros, de desequilibrio económico contractual, desacuerdo en la interpretación de cláusulas contractuales, falta de competitividad en el mercado aduciéndose entonces desigualdad con otras empresas explotadoras de carbón en Colombia, hasta expansión, pero con ésta disminuyendo el porcentaje de regalías a favor del Estado con el argumento de que entre mayor producción mayores ingresos a favor del mismo. En este último escenario se sostiene que tal disminución se compensará más adelante, sin que se hubiese determinado de antemano forma y término para ello, salvo enunciados abstractos y genéricos”.* [Emphasis added]

494. The *Contraloría* also concluded that Prodeco's conduct after receiving the Initial Version of the Eighth Amendment was contrary to good faith:<sup>445</sup>

*“No obedece a los postulados de la buena fe, que después de suscrito el primer otrosí No 8, que se devuelve sin registro minero, por lesivo a los intereses de la Nación, CI PRODECO, no asumiera un comportamiento acorde con la realización y ejecución del contrato suscrito, pasara por alto la advertencia realizada y con ello desconociera el interés de la otra parte”.* [Emphasis in the original]

495. The *Contraloría* found that Prodeco was Ingeominas' “collaborator”:<sup>446</sup>

*“Pasa por alto el señor apoderado que PRODECO tiene una relación contractual sui generis, producto del contrato estatal suscrito mediante el cual se busca el cumplimiento de los fines del Estado, vínculo jurídico en el*

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<sup>441</sup> Doc. C-32, p. 109.

<sup>442</sup> Doc. C-32, pp. 85, 93 and 106.

<sup>443</sup> Doc. C-32, p. 106.

<sup>444</sup> Doc. C-32, p. 85.

<sup>445</sup> Doc. C-32, p. 99.

<sup>446</sup> Doc. C-32, p. 87.



*que está involucrado el interés general, y por tal razón, adquirió la calidad o condición de ‘colaborador’ en el cumplimiento de tales fines”.*

496. The *Contraloría* finally concluded that, although Ingeominas had failed to meet its responsibilities, so also had Prodeco:<sup>447</sup>

*“En el caso objeto de debate, C.I. PRODECO conoció y participó en los hechos que dieron lugar a la lesión de los intereses patrimoniales del Estado. No obstante, ahora pretende que las cargas sólo reposaban en cabeza de la administración INGEOMINAS, cuando en realidad **también formaban parte de su carga y responsabilidad como colaborador de aquella**”.*<sup>448</sup> [Emphasis in the original]

#### Preliminary studies

497. In addition, the *Contraloría* found that Ingeominas did not prepare the preliminary studies, which would have been required in any contract of *gran minería*. Ingeominas had also failed formally to appoint officials to the negotiation and to seek the recommendation of the Contracting Committee.<sup>449</sup> The *Contraloría* also noted that the Viability Study had not been prepared prior to the execution of the Eighth Amendment, and contained severe inconsistencies, and overall it failed to secure the State’s interests.<sup>450</sup>
498. In sum, the *Contraloría* considered that, although Prodeco was a private person, by executing the Mining Contract it had assumed responsibility for the exploitation of a non-renewable public resource and had thus become subject to fiscal liability.<sup>451</sup>

#### Damage

499. The *Contraloría*’s subsequent conclusion was that during the Transition Period (*i.e.* during the year 2010), the Republic had suffered a reduction in the compensation received from Prodeco, and that Prodeco was responsible therefor.<sup>452</sup>

*“La responsabilidad de C.I. PRODECO deviene de la lesión a los intereses patrimoniales del Estado Colombiano como consecuencia de la modificación al negocio y condiciones ya pactadas, conocidas y en ejecución por el inversionista PRODECO e INGEOMINAS respecto del contrato 044/89, las que fueron lesivas en el periodo de transición a los intereses de la Nación, por lo que como bien se evidencia, lo que se busca es la reparación al Estado con una indemnización equivalente al valor que debía haberse pagado por parte del inversionista al Estado Colombiano, por la explotación del suelo y subsuelo en el periodo de transición, bajo las condiciones del contrato que no*

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<sup>447</sup> Doc. C-32, pp. 99 and 102.

<sup>448</sup> Doc. C-32, p. 94.

<sup>449</sup> Doc. C-32, pp. 198-199.

<sup>450</sup> Doc. C-32, pp. 200-203.

<sup>451</sup> Doc. C-32, pp. 93 and 107.

<sup>452</sup> Doc. C-32, pp. 115-116.

*habían cambiado en dicho periodo, que conocía y había aceptado el inversionista con la suscripción del mismo”. [Emphasis added]*

500. The relevant period for the calculation of the damage was exclusively the *período de transición*. The Decision justified this conclusion exclusively by reference to the Tovar Silva Report:<sup>453</sup>

*“Con el otrosí No. 8, se establecieron modificaciones en relación con la liquidación de regalías y otras contraprestaciones económicas, tal como se recoge en el informe técnico del grupo de reacción inmediata, rendido por la doctora Johanna Tovar Silva, el cual obra en el expediente y que claramente determina las condiciones económicas que fueron modificadas con ocasión del otrosí No. 8 y su periodo de transición.*

*Por lo tanto, para la presente causa fiscal, el daño ocasionado y cuantificado es el previsto para el denominado periodo de transición, el cual se estipuló en el otrosí No. 8, tal y como lo precisan los informes técnicos obrantes como pruebas dentro del proceso, y lo señaló en su oportunidad el auto de imputación, las distintas modificaciones introducidas al contrato advierten una disminución y menoscabo en la [sic] regalías y contraprestaciones económicas, como en efecto ocurrió para dicho periodo [...]”.*

501. The Contraloría’s Decision calculated such damage as the difference between the income which the Republic had received under the Eighth Amendment during the Transition Period (*i.e.* during the year 2010) and the income which it would have received had the Eighth Amendment not been executed.<sup>454</sup> For the precise calculations, the Contraloría’s Decision referred to:<sup>455</sup>

- The Tovar Silva Report, which estimated a damage of COP 51.4 billion, and
- The Technical Support Report, which reached a slightly higher amount of COP 52.2 billion.

502. The Decision explained that the difference between both reports was due to differences in the *Tasa Representativa del Mercado* [“**TRM**”], without providing further detail,<sup>456</sup> and eventually settled for the higher amount:<sup>457</sup>

*“Para este despacho, las conclusiones del informe son contundentes en señalar que como consecuencia de los cambios realizados en el cálculo de los ítems de regalía básica, regalía adicional y compensación por ingresos brutos, para la producción del año 2010 (año considerado de transición), en la Mina Calenturitas de acuerdo con el Otrosí 8, el Estado dejó de percibir la suma de \$52.214.393.982,17”.*

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<sup>453</sup> Doc. C-32, p. 219.

<sup>454</sup> Doc. C-32, p. 217.

<sup>455</sup> Doc. C-32, pp. 221-222.

<sup>456</sup> Doc. C-32, p. 222.

<sup>457</sup> Doc. C-32, p. 228.

503. This amount was then indexed in accordance with the Colombian inflation rate between December 2010 and January 2015, reaching a total of COP 60,023,730,368.33.

Causal link

504. The *Contraloría* also held that Prodeco's conduct had been decisive for the execution of the Eighth Amendment, and consequently that there was a causal link between Prodeco's *dolo* and the damage suffered by the State.<sup>458</sup>

Dispositif

505. The *dispositif* ordered Prodeco and Messrs. Ceballos, Martínez Torres and Ballesteros, jointly and severally ("*solidariamente*") to pay to the Colombian State the amount of COP 60 Bn. Ms. Aristizábal was acquitted of liability.<sup>459</sup>

506. Finally, the *Contraloría* decided to send a copy of the Decision to the State's mining agency, for the effects of Art. 61 of Law 610 of 2000,<sup>460</sup> which provides for:<sup>461</sup>

*"CADUCIDAD DEL CONTRATO ESTATAL. Cuando en un proceso de responsabilidad fiscal un contratista sea declarado responsable, las contralorías solicitarán a la autoridad administrativa correspondiente que declare la caducidad del contrato, siempre que no haya expirado el plazo para su ejecución y no se encuentre liquidado".*

**O. Prodeco's Appeals en Vía Gubernativa**

507. Immediately after the enactment of the *Contraloría's* Decision, Prodeco started a long list of requests and appeals to have such Decision overturned.

508. On 11 May 2015, Prodeco filed:

- A *recurso de reposición* asking for reconsideration of the *Contraloría's* Decision, with the *Contralora Delegada*, the very authority who had issued the Decision, and
- A *recurso de apelación* with the *Contralor General de la República*, the supervisor of the *Contralora Delegada*.<sup>462</sup>

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<sup>458</sup> Doc. C-32, p. 109.

<sup>459</sup> Doc. C-32, p. 232. The *Contraloría's* Decision also lifted the precautionary measures which had been ordered against Ms. Aristizábal (Doc. C-32, p. 234).

<sup>460</sup> Doc. C-32, p. 234.

<sup>461</sup> Doc. C-71, Art. 61.

<sup>462</sup> Doc. C-33.

509. These administrative appeals were unsuccessful.

Reconsideration Decision

510. In July 2015, the *Contralora Delegada* rejected Prodeco's *recurso de reposición*. In her Reconsideration Decision, the *Contraloría* dismissed Prodeco's reasoning.<sup>463</sup>

Appeal Decision

511. On 21 August 2015, the *Contralor General de la República* issued the Appeal Decision in the *recurso de apelación*, confirming the *Contraloría*'s Decision [**"Appeal Decision"**].<sup>464</sup>

512. In his Decision, the *Contralor General* explained the background to the Fiscal Liability Proceeding and summarized the *Contraloría*'s Decision.<sup>465</sup> After reviewing the facts in the file, the *Contralor General* fully supported the conclusions of the *Contralora Delegada* and dismissed the appeal.<sup>466</sup>

513. As to Prodeco's reasons to lodge an appeal, the *Contralor General* noted the following:

514. (i) The *Contraloría* is authorized to exercise its control function over contracts once the contract has been signed, there being no requirement that the contract be finalized and liquidated.<sup>467</sup>

515. (ii) The lack of planning and of preliminary studies by Ingeominas could be directly imputed to Prodeco. Prodeco, by signing a contract with the public administration, became its collaborator and entered into a special relationship.<sup>468</sup>

516. Prodeco failed to adhere to this heightened level of responsibility. It imposed its desire to obtain profits over the collective interests of the society, and it took advantage of the institutional frailty of Ingeominas.<sup>469</sup>

517. (iii) The characterization of Prodeco's conduct as *dolosa* in the *Contraloría*'s Decision was accurate.<sup>470</sup> There are two fundamental reasons why Prodeco acted with *dolo*:

- Its actions showed "*una intención de incrementar ilegítimamente sus ganancias derivadas del negocio, sin hacer un mínimo esfuerzo por armonizarlos [sic] con*

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<sup>463</sup> Doc. C-35.

<sup>464</sup> Doc. C-37.

<sup>465</sup> Doc. C-37, pp. 3-14.

<sup>466</sup> Doc. C-37, pp. 15-43.

<sup>467</sup> Doc. C-37, pp. 58-59.

<sup>468</sup> Doc. C-37, p. 61.

<sup>469</sup> Doc. C-37, p. 62.

<sup>470</sup> Doc. C-37, pp. 62-64.

*los intereses estatales, obligación que se deriva de su condición de colaborador de la administración”;*

- Additionally, *dolo* derives from the fact that Prodeco resorted to the argument that it would increase its investments and the volume of coal mined, but such increases did not materialize during the Transition Period (*i.e.* during the year 2010).<sup>471</sup>

518. (iv) The Appeal Decision also confirmed that Prodeco can be subjected to a fiscal control procedure and that there had been no violation of due process.<sup>472</sup>

519. The *Contralor General* also rejected the remaining appeals by Mr. Martínez Torres, Mr. Ballesteros, and Mr. Ceballos.<sup>473</sup>

#### **P. Judicial Recourse: The Annulment Procedure**

520. Having exhausted the available administrative remedies (*recursos en vía gubernativa*), Prodeco put in motion a judicial *proceso de nulidad* before the *Tribunal Administrativo de Cundinamarca* [**“Annulment Procedure”**]. This was the first time that the dispute between Prodeco and the *Contraloría* was submitted to a Court of Justice – till then, the Fiscal Liability Proceeding had been handled and decided by the *Contraloría*, a non-judicial agency of the Colombian Republic.

521. After a mandatory, but eventually unsuccessful conciliation attempt, on 31 March 2016, Prodeco filed the Annulment Procedure with the *Tribunal Administrativo de Cundinamarca*.<sup>474</sup> The remedies sought were:<sup>475</sup>

- Annulment of the *Contraloría*’s Decision,
- With the consequent restitution of the amounts already paid by Prodeco in compliance with the *Contraloría*’s Decision,
- Certain ancillary requests plus damages.

#### **Progress**

522. The progress of this court procedure has been slow.

523. The *Tribunal Administrativo* adopted its first measure on 31 January 2017, when it dismissed the claim on formal grounds. Two months later, on 17 March 2017,

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<sup>471</sup> Doc. C-37, pp. 63-64.

<sup>472</sup> Doc. C-37, pp. 65-67.

<sup>473</sup> Doc. C-37, pp. 67-87.

<sup>474</sup> Doc. R-2. See also McManus I, para. 45.

<sup>475</sup> Subsidiarily, Prodeco also claimed against Messrs. Martínez Torres, Ballesteros, and Ceballos and the insurance companies, requesting reimbursement of the amounts paid to the *Contraloría*.

Prodeco filed a submission correcting the errors. This submission was presented to the Judge (“*al despacho*”) on 28 March 2017.<sup>476</sup>

524. The evidence submitted by the Parties on the record shows the development of the Annulment Procedure only until June 2017.<sup>477</sup> The Parties have however confirmed that the *Tribunal* has not yet issued a decision on Prodeco’s claim.<sup>478</sup>

**Q. Payment by Prodeco**

525. On 19 January 2016, in order to avoid the forfeiture of the Mining Contract, Prodeco paid to the Colombian State the Fiscal Liability Amount of COP 63 Bn (USD 19.1M), which Prodeco had been ordered to pay as a result of the Fiscal Liability Proceeding [the “**Fiscal Liability Amount**”]. Prodeco did so under protest.<sup>479</sup>
526. Prodeco also asked that the *Contraloría* lift the attachment of Prodeco’s assets, which had been ordered in 2012.<sup>480</sup>

**(8) FILING OF THE PROCEDURE FOR CONTRACTUAL ANNULMENT**

527. Pursuant to clause 39, the Mining Contract is subject to Colombian law and to the jurisdiction of Colombian courts.<sup>481</sup> Colombian courts are thus empowered to adjudicate all disputes arising out of the Mining Contract – including any dispute as regards the validity of the Contract or of its Amendments.
528. On 30 March 2012, the SGC (the mining agency), invoking clause 39 of the Mining Contract, and after an unsuccessful request for mandatory conciliation, filed the Procedure for Contractual Annulment with the *Tribunal Administrativo de Cundinamarca* [previously defined as the “**Procedure for Contractual Annulment**”]. The SGC requested that the court declare the nullity of the Eighth Amendment, arguing that such Amendment was detrimental to the general interest of the State: the Amendment had been executed on the assumption that it would generate benefits for the State, but this scenario had not materialized.<sup>482</sup>
529. Subsidiarily, the SGC requested that the *Tribunal Administrativo* revise the Eighth Amendment, “*de tal manera que se preserve el interés general, recuperando y manteniendo a un futuro el equilibrio de la ecuación financiera del Contrato 044/89, perdido con el desarrollo del Otrosí No. 8*”.

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<sup>476</sup> Doc. R-175.

<sup>477</sup> Doc. R-175, which is an official record of all the actions and decisions adopted by the *Tribunal Administrativo de Cundinamarca* in relation to this procedure.

<sup>478</sup> RPHB, para. 114; HT, Day 1, p. 155, l. 4.

<sup>479</sup> Doc. C-180, p. 3. See also McManus I, para. 43.

<sup>480</sup> Doc. C-180, p. 4.

<sup>481</sup> Doc. C-2, clause 39, p. 38.

<sup>482</sup> Doc. C-140, pp. 3, 34 and 35.

530. The SGC's claim was served on Prodeco in October 2012.<sup>483</sup>
531. On 15 May 2013, the ANM (which had replaced the SGC) resubmitted its claim before the *Tribunal Administrativo de Cundinamarca*,<sup>484</sup> in terms which were practically identical to the initial ones. The ANM however updated the amount of the State's alleged losses resulting to USD 99 M.<sup>485</sup>
532. On 7 October 2013, Prodeco filed its response to the ANM's resubmitted claim,<sup>486</sup> together with a report by KPMG.<sup>487</sup>
533. Prodeco said that the Eighth Amendment had been executed in accordance with Colombia's legislation and had been necessary to permit an expansion of the Mine. Prodeco also argued that the Eighth Amendment would increase Colombia's benefits in the long-term. According to Prodeco, the impact of the Eighth Amendment's on the State's finances could only be determined at the end of the life of the Mining Contract.<sup>488</sup>
534. On 22 October 2013, the ANM filed its reply submission.<sup>489</sup>
535. It is undisputed that the *Tribunal Administrativo de Cundinamarca* has not issued a decision in the Procedure for Contractual Annulment.<sup>490</sup>

**(9) AMICABLE CONSULTATIONS AND ARBITRATION**

536. On 28 August 2015, Claimants wrote to the President of Colombia Mr. Juan Manuel Santos, formally notifying a dispute under the Treaty.<sup>491</sup> Claimants referred to their letter of September 2013, in which they had explained their investments in Colombia and expressed their concern regarding the State's actions, which Claimants considered to be in violation of the Treaty. Claimants thus put in motion the six-month amicable consultation period provided for in Art. 11 of the Treaty.<sup>492</sup>

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<sup>483</sup> Doc. C-149, p. 1.

<sup>484</sup> Doc. C-158.

<sup>485</sup> Doc. C-158, p. 46.

<sup>486</sup> Doc. C-170. It should be noted that Prodeco had already submitted a response to the SGC's initial claim on 21 May 2013 (Doc. C-160).

<sup>487</sup> Doc. C-168.

<sup>488</sup> Doc. C-170.

<sup>489</sup> Doc. C-172.

<sup>490</sup> C I, para. 143; Compass Lexecon I, para. 58; R I, para. 261; R II, para. 383; HT, Day 1, p. 155, l. 4.

<sup>491</sup> Doc. C-38. Claimants also forwarded this letter to several Ministers of the Colombian Government (see p. 26).

<sup>492</sup> Doc. C-38. Doc. C-6, Art. 11(1) of the Treaty provides that: "If an investor of a Party considers that a measure applied by the other Party is inconsistent with an obligation of this Agreement, thus causing loss or damage to him or his investment, he may request consultations with a view to resolving the matter amicably".



537. On 4 March 2016, following the expiration of such period, Claimants submitted a Request for Arbitration with ICSID,<sup>493</sup> which gave rise to the present arbitration.

**(10) CRIMINAL COMPLAINT AGAINST PRODECO**

538. On Sunday, 10 September 2017, the *Director de la Agencia Nacional de Defensa Jurídica del Estado* [previously defined as “**ANDJE**”] filed with the *Fiscalía General de la Nación* a “*Denuncia penal en averiguación de responsables por la presunta comisión de delitos contra la administración pública*” against Prodeco and Glencore [previously defined as the “**Criminal Complaint**”].<sup>494</sup>
539. The copy of the Criminal Complaint submitted in this procedure is partially redacted, and hence relevant aspects of such *denuncia* remain unknown to this Tribunal. In the unredacted part, the ANDJE provides the factual background to the 3ha Contract (see section **III.(3)** *supra*), gives a summary of the facts surrounding the negotiation and execution of the Eighth Amendment, and submits a list of articles of the Colombian Criminal Code which might have been violated.
540. The Criminal Complaint does not accuse any individual persons of having committed specific illegal conduct, but simply asks the *Fiscalía* to investigate and to determine whether crimes have been committed.<sup>495</sup>
541. There is no evidence in the file of any investigation carried out by the *Fiscalía* as a consequence of the Criminal Complaint.

Disciplinary complaint against employees and ex-employees of the mining agency

542. Only two days after the Criminal Complaint, the ANDJE submitted a new complaint, in this case a disciplinary complaint, with the *Procurador General de la Nación* against several ex-employees of Ingeominas and the Ministry of Mines, *inter alia* Mr. Martínez Torres, Mr. Ballesteros, Mr. Ceballos, and Mr. Maldonado, for alleged violations of the *Código Único Disciplinario*.<sup>496</sup>
543. According to the ANDJE’s complaint, the concerned individuals had engaged in irregular courses of conduct between 2006 and 2010, in order to permit the execution of the Eighth Amendment. The ANDJE attached to its disciplinary complaint the Criminal Complaint filed with the *Fiscalía*.
544. There is no evidence in the file of any investigation carried out by the *Procuraduría* as a consequence of this disciplinary complaint.

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<sup>493</sup> RfA, dated 4 March 2016.

<sup>494</sup> Doc. C-278.

<sup>495</sup> Doc. C-278, p. 1.

<sup>496</sup> Doc. R-228.

**(11) PROVISIONAL APPLICATION OF THE EIGHTH AMENDMENT**

545. Despite all these disputes and procedures, it is an undisputed fact that the Parties have been abiding by the terms of the Eighth Amendment and that Prodeco has been making Royalty payments based thereon.<sup>497</sup>

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<sup>497</sup> R I, paras. 211 and 262-263; Paredes I, para. 37; R II, paras. 381-382.

#### **IV. RELIEF SOUGHT BY THE PARTIES**

546. In the present section the Arbitral Tribunal reproduces the Parties' requests for relief.

##### **(1) CLAIMANTS' REQUEST FOR RELIEF**

547. In their Post-Hearing Brief,<sup>498</sup> Claimants declared that they reiterated the requests for relief submitted in their Reply memorial, which reads as follows:<sup>499</sup>

“374. On the basis of the foregoing, Claimants respectfully request that the Tribunal:

(a) DECLARE that Colombia has breached Articles 4(1), 4(2) and 10(2) of the Treaty;

(b) ORDER that Colombia, through the ANM or any other government agency that may in due course become the contractual counterparty of Prodeco under the Mining Contract, continue to perform and observe the Eighth Amendment and further that all organs of the Colombian State take any and all actions necessary to ensure and not interfere with such continued performance and observance;

(c) ORDER that Colombia, through the ANM, procure the immediate and unconditional cessation of the ANM Proceedings with prejudice;

(d) ORDER that Colombia provide appropriate assurances and guarantees from the GCO<sup>500</sup> that it will refrain from initiating any new proceedings in relation to the Eighth Amendment;

(e) ORDER that Colombia, through the ANM, give appropriate assurances and guarantees that it will refrain from initiating any new proceedings in relation to the Eighth Amendment;

(f) ORDER that, by way of restitution, Colombia repay to Prodeco the Fiscal Liability Amount of US\$19.1 million<sup>501</sup> paid by Prodeco to Colombia on 19 January 2016 in the context of the Fiscal Liability Proceeding, and any sums that the GCO or any other organ of the Colombian State or Colombian court may, up to the date of the Tribunal's Award, have ordered Prodeco to pay by way of royalties or GIC calculated on the purported basis that the Eighth Amendment should not apply, adjusted from the date of payment to the date of the Award at an annual rate of 9.69%, compounded semi-annually;

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<sup>498</sup> CPHB, para. 92.

<sup>499</sup> C II, para. 374.

<sup>500</sup> Claimants refer to the *Contraloría* as “GCO”.

<sup>501</sup> C II, fn. 991: *Ie* 63 billion Colombian Pesos converted into US Dollars at the 19 January 2016 date of payment. *See* Compass Lexecon I, para. 96; Compass Lexecon II, para. 92.

(g) ORDER that if Colombia does not comply with orders requested in (b), (c), (d), (e), and (f) above within 90 days of the date of the Award, Colombia:

- (A) pay Claimants the Fiscal Liability Amount of US\$19.1 million plus interest to the date of the Award;
- (B) pay Claimants forward-looking damages as of the date of the Award computed as the difference in expected net revenues between a scenario with and without the royalty and GIC provisions in the Eighth Amendment between the date of Award and the end of the Calenturitas mine life as assessed by Claimants' experts at US\$336.1 million as of 31 December 2017; and
- (C) fully indemnify and hold harmless Claimants in respect of all retroactive royalty and GIC amounts that Claimants are ordered to pay in relation to the years 2011 to the date of the Award as a consequence of a failure to apply the Eighth Amendment, assessed at US\$238.6 million as of 31 December 2017.

(h) In order to avoid double recovery, in the event that subsection (g) is triggered, and solely upon Colombia's payment and Claimants' effective receipt of all of the compensation set out in (g)(A) and g(B) above (duly updated to the date of the Award), and in light of the indemnification ordered in g(C) above, ORDER Claimants to pay royalties and GIC from the date of the Award onwards based on the regime that existed prior to the Eighth Amendment.

(i) ORDER Colombia to pay post-award interest on (f), or, alternatively, (g) above, at a rate of 9.69%<sup>502</sup> per annum from the date of the Award, compounded semi-annually, or at such other rate and compounding period as the Tribunal determines will ensure full reparation;

(j) DECLARE that:

- (i) The award of damages and interest in (f), (g) and (h) is made net of applicable Colombian taxes; and
- (ii) Colombia may not deduct taxes in respect of the payment of the award of damages and interest in (f), (g) or (h);

(k) ORDER Colombia to indemnify the Claimants in full with respect to any Colombian taxes imposed on the compensation awarded to the extent that such compensation has been calculated net of Colombian taxes;

(l) ORDER Colombia to indemnify Claimants in respect of any double taxation liability that would arise in Switzerland or elsewhere that would not have arisen but for Colombia's adverse measures;

(m) ORDER Colombia to pay all of the costs and expenses of this arbitration, including Claimants' legal and expert fees, the fees and expenses of any

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<sup>502</sup> This figure was updated in Claimants' Reply Memorial.

experts appointed by the Tribunal, the fees and expenses of the Tribunal, and ICSID's costs; and

(n) AWARD any such other relief as the Tribunal considers appropriate.”

548. As to Respondent's jurisdictional and admissibility objections, Claimants have asked that the Tribunal:<sup>503</sup>

“[...] (a) REJECT Colombia's objections on jurisdiction and admissibility;

(b) ORDER Colombia to pay all of the costs and expenses of this arbitration, including Claimants' 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 costs; and

(c) AWARD any such other relief as the Tribunal considers appropriate.”

## **(2) RESPONDENT'S REQUEST FOR RELIEF**

549. Respondent sets out its request for relief in the Rejoinder:<sup>504</sup>

“1003. In light of all the above, and reserving its right to complement, develop or modify its position at a further, appropriate stage of these proceedings (including on the basis of the documents Claimants are yet to disclose), Colombia respectfully requests the Tribunal:

### **8.1 On Jurisdiction And Admissibility**

1004. To declare:

- That it lacks jurisdiction over all of Claimants' claims; and
- That all of Claimants' claims are, in any event, inadmissible;
- That Claimants' claims newly raised in the Reply are untimely and hence inadmissible; and

1005. To order:

- Claimants to reimburse Colombia for all the costs and expenses incurred in this arbitration, including with interest due and payable from the date Colombia incurred such costs until the date of full payment; and
- Such other relief as the Tribunal may consider appropriate.

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<sup>503</sup> C III, para. 148.

<sup>504</sup> R II, paras. 1003-1009.

## **8.2 On The Merits**

1006. If, *par impossible*, the Tribunal finds that it has jurisdiction on Claimants' claims and that such claims are admissible, to declare:

- That Colombia complied with its international obligations under the Treaty and international law;
- That Colombia did not breach Article 4(1) of the Treaty and that all Claimants' claims grounded therein are therefore dismissed;
- That Colombia did not breach Article 4(2) of the Treaty and that all Claimants' claims grounded therein are therefore dismissed;
- That Colombia did not breach Article 10(2) of the Treaty and that all Claimants' claims grounded therein are therefore dismissed; and

1007. To order:

- Claimants to reimburse Colombia for all the costs and expenses incurred in this arbitration, including with interest due and payable from the date Colombia incurred such costs until the date of full payment; and
- Such other relief as the Tribunal may consider appropriate.

## **8.3 On Quantum**

1008. If, *par impossible*, the Tribunal finds that Colombia has breached its international obligations under the Treaty and/or international law, to declare:

- That Claimants' non-monetary claims are beyond the Tribunal's jurisdiction and powers, or are inadmissible;
- That Claimants have not suffered any damages warranting compensation; and
- That, in any event, Claimants materially contributed to their alleged losses, and that any amounts the Tribunal may award to Claimants are to be reduced accordingly by, at least, 75%; and

1009. To order:

- Claimants to reimburse Colombia for all the costs and expenses incurred in this arbitration, including with interest due and payable from the date Colombia incurred such costs until the date of full payment; and
- Such other relief as the Tribunal may consider appropriate".

## V. JURISDICTIONAL AND ADMISSIBILITY OBJECTIONS

550. Claimants argue that their investments in Colombia are protected pursuant to Arts. 1(1) and 1(2)(c) of the Treaty<sup>505</sup> and that all requirements for access to arbitration both under the ICSID Convention and under the Treaty have been satisfied.<sup>506</sup>
551. Respondent, however, argues that Claimants' claims are not admissible and fall outside the jurisdiction of the Centre and the competence of the Tribunal.<sup>507</sup> Respondent raises three jurisdictional and one admissibility objections:<sup>508</sup>
- The Tribunal may not exercise competence over Claimants' claims because the Eighth Amendment is tainted with illegality, as it was procured through illicit means and bad faith conduct [**"Illegality Objection"**] (V.1);
  - Claimants' claim against the conduct of the *Contraloría* falls outside the jurisdiction of the Tribunal by virtue of the fork-in-the-road provision of the Treaty, because Claimants resorted to Colombian administrative courts to adjudicate that claim before starting the present arbitration [**"Fork-in-the-Road Objection"**] (V.2);
  - The Tribunal cannot derive competence from the umbrella clause of the Treaty, because the dispute-resolution clause of the Treaty expressly excludes disputes based on such clause; additionally, the Tribunal also lacks competence over claims against the ANM, since these claims are contractual and the Mining Contract contains its own dispute-resolution clause [**"Umbrella Clause Objection"**] (V.3);
  - Claimants' claims are not ripe for adjudication and are, therefore, inadmissible [**"Inadmissibility Objection"**] (V.4).
552. Claimants note that Respondent does not dispute that Claimants and their investments are protected under the Treaty, or that Claimants have fulfilled all requirements to have access to arbitration under the ICSID Convention and the Treaty.<sup>509</sup> As to Colombia's jurisdictional and admissibility objections, Claimants consider that they do not withstand scrutiny.<sup>510</sup>

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<sup>505</sup> C I, paras. 150-158.

<sup>506</sup> C I, paras. 159-168.

<sup>507</sup> R I, para. 264; R II, paras. 383-384.

<sup>508</sup> R I, paras. 265-268; R II, paras. 385-388.

<sup>509</sup> C II, para. 159; HT, Day 1, p. 178, ll. 5-10.

<sup>510</sup> C II, para. 160; HT, Day 1, p. 178, l. 14.



## **V.1. ILLEGALITY OBJECTION**

553. Colombia argues that Claimants' claims are tainted by illegality, because Claimants engaged in acts of corruption and bad-faith conduct. Respondent submits that Claimants' illicit conduct deprives Claimants' investments of the protection of the Treaty and that the Centre lacks jurisdiction and the Tribunal competence over such claims (1).<sup>511</sup>
554. Claimants counter that Respondent's illegality allegations are devoid of any support or substance.<sup>512</sup> Claimants argue that Respondent has failed to satisfy the standard of proof required for corruption allegations, and that Respondent's characterization of Prodeco's actions cannot deprive the Centre of its jurisdiction and the Tribunal of its competence (2).<sup>513</sup>
555. The Tribunal will devote separate sections to the allegation of corruption (3) and of bad faith (4), and will finally summarize its decisions (5).

### **(1) RESPONDENT'S POSITION**

556. Respondent says that Claimants' investment made in connection with the Eighth Amendment cannot be protected by the Treaty, because such investment was secured in contravention of Colombian law, and is tainted by Claimants' illegal and disloyal behaviour, including corruption and bad-faith conduct.<sup>514</sup>
557. According to Respondent, Arts. 2 and 4(1) of the Treaty expressly exclude from protection investments made in violation of the laws and regulations of the recipient State.<sup>515</sup> Respondent argues that if an investment was made on an illicit basis, contrary to principles of good faith, or by way of corruption, fraud or deceitful conduct, it cannot benefit from the substantive protection of the Treaty.<sup>516</sup>
558. Respondent explains that it is part of the general consensus in international investment law that:
- Tribunals cannot exercise jurisdiction over illegal, illicit or improperly acquired investments,<sup>517</sup> and

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<sup>511</sup> R II, paras. 385 and 389.

<sup>512</sup> C II, para. 175.

<sup>513</sup> C III, paras. 11 and 49.

<sup>514</sup> R I, para. 269; R II, para. 389.

<sup>515</sup> R I, paras. 270-272; R II, paras. 424-431.

<sup>516</sup> R I, paras. 276-278, referring to *Hamester*, para. 123; R II, paras. 447-449.

<sup>517</sup> R I, paras. 273-274.

- The purpose of the international mechanism of protection of investments through ICSID arbitration is not to defend investments which are illegal or secured through improper means, but only *bona fide* investments.<sup>518</sup>
559. Respondent submits that if the Tribunal were to exercise jurisdiction over claims based on illegal or illicit conduct, it would be condoning and encouraging such misconduct.<sup>519</sup>
560. Respondent considers that Claimants' conduct in securing the Eighth Amendment falls within the type of illegal and improper behaviour which cannot be protected by the ICSID arbitration system, for two main reasons:<sup>520</sup> in order to secure the execution of the Eighth Amendment, Claimants engaged in illicit acts (A) and in bad faith conduct (B).

**A. Claimants Obtained the Eighth Amendment Through Illicit Means**

561. Colombia submits that Claimants caused Ingeominas to execute the Eighth Amendment through corruption: Claimants acquired the 3ha Contract from Mr. Maldonado, thereby securing Director Ballesteros' support for the Commitment to Negotiate. According to Respondent, Claimants cannot deny that they made an outsized payment to an associate of Director Ballesteros.<sup>521</sup>
562. Respondent argues that the Tribunal should follow the approach set out by the *Metal-Tech*, *Spentex*, and *World Duty Free* tribunals for evaluating evidence of corruption.<sup>522</sup>
563. According to Respondent, the Tribunal has a duty to inquire about the reasons for the payment of a substantial sum made by Claimants to Mr. Maldonado, an associate of Director Ballesteros. In this endeavour, the Tribunal should depart from traditional rules on the burden of proof, and rather assess the evidence as whole, given that it is almost impossible to prove bribery and corruption. The Tribunal should "connect the dots" and identify "red flags" of corruption, in particular the following:<sup>523</sup>
- Prodeco paid a very high compensation of USD 1.75 M for the 3ha Contract;
  - The price increased exponentially between December 2008 and April 2009 and was disproportionate to the consideration received, which was a small plot of land;
  - Prodeco hid the documentation underlying the 3ha Contract; Prodeco did not disclose the price of the transaction to Ingeominas until two years thereafter, in

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<sup>518</sup> R I, paras. 279-280, referring to *Phoenix*, para. 100.

<sup>519</sup> R I, para. 275, referring to *World Duty Free*, para. 157.

<sup>520</sup> R I, para. 281.

<sup>521</sup> R I, para. 283; R II, paras. 390, 422 and 434.

<sup>522</sup> R II, paras. 395 and 398-407.

<sup>523</sup> R II, paras. 408-422.

the wake of the corruption scandal at Ingeominas; in addition, Prodeco has produced almost no evidence concerning the 3ha Contract in this arbitration;

- Prodeco failed to produce evidence of the account to which the payment for the 3ha Contract was made;
- Finally, the payment was made directly to a former employee of Ingeominas' predecessor, Mr. Maldonado, and as such, closely connected to the Director of that State agency; only ten days after CDJ's acquisition of the 3ha Contract was approved, Director Ballesteros caused Ingeominas to execute the Commitment to Negotiate.

564. Colombia contends that as a result of this undue influence, Claimants induced Ingeominas to execute the Eighth Amendment in complete disregard of the legal framework applicable to the amendment of mining contracts. Claimants caused Ingeominas to bypass the necessary authorizations and to breach the procedure for the renegotiation of the Mining Contract.<sup>524</sup> In particular:<sup>525</sup>

- The *Consejo Directivo* of Ingeominas was not kept properly informed of the negotiations;
- The advice of Ingeominas' Contracting Committee and external consultants was not sought, nor were the required ministerial approvals;
- No viability assessments were carried out prior to the execution of the Eighth Amendment;
- The final version of the Eighth Amendment was negotiated over the span of five days only, in an informal context.

565. Colombia argues that the above leads to the conclusion that the Eighth Amendment was procured through illicit acts and in contravention of Colombian law; hence, Claimants' investment is tainted with illegality and cannot benefit from the protection of the Treaty.<sup>526</sup>

#### Hearing

566. In the course of the Hearing, Colombia reiterated its position that an illegal investment does not deserve legal protection, since the investor does not have "clean hands":<sup>527</sup>

- First, because Arts. 2 and 4(1) of the Treaty restrict the jurisdiction of the Tribunal to investments "made in accordance with [the Contracting Party's] laws

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<sup>524</sup> R I, para. 282; R II, para. 390.

<sup>525</sup> R I, para. 282; R II, para. 390.

<sup>526</sup> R I, para. 282.

<sup>527</sup> HT, Day 2, p. 467, l. 7 – p. 468, l. 4, referring to *Al Warraq*.

and regulations”, and under Colombian law, corruption is illegal under Art. 411 A of the Criminal Code;

- Second, Respondent says that the evidence in the present case meets the standard of proof for an illegality objection, and this follows from the application of the red-flag methodology as used by the tribunals in *Metal-Tech* and *Spentex*;<sup>528</sup>
- Third, tribunals confronted with illegality objections and corruption allegations have a duty to take affirmative action and inquire as to the true reasons behind suspicious payments;<sup>529</sup>
- Fourth, if explanations are not provided by the party who made the suspicious payment, then tribunals must draw the only logical adverse inference, namely that the payments have been made with the purpose of corrupting public officials;
- Fifth, tribunals must not ignore red flags on the issue of corruption, and when these red flags appear, a tribunal must connect the dots and conclude that the investment was tainted with corruption;<sup>530</sup>
- Sixth, tribunals should not apply strictly the *actori incumbit probatio* rule, or a heightened standard of proof, but instead they must look to the entirety of the evidence in the record – otherwise they run the risk of making it almost impossible to prove bribery.<sup>531</sup>

567. Respondent also reiterated the red flags which – in its submission – prove corruption:<sup>532</sup>

- The payment,
- The fact that Mr. Maldonado was a former employee of Minercol (the Republic’s prior mining agency),
- The timing of such payment,
- Claimants’ concealment of the transaction,
- Claimants’ decision to restrict knowledge of the transaction to three members of its top management,

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<sup>528</sup> HT, Day 2, p. 469, ll. 9-15, referring to *Metal-Tech*, para. 241 and *Spentex* (quoted by K. Betz, Proving Bribery, Fraud, and Money Laundering in International Arbitration: on Applicable Criminal Law and Evidence, 2017, Doc. RL-149).

<sup>529</sup> HT, Day 2, p. 469, l. 20 – p. 470, l. 3, referring to *Metal-Tech*.

<sup>530</sup> HT, Day 2, p. 471, ll. 12-18, referring to *Spentex*.

<sup>531</sup> HT, Day 2, p. 474, ll. 1-22.

<sup>532</sup> HT, Day 2, p. 476, l. 14 – p. 477, l. 14.

- The fact that the Eighth Amendment was executed in open disregard of the applicable law and regulations.

**B. Claimants Acted in Bad Faith**

568. According to Colombia, Claimants provided false and misleading information to Ingeominas, while withholding other important information, so as to induce Ingeominas to execute the Eighth Amendment. Colombia finds that this bad-faith conduct in securing the Eighth Amendment is sufficient to deprive the investment of the protections of the Treaty.<sup>533</sup> In particular:<sup>534</sup>

- Claimants misrepresented the economic situation of the project, in order to persuade Ingeominas that expanding production beyond 8 MTA, under the current conditions, was not economically feasible;
- Claimants presented misleading figures, aimed at showing the alleged lack of profitability of the project's expansion under the existing Compensation Scheme;
- Claimants deliberately withheld geological, technical and accurate pricing information from Ingeominas;
- Claimants improperly sought to justify delaying the submission of the 2010 PTI;
- Claimants sought to exert undue influence over Ingeominas through questionable means.

569. Respondent rejects Claimants' argument that Colombia would be estopped from raising an illegality objection in the present case, given that the execution of the Eighth Amendment would be attributable to Colombia. Respondent argues that the responsibility for the misconduct surrounding the negotiations of the Eighth Amendment cannot be placed solely on Ingeominas. Through corruption and bad faith, Claimants willingly caused and shaped the negotiations that led to the execution of the Eighth Amendment.<sup>535</sup>

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570. In sum, Respondent submits that, in securing the Eighth Amendment, Claimants did not act in good faith, but rather acted deceitfully and illegally. The Eighth Amendment was procured through acts of corruption, which is prohibited under both international and Colombian law. This means that Claimants' claims are tainted with illegality and fall outside the Tribunal's jurisdiction.<sup>536</sup>

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<sup>533</sup> Referring to *Plama*, para. 144.

<sup>534</sup> R I, paras. 285-286; R II, paras. 390, 446 and 451.

<sup>535</sup> R I, paras. 287-288; R II, paras. 432-444.

<sup>536</sup> R I, para. 289; R II, paras. 445 and 453.

571. Respondent says that, alternatively, if the Tribunal were to consider that Claimants' conduct is not an obstacle to the Tribunal's jurisdiction, it should conclude that Claimants' unclean hands render their claims inadmissible.<sup>537</sup>

**(2) CLAIMANTS' POSITION**

572. Claimants contend that Respondent's allegations of illegality (A) and bad faith (B) have no merit and cannot deprive the Tribunal of jurisdiction.

**A. Colombia's Allegations of Illegality are Devoid of Substance**

573. Claimants argue that Colombia's corruption allegations are false and unsubstantiated. According to Claimants, as recognised by the *Metal-Tech*, *Spentex*, and *ECE* tribunals, the party who raises corruption allegations has the burden of proof.<sup>538</sup>

574. Case-law confirms that when confronted with such allegations, tribunals are bound to consider them, but also to safeguard those against whom corruption is alleged. As explained by the *Spentex* tribunal, shifting the burden of proof and demanding evidence from the accused party that it did not engage in corrupt acts would subject such party to a *probatio diabolica*. Hence, it is not for Claimants to prove their innocence, but for Colombia to prove its claims.<sup>539</sup>

575. According to Claimants, in the present case, Colombia has failed to produce any evidence supporting its allegation that the Eighth Amendment was procured through corruption.<sup>540</sup>

576. Claimants submit that, far from engaging in corrupt practices in order to influence civil servants to negotiate a contractual amendment, Claimants were the victims of an extortion scheme, facilitated by the Colombian government's inertia in the face of Claimants' multiple challenges, complaints and requests for investigation. Claimants argue that:<sup>541</sup>

- Prodeco filed multiple administrative petitions and appeals to prevent the 3ha Contract from being granted to Messrs. Maldonado and García; after it had been granted, and even after it was assigned to CDJ, Prodeco still complained to the highest Colombian authorities and requested investigations;
- Faced with the silence of the Colombian authorities, CDJ agreed to the assignment of the 3ha Contract; the price paid by CDJ for this assignment was not disproportionately high, given the value of the coal within the three-hectare area, and the significant losses that would have resulted for the Prodeco Affiliates from the inability to mine around that area; in addition, Messrs.

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<sup>537</sup> R I, para. 290; R II, para. 453.

<sup>538</sup> C III, para. 13.

<sup>539</sup> C III, paras. 14-16.

<sup>540</sup> C III, para. 17.

<sup>541</sup> C II, paras. 38 and 163(b); C III, paras. 19-42.

Maldonado and García had initially requested that CDJ pay approximately USD 10 million for the assignment;

- Claimants have not concealed the documentation underpinning the 3ha Contract; the vast majority of the evidence relating to this transaction was placed on the record by Claimants; in addition, Claimants have presented Mr. Nagle as a witness, whereas Colombia has not presented a single witness who was involved in the events allegedly involving corruption; Colombia also deliberately ignores information that it has in its possession, such as the repeated complaints filed by the Prodeco Affiliates or the volume of coal extracted by CDJ from the 3 hectare concession;
- Claimants did not keep the price paid for the 3ha Contract secret; there was no obligation to disclose the purchase price to Ingeominas before the transaction; in any event, CDJ disclosed the purchase price to Ingeominas nine months after the transaction, it reflected the purchase price in its accounts and audited financial statements, and made the necessary Colombian tax withholdings; finally, Claimants paid the purchase price to the bank accounts identified in the assignment contract;
- Colombia has not established any connection whatsoever between Mr. Maldonado and Mr. Ballesteros; moreover, Mr. Maldonado was an employee of Carbocol, Ecocarbón and Minercol between 1988 and 2002, whereas Mr. Ballesteros only began his tenure at Ingeominas in 2007.

577. As for Colombia's allegation that through corruption Claimants induced Ingeominas to execute the Eighth Amendment, Claimants reject it, and argue that there were no departures from internal Government procedures.<sup>542</sup>

- Ingeominas' *Consejo Directivo* did not have to approve contractual amendments such as the Eighth Amendment;
- Ingeominas had discretion to decide whether to appoint an external advisor or to consult the Contracting Committee;
- Ingeominas was not required to prepare a viability report;
- The *Ministro de Minas y Energía* did not have to approve the Eighth Amendment prior to execution;

578. Claimants submit that even if true, these alleged departures could not deprive the Tribunal of jurisdiction because they were not known to or not attributable to Claimants and were not significant.<sup>543</sup> Colombia is bound by the actions of its officers under international law and is, thus, estopped from objecting to the

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<sup>542</sup> C II, paras. 163(c) and 168-171; C III, para. 43.

<sup>543</sup> C II, paras. 171-173; C III, para. 43.



Tribunal's jurisdiction on the basis that those officers did not comply with their own obligations.<sup>544</sup>

579. Claimants submit that Colombia has also failed to explain how Mr. Ballesteros would have allegedly single-handedly forced employees or board members of Ingeominas, or even the *Ministro de Minas y Energía*, to engage in purported irregularities in the negotiation and execution of the Eighth Amendment.
580. In addition, the new administration of Ingeominas, led by Mr. Paredes, never raised these procedural irregularities when it sought to annul the Eighth Amendment, or investigated the concerned parties for administrative or disciplinary purposes.<sup>545</sup>
581. Thus, Claimants argue that Colombia's illegality objection must be dismissed in its entirety.<sup>546</sup>

#### Hearing

582. At the Hearing, Claimants reiterated that Respondent's allegations of corruption were advanced for the first time in this arbitration, without a shred of evidence.<sup>547</sup>
583. Claimants explained that following Glencore's acquisition of the Prodeco Affiliates, these companies submitted to Ingeominas an agreement for the integrated use of mining infrastructure, to conduct joint operations in the La Jagua mine. Ingeominas authorized this integrated mining operation in April 2007. It was in this context that Mr. Maldonado and Mr. García applied for a concession over the 3 hectare area situated in the middle of the La Jagua project, likely exploiting insider knowledge. Despite CDJ's administrative challenges, Ingeominas reversed its initial decision, and resolved to give the 3 hectare concession to Messrs. Maldonado and García.<sup>548</sup>
584. Claimants submit that, thereafter, Prodeco complained to the highest Colombian state authorities; despite this, not a single authority took any action against what was apparently highly inappropriate conduct.<sup>549</sup> Even after Prodeco purchased the 3ha Contract from Messrs. Maldonado and García, the company continued to complain to the highest authorities. Nevertheless, no authority with investigative power did anything.<sup>550</sup>
585. According to Claimants, Respondent's corruption allegation only stands through a highly selective and deliberately misleading narrative of the facts.<sup>551</sup> Claimants refer to the *Methanex* decision, in which the tribunal found that in order properly to

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<sup>544</sup> C II, paras. 169-171; C III, para. 43.

<sup>545</sup> C III, para. 44.

<sup>546</sup> C III, para. 47.

<sup>547</sup> HT, Day 1, p. 180, ll. 3-16.

<sup>548</sup> HT, Day 1, pp. 181-186.

<sup>549</sup> HT, Day 1, p. 189, ll. 3-6.

<sup>550</sup> HT, Day 1, pp. 190-196.

<sup>551</sup> HT, Day 1, p. 196, ll. 17-18.

connect the dots and make inferences, each and every relevant dot must be considered individually before trying to assert a pattern.<sup>552</sup> Claimants argue that Respondent's alleged "red flags" are totally without merit.<sup>553</sup>

- The amount paid by Claimants for the 3ha Contract was not strikingly high or disproportionate, since the Prodeco Affiliates stood to lose tens of millions of dollars if they could not gain access to the 3 hectare area;
- Claimants have not concealed any documents related to the 3ha Contract; in fact, Claimants have brought extensive correspondence to the record; by contrast, Respondent did not tell this Tribunal that the Prodeco Affiliates had filed multiple complaints relating to the 3ha Contract with the State's highest authorities;
- Claimants did not conceal the price paid for the 3ha Contract from the Colombian authorities; there was no obligation to disclose the price paid for the 3 hectare concession to Ingeominas, and in any event CDJ did so as part of its regular disclosures of domestic suppliers of goods and services; in addition, Claimants made the appropriate tax withholdings and the price was reflected in CDJ's audited financial statements; finally, the Assignment Contract clearly identifies the price paid for the 3 hectare concession;
- Respondent has not established any connection between Mr. Maldonado and Mr. Ballesteros; Mr. Maldonado worked in Ecorcarbón and Minercol in Valledupar between 1998 and 2002; Mr. Ballesteros started his tenure at Ingeominas in Bogotá in 2007;
- There was no departure from internal Government procedures.

**B. Claimants Did Not Act in Bad Faith**

586. Claimants submit that they did not misrepresent or conceal any information from Ingeominas. Even if Colombia's mischaracterization of Claimants' conduct were correct, there would still be no ground for a jurisdictional objection.<sup>554</sup>
587. Claimants argue that the standard for proving bad faith is a demanding one; only significant and intended violations of applicable laws by investors can serve as grounds for challenging jurisdiction. Colombia has failed to prove any violations or conduct grave enough to give rise to a jurisdictional objection.<sup>555</sup>
588. Claimants say that Colombia does not dispute that throughout the over 20 months of negotiations for the Eighth Amendment, Prodeco.<sup>556</sup>

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<sup>552</sup> HT, Day 1, p. 196, l. 18 – p. 197, l. 1.

<sup>553</sup> HT, Day 1, pp. 198-209.

<sup>554</sup> C III, para. 49.

<sup>555</sup> C II, paras. 172-173; C III, paras. 50 and 58, referring to *Invesmart*, para. 430 and to *Bayindir*, para. 143.

<sup>556</sup> C II, para. 163(d); C III, para. 51.

- Diligently responded to all of Ingeominas' requests for information;
- Repeatedly invited Ingeominas to request any additional information that might facilitate its review of Prodeco's proposals;
- Solicited questions from Ingeominas;
- Facilitated in-depth, in-person reviews of the proposals with Ingeominas' negotiation team.

589. Claimants also deny Colombia's accusations that they presented skewed information to Ingeominas, or that they omitted to present any material information to Ingeominas in bad faith.<sup>557</sup> Claimants argue that Colombia and its experts try to scavenge for purported errors in the estimates and analyses shared by Prodeco with Ingeominas at the relevant time. Their argument, however, is based on information that Ingeominas never requested. As held by the *Mamidoil Jetoil* tribunal, States cannot abuse the process by scrutinizing the investment *post factum* with the intention of rooting out minor or trivial illegalities as a pretext to free themselves of an obligation.<sup>558</sup>

590. According to Claimants, Colombia is submitting for the first time in this arbitration that Claimants acted disloyally, since it never raised any complaints regarding the information provided by Prodeco at the time of the negotiations or in the context of the Procedure for Contractual Annulment. Similarly, no such accusations were made by the *Contraloría* in the context of the Fiscal Liability Proceeding.<sup>559</sup>

591. Prodeco was always transparent about its assumptions and about the trade-off underpinning the Eighth Amendment: there would be a reduction in Colombia's royalty taken as a percentage of the total value of production; however, this reduction would be compensated by a higher royalty associated with higher production following expansion, and Colombia would overall receive higher revenues.<sup>560</sup> Claimants submit that they always discussed these assumptions with Ingeominas, which was the State agency competent to verify the information delivered by Prodeco.<sup>561</sup>

592. In sum, Claimants argue that the Tribunal should dismiss Respondent's Illegality Objection.

### **(3) CORRUPTION**

593. Respondent's first argument is that, in order to secure the Eighth Amendment, Claimants corrupted Mr. Ballesteros, Ingeominas' *Director General*. The corrupt payment was allegedly disguised as the purchase price for the acquisition of the 3ha Contract. Colombia submits that Mr. Maldonado, the co-owner of the 3ha Contract,

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<sup>557</sup> C III, paras. 63-81.

<sup>558</sup> C III, paras. 54-55, referring to *Mamidoil Jetoil Greek Petroleum*, para. 483.

<sup>559</sup> C III, paras. 52-53.

<sup>560</sup> C II, para. 163(d); C III, para. 62.

<sup>561</sup> C II, paras. 163(d) and 164; C III, paras. 62 and 65-67.

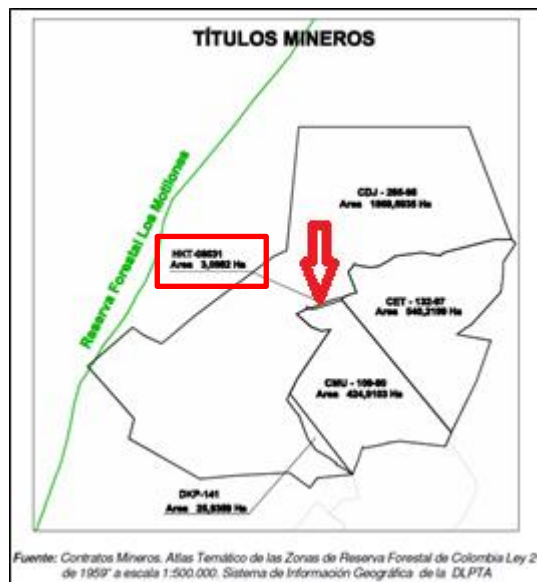
was in fact an associate of Mr. Ballesteros, and that both shared the USD 1.75 M price paid by Prodeco.

594. Claimants deny any wrongdoing. They acknowledge the purchase of the 3ha Contract in May 2009, after having reported the situation to various Colombian authorities, and having received no support or solution whatsoever. They also deny that Mr. Ballesteros was the final recipient of the funds.
595. The Tribunal will first establish the proven facts (3.1), then explain certain issues which arose regarding the marshalling of evidence regarding corruption (3.2), and finally dismiss Respondent's objection (3.3).

### (3.1) PROVEN FACTS

#### A. The 3ha Contract

596. On 29 November 2006, Mr. Jorge Maldonado – a former employee of the Ministry of Mines and of Carbocol, Ingeominas' predecessor as mining agency of the Republic – and his partner, Mr. César García, filed a request with Ingeominas to obtain a concession contract for the exploration and production of coal in a parcel of 3 hectares located in the middle of the La Jagua coal mine, which was already being exploited by Prodeco through its Affiliates.<sup>562</sup> The arrow in the following map shows the tiny 3 hectares strip, surrounded by Prodeco's mining concessions:



597. The Prodeco Affiliates had obtained their mining rights over the La Jagua project from the mining agencies that had preceded Ingeominas, long before Glencore's involvement.<sup>563</sup> It seems that the three-hectare gap was the result of clerical errors

<sup>562</sup> Doc. R-90, p. 6. See also R I, para. 69 and C II, para. 38(b).

<sup>563</sup> Doc. C-234, p. 2.

in the mapping of the concessions granted in the 1990s and 2000s.<sup>564</sup> While it remains uncertain whether these errors were accidental or intentional, it should be noted that Mr. Maldonado worked in Carbocol and in the subsequent mining agencies from 1988 through 2002<sup>565</sup> and was accordingly in a position to obtain insider information on the three-hectare gap.

#### Initial rejection by Ingeominas

598. Four months after Mr. Maldonado's application, on 2 March 2007, Ingeominas issued a technical report concluding that the 3ha Contract would partially overlap with other nearby concessions and that it was too small for a standalone mining operation.<sup>566</sup> A week thereafter, on 17 March 2007, Ingeominas formally rejected Mr. Maldonado's application for the 3ha Contract.<sup>567</sup>
599. There is a dispute as to whether Mr. Maldonado filed a request for reconsideration of this decision on time. In the apparent absence of a request for reconsideration, on 3 May 2007, Ingeominas issued a resolution declaring that its decision to reject the application for the 3ha Contract had become final and enforceable.<sup>568</sup>
600. On 11 May 2007, Mr. Maldonado contested this resolution, saying that he had presented a request for reconsideration at Ingeominas' offices in the city of Valledupar on 2 May 2007. Attached to his letter was a hardly legible request for reconsideration dated 2 May 2007.<sup>569</sup> The request seemed to have some irregularities, and did not contain a notary stamp, as required by law.<sup>570</sup> According to Mr. Maldonado, after this incident and until April 2008, he received no further information from Ingeominas, except that the case was still under analysis.<sup>571</sup>

#### Integrated Use Agreement

601. In early 2008, the Prodeco Affiliates submitted to Ingeominas a proposed Integrated Use Agreement which would allow them to conduct joint operations in the mining areas of the La Jagua project,<sup>572</sup> an agreement which Ingeominas subsequently approved.<sup>573</sup> Accordingly, on 10 March 2008, the Prodeco Affiliates submitted to Ingeominas a formal opposition to the 3ha Contract, requesting that Ingeominas:<sup>574</sup>

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<sup>564</sup> Doc. C-202, pp. 1-2. See also Nagle II, para. 16.

<sup>565</sup> Doc. R-92. See also Paredes I, para. 17.

<sup>566</sup> Doc. C-199, pp. 1-2. See also R I, para. 72 and C II, para. 38(c).

<sup>567</sup> Doc. C-200. See also R I, para. 72 and C II, para. 38(c).

<sup>568</sup> Doc. C-233.

<sup>569</sup> Doc. C-201.

<sup>570</sup> Doc. C-201; Doc. C-207, p. 2. Pursuant to Art. 52 of the *Código Contencioso Administrativo (Decreto 1 de 1984)*, a "*recurso*" has to be filed in person. According to the Prodeco Affiliates, there should be some sort of authentication if Mr. Maldonado had indeed filed the *recurso* in person (Doc. C-209, p. 9).

<sup>571</sup> Doc. C-204, pp. 2-3.

<sup>572</sup> Doc. C-234.

<sup>573</sup> Doc. C-202, p. 2, para. 11.

<sup>574</sup> Doc. C-202, pp. 3-4.

- Correct the errors in the coordinates of the titles granted to the Prodeco Affiliates, which had created the three-hectare gap; or
- Alternatively, reject the request for the 3ha Contract, because it would be technically impractical to exploit such a small area.

Ingeominas backtracks and awards the 3ha Contract

602. Prompted by Mr. Maldonado's request for reconsideration and by the Prodeco Affiliates' opposition to the 3ha Contract, Ingeominas went back to evaluate the viability of the 3ha Contract. In June 2008, Ingeominas backtracked on its original decision: it found that the 3ha Contract area did not overlap with other mining concessions and revoked its rejection of Mr. Maldonado's application.<sup>575</sup>
603. In July 2008, the Prodeco Affiliates filed a request for reconsideration,<sup>576</sup> which Ingeominas rejected on 19 August 2008.<sup>577</sup>

**B. Prodeco Complains to Authorities**

604. Prodeco was now faced with the situation that Ingeominas was about to grant the 3ha Contract to Mr. Maldonado and his partner – a concession which threatened to disrupt the development of the La Jagua mine.<sup>578</sup> In this situation Prodeco decided to complain in writing to various Colombian authorities.
605. First, on 26 August 2008, Ms. Zuleta, acting on behalf of the Prodeco Affiliates, filed a formal complaint regarding the anomalies surrounding the 3ha Contract with Colombia's *Procurador General de la Nación*.<sup>579</sup> Ms. Zuleta forwarded this complaint to the *Ministro de Minas y Energía*, to the *Ministro de la Presidencia*, to Mr. Ballesteros, and to the *Contraloría*.<sup>580</sup> In particular, the Prodeco Affiliates explained that:<sup>581</sup>

*“Si INGEOMINAS persiste en otorgar a los señores Maldonado Mestre y García Vargas la concesión del área solicitada como HKT-08031, incurre en un grave y serio detrimento patrimonial contra la Nación y las entidades territoriales beneficiarias de las regalías derivadas de la explotación de los recursos existentes en dicha área. [...]*

*El área objeto de la solicitud de concesión en controversia contiene reservas estimadas de 1'114.761 toneladas de carbón, que sólo [sic] se podrán explotar dentro de una integración con los depósitos 285-95, 109-90, 132-97 y DKP-141, por lo cual, debido a que la explotación aislada que pretenden hacer los señores Maldonado Mestre y García Vargas no será factible, se*

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<sup>575</sup> Doc. C-205. See also R I, para. 73 and C II, para. 38(j).

<sup>576</sup> Doc. C-207.

<sup>577</sup> Doc. C-208.

<sup>578</sup> Doc. C-300, p. 4. See also Doc. H-1, p. 184; Doc. C-207, p. 9; Nagle III, paras. 7-9; HT, Day 1, p. 184, l. 13 – p. 185, l. 19 and p. 190, l. 14 – p. 191, l. 10.

<sup>579</sup> Doc. C-209.

<sup>580</sup> Doc. C-210.

<sup>581</sup> Doc. C-209, p. 8.



*perderán no solo dichas reservas, sino las 10'186.766 toneladas de carbón que en el evento de pretenderse tal explotación habría que dejar de explotar dentro de la integración aprobada a CDJ, CET y CMU, por cuanto que están contenidas en las áreas contiguas que constituirían los taludes de seguridad que tendrían que dejarse entre las fronteras de los títulos mineros circundantes al área solicitada.*

*Por tal razón, la Nación y las entidades territoriales correspondientes dejarán de percibir una suma estimada en \$106.314.873.123 [...]”.* [Emphasis added]

606. Second, on 22 September 2008, Ms. Zuleta approached the *Procurador General* again, saying that Ingeominas’ rejection of the Prodeco Affiliates’ request for reconsideration constituted a violation of due process and of the applicable mining provisions. Ms. Zuleta emphasised that the *Procurador General* should investigate the fact that the 3ha Contract had been awarded to an ex-employee of the agency, since there had been clear irregularities and an undue use of insider information.<sup>582</sup> This letter was, once again, forwarded to the *Ministro de Minas y Energía*, the *Ministro de la Presidencia* and the *Contraloría*.<sup>583</sup>
607. Third, on 6 October 2008, the Prodeco Affiliates sent a complaint to Mr. Ballesteros and Mr. Edward Franco (with copy to the *Procurador General*, the *Ministro de Minas y Energía*, the *Ministro de la Presidencia* and the *Contraloría*), asking Ingeominas to review the 3ha Contract and to refrain from granting, or at least from registering, the 3ha Contract.<sup>584</sup>
608. Fourth, on 10 October 2008, the Prodeco Affiliates asked the *Jefe del Registro Minero Nacional* (with copy to the *Procurador General*, the *Ministro de Minas y Energía*, the *Ministro de la Presidencia* and the *Contraloría*) to refrain from registering the 3ha Contract, claiming that he had a duty to defend the national interest.<sup>585</sup>
609. Did these repeated complaints produce any effect?
610. Respondent has not provided evidence of any reaction from any of the Colombian authorities to whom Prodeco complained. There is also no written record of any of these authorities taking any action to rectify the situation.<sup>586</sup>

#### Execution of the 3ha Contract

611. Notwithstanding Prodeco’s appeals and complaints, on 16 October 2008, Ingeominas (represented by Mr. Franco Gamboa) and Mr. Maldonado and his

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<sup>582</sup> Doc. C-211.

<sup>583</sup> Doc. C-211, “C.c. Doctor Julio Cesar Turbay Quintero – Contralor General de la República; Doctor Hernán Martínez – Ministro de Minas y Energía; Doctora Cecilia Álvarez – Ministro de la Presidencia”.

<sup>584</sup> Doc. C-212, pp. 1 and 5.

<sup>585</sup> Doc. C-213.

<sup>586</sup> Doc. C-300, p. 4. The *Contraloría* and the *Procurador General* simply forwarded the complaints to the *Oficina de Control Interno Disciplinario* at Ingeominas (C-210; C-222).



partner finally executed the 3ha Contract, and thus became the owners of the three-hectare mining concession.<sup>587</sup>

612. Prodeco's reaction did not take long to materialize: on 21 November 2008, Ms. Zuleta asked Ingeominas' *Coordinador del Grupo de Control Interno Disciplinario* to open a disciplinary investigation against the employees involved in awarding the 3ha Contract (with copy to the *Procurador General*, the *Ministro de Minas y Energía*, the *Ministro de Presidencia*, the *Director del Programa Presidencial de Lucha contra la Corrupción*, and the *Contraloría*).<sup>588</sup> And in February 2009 Prodeco's external counsel filed a citizen's suit (*acción popular*) against Ingeominas and Messrs. Maldonado and García based on the irregularities surrounding the 3ha Contract.<sup>589</sup>

No negative inference

613. Respondent argues that Claimants' failure to deliver documents responsive to Colombia's request to produce documents exchanged or reviewed by management related to the challenge of the 3ha Contract, should lead the Tribunal to infer:
- that Prodeco was aware that the challenge would end up on Mr. Ballestero's desk, and
  - that Prodeco "[w]anted to address the consequences of Ingeominas' decision to grant the 3ha Contract directly with [Mr.] Ballesteros".<sup>590</sup>
614. The argument is a *non sequitur*. Furthermore, there is overwhelming evidence proving Prodeco's repeated complaints to the highest administrative authorities within the Republic.

**C. CDJ Buys the 3ha Contract**

615. In the meantime, in December 2008, Messrs. Maldonado and García had approached Prodeco through an intermediary, offering to sell the 3ha Contract for USD 11 M.<sup>591</sup> Messrs. Maldonado and García knew that the three-hectare area was fundamental for La Jagua's integrated project. Prodeco, on the other hand, initially feigned not to be interested in acquiring the area.<sup>592</sup>

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<sup>587</sup> Doc. C-214.

<sup>588</sup> Doc. C-239. See also Doc. C-222, p. 14.

<sup>589</sup> Doc. C-215.

<sup>590</sup> R II para. 990.

<sup>591</sup> Doc. R-280, pp. 1 and 2: "He told me that the US \$10 for ton was a starting point, but that price could be negotiated" and "Gary, total coal tones are 1'114.000 aprox.". The value of multiplying 1.14 MT by USD 10/tonne, would amount to approximately USD 11 million (See Nagle III, para. 6).

<sup>592</sup> Doc. R-280. See also Nagle II, para. 22; Nagle III, para. 8: "I believed that the best approach was to initially delay matters and 'show indifference' regarding the 3-hectare concession. In this context, I stated that we should tell the concession holders that, 'as we are not interested in buying them [out], even \$ 100'000 is too high'".

616. But when the mining operations in La Jagua were starting to surround the 3 hectare concession, Prodeco was left with little option: either to mine around the area, which would imply losing up to 11 million tonnes of coal, or to buy out Messrs. Maldonado and García.<sup>593</sup>

Further complaint

617. At the end of March 2009,<sup>594</sup> Prodeco made a last complaint to the *Ministro de Presidencia* about the irregularities surrounding the 3ha Contract. Prodeco warned that the lack of a solution to the 3ha Contract situation would leave Prodeco with no option other than to engage in direct negotiations with Messrs. Maldonado and García.<sup>595</sup>

*“A pesar de lo anterior a la fecha, seis meses después de otorgado el contrato de concesión HKT-08031 la administración no ha iniciado investigación sobre los hechos mencionados y los titulares del contrato de concesión HKT-08031 no han iniciado actividad exploratoria alguna, a pesar de que la Operación Conjunta ha permitido el acceso al área siempre que ha sido solicitado.*

*La Operación Conjunta se vio obligada a modificar su plan minero, lo cual significa menos toneladas de carbón explotadas, menos regalías y menos generación de empleo.*

*La demora en la solución de esta situación, de otra parte, obligará a la Operación Conjunta a aceptar una comunicación directa con los titulares del contrato de concesión HKT-08031, lo cual es totalmente contrario a sus intereses y a su política, pero la Operación Conjunta no puede seguir viendo cómo se afecta su operación minera sin que se adelante actuación alguna para corregir la situación creada por INGEOMINAS”.* [Emphasis added]

618. Once again faced with the silence of the Colombian authorities, Prodeco eventually settled for the alternative of buying out the 3ha Contract from Messrs. Maldonado and García.

The purchase

619. The transaction took place on 4 May 2009:<sup>596</sup> Ms. Elsa Aragón Barrera, acting on behalf of and in representation of Mr. Maldonado and Mr. García, executed the

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<sup>593</sup> Doc. C-300, p. 4. See also Doc. H-1, p. 184; Doc. C-207, p. 9; Nagle III, paras. 7-9; HT, Day 1, p. 184, l. 13 – p. 185, l. 19 and p. 190, l. 14 – p. 191, l. 10.

<sup>594</sup> The letter erroneously reads 31 March 2008. There is no doubt that it is of 2009, since it describes facts which are posterior to 31 March 2008 (Doc. C-300).

<sup>595</sup> Doc. C-300, p. 4, para. 9.

<sup>596</sup> The Assignment Contract is erroneously dated 4 May 2008 (Doc. C-301). There is no doubt that it is actually dated May 2009, as also proved by the draft submitted to Ingeominas for approval (Doc. R-94; Doc. R-95).

Assignment Contract, under which CDJ, one of the Prodeco Affiliates, acquired the 3ha Contract against payment of a consideration of USD 1.75 M.<sup>597</sup>

620. Prodeco submitted the Assignment Contract to Ingeominas for approval. In that version of the Contract, the price paid was redacted.<sup>598</sup>
621. Ingeominas approved the Assignment Contract on 8 May 2009, and the transaction was registered on 27 May 2009.<sup>599</sup>

#### Payment of the Purchase Price

622. The Assignment Contract provided that CDJ should make the payments due in Colombian Pesos, in two designated accounts opened in two Colombian banks (*Banco Davivienda* and *Banco Occidente*).<sup>600</sup> There is evidence that CDJ, a Colombian company affiliated to Prodeco, made the payments by transferring funds to the sellers' accounts located in Colombia and identified in the Assignment Contract.<sup>601</sup>
623. There is also evidence in the file that, once payment had been made, CDJ made the appropriate tax withholding required under Colombian tax law.<sup>602</sup>
624. The transaction was also reflected in CDJ's audited financial statements of February 2010,<sup>603</sup> and on 1 February 2010, CDJ informed Ingeominas that it had acquired the 3ha Contract from Messrs. Maldonado and García, this time disclosing the consideration of USD 1.75 M paid to both.<sup>604</sup>

#### Further Complaints

625. There is also evidence that even after the Assignment Contract was executed, Prodeco continued to complain about the irregular character of the grant of the three-hectare concession to Messrs. Maldonado and García.
626. Mr. Oscar Paredes, Respondent's witness in this arbitration, who replaced Mr. Ballesteros as *Director General* of Ingeominas, recalls that Dra. Zuleta personally raised the issue with him.<sup>605</sup>

*“Cuando fui nombrado Director General de Ingeominas en febrero de 2011, esta entidad se encontraba en una profunda crisis institucional y reputacional caracterizada por diversos cuestionamientos por la adjudicación de títulos mineros en zonas ambientales excluidas de la actividad minera, la falta de*

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<sup>597</sup> Doc. C-301. See also Nagle II, para. 22; Paredes I, para. 17.

<sup>598</sup> Doc. R-95.

<sup>599</sup> Doc. R-97. See also R I, para. 80 and C II, para. 38(p).

<sup>600</sup> Doc. C-301, pp. 1-2.

<sup>601</sup> Doc. C-303; Doc. C-307; Doc. C-308.

<sup>602</sup> Doc. C-315, p. 2; Doc. C-316, p. 2.

<sup>603</sup> Doc. C-313, pp. 5-6.

<sup>604</sup> Doc. C-312, p. 2. The amount in USD is slightly higher than USD 875,000 corresponding to each partner due to exchange rate fluctuations.

<sup>605</sup> Paredes I, para. 17.

*acciones para frenar la especulación con los derechos mineros, y varias quejas y denuncias por presuntos actos de corrupción y falta de transparencia. [...] Recuerdo, por ejemplo, una conversación con la Dra. María Margarita Zuleta, representante legal de Prodeco, en la que me comentó que su empresa había tenido que adquirir, a un precio exorbitante un contrato minero de tres hectáreas que se encontraba en el medio de otros contratos mineros que eran operados conjuntamente por Carbones de la Jagua*”.

#### **D. Public Statement of New Minister**

627. In August 2010, President Santos took office and Mr. Carlos Rodado became Minister of Mines and Energy. At a press conference held in May 2011, Mr. Rodado acknowledged that irregularities had occurred in the granting of mining licenses. Certain well-connected individuals had been able to register mining licenses in small strategic areas, in order to “greenmail” owners of adjacent mining exploitations:<sup>606</sup>

*“Que les permiten negociar con los dos titulares vecinos. Los titulares vecinos pueden ser uno mismo. Tienen un área aquí, y tiene otra área, pero aquí se mete un corredor. Y este señor del corredor adquiere digamos un poder de negociación y vende estos títulos a un precio alto, altísimo y los que quieren, las empresas ellas que quieren hacer una explotación que permita un aprovechamiento racional de los recursos tienen que comprarle al precio que este especulador quiere cobrar.*

*Y aquí quiero hacer una declaración. La gran mayoría de las empresas mineras que trabajan en Colombia son unas empresas serias [...] y ellos son los primeros interesados en que haya transparencia y que haya un manejo eficiente, y están cooperando y colaborando en que las investigaciones que se hagan den resultados. Porque este tipo de maniobras son las que impiden realmente que podamos hacer un desarrollo, primero sostenible, segundo de aprovechamiento racional de los yacimientos, y tercero, un aprovechamiento verdaderamente transparente, honesto, de la minería en Colombia. [...]*

*Entonces, el dueño de este título y el dueño de este, que es uno mismo, pues tiene que entrar en negociación y comprar el derecho de este título a un precio altísimo. Y si es de un ex funcionario de una de las entidades que han manejado la minería en Colombia, esto se vuelve también un caso de verdadera duda que merece ser investigado por los organismos competentes. Nosotros obviamente tenemos nombres de quienes son los titulares de todo esto, pero nosotros obviamente no somos organismo de investigación, no somos órgano de control, no somos poder judicial, pero pondremos todo esto en manos de las autoridades pertinentes”.* [Emphasis added]

628. It is noteworthy that during this press conference Minister Rodado used a PowerPoint presentation in which Prodeco’s three-hectare concession was clearly visible,<sup>607</sup> and that in his public statement there is no allegation that Prodeco had

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<sup>606</sup> Doc. R-237, video of the press conference, min. 00:00-02:49.

<sup>607</sup> Doc. R-237, min. 01:45. In the video there is a zoom in on Mr. Rodado’s PowerPoint presentation, in which it is possible to read “Cárbones de La Jagua S.A.”.

bribed any public official or had otherwise engaged in improper conduct. To the contrary, he explicitly stated that most mining companies working in Colombia were responsible enterprises. At that time, criticism was directed at the former Ingeominas employees who had granted the irregular mining contracts.

629. Although Minister Rodado announced “*pondremos todo esto en manos de las autoridades pertinentes*”, there is no information in the file showing that any Colombian authority commenced a formal investigation into the events surrounding the 3ha Contract (or any of the other analogous irregular situations).

**E. No Reference to Corruption nor to the 3ha Contract**

630. Minister Rodado never accused Prodeco or Glencore of improper behaviour – to the contrary, he portrayed mining companies in general as victims of greenmail, permitted by the unscrupulous behaviour of certain civil servants and insiders.
631. There is also no accusation of corruption in the Fiscal Liability Proceeding. In this extensive and thoroughly researched administrative file, the *Contraloría* never alleged that Prodeco had bribed Mr. Ballesteros; in fact, there is no reference at all to the 3ha Contract.
632. The *Contraloría*’s Decision and the Appeal Decision found that Prodeco had acted with *dolo*, in essence because, when negotiating the Eighth Amendment, Prodeco was considered to have taken advantage of the frailty of Ingeominas and had advanced its own interests to the detriment of those of Colombia. But in the course of the Fiscal Liability Proceeding, there is no indication that either Prodeco or its parent Glencore had engaged in the corruption of public officials.<sup>608</sup>
633. The same is true for the Procedure for Contractual Annulment filed by the new mining agencies that succeeded Ingeominas: in their submissions to the *Tribunal Administrativo de Cundinamarca*, the SGC and the ANM never raised any accusation that either Prodeco or its parent Glencore had engaged in corruption of public officials.

**F. The 2017 Criminal Complaint**

634. The argument that Prodeco had bribed Mr. Ballesteros was formally raised by Colombia for the first time on Sunday, 10 September 2017, when the Director of ANDJE – the agency which provides legal support to the Colombian State – filed with the Public Prosecutor a Criminal Complaint against (unnamed) officers of Prodeco and Glencore and against civil servants in Ingeominas.<sup>609</sup>
635. *Pro memoria*: Claimants had commenced this investment arbitration a year and a half earlier, in March 2016. Colombia’s Counter-Memorial, dated 16 November 2017 (*i.e.* one month after the Criminal Complaint), devoted only a few paragraphs

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<sup>608</sup> As Prodeco has established in the Annulment Procedure; see Doc. R-2, pp. 41-42.

<sup>609</sup> Doc. C-278.

to this accusation,<sup>610</sup> which was fully developed for the first time in Respondent's Reply on Preliminary Objections and Rejoinder on the Merits of April 2018.<sup>611</sup>

636. Since the copy of the Criminal Complaint submitted in this arbitration procedure is heavily redacted, significant portions of it remain unknown to this Tribunal. In the unredacted part, the ANDJE provides the factual background to the 3ha Contract (see section **III.(3)**. *supra*), gives a summary of the facts surrounding the negotiation and execution of the Eighth Amendment, and submits a list of articles of the Colombian Criminal Code which might have been violated.
637. The Criminal Complaint does not accuse any individual persons of having committed specific forms of illegal conduct, but simply asks the *Fiscalía* to investigate and to determine:<sup>612</sup>

“[...] responsables por la presunta comisión de los delitos de cohecho, celebración de contrato sin cumplimiento de requisitos legales, interés indebido en la celebración de contratos, concierto para delinquir, tráfico de influencias y tráfico de influencia de particular, por los hechos que se describen a continuación, relacionados con el desarrollo de actividades de agentes de la empresa CI Prodeco S.A. [...] subsidiaria de la multinacional suiza Glencore International AG [...], perpetrados durante los años 2009 y 2010”.

638. There is no evidence in the file that, upon receipt of the Criminal Complaint, the *Fiscalía* carried out any investigation or indicted any individual because of such Criminal Complaint.

### **(3.2) THE PROCEDURAL INCIDENT**

639. The allegations of corruption also provoked a relevant procedural incident.
640. On 17 July 2017, Respondent filed its Counter-Memorial together with certain exhibits.
641. Ten days thereafter, Claimants submitted a letter to the Arbitral Tribunal averring that 41 of these exhibits were private e-mail chains exchanged between Claimants' management and their in-house and external counsel [previously defined as the “**Disputed Documents**”]. Claimants requested that the Tribunal exclude such documents from the evidence.<sup>613</sup>
642. On 3 August 2017, Respondent reacted to Claimants' allegations, explaining that the Disputed Documents had been legally obtained by the *Superintendencia de Industria y Comercio* [the “**SIC**”] in the context of a preliminary investigation into

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<sup>610</sup> R I, paras. 82-84 and 283.

<sup>611</sup> R II, paras. 390-423.

<sup>612</sup> Doc. C-278, p. 1.

<sup>613</sup> Claimants' letter dated 26 July 2017, pp. 7-8.



unfair practices by Prodeco and its affiliates at Puerto Nuevo. Respondent requested that the Tribunal declare the Disputed Documents to be admissible evidence.<sup>614</sup>

643. Both Parties reiterated their requests in their reply and rejoinder letters presented on 22 August 2017<sup>615</sup> and 11 September 2017,<sup>616</sup> respectively.
644. The Tribunal had no direct and complete knowledge of the precise content of the Disputed Documents,<sup>617</sup> other than by reading Respondent's Counter-Memorial and the Criminal Complaint – which transcribed passages from some of the Disputed Documents. The Disputed Documents apparently consisted of chains of private e-mails sent or received by three of Claimants' managers. Some of the e-mails were either addressed to or sent by Claimants' (in-house and possibly external) lawyers.

Use of the Disputed Documents in the arbitration

645. It was common ground between the Parties that the SIC had lawfully obtained the Disputed Documents in the course of an antitrust investigation against Prodeco. Yet the Parties disagreed on whether such Documents could lawfully be used in these proceedings.
646. Claimants argued that the introduction of the Disputed Documents in this arbitration violated Colombian Law and undermined the integrity of the proceedings by breaching basic concepts of due process, fairness, and equality between the Parties, as guaranteed by international law. Respondent denied this allegation.
647. In PO No. 2, the Tribunal ruled for Claimants. The Arbitral Tribunal found that the introduction of the Disputed Documents into the record constituted a violation of the international law principle that parties ought to arbitrate fairly, in good faith and with equality of arms<sup>618</sup>; and that under Colombian Law, their introduction would seem to amount to a *desviación de poder*.<sup>619</sup>
648. Accordingly, the Disputed Documents were excluded from the file and Colombia was ordered to re-submit its Counter-Memorial free of references to the Disputed Documents and without attaching them.<sup>620</sup>
649. The Tribunal further clarified that the proper procedure for obtaining evidence from the counterparty was through the agreed-upon document production exercise,<sup>621</sup> and gave the Parties the opportunity to re-submit their document production

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<sup>614</sup> Respondent's letter dated 3 August 2017, p. 17.

<sup>615</sup> Claimants' letter dated 22 August 2017, section IV.2.

<sup>616</sup> Respondent's letter dated 11 September 2017, section IV.

<sup>617</sup> In the communication sent by the Secretary to the Parties on 27 July 2017, the Arbitral Tribunal announced it would not review the Disputed Documents.

<sup>618</sup> PO No. 2, paras. 66-70

<sup>619</sup> PO No. 2, paras. 71-74.

<sup>620</sup> PO No. 2, para. 109.

<sup>621</sup> PO No. 2, para. 70.



requests.<sup>622</sup> The Tribunal then issued certain rules and recommendations for the document production exercise.<sup>623</sup>

Document R-100

650. Amongst the Disputed Documents was document R-100 [**“Doc. R-100”**], an email chain exchanged in May 2009 between Prodeco’s management and its in-house counsel (*i.e.* between Natalia Anaya, Gary Nagle, Chris Phillips, Margarita Zuleta, and Tomás Lopez) which discussed the *caducidad* procedure and the negotiations with Ingeominas.
651. *Pro memoria*: On 23 January 2009, Ingeominas had formally put Prodeco on notice through a *Requerimiento bajo apremio de caducidad*. Ingeominas considered that Prodeco’s unilateral interpretation of the Mining Contract amounted to a contractual breach. By means of the *Requerimiento*, Ingeominas threatened Prodeco with termination of the Contract through a declaration of *caducidad* if payment of the disputed amount was not effected or an appropriate justification provided within one month.<sup>624</sup>
652. Prodeco replied to the *Requerimiento* on 13 February 2009, restating the reasons for its interpretation of the Definitive Price term used in the Contract, and pointing out that Ingeominas had not explained why it disagreed with such interpretation.<sup>625</sup>
653. In April 2009, Prodeco approached Ingeominas regarding the outstanding royalty payments and proposed paying all the disputed amounts into an escrow account, until the dispute on the proper interpretation of the term Definitive Price had been settled.<sup>626</sup> Ingeominas rejected this proposal, insisting that Prodeco must pay the disputed amounts directly to Ingeominas in cash, before negotiations could proceed.<sup>627</sup>
654. The email chain in Doc. R-100 covers precisely the week before Ingeominas rejected Prodeco’s proposal that the payment be made to an escrow account. The email chain starts with an e-mail sent by Ms. Natalia Anaya, Prodeco’s in-house counsel, to Prodeco’s officers and other in-house counsel (Gary Nagle, Chris Phillips, Margarita Zuleta, and Tomás Lopez) recounting her conversation with Ms. Marcela Estrada, Ingeominas’ lawyer. In the e-mail, Ms. Anaya says that Ms. Estrada confirmed her agreement with Mr. Ballesteros that Prodeco could pay the contested sum into an escrow account to end the *caducidad* process:<sup>628</sup>

“Marcela Estrada confirmed today that she agreed with Ballesteros that they will accept our proposal for the trust and with that they will end the caducity

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<sup>622</sup> PO No. 2, para. 113. See also section II.(2.1) *supra*.

<sup>623</sup> PO No. 2, section III.2-5.

<sup>624</sup> Doc. C-88 / C-243.

<sup>625</sup> Doc. C-244.

<sup>626</sup> Doc. C-90.

<sup>627</sup> Doc. R-101, p. 3. See also Nagle I, para. 56; Nagle II, para. 25; HT, Day 3, p. 658, ll. 7-11 and p. 661, ll. 10-22.

<sup>628</sup> Doc. R-100, p. 5.

process. She said that Ballesteros did not put any problems to this and that Adolfo supported her a lot so that everything was accepted easily by Ballesteros.

She will draft the letter today and expects to issue it on Monday (as tomorrow will be in Medellin). I asked her if we should go and talk to Ballesteros about this and she said that it is not necessary because everything was clear for him. However, I told her that I will be following up on Monday and if by then there has been any issue to send us the letter, I will request the meeting with Ballesteros.” [Emphasis added]

655. Mr. Nagle, Prodeco’s Chief Executive Officer at the time, responded to Ms. Anaya’s email with the following sentence:

“Of course he now supports us, we have bought the 3has.”

656. The chain continues with Ms. Anaya reporting on her follow-up with Ms. Estrada, and on the status of the letter that would in fact confirm to Prodeco that the *caducidad* process would end if Prodeco paid the outstanding amounts into the escrow account.

657. The email chain ends with a long email by Ms. Anaya reporting on several meetings held at Ingeominas on 15 May 2009. Ms. Anaya explains that Ingeominas’ director, Mr. Ballesteros, changed his mind regarding the escrow account and that the only way to avoid *caducidad* would be for Prodeco to pay the disputed sum directly to Ingeominas. Ms. Anaya recounts that Ms. Estrada told her she believed that it had to do with the 3 hectare issue:

“First, I met with Marcela and she told me straight away that she is very embarrassed because she assured me that everything was OK, but that Mario yesterday had a sudden change and that (off the record) she believes it has to do with the 3 hectares issue because he is very upset that we negotiated the assignment as it made him look really bad in front of Uribe.

[...]

After the meeting, Marcela told me that she strongly considers that it is even more risky for Ingeominas to receive a payment without a cause and then be exposed to having to offset the money after it [has] been delivered to the municipalities, and that she will strongly defend these arguments at their internal meetings. But she said that it is not her decision and reiterated that Mario is so crossed with the 3 hectares issue that she believes it will not be easy for him to accept the trust. [...]”. [Emphasis added]

#### Introduction of Doc. R-100 during the Hearing

658. At the Hearing, counsel for Respondent stated that an email existed which showed that the Eighth Amendment had been executed because Mr. Ballesteros was pleased by Prodeco’s purchase of the 3ha Contract.<sup>629</sup> He added that the email in question,

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<sup>629</sup> HT, Day 2, p. 366, ll. 19-22.

Doc. R-54, was one of the Disputed Documents which the Tribunal had excluded from the file in accordance with PO No. 2.

659. The Tribunal requested that the Parties agree<sup>630</sup> that the email in question, which seemed a highly relevant document, be introduced into the record. Both Parties agreed to the request, and it was further agreed to include the complete email chain in which the email was inserted as Doc. R-100.<sup>631</sup>
660. On the following day, both Parties were granted the opportunity to make brief presentations regarding Doc. R-100 and its probative value.
661. Claimants asserted that Doc. R-100 showed “no link whatsoever anywhere of anything between Mr. Maldonado and Mr. Vargas and Mr. Ballesteros”,<sup>632</sup> while the Republic reached the opposite conclusion.<sup>633</sup> The Tribunal will analyse Doc. R-100 extensively in section **V.1.(3.3).C** *infra*.

### **(3.3) DECISION OF THE ARBITRAL TRIBUNAL**

662. Colombia says that Glencore procured the Eighth Amendment through corruption. The Tribunal takes the contention of the Republic very seriously.
663. Corruption is morally odious: the proper governance of public affairs and the correct assignment of public goods is substituted by favour and arbitrariness. Corruption is also economically deleterious: it restrains economic development and subdues nations into under-development and poverty, as bribes enriching well-connected civil servants or politicians are financed via inflated prices paid or reductions in income suffered by the poorest citizens. Scarce public funds are misdirected by enriching privileged individuals, at the expense of the common good.
664. The Tribunal agrees with Respondent that, provided that there are *prima facie* grounds for suspecting malfeasance, an international arbitration tribunal has the duty to investigate the facts, even *sua sponte*, and to take appropriate measures under the applicable principles of law.
665. The Tribunal further agrees with the Republic that an investment obtained through corruption is not protected by the Treaty. Arts. 2 and 4(1) of the Treaty expressly require that the investments, to be protected, have to be “made in accordance with [Colombia’s] laws and regulations.”<sup>634</sup> Under Colombian law, an investor who corrupts civil servants of the host State to procure the investment commits a crime.<sup>635</sup> Therefore, an investment made by corrupting the senior Colombian civil

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<sup>630</sup> HT, Day 2, pp. 372-378.

<sup>631</sup> HT, Day 2, p. 378, ll. 3-15.

<sup>632</sup> HT, Day 3, p.623, ll. 18-20.

<sup>633</sup> HT, Day 3, p.628, ll. 12-19.

<sup>634</sup> Doc. C-6.

<sup>635</sup> Art. 28 of the Law 1474 of 2011 (Doc. R-87) and Art. 411 of the Colombian Criminal Code, Law 599 of 2000 (Doc. R-88).

servant in charge of supervising the mining sector would not be protected by the Treaty.<sup>636</sup> In light of the clarity of this conclusion, it is unnecessary for the Tribunal to decide, as other tribunals have done, that an investment made through corruption would violate international public policy.<sup>637</sup>

666. The issue to be determined is thus not a question of material law: if Claimants have bribed Mr. Ballesteros, disguising the corrupt payment as the consideration for the acquisition of the 3ha Contract, the necessary consequence will be the loss of international law protection.

667. The real question in this case is whether corruption has been proven.

#### Burden of Proof

668. In international law, the general principle is *actori incumbit probatio*: the party who alleges a certain fact has the burden to prove it.<sup>638</sup> The Tribunal sees no reason to deviate from this principle. Since Colombia is alleging that the Eighth Amendment was obtained through the corruption of Director Ballesteros, it is for Colombia to marshal the appropriate evidence.

669. As for the standard to be applied to assess the evidence, the Tribunal perceives no reason to depart from the traditional standard of preponderance of the evidence, since neither the Treaty nor the ICSID Arbitration Rules impose a different standard. Colombia argues, based on the approach followed by the tribunal in *Spentex*, that the Tribunal should adopt a methodology of starting from “red flags” (individual indicia of corruption) and “connecting the dots” to obtain a larger picture:<sup>639</sup>

“In order to avoid making it practically impossible to prove corruption, the *Spentex* tribunal considered it appropriate to connect the dots in the indicia of corruption before it. It “*applied a method of ‘connecting the dots’, thereby assessing all individual indicia in detail and checking the plausibility of a potential picture emerging from putting them together.*” As a result, the *Spentex* tribunal found that the most compelling explanation of the facts it had considered was that there had been corruption involving the investor and Uzbek State officials [...]” [Emphasis in the original]

670. In fact, what Respondent labels as “connecting the dots” is nothing else than the time-honoured methodology followed by tribunals in all jurisdictions to establish truth based on indicia or circumstantial evidence: if a party marshals evidence that proves the existence of certain indicia, and it is possible to infer from these indicia (using experience and reason) that a certain fact has occurred, the tribunal may take such fact as established. The Tribunal has followed this methodology.

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<sup>636</sup> *Flughafen*, para. 129 (Doc. RL-42); *Phoenix*, para. 100 (Doc. RL-37); *Spentex* (quoted in an article by K. Betz, p. 5 of Doc. RL-149).

<sup>637</sup> *Plama*, paras. 141-143 (Doc. RL-36); *Spentex* (quoted in an article by K. Betz, p. 5 of Doc. RL-149).

<sup>638</sup> *Flughafen*, para. 136 (Doc. RL-42); *Metal-Tech*, para. 237 (Doc. RL-122).

<sup>639</sup> R II, para. 405, footnotes omitted.

Relationship with municipal criminal investigation

671. As noted, corruption is a criminal offence in Colombia. In this case, the ANDJE has filed a Criminal Complaint against officers of Glencore/Prodeco and civil servants in Ingeominas, accusing them of corruption in the procurement of the Eighth Amendment.<sup>640</sup>
672. What is the relevance of the Criminal Complaint for the present arbitration?
673. The Criminal Complaint and this procedure operate in different legal spheres, are subject to diverging standards of proof, and may reach conflicting results. The fact that the Colombian criminal system has not punished (in fact, in accordance with the available record, has not even investigated) the alleged corrupt practices surrounding the Eighth Amendment, does not preclude a hypothetical finding by this Tribunal that corruption has occurred. And *vice-versa*.
674. That said, the conclusions of the justice system at the municipal level, or absence thereof, which have a much higher capacity of investigation than this Arbitral Tribunal, is one of the various elements that must be considered when evaluating the available evidence.

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675. The Tribunal will in the subsequent sections analyse the red flags identified by Respondent (A.), and then weigh the available evidence (B.). Finally, it will devote a section to the evidentiary value of the email chain in Doc. R-100 (C.).

**A. The Red Flags**

676. In the course of the Hearing, Respondent identified the red flags which – in its submission – prove corruption:<sup>641</sup>
- The payment to Mr. Maldonado and his partner,
  - The fact that Mr. Maldonado was a former employee of Minercol,
  - The timing of such payment,
  - Claimants' concealment of the transaction,
  - Claimants' decision to restrict knowledge of the transaction to three members of its top management, and
  - The fact that the Eighth Amendment was executed in open disregard of the applicable law and regulations.

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<sup>640</sup> Doc. C-278.

<sup>641</sup> HT, Day 2, p. 476, l. 14 – p. 477, l. 14. See also R II, para. 407.

677. The Tribunal will analyse these indicia in turn.

**a. The Payment to Mr. Maldonado and his Partner**

678. Respondent says that Claimants paid a strikingly high price of USD 1.75 M for the 3ha Contract.<sup>642</sup>

679. It is undisputed that Prodeco, through one of its Affiliates, made a payment of USD 1.75 M for the 3ha Contract to Mr. Jorge Maldonado (a former employee of the predecessors of Ingeominas) and his partner, and in exchange secured the mining rights for a small plot located in the middle of the La Jagua mine. But the transaction must be viewed in its proper context.

680. The Tribunal recalls the press conference held in May 2011 by Colombia's then-Minister of Mines, Mr. Carlos Rodado, where he acknowledged that the granting of mining licenses had been plagued by irregularities, and that certain well-connected individuals, using privileged information, had been able to register mining licenses in small strategic areas, adjacent to substantial mines, with the purpose of selling these licenses at an exorbitant price. And as an example of such greenmail, the Minister specifically referred to the La Jagua mine and the 3ha Contract. He explicitly stated that most mining companies working in Colombia were responsible enterprises, and his criticism was directed to the Colombian mining agencies, which had irregularly awarded licenses for the benefit of certain insiders.<sup>643</sup>

681. The Tribunal also recalls that Prodeco vigorously and repeatedly objected to the concession of the 3ha Contract to Mr. Maldonado, and that the objections were dismissed by Ingeominas.<sup>644</sup> Prodeco complained not less than four times in writing to at least five authorities within the Colombian government (*Procurador General, Ministro de Minas y Energía, Ministro de la Presidencia, Contraloría* and Ingeominas), denouncing the irregularities surrounding the 3ha Contract. The complaints did not elicit any material reaction from the authorities.

682. In the absence of support from the public administration, Prodeco negotiated with Mr. Maldonado the purchase of the 3ha Contract, to minimize the losses of having to mine around his concession. But before doing so, Prodeco made a last plea to the *Ministro de la Presidencia*, reiterating that the administration had failed to launch any investigation into the irregularities, and declaring that it was being forced to submit to the greenmail ("*aceptar una comunicación directa con los titulares del contrato de concesión*").<sup>645</sup>

683. This last plea also remained unanswered. Only thereafter did Prodeco execute the Assignment Contract.

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<sup>642</sup> R II, para. 409.

<sup>643</sup> Doc. R-237, video of the press conference, min. 00:00-02:42.

<sup>644</sup> Doc. C-208.

<sup>645</sup> Doc. C-300, p. 4.



684. The Tribunal does not see any illegality or impropriety in the transaction. It is true that Prodeco yielded to greenmail – but it was a greenmail caused by Ingeominas’ inappropriate registration of the 3ha Contract in favour of Mr. Maldonado, and the Colombian authorities’ unwillingness or inability to react, notwithstanding repeated warnings and complaints.
685. Finally, the Tribunal notes that Prodeco’s behaviour is exactly the opposite to that normally adopted in cases of bribery. Corruption requires secrecy. In this case, Prodeco announced *urbi et orbi* that it was being subjected to greenmail and requested assistance from the public administration. When the authorities offered no support, Prodeco informed *ex ante* not less than the *Ministro de la Presidencia* that it was being forced to buy the 3ha Contract.

Excessive payment

686. Respondent also says that the payment made to Mr. Maldonado and his partner was excessive.
687. The available evidence shows that Prodeco negotiated the price: Mr. Maldonado initially asked for USD 10 per tonne,<sup>646</sup> but eventually settled for the much lower amount of USD 1.75 M. Taking into consideration that the mining operations were approaching the 3ha Contract, and would be severely affected if the 3ha plot had to be excluded, the Tribunal does not agree with Respondent’s unsubstantiated argument that the price was excessive.<sup>647</sup>

**b. Mr. Maldonado was a Former Employee of Minercol and Carbocol**

688. Respondent argues that Mr. Maldonado was a former employee of Ingeominas’ predecessors, and as such he was “closely connected” to the *Director General* of Ingeominas, Mr. Ballesteros.<sup>648</sup>
689. The first part of the averment is documented: in accordance with an official certificate, Mr. Maldonado was employed by Carbocol, Ecocarbón, and Minercol between 1998 and 2002 as a “*Profesional especializado*”, his work relationship with these agencies ending in the northern city of Valledupar on 30 June 2002.<sup>649</sup>
690. Mr. Ballesteros, a political appointee, did not begin his tenure until 2007, *i.e.* five years thereafter, and was based in Colombia’s capital city, Bogotá, 850 km south of Valledupar.<sup>650</sup>
691. Colombia has failed to marshal any evidence suggesting that there was any connection, let alone a close one, between Mr. Maldonado, or his associate Mr.

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<sup>646</sup> Doc. R-280 (Email from A. López dated 14 December 2008).

<sup>647</sup> The USD 100,000 figure, repeatedly invoked by Respondent (R II, paras. 52 and 411), is not an internal valuation; it is a recommendation between two Prodeco officers on how to negotiate with Mr. Maldonado (see Doc. R-280, p. 1).

<sup>648</sup> R II, para. 420.

<sup>649</sup> Doc. R-92.

<sup>650</sup> Doc. C-297.



García, and Mr. Ballesteros. They worked at different agencies, in different locations, with a time gap of five years.

No negative inference

692. Respondent adds that Claimants' failure to produce management documents responsive to Colombia's requests should induce the Tribunal to infer

- that Mr. Ballesteros had a direct interest in the consideration paid by Prodeco and
- that through the payment of an exorbitant payment Claimants secured Mr. Ballesteros' support.<sup>651</sup>

693. The Tribunal disagrees.

694. Respondent had asked in the document production exercise for internal management documents regarding the negotiations with Mr. Maldonado, and Respondent now complains that no (or only a few) internal documents have been produced. The complaint is baseless. Prodeco had no obligation to prepare internal memoranda justifying its negotiations with Mr. Maldonado. The existence or non-existence of such documentation does not prove the involvement of Director Ballesteros, nor that the payment eventually benefitted Director Ballesteros.

**c. The Timing of the Payments**

695. Colombia says that only 10 days after Prodeco was served notice of the resolution approving the assignment of the 3ha Contract, and only six days before such assignment was registered at the Mining Registry, Director Ballesteros caused Ingeominas to enter into the Commitment to Negotiate.<sup>652</sup>

696. On 4 May 2009, Prodeco and Messrs. Maldonado and García executed the Assignment Agreement, transferring the 3ha Contract and receiving the USD 1.75 M consideration. A few days thereafter, on 21 May 2009, Prodeco and Ingeominas signed the Commitment to Negotiate, which eventually led to the execution of the final version of the Eighth Amendment on 22 January 2010.

**d. Claimants' Concealment of the Transaction**

697. Respondent says that Prodeco tried to conceal the acquisition of the 3ha Contract and draws the attention of the Tribunal to the fact that the request for approval of the assignment of the 3ha Contract did not specify the purchase price, which was instead recorded as "US\$xxxx".<sup>653</sup>

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<sup>651</sup> R II, para. 993.

<sup>652</sup> R II, para. 422.

<sup>653</sup> R II, para. 414.

698. As a preliminary observation, it seems that it was not Prodeco who submitted the draft Assignment Contract to Ingeominas for approval, but rather Ms. Elsa Aragón Barrera, acting on behalf of Mr. Maldonado and Mr. García.<sup>654</sup>
699. In any event, it is true that the Assignment Contract which was submitted to Ingeominas for approval did not contain the price details.<sup>655</sup> But it is undisputed that there was no legal obligation to indicate the purchase price in the form requesting registration of the assignment—<sup>656</sup> Messrs. Maldonado and García and Prodeco made the submission in the customary manner, deleting the purchase price.
700. In addition, in all subsequent public statements, Prodeco did not conceal the acquisition or the consideration paid:
- On 1 February 2010, CDJ (Prodeco's Affiliate which had executed the Assignment Contract) complied with its contractual duty to disclose to Ingeominas all assets and services acquired in the course of the preceding year; in that disclosure the payment of USD 1.75 M to Messrs. Maldonado and García was properly disclosed;<sup>657</sup>
  - CDJ made the appropriate tax withholding required under Colombian tax law;<sup>658</sup>
  - The transaction was also reflected in CDJ's audited financial statements for 2009.<sup>659</sup>

**e. Restriction of Knowledge to Top Management**

701. Respondent says that only the top management of Prodeco (Mr. Phillips, Mr. López, Ms. Zuleta, and Mr. Nagle) were aware of the amount which was being paid by CDJ, and that this reinforces a finding that Prodeco intended to conceal the transaction.<sup>660</sup>
702. The Tribunal acknowledges that in an email dated 1 May 2009, it was agreed that information within the company should be restricted to Mr. Phillips, Ms. Zuleta, and Mr. Nagle.<sup>661</sup>
703. But Claimants have convincingly explained that this restriction only operated prior to the closing of the 3ha Contract – a standard practice, Claimants say, to avoid information leaks. But once the deal had been closed, information pertaining to the transaction was made available to other officers of Prodeco, and by the date of

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<sup>654</sup> Doc. R-94.

<sup>655</sup> Doc. R-94; Doc. R-95.

<sup>656</sup> C II, para. 38(p), accepted by Respondent in R II, para. 54.

<sup>657</sup> Doc. C-312, p. 2. The amount is split between both sellers, is expressed in USD and is slightly higher than the USD 875,000 actually paid, presumably due to changes in the exchange rates.

<sup>658</sup> Doc. C-315, p. 2; Doc. C-316, p. 2.

<sup>659</sup> Doc. C-313, pp. 5-6.

<sup>660</sup> R II, para. 414.

<sup>661</sup> Doc. R-271.

payment of the second instalment (on 28 May 2009), at least eight additional employees had been made aware of the deal and of the consideration paid.<sup>662</sup>

**f. Disregard of Mandatory Regulations**

704. Respondent says further that, because of Claimants' undue influence, Mr. Ballesteros disregarded applicable laws and regulations when negotiating and approving the Eighth Amendment.<sup>663</sup> Respondent avers that Director Ballesteros did not submit the Eighth Amendment to the *Consejo Directivo* (*infra*, (i)), and that he failed to request mandatory advice from Ingeominas' Contracting Committee (ii).

(i) Consejo Directivo

705. Under Colombian law, Ingeominas did not require approval of its *Consejo Directivo* in order to conclude the Eighth Amendment. This conclusion derives from Decree 252 of 2004, which does not include among the functions of the *Consejo Directivo* the approval of mining contracts or their amendments,<sup>664</sup> a point that was confirmed by the former *Ministro de Minas y Energía*, Mr. Martínez Torres.<sup>665</sup>

706. In August 2009, Ingeominas had approved a document called "*Guía de Fiscalización de Proyectos de Interés Nacional*", which provided guidelines on the internal procedures to be followed when dealing with *Proyectos de Interés Nacional*.<sup>666</sup> This *Guía* was an internal document, drafted within Ingeominas, to structure its procedures when handling national interest mining projects.<sup>667</sup>

707. The *Guía* confirms that proposals for the approval of mining contracts are presented to the *Consejo Directivo* for a "recommendation", not for its approval:<sup>668</sup>

*"Se analiza y se evalúa la propuesta en reunión de Consejo Directivo, donde se recomienda sobre su aceptación, rechazo o complemento y aclaraciones si es del caso".* [Emphasis added]

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<sup>662</sup> C III, footnote 99. These employees include Carlos Carrillo, Edgardo Alberto Pichón Visbal, Juan Rafael, Chávez Ruiz, Sandra Milena Molina Ramos, Viviana Gaines Vimos, Lucila Casas, and the entire "*Contabilidad*" Department (Doc. C-304); Monica Bossa (Doc. C-305); and Carmen Julia Duarte (Doc. R-282 and R-322).

<sup>663</sup> R I, para. 282; R II, para. 390; H 2, p. 24.

<sup>664</sup> Doc. C-190.

<sup>665</sup> *Versión Libre y Espontánea* rendered by the then-Minister Martínez Torres in Doc. R-81, p. 2: "*Quiero recordar que el Consejo Directivo de INGEOMINAS, no tiene autoridad sobre el ente de INGEOMINAS, sino simplemente actúa como un verdadero consejero, por tanto, pues no podíamos dar órdenes a INGEOMINAS, si orientación que fue lo que el Ministro hizo en todo momento*"; HT, Day 4 (Mr. Martínez's deposition), p. 1098, ll. 8-10. See also Doc. C-115 (p. 2), in which Mr. Ballesteros refers simply to the need for a "recommendation" from the *Consejo Directivo* and Doc. C-136, p. 2.

<sup>666</sup> Doc. R-102.

<sup>667</sup> Doc. R-102, p. 1.

<sup>668</sup> Doc. R-102, p. 10.

708. In accordance with these Guidelines, the *Consejo Directivo* of Ingeominas was informed on at least seven occasions of the progress in the negotiation of the Eighth Amendment – as reflected in its official minutes (see section **III.(4)** *supra*).
709. The two most relevant meetings of the *Consejo Directivo* were those held on 10 December 2009 (after the execution of the Initial Version of the Eighth Amendment) and on 26 January 2010 (after the execution of the final version of the Eighth Amendment).

*Meeting of the Consejo Directivo on 10 December 2009*

710. On 10 December 2009 (one day after execution of the Initial Version of the Eighth Amendment), Ingeominas held a meeting of the *Consejo Directivo*<sup>669</sup> at which Ms. Aristizábal appeared and submitted a report summarizing the terms of the Initial Version of the Eighth Amendment.<sup>670</sup>
711. Minister Hernán Martínez Torres testified in the *Contraloría* proceeding that he disagreed with the signed Initial Version of the Eighth Amendment, that he asked for his disagreement to be included in the minutes, and that it was agreed to create a task force to analyse whether the changes were in the interest of the Nation.<sup>671</sup> The official minutes simply say that the Minister and the remaining members requested that the issue be re-examined in more detail taking into account the national interest.<sup>672</sup>
712. In any case, Director Ballesteros did not feel comfortable going forward without the support of his Board, and consequently he decided to approach Prodeco and to renegotiate the deal, seeking to accommodate the *Consejo*'s recommendation.

*Meeting of the Consejo Directivo on 26 January 2010*

713. The next meeting of the *Consejo Directivo* was held on 26 January 2010, four days after the execution of the final version of the Eighth Amendment.
714. This time it was Mr. Ballesteros himself who informed the board members that the Eighth Amendment had been signed “*teniendo en cuenta las sugerencias emitidas por ellos en consejos anteriores*”. He then provided detailed information of the agreed changes.<sup>673</sup> The minutes do not reflect any reaction from the *Consejeros*.

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<sup>669</sup> Doc. R-150.

<sup>670</sup> Doc. R-149.

<sup>671</sup> Doc. C-157 / R-81, p. 1.

<sup>672</sup> Doc. R-150, p. 3.

<sup>673</sup> Doc. C-257, pp. 4-5.

(ii) Contracting Committee

715. Respondent says that the Eighth Amendment should have been submitted to and discussed before the so-called Contracting Committee – and that Director Ballesteros, as a result of Claimants’ undue influence, failed to do so.

716. The *Comité de Contratación Minera* was created in June 2004 by an Ingeominas Resolution, later amended in September 2004.<sup>674</sup> While under the June 2004 Resolution the Contracting Committee was requested to provide advice to the *Director* regarding all contracts affecting “*mediana y gran minería*”, the September 2004 Resolution reduced the scope of the Committee’s functions. Under the September 2004 Resolution, the Committee was required to provide advice only when the *Dirección del Servicio Minero*, or the *Subdirecciones de Contratación y Titulación Minera y Fiscalización y Ordenamiento Minero* asked for its participation:<sup>675</sup>

“[...] en los asuntos que por su complejidad o importancia para el sector minero, sean presentados al Comité [...]”.

717. It seems that Director Ballesteros chose not to convene the Contracting Committee to seek its advice regarding the Eighth Amendment – as he was entitled to do under the September 2004 Resolution. Instead, Director Ballesteros relied on a group of Ingeominas civil servants – comprising engineers, economists, and legal counsel – who participated in the negotiations and advised him. Whether this was or not a wise decision is not for the Tribunal to gauge. What is relevant is that Mr. Ballesteros did not disregard any mandatory regulation.<sup>676</sup>

718. Summing up, the Tribunal concludes that Director Ballesteros did not disregard any mandatory regulation in the way that he handled the negotiation and approval of the Eighth Amendment – and consequently this episode constitutes no red flag.

719. The Tribunal’s conclusion is shared by the new agencies created to substitute Ingeominas. These agencies – AMN and SGC – filed in 2012 the Procedure for Contractual Annulment of the Eighth Amendment before the *Tribunal Administrativo de Cundinamarca*. The request for annulment was based on the argument that the Eighth Amendment had failed to meet its purpose and was detrimental to the interest of the State<sup>677</sup> – not that it had been negotiated and executed in disregard of mandatory regulations.<sup>678</sup>

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<sup>674</sup> Doc. R-10; Doc. R-11.

<sup>675</sup> Doc. R-11, Art. 1.

<sup>676</sup> This conclusion is fatal for Respondent’s request for negative inferences in para. 995 of R II.

<sup>677</sup> Doc. C-140.

<sup>678</sup> Respondent has also mentioned that Ingeominas failed to obtain external advice. The argument carries no weight, since there is no mandatory rule which requires Ingeominas to obtain external advice.

**g. Destination of Payments**

720. Respondent says that Claimants have not provided any details regarding the destination to which they transferred their payments for the 3ha Contract.<sup>679</sup>
721. The evidence proves otherwise.
722. Prodeco has established that the payments to Messrs. Maldonado and García were made on-shore, in Colombian Pesos, and deposited into two identified bank accounts opened with Colombian banks, as established in the Assignment Contract.<sup>680</sup> There is also evidence on the record that, once payment had been made, CDJ made the appropriate tax withholding required under Colombian tax law.<sup>681</sup>

**B. Weighing of the Evidence**

723. Respondent asked that the Tribunal adopt the methodology of “connecting the dots” between certain “red flags,” in order to reach the conclusion that Prodeco had bribed Director Ballesteros, and that the illicit payment had been concealed in the consideration paid for the 3ha Contract. The Tribunal has carefully analysed the alleged red flags but is unable to make the inference proposed by Colombia.
724. (i) As regards the alleged first red flag, the Tribunal notes that Prodeco became the victim of a case of greenmailing, due to the improper functioning of Colombia’s successive mining agencies, that Prodeco resisted the transaction with all its means, that it complained repeatedly to at least five Governmental authorities, and that it warned the *Ministro de la Presidencia* before yielding to the extortion.
725. This behaviour is antagonistic to and incompatible with Respondent’s accusation that Claimants, through the acquisition of the 3ha Contract, were surreptitiously bribing Director Ballesteros.
726. (ii) As regards the second red flag, Colombia has failed to marshal any evidence linking Mr. Maldonado and Director Ballesteros.
727. The only connection proven by Respondent is that Mr. Maldonado had been an employee of a predecessor of Ingeominas, in the southern part of Colombia, five years before Mr. Ballesteros was appointed *Director General* of Ingeominas. Mr. Maldonado’s historic experience in the mining agency might explain why he had the insider knowledge and connections with former colleagues which permitted him to secure the 3ha Contract. But it does not show any link to Mr. Ballesteros.
728. (iii) The third red flag is based on a chronological sequence, which starts with the Assignment Agreement, leads in a few days to the Commitment to Negotiate and six months thereafter to the execution of the Eighth Amendment.

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<sup>679</sup> R II, para. 419.

<sup>680</sup> Doc. C-301, pp. 1-2, Doc. C-303, Doc. C-307 and Doc. C-308. See also Doc. R-281; Doc. R-322.

<sup>681</sup> Doc. C-315, p. 2; Doc. C-316, p. 2.

729. This alleged red flag is based on the logical fallacy *post hoc, ergo propter hoc*. This fallacy is a particularly tempting error, because there is an unconscious bias which equates temporal correlation with causality. This may be true in certain situations, but it can be radically false in others. A conclusion cannot be based exclusively on the order of events, but must consider other factors potentially responsible for the result.
730. Furthermore, the evidence shows that the date of the Assignment Agreement was triggered by the fact that Prodeco's mining activities were fast approaching the 3ha strip. There is no evidence linking the Assignment Agreement with the Commitment to Negotiate.
731. (iv) The fourth and fifth red flags also fail to indicate corruption.
732. The evidence shows that Prodeco did not adopt any special measures to conceal the 3ha Contract and the payment to Mr. Maldonado and his partner, but that it handled information affecting the 3ha Contract respecting regulations and in accordance with customary practice.
733. (v) The sixth alleged red flag is also not a proven fact. There is no evidence that Mr. Ballesteros disregarded applicable laws and regulations when negotiating and approving the Eighth Amendment.
734. (vi) There is a final red flag, which in fact is a "green flag." Contrary to Respondent's allegation, Prodeco paid Messrs. Maldonado and García not off-shore, not in an obscure jurisdiction or through some scheme for concealment. Prodeco effected payment into two Colombian bank accounts opened in the name of the recipients, in Colombian pesos and thereafter it made the requisite tax withholding.
735. Prodeco's conduct shows no intention of concealment, nor any impropriety.

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736. Summing up, the Tribunal rejects Colombia's allegation that Prodeco wilfully designed the 3ha Contract as a means to bribe Mr. Ballesteros. The dots simply do not connect.
737. If Prodeco's intention had been to corrupt Ingeominas, it would not have filed multiple administrative appeals to prevent the grant of the 3ha Contract, it would not have repeatedly complained to the highest Colombian authorities, and it would not have made the payments on-shore, subject to the mandatory tax withholding.
738. The Tribunal's conclusion is confirmed by the fact that the Colombian criminal prosecutor and the Colombian criminal courts, which have a much higher capacity for investigation than this Arbitral Tribunal, have not initiated an investigation into the alleged corrupt practices surrounding the Eighth Amendment either *in tempore insuspecto* or even after the start of this arbitration.



**C. The Probative Value of the Email Chain in Doc. R-100**

739. On the third day of the Hearing the Parties had the opportunity to make allegations on the evidentiary value of Doc. R-100.

Claimants' position

740. Claimants submitted that Doc. R-100 showed no link between Mr. Maldonado and Mr. Vargas and Mr. Ballesteros,<sup>682</sup> and hence no proof of corruption could be derived from said document.<sup>683</sup>

Respondent's position

741. Respondent made four comments regarding Doc. R-100:

- First, that there was no doubt that the “he” Mr. Nagle is referring to is Mr. Ballesteros;<sup>684</sup>
- Second, that Doc. R-100 confirms the direct link between the 3ha Contract and the Commitment to Negotiate, because the subject of the e-mail was “Royalties-Caducity update” and Mr. Ballesteros agreed to finalize the *caducidad* proceedings, precisely in the Commitment to Negotiate, the agreement which led to the execution of the Eighth Amendment;<sup>685</sup>
- Third, regarding the timing of Mr. Nagle’s email, it was sent on 7 May 2009, 72 hours after Mr. Maldonado and Mr. García requested Mr. Ballesteros to approve the 3ha assignment to CDJ; and two days after Mr. Nagle’s e-mail, the 3ha Contract was assigned to CDJ;<sup>686</sup> thus, by 7 May 2009, Mr. Ballesteros must have already known that the 3ha Assignment had been signed;<sup>687</sup>
- Fourth, regarding the addressees of Mr. Nagle’s email: the email was sent only to Prodeco’s top management (except for Ms. Anaya), and this shows the secrecy red flag.<sup>688</sup>

Mr. Nagle’s testimony

742. Mr. Nagle testified in the course of the Hearing, and under oath he explained the context and meaning of Doc. R-100.<sup>689</sup>

“Q. Thank you. If you could look at the mail above [Doc. R-100], which is your response to that, and could you give us some context as to what your

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<sup>682</sup> HT, Day 3, p. 623, ll. 18-20.

<sup>683</sup> HT, Day 3, p. 622, l. 19 – p. 623, l. 7.

<sup>684</sup> HT, Day 3, p. 627, 18 – p. 628, l. 11.

<sup>685</sup> HT, Day 3, p. 628, l. 12 – p. 629, l. 14.

<sup>686</sup> HT, Day 3, p. 629, ll. 15-22.

<sup>687</sup> HT, Day 3, p. 631, l. 20 – p. 632, l. 1.

<sup>688</sup> HT, Day 3, p. 632, l. 10 – p. 633, l. 3.

<sup>689</sup> HT, Day 3, p. 658, l. 22 – p. 661, l. 6.

reaction was and explain in context what essentially you're saying in that response to Ms. Anaya.

A. Well, for a long time, Ingeominas were very much against this idea of an escrow. They told us pay, or we are going to declare caducity and cancel your Contract, and they had quite a firm position on it.

At the same time as you're aware we had an issue of a 3-hectare Concession in La Jagua, which we were very concerned about, and had--and Ingeominas had been unable to resolve our concerns. We, therefore, had been writing to various and many arms of government to ask them to assist. We understand as a result of this, the Head of Ingeominas, Mr. Ballesteros, came under a lot of pressure. My reaction to Natalia's e-mail was on the basis that just before this discussion, we had ultimately found us buying the 3-hectare Concession despite the fact that we didn't want to buy it. We felt it had been awarded inappropriately. It never should have been awarded. We got to a stage where we were forced to buy this Concession, and I felt at the time that by the fact that we had bought the Concession, Mr. Ballesteros had probably figured that all that pressure would go away because now we had the Concession.

In his mind, I thought this would be over, and we could go back to a normal discussion over this, over, whatever issues we have without him being--feeling under pressure, that there is some other, let's say, complaints to relevant authorities.

Q. Thank you. I'd like you to now look at the last mail in the chain, which is the e-mail from Ms. Anaya of that date reporting on a meeting she had at Ingeominas. If you could just briefly look through that e-mail, particularly focusing, perhaps, on the first few paragraphs.

A. Yes.

Q. What did you understand Mr. Ballesteros's reaction to the 3-hectare transaction to be from Ms. Anaya's report?

A. Well, originally, I thought that he would be relieved that the 3-hectare issue had been resolved in his mind because we had bought it, and that's why I felt he would be as I wrote in my e-mail.

However, it seems that the opposite had happened. I do recall we had written to the President's Office. I think Claudia Jiménez was the Head of that office at that time. Soon before finalizing the 3-hectare transaction, we had advised the President's office of the facts of matter and it urgently needed to be resolved, and in the absence of it being resolved by Government, we would have been forced to effectively buy the Concession.

It seemed that the fact that we transacted and bought the Concession reflected badly on President Uribe, who was at that time quite vocal in his pursuit of corruption and didn't want anything to taint the name of his Government. He was coming up to the end of his term, and he didn't want anything tainting the name of his Government or anything further.

As a result of us buying this, this obviously upset President Uribe, and I suspect that he obviously took it out on Mr. Ballesteros because it reflected badly on the President.

So, what I--what my suspicion was in the original e-mail on the 7th of May turned out to not be true.” [Emphasis added]

The Tribunal’s position

743. The Tribunal finds Mr. Nagle’s explanations convincing.
744. In his email, the words used by Mr. Nagle were these: “Of course he [Director Ballesteros] now supports us, we have bought the 3ha.”
745. Respondent construes these words to be an acknowledgement that Prodeco had bribed Mr. Ballesteros through the purchase of the 3ha Contract. Mr. Nagle’s construction is totally different. He explains that Prodeco had been writing to various Ministries and authorities within the Colombian public administration, complaining that Ingeominas’ decision to grant the 3ha Contract to Messrs. Maldonado and García was highly irregular and requesting that steps be taken to undo such decision. Eventually, Prodeco gave in, and decided to acquire the 3ha Contract. In that context, Mr. Nagle thought that Mr. Ballesteros would be relieved that Prodeco had “solved” the situation by yielding to the greenmail.
746. The Tribunal finds Mr. Nagle’s explanation of his words convincing. Such construction is also confirmed by the following messages in the R-100 email chain: Mr. Nagle’s assumption that Mr. Ballesteros would be satisfied proved totally wrong. Ms. Anaya, an employee of Prodeco, held a meeting at Ingeominas a week later and was told that Mr. Ballesteros was not happy at all with the execution of the 3ha Contract, because the matter had reached President Uribe, and the President was not satisfied at all as to how the problem had been solved.
747. Summing up, Doc. R-100, and particularly Mr. Nagle’s email of 7 May 2009, do not undermine the conclusion reached by the Arbitral Tribunal that Respondent has failed to marshal any evidence proving that Prodeco corrupted Ingeominas’ Director Ballesteros in order to procure the Eighth Amendment.

**(4) BAD FAITH**

748. Colombia submits a second argument: that Claimants’ investment was secured through misrepresentation, concealment, and bad faith. Respondent says that Prodeco misrepresented the economic situation of the project in order to persuade Ingeominas that under the Mining Contract expanding coal production beyond 8 MTA was not economically feasible. Claimants deliberately and in bad faith withheld geological, technical, and pricing information from Ingeominas, thus rendering the agency unable to properly assess Prodeco’s economic proposals.<sup>690</sup>

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<sup>690</sup> R II, paras. 447-451.

749. Claimants deny having misrepresented or concealed any information from Ingeominas. That said, they add, even if Colombia's mischaracterization of Claimants' conduct were correct, there would still be no ground for a jurisdictional objection.<sup>691</sup>
750. The Tribunal will first establish the proven facts regarding the negotiation of the Eighth Amendment **(4.1)** and then it will state its decision **(4.2)**.

**(4.1) PROVEN FACTS**

**A. Prodeco's Initial Proposals**

751. Six months after executing the Seventh Amendment, Prodeco decided to approach Ingeominas and to propose a new amendment to the Mining Contract.<sup>692</sup>
752. On 23 May 2008, Prodeco's representatives met with Director Ballesteros, and made a presentation, based on an extensive PowerPoint, suggesting a revision of the economic conditions of the Mining Contract.<sup>693</sup> A few days later, on 28 May, Prodeco submitted a nine-page formal request.<sup>694</sup> Prodeco argued that the existing compensation arrangement compromised the potential expansion and even the viability of the Calenturitas mining project.<sup>695</sup>
753. Thus, Prodeco proposed that, in order to guarantee the sustainability of Colombia's returns and the viability of the mining project, certain conditions agreed upon in the Mining Contract should be amended:<sup>696</sup>
- Replacing the ICR index by the API2-BCI7 indexes;<sup>697</sup>
  - Calculating Royalties and GIC based on the value of coal at the Mine's pithead;
  - Capping Royalties at 10%;
  - Updating the value of the GIC and introducing a formula for indexation.
754. Prodeco proposed the creation of a committee to analyse these potential modifications and, in the meantime, the execution of a memorandum of understanding.<sup>698</sup>

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<sup>691</sup> C III, para. 49.

<sup>692</sup> Doc. C-82.

<sup>693</sup> Doc. C-82.

<sup>694</sup> Doc. C-83.

<sup>695</sup> Doc. C-83. See also Doc. C-82 and Nagle I, paras. 41-45.

<sup>696</sup> Doc. C-82; Doc. C-83.

<sup>697</sup> Monthly arithmetic average of the export prices CIF ARA published by Argus/McCloskey in the index known as API2, minus the monthly average price of the maritime freight costs between Puerto Bolivar and Rotterdam published by SSY in the index known as BCI7 (see Doc. C-96, pp. 1-2).

<sup>698</sup> Doc. C-82, p. 25; Doc. C-83, p. 10.

Ingeominas' reaction

755. A few days thereafter,<sup>699</sup> Ingeominas' *Subdirector de Fiscalización y Ordenamiento Minero*, Mr. Edward Franco, prepared an extensive legal and economic report, analysing Prodeco's proposal. The report was delivered to Mr. Ballesteros, for submission to Ingeominas' *Consejo Directivo*.<sup>700</sup> The main conclusions were the following:<sup>701</sup>

- Prodeco had agreed to execute the Mining Contract, and its subsequent amendments, fully aware of its underlying economic conditions;
- The economic conditions of the Mining Contract were not discriminatory or contrary to principles of equity, equality or economic balance;
- Prodeco's proposal would substantially reduce the State's revenues and would thus be contrary to Colombia's interests.

756. Mr. Franco's proposal to the *Consejo Directivo* was the following:<sup>702</sup>

*"En cuanto a la modificación propuesta se recomienda no acceder a la misma por ser poco favorable para los intereses de la Nación".*

757. Despite this unfavourable initial analysis, the negotiations did not break off and Prodeco and Ingeominas held further meetings to discuss the changes proposed by Prodeco.<sup>703</sup>

Prodeco's second approach

758. On 15 July 2008, Prodeco sent to Ingeominas a second formal request for the revision of the economic conditions of the Mining Contract and the reduction of Royalties and GIC. This extensive request further developed Prodeco's original proposal, adding a new argument. With a new price structure Prodeco would be able to commit additional investments and increase production:<sup>704</sup>

*"6.1 Las condiciones actuales pactadas en el contrato de la referencia para regular las contraprestaciones que Prodeco debe pagar, generan una situación inequitativa para ésta que puede afectar la viabilidad económica del proyecto, amén de que constituyen un obstáculo para futuras expansiones que se encuentran en estudio. Adicionalmente, algunas imprecisiones o vacíos pueden repercutir en situaciones perjudiciales para la Nación.*

*6.2 La razón fundamental de la propuesta de Prodeco radica en que los aspectos inequitativos o ambiguos de las cláusulas Décima Cuarta y Décima Quinta, modificadas a lo largo del tiempo, sean revisadas en beneficio de*

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<sup>699</sup> The precise date is difficult to establish, because the copy in the file is undated (Doc. R-79; Doc. R-80).

<sup>700</sup> Doc. R-80. See also Doc. R-79.

<sup>701</sup> Doc. R-80; Doc. R-24.

<sup>702</sup> Doc. R-80, p. 13.

<sup>703</sup> Doc. C-86, p. 1.

<sup>704</sup> Doc. C-84, p. 19. See also p. 20.

*ambas partes, de manera que se asegure un conjunto de contraprestaciones que al mismo tiempo permitan a Prodeco desarrollar el depósito a su máximo potencial de manera competitiva, así como a la Nación percibir un mayor monto de ingresos*". [Emphasis added]

759. Prodeco submitted a precise calculation of two scenarios – one if the Mining Contract was not amended, and the other if Prodeco's proposals were accepted:

- Under the first scenario, based on the 2006 PTI, the Mine's total production would be 117.5 MT, with a maximum annual production of 10 MTA; Royalties and taxes flowing to Colombia would be just USD 1.9 Bn;
- The second scenario would result in a lifetime production of 225.1 MT and a maximum annual production of 15.5 MTA; in this case the Royalties and taxes collected by the Republic would be much higher: USD 5.4 Bn.<sup>705</sup>

760. In essence, Prodeco was proposing to Ingeominas a win-win alternative: if Ingeominas would agree to a reduction of its Royalties, Prodeco would commit to making additional investments, production of the Mine would increase, costs would be slashed, sales would be higher, and at the end of the lifecycle Prodeco would have earned higher profits and Colombia would have received significantly higher Royalties and taxes.

#### The Dispute over the Definitive Price

761. In the same letter Prodeco also raised for the first time an interpretative issue regarding the definition of the Definitive Price provision in the Seventh Amendment to the Mining Contract.<sup>706</sup>

762. Prodeco acknowledged that there were two possible interpretations of the term "Definitive Prices":<sup>707</sup>

- The first interpretation would equal "Definitive Price" with the actual sale price received by Prodeco, evidenced in the invoices issued to the buyers;
- The second interpretation would define "Definitive Price" as the higher of (i) the FOB Price in the week when the coal was shipped and (ii) the actual sale price obtained by Prodeco.

763. Prodeco recognised that, until then, it had calculated the Definitive Price based on the second alternative; but Prodeco now submitted that this interpretation failed to consider that the market situation had drastically changed. Prodeco proposed that the Mining Contract be modified, so that after the amendment, Royalties and GIC be adjusted based on Prodeco's actual sale price.<sup>708</sup>

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<sup>705</sup> Doc. C-84, Annex 8.

<sup>706</sup> C I, para. 51; R I, paras. 61-62. See also Doc. C-84, paras. 1.3-1.15.

<sup>707</sup> Doc. C-84, para. 1.4.

<sup>708</sup> Doc. C-84, paras. 1.5-1.15.

Prodeco unilaterally construes the Mining Contract

764. On 8 September 2008, Prodeco sent a letter to Ingeominas, stating that as of 30 September 2008 it would calculate Royalties and GIC using a Definitive Price equal to that paid by the end consumer.<sup>709</sup>
765. At the end of September Prodeco did as it had anticipated: it paid the adjustment amount corresponding to the Royalties and GIC of the third quarter of 2008, applying the new interpretation of Definitive Prices. This led to an underpayment of USD 6 M in favour of Prodeco.
766. This behaviour did not please Ingeominas. On 17 October 2008, Ingeominas enjoined Prodeco to comply with the terms of the Mining Contract.<sup>710</sup> Prodeco reacted ten days later, stating that it was aware that any modification of the Mining Contract had to be bilaterally agreed, but that it no longer required an amendment to the Definitive Price clause, given that its meaning was clear.<sup>711</sup>

**B. The Negotiations**

767. On 23 January 2009, Ingeominas formally put Prodeco on notice through a *Requerimiento bajo apremio de caducidad*. Ingeominas considered that Prodeco's unilateral interpretation of the Mining Contract amounted to a contractual breach. Ingeominas notified Prodeco that if payment was not made or appropriate justification provided within one month, the Contract would be terminated through a unilateral declaration of *caducidad*.<sup>712</sup>
768. The negotiations between Prodeco and Ingeominas continued, and on 21 May 2009, both parties finally executed a Commitment to Negotiate, in an effort to solve their dispute. Pursuant to the Commitment to Negotiate:<sup>713</sup>
- Prodeco accepted to pay to Ingeominas an additional amount of USD 6.3 M as Royalties and GIC accrued during the third quarter of 2008, accepting (albeit under protest) Ingeominas' interpretation of the Definitive Price term used in the Mining Contract;
  - Prodeco agreed to continue paying Royalties and GIC based on Ingeominas' interpretation of the Definitive Price provision, until a final agreement was reached between the parties;
  - Both parties undertook to negotiate for a period of 90 days (subject to extension), trying to solve the Definitive Price dispute and any other economic issues affecting the Mining Contract raised by Prodeco; should these negotiations fail,

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<sup>709</sup> Doc. C-86.

<sup>710</sup> Doc. R-84.

<sup>711</sup> Doc. R-85.

<sup>712</sup> Doc. C-88; Doc. C-243.

<sup>713</sup> Doc. C-91, pp. 7-9.



Ingeominas and Prodeco agreed to resort to *amiable composition*, and, alternatively, to domestic Colombian arbitration.

769. On 3 June 2009, Prodeco made the agreed payment of more than USD 6 M, and consequently the 90-day negotiation period started to run.<sup>714</sup> The negotiation period was extended three times, in September, October, and November 2009, before finally expiring on 9 December 2009.<sup>715</sup>

**a. Kick-off Meeting**

770. Ingeominas scheduled a kick-off meeting for 12 June 2009, and sent a letter to Prodeco in preparation of that meeting.<sup>716</sup> The letter started with a request that Prodeco submit its proposal, with the economic and legal arguments supporting it:<sup>717</sup>

*“Para ello y en razón a la importancia que para INGEOMINAS tiene, como ya indicamos, conocer claramente la posición del contratista, (máxime cuando por la reciente vinculación de algunos directivos y asesores, estos no conocen antecedente alguno del proceso) específicamente lo propuesto para la revisión de las contraprestaciones, se hace necesario adelantar una primera reunión en la que el contratista exponga dicha posición, con los argumentos económicos y jurídicos que la sustentan”.* [Emphasis added]

771. Ingeominas then added a highly relevant condition: Ingeominas must defend “the interests of the Nation, and it would do so evaluating “the net present value” associated with the project in its integrity:<sup>718</sup>

*“Como ustedes bien saben, INGEOMINAS tiene que evaluar en forma integral su relación con el contratista y examinar toda propuesta que reciba conforme resulte más conveniente a los intereses de la Nación, entendidos estos en términos económicos y de valor presente neto, con estricta sujeción a las normas legales aplicables, razón por la cual solicitamos respetuosamente considerar esos condicionamientos al momento de presentar su propuesta”.* [Emphasis added]

772. The kick-off meeting took place on 12 June 2009. Prodeco submitted an extensive PowerPoint presentation explaining its position.<sup>719</sup> Claimants proposed to replace the existing Compensation Scheme (Royalties and GIC) with a single flat royalty rate based on Prodeco’s actual sale prices. According to Prodeco, this modification

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<sup>714</sup> Doc. R-109.

<sup>715</sup> Doc. C-99; Doc. C-105; Doc. C-109.

<sup>716</sup> Doc. R-110.

<sup>717</sup> Doc. R-110, p. 1.

<sup>718</sup> Doc. R-110, p. 1.

<sup>719</sup> Doc. C-93; Doc. R-111 (contains a full resolution version of the PowerPoint presentation, in which it is possible to read on the first page “Junio 12, 2009”).

would ultimately generate higher revenues for the State, without impairing the NPV of the project for Claimants.<sup>720</sup>

773. Ingeominas' response came on 23 June 2009, requesting that Prodeco provide a numerical, detailed, and concrete proposal of the requested changes to the Compensation Scheme, and the analyses, valuations, and commitments with respect to future investments, expansion and production.<sup>721</sup>

*“Tal como entonces tuvimos oportunidad de señalar a ustedes, INGEOMINAS considera indispensable la presentación de una propuesta que contenga en forma numérica, detallada y concreta, tanto la propuesta que el contratista formula a la Nación, como los análisis valoraciones y compromisos específicos que en materia de inversión, expansión y producción futura asumiría la sociedad titular de cara a la solicitud de revisión de las contraprestaciones económicas del contrato”.* [Emphasis added]

**b. The Meeting of 2 July 2009**

774. Prodeco presented its proposal at the meeting scheduled for 2 July 2009.<sup>722</sup> In a PowerPoint presentation,<sup>723</sup> Prodeco proposed a single compensation payment of 10% based on the higher of:

- the actual coal sales price, and
- USD 42.43 per tonne (which was the base price of the 2006 PTI).

775. According to Prodeco, the proposal, by guaranteeing a minimum price per tonne, shielded Ingeominas from the risk of potential decreases in coal prices. In a letter sent two days thereafter, Prodeco again represented to Ingeominas that the proposal would permit a further expansion of the Mine and would also be advantageous for Ingeominas and for the Nation:<sup>724</sup>

*“La propuesta contenida en la presentación adjunta además de representar un ingreso mayor para Ingeominas y para los departamentos y municipios que reciben regalías y contraprestaciones, representa un ingreso mayor para la Nación ya que la expansión de la mina permitirá incrementar: (i) el número de empleos directos e indirectos en la mina, (ii) la contribución al desarrollo regional, (iii) el rubro de exportaciones, (iv) el valor del capital invertido en la mina y en consecuencia, la inversión extranjera directa, (v) el monto de los impuestos a pagar, y (vi) la contribución al crecimiento del Producto Interno Bruto”.* [Emphasis added]

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<sup>720</sup> Doc. C-93, pp. 26-29.

<sup>721</sup> Doc. R-112, p. 1; Doc. BR-5, p. 1.

<sup>722</sup> Doc. R-114.

<sup>723</sup> Doc. C-95.

<sup>724</sup> Doc. R-115.

776. On 13 July 2009, Ingeominas acknowledged receipt and declared that it was evaluating Prodeco's proposal "*bajo la salva guarda [sic] de los intereses de la Nación y por ende de todos los Colombianos*".<sup>725</sup>

**c. The Meeting of 31 July 2009**

777. The next meeting took place on 31 July 2009.<sup>726</sup> In his witness statement, Mr. Nagle records his recollection of the topics which were discussed: Ingeominas had in the meantime analysed the proposal submitted by Prodeco, and suggested a single royalty rate of 13%, with the possibility of increasing it to 15% if prices rose and Prodeco made windfall profits.<sup>727</sup>

778. Since Mr. Nagle's "main takeaway" from the meeting was that Ingeominas expected an improved offer, Prodeco submitted a revised proposal on 10 August 2009. Prodeco now proposed:<sup>728</sup>

- As to the Compensation Scheme, a single compensation rate of 13% (instead of 10% as originally proposed), calculated on the pithead coal prices, and a scaled increase in the single compensation rate up to 15% in the event of extraordinarily high prices, exceeding USD 107 per tonne FOB;
- That the Coal Reference Price be determined monthly by a formula based on the API2-BC17 indexes, using certain time lags.

**d. Communications Between Ingeominas and Prodeco**

779. On 27 August 2009, Ingeominas replied to Prodeco's revised proposal. Ingeominas explained that it had not stated its official position yet, and made the following clarifications:<sup>729</sup>

- It considered it to be possible, but had not accepted, to replace the existing Compensation Scheme with a unified payment; this unified payment could not be lower than 15% of the FOB price of coal;
- Any amendment to the Compensation Scheme should generate higher yields for Colombia;
- It did not oppose using a minimum Coal Reference Price to calculate royalties, but the USD 42.43 price proposed by Prodeco was too low;
- It found that the price reported by the producer as the final price in its invoices was not always reliable;

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<sup>725</sup> Doc. R-116.

<sup>726</sup> Doc. R-118.

<sup>727</sup> Nagle I, para. 60.

<sup>728</sup> Doc. C-96.

<sup>729</sup> Doc. C-97, pp. 1-2.

- It was necessary to incorporate an internationally recognized coal price index, with certain time lags.

780. Ingeominas explained that its officials were assessing Prodeco's revised proposal and hoped to come back with a response at the following meeting.<sup>730</sup>
781. Prodeco answered on 1 September 2009, explaining that its improved offer was simply aimed at reflecting the parties' latest discussions. Prodeco declared that it was open to discuss Ingeominas' proposals at the following meeting, which should also address the fact that the Commitment to Negotiate was about to expire.<sup>731</sup>
782. As foreseen by Prodeco, the 90-day agreed period for negotiations expired, and on 3 September 2009, Ingeominas officially notified Prodeco that it would resort to mediation, as envisaged in the Commitment to Negotiate.<sup>732</sup> But on that same day Prodeco and Ingeominas reached an agreement to extend the negotiation period until 30 October 2009, and no mediation was initiated.<sup>733</sup>

Ingeominas' letter of 23 September 2009

783. On 23 September 2009, Ingeominas responded, after analysing Prodeco's last proposal. Ingeominas' initial reaction was negative:<sup>734</sup>

*“[...] de manera respetuosa nos permitimos precisarles que no se encontraron razones de índole jurídica, técnica o financiera que sustenten las modificaciones contractuales solicitadas”.* [Emphasis added]

784. But Ingeominas did not completely close the door: if Prodeco submitted clear evidence of the fact that expansion was impracticable under the existing Compensation Scheme, Ingeominas would be willing to review Prodeco's proposal.<sup>735</sup>

*“El Instituto considera que en la medida que la premisa fundamental de PRODECO consiste en la alegada inviabilidad económica del plan de expansión de producción como consecuencia del esquema de contraprestaciones y regalías, compete a PRODECO allegar prueba suficiente de tal hecho, lo que hasta ahora no ha ocurrido a pesar de nuestras reiteradas solicitudes, haciéndose por lo tanto imposible continuar con una negociación basada exclusivamente en razones de conveniencia.*

*Si PRODECO allega la demostración clara del hecho antes indicado, el Instituto estaría dispuesto a revisar la progresión de la escalación en el sistema de regalías a partir de los volúmenes en los que PRODECO*

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<sup>730</sup> Doc. C-97, p. 3.

<sup>731</sup> Doc. R-124.

<sup>732</sup> Doc. C-98.

<sup>733</sup> Doc. C-99.

<sup>734</sup> Doc. C-100, p. 1.

<sup>735</sup> Doc. C-100, p. 1.

*demuestre que el pago de las mismas torna inviable la explotación*".  
[Emphasis added]

Prodeco's reply on 30 September 2009

785. Prodeco replied on 30 September 2009, asking Ingeominas to indicate which specific data were missing or had not been presented by Prodeco, since Prodeco could not find any request for information made by Ingeominas to which Prodeco had not timely answered. Prodeco further cited all the communications and documents which, in its view, demonstrated that an expansion was unviable.<sup>736</sup>

**e. The Meeting of 5 October 2009**

786. Ingeominas and Prodeco held a further meeting on 5 October 2009,<sup>737</sup> and a few days thereafter, on 9 October, Prodeco submitted a new letter, with additional explanations.<sup>738</sup>

787. Prodeco started by justifying its view why, under the existing Compensation Scheme, it was not economically feasible to expand the Mine, in terms of NPV. Applying the present system, the maximum NPV was achieved at 8 MTA, and for higher production the NPV started to decrease as a result of the progressive Compensation Scheme agreed upon in the Mining Contract.<sup>739</sup>

*"Por tanto, a partir de dicho punto el valor presente neto del proyecto se reduce, motivo por el cual es claro que ningún inversionista arriesgaría su capital para que disminuya el valor de su inversión. En tales condiciones, un proyecto cualquiera deja de ser viable económicamente"*. [Emphasis added]

788. Prodeco thus averred that beyond 8 MTA it would be uneconomical to further increase the capacity of the Mine, and provided the following graph:<sup>740</sup>

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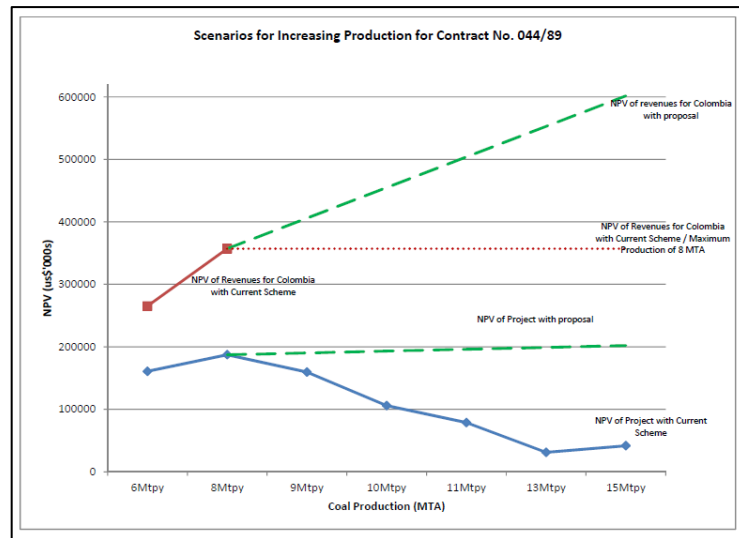
<sup>736</sup> Doc. C-101; Doc. R-130.

<sup>737</sup> Doc. C-101, p. 3. See also Nagle I, para. 66.

<sup>738</sup> Doc. C-102.

<sup>739</sup> Doc. C-102, p. 1.

<sup>740</sup> Doc. C-102, p. 9 (high resolution image of the graphic presented on p. 4 (English version)).



789. In accordance with the graph, with the existing Compensation Scheme:

- Prodeco would reach the maximum NPV of the project with an annual production of 8 MTA, and consequently had no interest in making additional investments to increase capacity;
- Assuming this annual production, the income generated in favour of Ingeominas, in NPV at a 12% discount rate, would amount only to USD 360 M.<sup>741</sup>

790. In the letter, Prodeco then submitted its alternative proposal, which it said had been discussed in the meeting with Ingeominas held on 5 October.

791. Under this proposal, the present Compensation Scheme would be retained for production rates up to 8 MTA; but for higher production rates a unified compensation rate of 13% would be applied.

792. In that case an annual production of 15 MTA would become economical, even if the increase in production required a capital investment of USD 1.6 Bn. Prodeco would be prepared to assume such investment, since the NPV of the project increased to slightly more than USD 200 M. Ingeominas would also benefit in Prodeco's view: the NPV of its take would increase to USD 600 M (again at a 12% discount rate).<sup>742</sup>

#### Analysis by Ingeominas

793. Ingeominas asked two of its officers – Mr. Balcerro and Ms. Gómez – to analyse Prodeco's latest proposal.

<sup>741</sup> Doc. C-102, p. 1.

<sup>742</sup> Doc. C-102, p. 2.

794. Mr. Balcerro and Ms. Gómez prepared a three-page memorandum, dated 20 October 2009, which reached the following conclusions:<sup>743</sup>

- NPV was a proper financial tool to evaluate long term investment projects; if the NPV was higher than the required investment, the investment was feasible;
- The model submitted by Prodeco had a positive NPV for annual production between 8 and 15 MTA and consequently a project foreseeing production in that range would be financially viable;
- Certain aspects of Prodeco's model required further clarification;
- Prodeco should submit a sensitivity analysis to confirm the financial viability of the project.

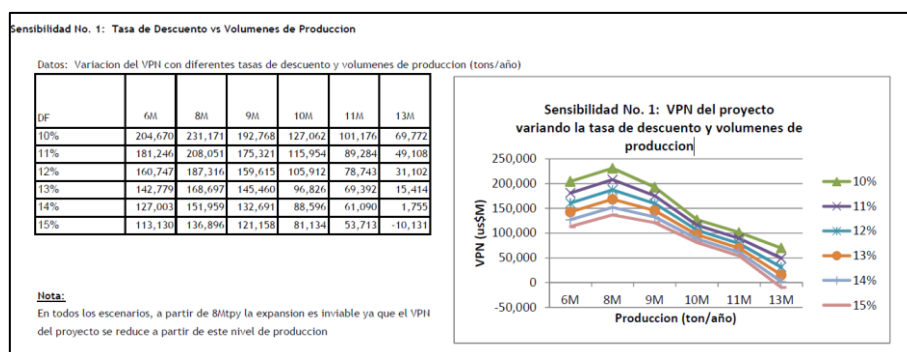
795. The report did not address Prodeco's argument that the NPV of the project was maximized at a production of 8 MTA, and that for higher production (which require greater investment) the NPV decreased – and that for Prodeco the best alternative, with the existing Compensation Scheme, was to limit production at 8 MTA.

**f. The Meeting of 26 October 2009**

796. On 26 October 2009, Ms. Gómez met with Mr. Johnny Campo of Prodeco to discuss her report.

797. On that same day, Mr. Campo sent to Mr. Balcerro of Ingeominas the sensitivity analysis,<sup>744</sup> reflecting the impact of the variation of certain factors on the NPV of the project at different production levels,<sup>745</sup> namely:

- The impact of the variation of the discount rate on the NPV of the Project at different production levels:



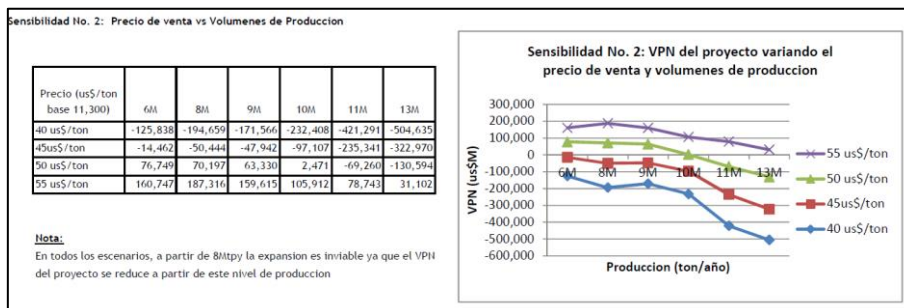
<sup>743</sup> Doc. R-134; Doc. R-135.

<sup>744</sup> Doc. R-134; Doc. C-103.

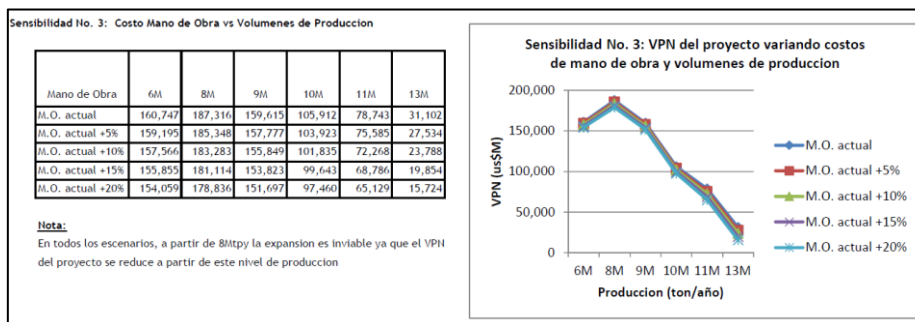
<sup>745</sup> Doc. C-103. See also Nagle II, para. 58; Brattle I, para. 39.



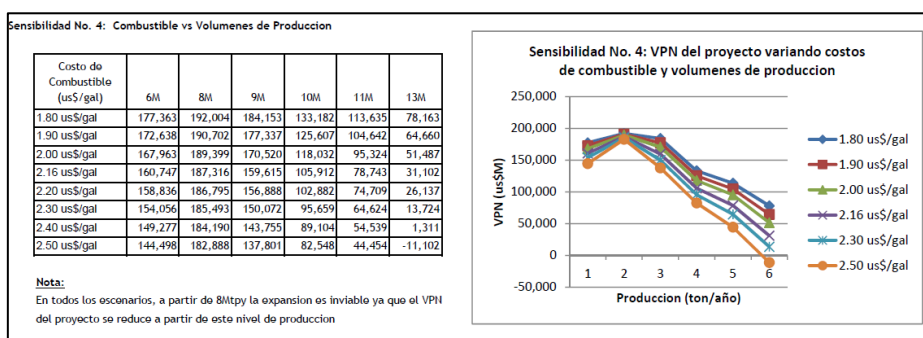
- The impact of the variation of the coal sales price on the NPV of the Project at different production levels:



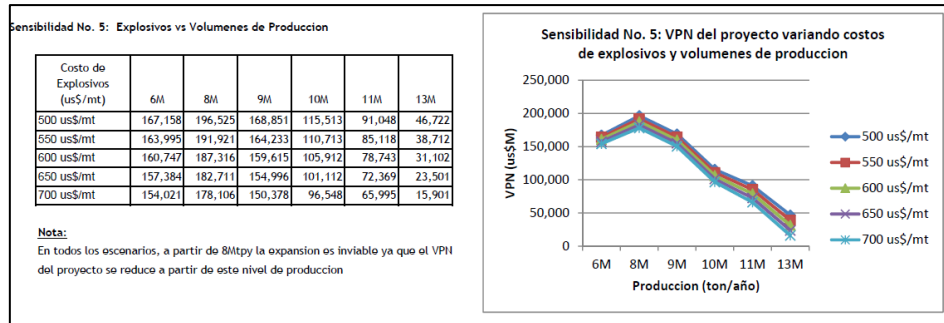
- The impact of the variation of labor costs on the NPV of the Project at different production levels:



- The impact of the variation of fuel costs on the NPV of the Project at different production levels:



- The impact of the variation of the costs of explosives on the NPV of the Project at different production levels:

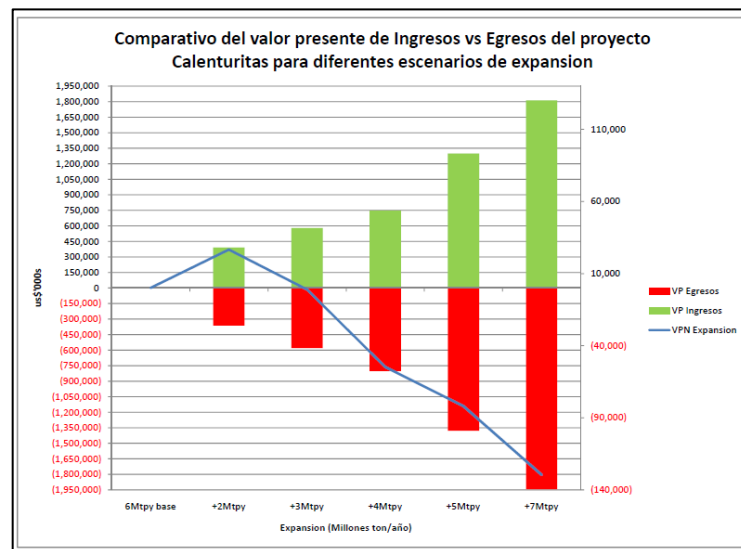


798. Taking into consideration these different scenarios, Prodeco concluded that “a partir de 8Mtpy la expansión es inviable ya que el VPN del proyecto se reduce a partir de este nivel de producción”.

799. Thereafter, officers from Prodeco and Ingeominas met several times and jointly ran different sensitivity models.<sup>746</sup>

#### Additional NPV information

800. On 29 October 2009, Prodeco’s Mr. Campo sent further information to Ingeominas’ Mr. Balcerro, at the latter’s request. The information took the form of a graph illustrating the impact of an expansion of the project on its NPV, where the blue line represents the incremental NPV:<sup>747</sup>



801. The graph confirms that the NPV maximizes for a production of 8 MTA, and that for higher production expenses rise faster than income, resulting in lower NPVs.

<sup>746</sup> Doc. C-103; Doc. C-134, pp. 5-6.

<sup>747</sup> Doc. C-255.

**g. Prodeco's Proposal of 4 November 2009**

802. On 4 November 2009, Prodeco presented yet another revised proposal to Ingeominas, based on the information and projections reviewed jointly by Ingeominas and Prodeco.<sup>748</sup>
803. (i) Prodeco suggested applying the existing Compensation Scheme for production up to 8 MTA, with a few modifications:
- The Coal Reference Price for liquidating Royalties and GIC would be the actual sales prices, instead of a reference index price;
  - GIC would apply when production costs were less than 75% of the sales price; the threshold for GIC payments would be updated annually based on national and international indexes.
804. (ii) For production in excess of 8 MTA, the first 8 MTA would be remunerated in accordance with the Compensation Scheme described in (i), and the excess would be subject to:
- A flat royalty rate of 5% based on the pithead price, which would apply to production levels between 8 to 11 MTA;
  - If production exceeded 11 MTA, a flat royalty rate of 10% based on the pithead price would apply to production above 8 MTA;
  - The pithead price would be calculated as the final sales price to the consumer less transport and shipment.
805. On 11 November 2009, Prodeco submitted two proposed *formulae* to calculate the GIC payments. Prodeco also drew Ingeominas' attention to the fact that it had been almost six months since the execution of the Commitment to Negotiate, and that despite Prodeco's several proposals, Ingeominas had not yet presented any counter-proposals.<sup>749</sup>

**h. The Meeting of 17 November 2009**

806. Prodeco and Ingeominas met again on 17 November 2009 and Ingeominas provided Prodeco with some feedback:<sup>750</sup>
- Ingeominas recognized the need to update the GIC threshold;
  - But insisted on using the ICR index as the Coal Reference Price to calculate Royalties and GIC – a point which Prodeco accepted;

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<sup>748</sup> Doc. C-106. See also Nagle I, para. 70 and Brattle I, para. 40.

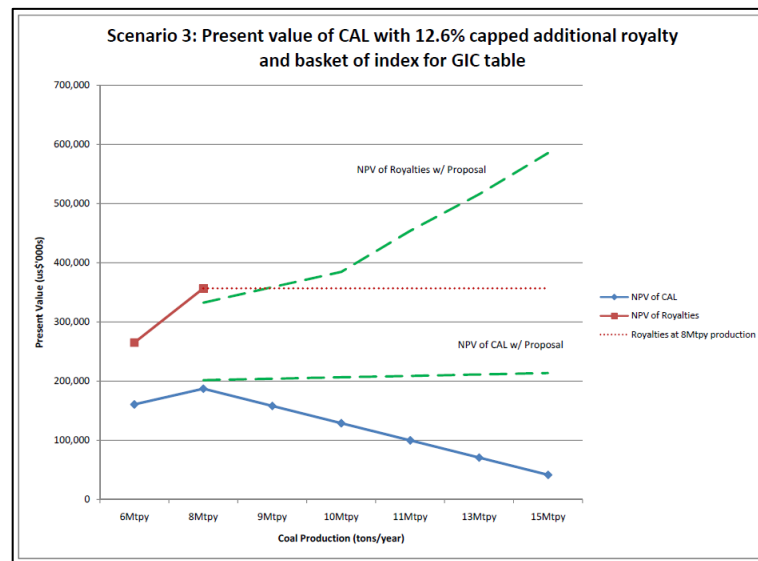
<sup>749</sup> Doc. C-107.

<sup>750</sup> Doc. R-145. See also Nagle I, para. 71.

- Proposed that a flat 12.6% royalty rate apply to all production when production exceeded 8 MTA.

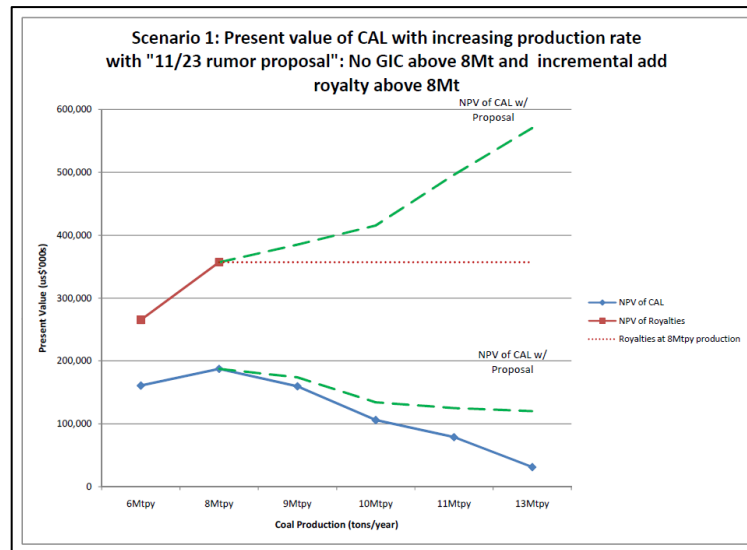
Further analyses

807. On 25 November 2009, Prodeco's Mr. Campo sent Ingeominas two charts displaying the impact of Ingeominas' proposals on NPV.
808. The first chart showed the impact of a flat 12.6% royalty rate for production volumes above 8 MTA and GIC thresholds, adjusted by a basket of indexes.<sup>751</sup>



809. The net take of this proposal is that the maximum NPV of the Mine (lower green line) is reached with a production of 15 MTA, and that with that production Ingeominas also maximizes the NPV of its royalties stream (higher green line). Consequently, this solution seems to offer a win-win scenario.
810. The second chart referred to an “11/23 rumor proposal,” where above 8 MTA the Additional Royalty would accrue, but not GIC. In that scenario, the maximum NPV of the Mine was reached at 8 MTA, a production which does not maximize Ingeominas' income stream (which peaks at 15 MTA):

<sup>751</sup> Doc. C-108, p. 3. See also Nagle I, paras. 72-73 and Brattle I, para. 41.



**i. The Meeting of 3 December 2009**

811. On 27 November 2009, Prodeco and Ingeominas executed a third, and last, extension of the Commitment to Negotiate, until 9 December 2009.<sup>752</sup>

812. Thereafter, the negotiations continued at a meeting held on 3 December 2009.<sup>753</sup>

813. In the course of that meeting, agreement seemed within reach. Prodeco accepted Ingeominas' proposals:<sup>754</sup>

- A 12.6% flat royalty rate would apply on all production in excess of 8 MTA;
- The ICR reference prices should be weighted to determine a Coal Reference Price to calculate Royalties and GIC;
- The GIC tables should be indexed to the Colombian consumer price index and not international indexes;
- Prodeco's proposal that GIC payments be due only where production costs exceed 75% of sales prices was rejected.

**C. Initial Version of the Eighth Amendment**

814. On 9 December 2009, representatives of Prodeco and Ingeominas met and executed the Initial Version of the Eighth Amendment. Prodeco and Ingeominas initialled and signed three copies of the Initial Version of the Eighth Amendment.<sup>755</sup>

<sup>752</sup> Doc. C-109.

<sup>753</sup> Nagle I, para. 74.

<sup>754</sup> Nagle I, para. 74.

<sup>755</sup> Doc. C-111, shows the initials and signatures; the document shows a stamp saying "Sin vigencia por falta de inscripción en el Registro Minero al considerarse lesivo para el Estado".

815. The Initial Version would enter into force upon its registration at the National Mining Registry and would be deemed to take effect on 1 January 2010.<sup>756</sup>

816. Mr. Ballesteros requested that Prodeco leave its signed copy with Ingeominas, stating that, as a courtesy, he wished to explain the contents of the agreement at the *Consejo Directivo* meeting scheduled for the following day. Prodeco acceded to his request.<sup>757</sup>

Ingeominas denies registration

817. On 18 January 2010, Ingeominas returned to Prodeco a signed copy of the Initial Version of the Eighth Amendment, with multiple stamps stating:<sup>758</sup>

*“SIN VIGENCIA POR FALTA DE INSCRIPCIÓN EN EL REGISTRO MINERO NACIONAL AL CONSIDERARSE LESIVO PARA EL ESTADO”.*

818. In the cover letter, Ingeominas explained that the Initial Version of the Eighth Amendment was contrary to the interests of the Nation and that registration at the Mining Registry had been denied.<sup>759</sup>

*“[...] me permito indicarle que con el presente oficio estamos adjuntando copia del Otrosí No 8 al Contrato de Gran Minería No 044/89 de fecha 9 de diciembre de 2009, sin la correspondiente inscripción en el Registro Minero Nacional, por considerarlo, después de efectuarse un análisis y evaluación de las condiciones allí pactadas, inconveniente para la Nación”.* [Emphasis added]

819. The agency explained its decision with the following words:<sup>760</sup>

*“Finalmente, es pertinente indicar que la decisión adoptada obedece a las políticas y directrices institucionales, encaminadas a garantizar la adecuada administración del recurso minero y la debida ejecución de las condiciones económicas pactadas en el contrato de concesión respectivo, en pro de los intereses de la Nación, siendo estos últimos los únicos que pueden orientar la actividad de quienes prestan sus servicios a INGEOMINAS”.*

820. Finally, Ingeominas invited Prodeco to an immediate and joint review of the pending aspects of the negotiations.<sup>761</sup>

**D. Final Negotiations**

821. Upon receipt of Ingeominas' letter, dated 18 January 2010, negotiations resumed.

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<sup>756</sup> Doc. C-111, Clauses 9 and 10.

<sup>757</sup> Doc. C-112. See also Nagle I, para. 78.

<sup>758</sup> Doc. C-115. See also Doc. R-17, with an internal memorandum of Ingeominas dated 14 January 2010.

<sup>759</sup> Doc. C-115, p. 1.

<sup>760</sup> Doc. C-115, p. 2.

<sup>761</sup> Doc. C-115, p. 2.

822. Ingeominas suggested minor adjustments to the royalty scheme, namely, maintaining the existing Royalty rate up to 8 MTA (*i.e.*, a maximum flat 12.6% rate at 8 MTA), but that each additional MTA be subject to an additional 1% rate (*i.e.*, the 9<sup>th</sup> MTA only would be subject to a 13.6% royalty rate, the 10<sup>th</sup> MTA only to a 14.6% royalty rate, and so on).<sup>762</sup>
823. Prodeco acquiesced to Ingeominas' proposed modifications.<sup>763</sup>
824. Hence, four days later, on 22 January 2010, Prodeco and Ingeominas executed the final version of the Eighth Amendment,<sup>764</sup> which was registered with the National Mining Registry three days later.

#### **(4.2) DECISION OF THE ARBITRAL TRIBUNAL**

825. Pursuant to Arts. 2 and 4(1) of the Treaty, protection applies only to investments made in accordance with Colombia's laws and regulations,<sup>765</sup> and Colombian law requires that contracts be negotiated and performed in good faith.<sup>766</sup> This municipal law principle is echoed at the international law level. The principle was stated in *Inceysa* tribunal, and has been reiterated by other tribunals thereafter:<sup>767</sup>

*“La buena fe es un principio supremo al que están sujetas las relaciones jurídicas en todos sus aspectos y contenido. [...] En el ámbito contractual, la buena fe se manifiesta como la ausencia de engaños y artificios durante el proceso de negociación y otorgamiento de los actos que dieron origen a la inversión, así como la lealtad, la verdad y el ánimo de mantener el equilibrio en las prestaciones recíprocas de las partes”.* [Emphasis added]

826. Respondent submits that Claimants secured their investment through bad faith and deceit in three ways:<sup>768</sup>
- First, as of February 2009 (*i.e.* before the negotiations had commenced), Claimants were already planning to increase production beyond 8 MTA without any change in the Royalty regime (**A.**);
  - Second, Claimants misrepresented the economic situation of the project in order to persuade Ingeominas that expanding production beyond 8 MTA was not economically feasible under the then-applicable terms of the Mining Contract (**B.**);

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<sup>762</sup> Nagle I, para. 81.

<sup>763</sup> Nagle I, para. 81.

<sup>764</sup> Doc. C-15.

<sup>765</sup> Doc. C-6.

<sup>766</sup> Doc. C-184, Art. 1603.

<sup>767</sup> *Inceysa*, paras. 230-231. See also *Frontier Petroleum*, para. 297.

<sup>768</sup> R I, para. 285; R II, paras. 446 and 451.



- Third, Claimants deliberately concealed information from Ingeominas, namely geological, technical, and accurate pricing information, thus rendering Ingeominas unable to properly assess Prodeco's economic proposals (C.).

**A. Pre-Existing Plans**

827. Respondent argues that:<sup>769</sup>

“[...] as of February 2009 (i.e., before the Negotiations had commenced), Claimants were already planning to increase production beyond 8 MTA/108 MT without any change in the royalty regime.” [Emphasis added]

828. As evidence, Respondent refers to a Circular published on 2 February 2009 by Xstrata (an international mining company) to its shareholders, in the course of a failed sale of Prodeco from Glencore to Xstrata, which reads as follows:<sup>770</sup>

“An expansion of production of export thermal coal to 12 Mtpa is planned to be completed by 2013 [in Calenturitas]. However, work is still being completed to understand the maximum annual production achievable within the current lease area. This may increase production to approximately 14 Mtpa.”

The Tribunal's analysis

829. The weakness of Respondent's argument is that its basic premise is false: Respondent avers that February 2009 was before the “Negotiations had commenced.”

830. In fact, those negotiations had commenced eight months before, in the middle of 2008 (see Section **V.1.(4.1).A. *supra***).

831. The evidence does not prove *quod demonstrandum erat*.

**B. Allegations of Misrepresentation**

832. Respondent also says that Claimants misrepresented the economics of the Calenturitas Mine, in order to induce Ingeominas to execute the Eighth Amendment.<sup>771</sup>

833. Respondent argues that Prodeco's presentations to Ingeominas relied on unduly low coal prices and mine costs, and on unduly high discount rates, misleading Ingeominas into believing that the 8 MTA scenario resulted in the highest NPV to Prodeco.<sup>772</sup>

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<sup>769</sup> R II, para. 152.

<sup>770</sup> Doc. R-303, p. 32 of the PDF.

<sup>771</sup> R II, paras. 164 and 451.

<sup>772</sup> R II, para. 156.

834. Colombia specifically refers to Doc. C-103, a document which Prodeco sent to Ingeominas on 26 October 2009.

The Tribunal's Analysis

835. On 26 October 2009, Prodeco and Ingeominas had held a meeting in the morning. As a follow-up, in the afternoon Prodeco's Mr. Campo sent to Ingeominas' Mr. Balceró Doc. C-103, which contained certain sensitivity analyses. In the cover email, Mr. Campo offered to meet with Mr. Balceró on the following day, "*para revisarlo rápidamente y responder [a] las inquietudes que tengas*".
836. Mr. Campo's offer does not indicate any intention of hiding facts or presenting deceitful information – quite the contrary.
837. (i) Respondent's first argument that Prodeco acted in bad faith is based on the assertion that the coal price range used in Prodeco's sensitivity analysis was USD 40 to 60 per tonne, and thus too low.<sup>773</sup>
838. The argument does not stand up to scrutiny.
839. Ingeominas, Colombia's mining agency, could never be deceived by a mining company submitting an incorrect price range for coal prices. Ingeominas has ample information of appropriate price ranges to be applied in NPV valuations of coal mines – its team of experts was continuously reviewing mining PTIs submitted by various mining companies, which included (as one of their main factors) the price range for coal.
840. In any case, the 2010 PTI, which was approved by Ingeominas, used a price of USD 55 per tonne –<sup>774</sup> and was thus within the same range proposed by Prodeco in 2009, proving that this range was not fabricated by Prodeco.
841. (ii) Respondent's second argument is that Claimants' mine costs assumption under the 8 MTA scenario were unduly low, as compared to the cost assumptions used for higher production scenarios.<sup>775</sup>
842. This is a highly technical argument, based on the stripping ratios and truck use factors for three types of trucks used in the 6 MTA, 8 MTA, 9 MTA, and 10 MTA scenarios, and supported by an *ex post* report prepared by Brattle.<sup>776</sup>
843. Claimants disagree and say that there is no justification: the strip ratios were directly carried over from the internal mine sequence –<sup>777</sup> an averment not contradicted by Respondent.

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<sup>773</sup> See Doc. C-103, p. 4.

<sup>774</sup> Doc. C-117, pp. 191, 193 and 200.

<sup>775</sup> R II, para. 182.

<sup>776</sup> R II, para. 185.

<sup>777</sup> C III, para. 70(a).

844. All in all, the Tribunal sees no element of bad faith, simply a disagreement by Respondent's expert as to whether the truck utilization rate used in Claimants' sensitivity analysis was correct – a rate which Claimants also used in their own internal mine sequence.
845. (iii) Respondent finally says that Claimants overstated the appropriate discount rate to calculate the NPV of various scenarios.<sup>778</sup>
846. The argument is baseless.
847. Claimants included in their sensitivities for each of the production scenarios discount rates of 8, 9, 10, 11, 12, 13, 14, and 15%.<sup>779</sup>
848. If Ingeominas thought that any other discount rates would be appropriate, it could without doubt have made the calculation itself, or accept Mr. Campo's offer to provide additional information.

**C. Allegations of Withholding of Information**

849. Respondent further avers that Claimants withheld material information from Ingeominas.<sup>780</sup>
850. Respondent's argument is based on a so-called "Alternative Expansion Scenario", which was created by Respondent's expert, Brattle, pursuant to which Claimants could have expanded the total mine production beyond 8 MTA, even under the existing Royalty scheme, by producing 10 MTA and thus exhausting the reserve base within the term of the concession (*i.e.*, by 2035).<sup>781</sup> According to Respondent:<sup>782</sup>
- "The principal advantage of the Alternative Expansion Scenario is that it would have yielded – under the pre-Eighth Amendment regime – (i) a higher NPV to Prodeco than that of the 8 MTA/108 MT scenario, and (ii) a higher NPV to Colombia than Claimants' 15 MTA/245 MT proposal."
851. Respondent says that, although Prodeco was certainly aware that it did not need the Eighth Amendment in order to increase production, it deliberately omitted to discuss the Alternative Expansion Scenario with Ingeominas.<sup>783</sup>
852. Claimants aver that Respondent's argument is a *non sequitur*.<sup>784</sup>

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<sup>778</sup> R II, para. 192.

<sup>779</sup> C II, para. 55(b).

<sup>780</sup> R II, para. 199.

<sup>781</sup> R II, para. 199. See also R I, paras. 200-206.

<sup>782</sup> R II, para. 200.

<sup>783</sup> R I, para. 206; R II, paras. 220-221.

<sup>784</sup> C III, para. 74.

The Tribunal's analysis

853. The Tribunal agrees with Claimants.

854. The so-called "Alternative Expansion Scenario" did not exist at the time of the negotiation of the Eighth Amendment. It is a scenario created by Brattle, *ex post*, for the purposes of the present arbitration. There is no evidence that Claimants ever developed such a scenario, or that Ingeominas, Colombia's mining agency, staffed with well-prepared civil servants, ever raised such possibility.

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855. Summing up, the Tribunal is not convinced by Respondent's allegation that Claimants secured their investment through bad faith and deceit.

856. The evidence on the record does not support Respondent's proposition that Prodeco deliberately misrepresented the economic situation of the Project or tried to conceal information from Ingeominas.<sup>785</sup>

857. The Tribunal is persuaded that Prodeco and Ingeominas negotiated the Eighth Amendment extensively, in good faith, and at arm's length. The negotiations, which involved two entities with ample experience in the coal sector, were held for a period of over 20 months, during which there were multiple meetings and exchanges of proposals. Throughout the negotiations, Ingeominas had every opportunity to request information and to question the information provided by Prodeco. There is no evidence that Prodeco failed to address any request submitted by Ingeominas.

858. The Tribunal is reassured in its conclusions by two facts:

- First, up until the present arbitration, Colombia never raised any allegations of bad faith or deceit in the negotiation of the Eighth Amendment against Prodeco; in particular, in the Procedure for Contractual Annulment, the ANM never questioned Prodeco's conduct throughout the negotiations of the Eighth Amendment;
- Second, Prodeco's behaviour in the negotiations actually denotes good faith. Indeed, in December 2009 Prodeco and Ingeominas signed an Initial Version of the Eighth Amendment, from which Ingeominas eventually backtracked; Prodeco could have tried to enforce the Initial Version of the Eighth Amendment, which had been duly executed by Ingeominas; instead, Prodeco accepted to renegotiate, so that Ingeominas could be satisfied that the final version of the Eighth Amendment was favourable to the interests of the Colombian State. Prodeco's conduct is telling and contradicts Respondent's criticisms.

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<sup>785</sup> The negative inference requested by Respondent in R II para. 999 is totally without merit. There is no evidence that Claimants' withheld documents relating to the negotiations between Ingeominas and Prodeco.

**(5) SUMMARY OF THE DECISIONS**

859. In conclusion, the Tribunal finds that Respondent has failed to prove its accusations that Prodeco acquired the 3ha Contract as a means to bribe Mr. Ballesteros into executing the Eighth Amendment or that it misrepresented the economic situation of the project and deliberately and in bad faith withheld material information from Ingeominas in order to secure the Eighth Amendment.
860. Consequently, the Tribunal dismisses Respondent's Illegality Objection.

## **V.2. FORK IN THE ROAD OBJECTION**

861. Respondent argues that the fork-in-the-road clause of the Treaty [the “**FIR Clause**”] deprives the Centre of jurisdiction and the Tribunal of competence over the “Claim against the *Contraloría*”, since Claimants chose local courts to solve the underlying dispute **(1)**.<sup>786</sup>
862. Claimants argue that Respondent has failed to demonstrate that the elements for the application of the FIR Clause are satisfied, and that Colombia seeks unduly to expand the scope of application of this provision **(2)**.<sup>787</sup>
863. After summarizing the Parties’ positions, the Tribunal will analyse the issues and explain its decision **(3)**.

### **(1) RESPONDENT’S POSITION**

864. Respondent points out that Art. 11(4) of the Treaty contains an FIR Clause, which determines that once an investor has made the choice to submit a dispute to local courts or to international arbitration, that choice is final.<sup>788</sup>
865. According to Respondent, in the present case Prodeco chose to submit a claim against the *Contraloría*’s Decision to the Colombian administrative courts before it submitted such claim to arbitration. Therefore, this Tribunal has no competence over the claim against the *Contraloría*.<sup>789</sup>

### **The Request for Conciliation triggered the fork in the road**

866. Respondent argues that Prodeco started local administrative proceedings against the *Contraloría*’s Decision by filing, on 30 December 2015, a request with the *Procuraduría General de la Nación* to start extrajudicial conciliation proceedings [already defined as the “**Request for Conciliation**”].<sup>790</sup> Respondent explains that under Colombian law, conciliation is a mandatory pre-condition to litigation,<sup>791</sup> and that the action before the *Tribunal Administrativo de Cundinamarca* could not have been validly commenced without this pre-litigation stage.<sup>792</sup>
867. The Request for Conciliation was filed over two months prior to the referral of the same claim to arbitration, on 4 March 2016. Claimants thus chose local courts prior to choosing arbitration.<sup>793</sup> Respondent avers that the Request for Conciliation

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<sup>786</sup> R I, paras. 291-296.

<sup>787</sup> C III, para. 85.

<sup>788</sup> R I, para. 291; R II, paras. 454-455.

<sup>789</sup> HT, Day 2, p. 479, ll. 8-11.

<sup>790</sup> R I, para. 299; R II, para. 456.

<sup>791</sup> R I, para. 298.

<sup>792</sup> R II, para. 502.

<sup>793</sup> R II, para. 456.

suffices for the purposes of triggering the FIR Clause, which requires only that the proceedings be “referred” to domestic courts or to arbitration.<sup>794</sup>

868. Respondent also submits that it is irrelevant that the conciliation would be extra-judicial in nature, since the Treaty does not exclude this type of proceedings from the FIR Clause.<sup>795</sup>

The Tribunal must apply the fundamental basis test

869. Respondent argues that the test for a fork-in-the-road clause to apply has been established by the *Pantechniki* case, as the “fundamental basis” test: the Tribunal must assess whether the claim before the local courts and the arbitration claim share the same fundamental basis, and thus cannot be tolerated to run in parallel.<sup>796</sup>

870. According to Respondent, the claim submitted by Claimants against the *Contraloría* in the present arbitration shares the same fundamental basis as the claim filed by Prodeco before the *Tribunal Administrativo de Cundinamarca*.<sup>797</sup>

- The claim presented by Claimants against the *Contraloría* in the present arbitration and the challenge levied by Prodeco against the *Contraloría*’s Decision arise out of the same factual matrix: the imposition of the Fiscal Liability Amount on Prodeco; this is evident from the comparison of the arguments presented, on the one hand, by Claimants in the Statement of Claim and, on the other, by Prodeco in the Request for Conciliation;
- The relief sought is the same in both proceedings and both claims seek the same effect: to wipe out the *Contraloría*’s Decision and to return the Fiscal Liability Amount to Claimants;
- Claimants use the same legal terminology to articulate their claims in this arbitration and in the proceedings before the *Tribunal Administrativo de Cundinamarca*;
- Because Glencore indirectly holds 100% of Prodeco’s shares and effectively controls Prodeco, one must consider that the claim filed by Prodeco before the *Tribunal Administrativo* was in fact filed by Glencore.

871. Respondent argues that since the claim before the Colombian administrative jurisdiction predates the claim against the *Contraloría* in the present arbitration and both claims share the same fundamental basis, the Tribunal’s competence is barred by the FIR Clause.<sup>798</sup>

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<sup>794</sup> R II, para. 502.

<sup>795</sup> R II, para. 503.

<sup>796</sup> R I, paras. 303-306, referring to the *Pantechniki*, para. 53; R II, paras. 459 and 466-468.

<sup>797</sup> R I, paras. 307-313, 317 and 323; R II, paras. 456-457, 496 and 499; HT, Day 2, p. 479, l. 11 – p. 480, l. 21.

<sup>798</sup> R I, para. 323; R II, para. 499.



Claimants' counter-arguments are baseless

872. As to the counter-arguments raised by Claimants, Respondent submits that the “triple identity” test has fallen in disfavour regarding fork-in-the-road clauses.
873. First, Respondent argues that the Treaty and recent case-law do not require the strict identity of parties in order for the FIR Clause to be triggered.<sup>799</sup>
874. Respondent submits that the Treaty contains no language that could justify a requirement of strict identity of the parties. Fork-in-the-road clauses are aimed at preventing the same issue from being adjudicated twice, by different fora, and the same party from having to defend itself in multiple proceedings. Respondent argues that, in order to be effective, fork-in-the-road clauses must cover non-identical parties; requiring a strict identity of parties would open the door to multiple companies, forming part of the same corporate structure, bringing parallel claims against the same sovereign State.<sup>800</sup>
875. Respondent further avers that since the *Pantechniki* award was rendered, recent case-law has favoured the “fundamental basis” test and discarded the requirement of strict identity of the parties.<sup>801</sup> According to Respondent, a consistent line of cases, such as the *Ampal*, *Grynberg*, and *Apotex* cases, stands for the proposition that the party’s identity requirement must be applied flexibly, and that it is satisfied as between parties in the same corporate ownership chain. In particular, the *Ampal* tribunal found that the doctrine of *res judicata* was applicable “to the parties to the prior award and to those persons who are in privity of interest with them”.<sup>802</sup>
876. Second, Respondent submits that neither the Treaty nor recent case-law require a strict identity of dispute for the fork-in-the-road clause to be triggered.<sup>803</sup> Again, the “fundamental basis” standard of the *Pantechniki* award has gained increasing traction.<sup>804</sup>
877. Respondent says that in the *Salini Impregilo* case, the tribunal found it sufficient “that the substantive underpinnings of the dispute have been ‘submitted to the competent administrative or judicial jurisdiction’”.<sup>805</sup> Similarly, the *Philip Morris* case established that the term “dispute” should be understood broadly, and that it was sufficient for both disputes to be grounded on substantially similar facts and to related investments under the treaty.<sup>806</sup>

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<sup>799</sup> R I, para. 302; R II, para. 459.

<sup>800</sup> R II, paras. 460-463.

<sup>801</sup> R I, para. 316; R II, paras. 468-478, referring to *H&H Enterprises*, paras. 363-370; *Supervisión y Control*, para. 308.

<sup>802</sup> R II, para. 479, referring to *Ampal-American Israel Corp*, para. 266 and also to *Grynberg et al.*, paras. 7.1.5-7.1.7; *Apotex*, paras. 7.38-7.40.

<sup>803</sup> R II, para. 487.

<sup>804</sup> R II, paras. 488-496, referring to *Supervisión y Control*, para. 308.

<sup>805</sup> R II, para. 491, referring to *Salini*, para. 133.

<sup>806</sup> R I, paras. 321-322, referring to *Philip Morris (Jurisdiction)*, para. 113.

878. Respondent argues that Claimants only rely on case-law which pre-dates the *Pantechniki* award to support their claim that the majority of tribunals have adopted the “triple identity” test when interpreting fork-in-the-road provisions.<sup>807</sup>
879. Third, Respondent rejects Claimants’ argument that the proceedings before the *Tribunal Administrativo de Cundinamarca* would be a defensive action, and that the operation of the FIR Clause would somehow be barred. Claimants chose to impugn the *Contraloría*’s Decision before local courts and should not be permitted to pursue the same claim before this Tribunal. In any event, neither the Treaty nor case law exclude the application of the FIR Clause on the basis of the purported defensive nature of domestic litigation.<sup>808</sup>
880. Finally, Respondent denies that it is estopped from bringing an objection under the FIR Clause. The fact that in the Colombian court proceedings the *Contraloría* argued that Glencore had opted for international arbitration, and that this choice excludes the jurisdiction of the Colombian administrative courts, is irrelevant. Such statement was only made during the mandatory conciliation proceedings, and not before the *Tribunal Administrativo de Cundinamarca*. In addition, there is no evidence that Claimants relied on the *Contraloría*’s statement, nor that such reliance would have prejudiced them.<sup>809</sup>

## **(2) CLAIMANTS’ POSITION**

881. According to Claimants, for the FIR Clause of Art. 11(4) of the Treaty to apply, several cumulative conditions must be met:<sup>810</sup>
- The “investor”, who must be the same investor that brought the international claim,
  - Must have “referred the dispute”, as defined in Art. 11(4) of the Treaty – *i.e.* a Treaty dispute,
  - To a “national tribunal”,
  - Before referring it to international arbitration.
882. According to Claimants, Colombia cannot demonstrate that a single one of these elements is satisfied.<sup>811</sup>

### Identity of investor

883. Claimants submit that the Tribunal has a duty to apply the text of the Treaty that Colombia and Switzerland negotiated and executed. The Treaty expressly refers to

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<sup>807</sup> R II, para. 493.

<sup>808</sup> R II, paras. 506-508.

<sup>809</sup> R II, paras. 497-498.

<sup>810</sup> C II, paras. 178-179; C III, para. 84; HT, Day 1, p. 228, ll. 12-21.

<sup>811</sup> C II, para. 180; C III, para. 85; HT, Day 1, p. 228, l. 22 – p. 229 l. 2.

the strict identity of the investor who has referred the dispute to local courts and to international arbitration.

884. In the present arbitration, there are two “investors” in the sense of Art. 11(4) of the Treaty: Glencore and Prodeco. Glencore and Prodeco are separate legal entities and Glencore is not a party to any domestic court proceedings or conciliation in Colombia. Even if Colombia were able to establish that Prodeco referred the same dispute to a national court, *quod non*, Colombia cannot invoke the objection against Glencore.<sup>812</sup>
885. Claimants submit that, in any event, the case law invoked by Respondent does not support its argument:<sup>813</sup>
- In the *Pantechniki* and the *H&H v. Egypt* cases, the same investor had brought both the domestic and the arbitration proceedings; the tribunals simply found that the identity of the counter-party – the respondent, *i.e.* the State and its entities – was not required;
  - The *Supervisión y Control* decision, in which Colombia’s lead counsel in this arbitration acted as arbitrator, does not conclude that the reference in a treaty to an investor should be understood to include any controlled entities;
  - The *Salini Impregilo* case does not relate to the application of the fork-in-the-road clause, but to a “pre-arbitral domestic litigation requirement” that serves a fundamentally different purpose.

#### Identity of dispute

886. According to Claimants, the Tribunal must interpret the text of the Treaty pursuant to Art. 31(1) of the Vienna Convention on the Law of Treaties [“VCLT”]. Claimants assert that the term “dispute” in Art. 11(4) can only refer to the type of dispute described in Art. 11(1), *i.e.* a dispute regarding a violation of the Treaty by Colombia, which is submitted to two different *fora*.
887. Claimants argue that the dispute resolution clause of the Treaty does not cover domestic disputes, only disputes relating to Treaty breaches, in particular disputes arising from a party’s view that “a measure applied by the other Party is inconsistent with an obligation” under the Treaty.<sup>814</sup>
888. Claimants argue that Prodeco has never submitted a dispute regarding a violation of the Treaty to the Colombian courts. Prodeco simply started a defensive action in Colombia, to restore the *status quo* and to invalidate the Fiscal Liability Amount.<sup>815</sup>

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<sup>812</sup> C II, paras. 181-182; C III, paras. 91-96.

<sup>813</sup> C II, paras. 184, 199; C III, paras. 97-99, referring to *H&H Enterprises*, para. 367; *Supervisión y Control*, para. 327.

<sup>814</sup> C II, paras. 186-187; C III, paras. 88 and 101-103; HT, Day 1, p. 232, l. 21 – p. 235, l. 5.

<sup>815</sup> C III, para. 100.

889. Claimants contend that the treaty applicable in the *Pantechniki* case had a fundamentally different text, which broadly defined the investment dispute subject to its dispute settlement clause as “any dispute [...] concerning investments”. Similarly, the *Philip Morris* case is distinguishable due to the textual differences in the treaty between Uruguay and Switzerland and the one between Colombia and Switzerland. Thus, the findings in those cases do not assist Colombia’s arguments.<sup>816</sup>
890. Furthermore, Claimants submit that at least five cases decided after the *Pantechniki* award adopted the “triple-identity test” when interpreting fork in the road provisions, including the *Charanne* and the *Khan* cases, which rejected the fundamental basis test.<sup>817</sup>
891. Irrespective of this, Claimants contend that neither Prodeco’s Request for Conciliation nor the subsequent challenge of the *Contraloría*’s Decision before the *Tribunal Administrativo de Cundinamarca* concerns a Treaty dispute. Locally, Prodeco seeks a declaration that the Decision is not valid under Colombian law, whereas in this proceeding, Claimants seek relief for Colombia’s breaches of the Treaty, which does not include the nullification of the *Contraloría*’s Decision as a matter of Colombian law.<sup>818</sup>

Referral to arbitration preceded the challenge of the *Contraloría*’s Decision

892. Claimants argue that they filed the Request for Arbitration on 4 March 2016, and therefore chose arbitration before submitting a defensive challenge to the *Contraloría*’s Decision to the Colombian courts on 31 March 2016.<sup>819</sup>
893. According to Claimants, the *Contraloría* itself acknowledged that the Colombian courts lacked jurisdiction over Prodeco’s challenge because Prodeco had “opted for international arbitration to resolve this dispute, [and] ha[d] definitively excluded the Colombian Administrative Court’s jurisdiction”. The position adopted by Colombia in the conciliation proceedings precludes Colombia from raising the contrary objection in the present arbitration.<sup>820</sup>

Conciliation is extra-judicial in nature

894. Claimants note that Art. 11(4) expressly requires the referral of the dispute to a national court. The Request for Conciliation, which is a pre-condition to initiating court proceedings, was submitted to the *Procurador*, a non-judicial authority, and did not entail any court fees.<sup>821</sup>

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<sup>816</sup> C II, para. 188; C III, para. 104; HT, Day 1, p. 235, ll. 6-16.

<sup>817</sup> C III, para. 105.

<sup>818</sup> C III, para. 106.

<sup>819</sup> C II, para. 190; C III, paras. 86 and 107; HT, Day 1, p. 229, ll. 4-11.

<sup>820</sup> C II, para. 191; C III, paras. 86 and 108; HT, Day 1, p. 229, l. 13 – p. 230, l. 5.

<sup>821</sup> C II, para. 193; C III, paras. 87 and 110-111; HT, Day 1, p. 231, ll. 3-14.

895. Claimants explain that Art. 3 of Law 640 of 2001 states that conciliation is “extra-judicial” precisely by virtue of being prior to, or outside of, a court procedure. Similarly, Art. 179 of Law 1437 of 2011 makes clear that the first stage of the relevant court procedure begins with the submission of the complaint before the judge, not with compliance of any pre-requisites.<sup>822</sup>
896. Accordingly, there was no need for the Treaty to exclude pre-litigation conciliation.<sup>823</sup>
897. In reference to Colombia’s argument that referral to a national tribunal occurs when the amicable consultation process is initiated, Claimants submit that if that argument were correct, the same test would have to be accepted for arbitration. Consequently, Respondent’s objection would still fail, since Claimants delivered their notice of dispute triggering the amicable consultation process under the Treaty on 28 August 2015, several months before the Request for Conciliation.<sup>824</sup>

The Request for Conciliation was a defensive action to restore the *status quo*

898. Claimants argue that Prodeco started a claim against the *Contraloría*’s Decision as a defensive action under municipal law, seeking to restore the *status quo*. As this relief could only be sought in Colombia, Prodeco’s challenge constitutes the type of defensive action that tribunals in the *Genin* and *Enron* cases deemed not to trigger a fork-in-the-road clause.<sup>825</sup>

**(3) DECISION OF THE ARBITRAL TRIBUNAL**

899. Art. 11 of the Treaty, which concerns the settlement of disputes between a State party to the Treaty and an investor of the other State party, provides that:<sup>826</sup>

“(1) If an investor of a Party considers that a measure applied by the other Party is inconsistent with an obligation of this Agreement, thus causing loss or damage to him or his investment, he may request consultations with a view to resolving the matter amicably.

(2) Any such matter which has not been settled within a period of six months from the date of written request for consultations may be referred to the courts or administrative tribunals of the Party concerned or to international arbitration. [...]

(4) Once the investor has referred the dispute to either a national tribunal or any of the international arbitration mechanisms provided for in paragraph 2 above, the choice of the procedure shall be final”.

900. Arts. 11(2) and (4) contain a so-called “fork in the road” provision, which allows the investor to opt between different judicial or arbitral *fora* for the submission of

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<sup>822</sup> C II, para. 192; C III, para. 112; HT, Day 1, p. 231, l. 15 – p. 232, l. 2.

<sup>823</sup> C III, para. 111.

<sup>824</sup> C III, para. 113; HT, Day 1, p. 232, ll. 3-15.

<sup>825</sup> C III, para. 114.

<sup>826</sup> Doc. C-6, Art. 11.

an investment dispute, but prescribes that once that election has been made, it becomes final and irrevocable – *electa una via non datur recursus ad alteram*.

901. Respondent submits that Prodeco chose to refer the dispute against the *Contraloría* to the Colombian local courts, and that because of that choice Claimants are barred from resorting to international arbitration.
902. The Tribunal will briefly summarise the proven facts (A.) and then analyse and eventually dismiss Respondent's Fork in the Road Objection (B.).

**A. Proven Facts**

**a. *Contraloría's* Decision and Administrative Recourse**

903. On 30 April 2015, the *Contralora Delegada*, Ms. Vargas, issued the *Contraloría's* Decision, which found that by executing the Eighth Amendment Prodeco had incurred liability and held Prodeco and certain civil servants jointly and severally liable to compensate the State for the damage caused.<sup>827</sup>
904. On 11 May 2015, Prodeco filed:
- A *recurso de reposición* before the *Contralora Delegada*, the very authority who had issued the Decision, asking for reconsideration of her Decision, and
  - A *recurso de apelación* to the *Contralor General de la República*, the superior of the *Contralora Delegada*.<sup>828</sup>
905. These administrative appeals proved to be unsuccessful:
- In July 2015, the *Contralora Delegada* rejected Prodeco's *recurso de reposición*;<sup>829</sup> and
  - In August 2015, the *Contralor General* issued the Appeal Decision, which affirmed the *Contraloría's* Decision.<sup>830</sup>
906. The *Contraloría's* Decision thus became binding ("*firme*") at the administrative level. Under Colombian administrative law, Prodeco could now resort to challenging the validity of the *Contraloría's* final administrative act before the Colombian administrative courts. Such a challenge required, as a preliminary but obligatory step, that Prodeco request non-judicial conciliation with the *Contraloría*; if the conciliation were to prove unsuccessful, Prodeco would be entitled to file a judicial *proceso de nulidad* with the *Tribunal Administrativo de Cundinamarca* [already defined as the "Annulment Procedure"].

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<sup>827</sup> Doc. C-32, p. 231.

<sup>828</sup> Doc. C-33.

<sup>829</sup> Doc. C-35.

<sup>830</sup> Doc. C-37.



**b. Notification of the Investment Dispute**

907. But Prodeco did not immediately launch a non-judicial conciliation, as a preliminary step leading to an Annulment Procedure before the Colombian administrative courts. Claimants' first reaction was to start consultations with the Republic under Art. 11(1) of the Treaty – a measure necessary to start a claim for breach of the BIT.<sup>831</sup>
908. With this purpose in mind, on 28 August 2015, Claimants wrote to the President of Colombia, Mr. Juan Manuel Santos, formally notifying a dispute under the Treaty.<sup>832</sup> Claimants submitted that certain measures adopted by Colombia, including the *Contraloría's* Decision, had resulted in the Republic breaching its obligations under Art. 4, 6 and 10(2) of the BIT, which entitled Claimants to compensation for the damage caused to their investments in Colombia [the “**Investment Dispute**”].
909. The 28 August 2015 letter put in motion the mandatory six-month consultation period required by Art. 11(2) of the Treaty. After this mandatory cooling-off period, Claimants would be entitled to refer the Investment Dispute either to the Colombian domestic courts or to international arbitration.

**c. Request for Conciliation of the Annulment Dispute**

910. While the consultations regarding the Investment Dispute were taking place, Prodeco decided to carry out a further preliminary measure necessary to file a judicial Annulment Procedure against the *Contraloría's* Decision: a request for conciliation before an administrative agency, the *Procuraduría General de la Nación* [“**Procuraduría**”]. As noted, under Colombian law conciliation is a pre-requisite for launching judicial proceedings against the State.<sup>833</sup>
911. Prodeco filed a Request for Conciliation on 30 December 2015,<sup>834</sup> and the dispute to be conciliated was defined as the annulment of an administrative act (the *Contraloría's* Decision) and the subsequent “*restablecimiento de derechos*”, including restitution of amounts paid.<sup>835</sup>

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<sup>831</sup> Doc. C-38. Art. 11(1) of the Treaty provides that: “If an investor of a Party considers that a measure applied by the other Party is inconsistent with an obligation of this Agreement, thus causing loss or damage to him or his investment, he may request consultations with a view to resolving the matter amicably” [Emphasis added] (Doc. C-6).

<sup>832</sup> Doc. C-38. Claimants also forwarded this letter to several Ministers of the Colombian Government (see p. 26).

<sup>833</sup> Doc. R-3, Code of Administrative Procedure, Art. 161(1): “*La presentación de la demanda se someterá al cumplimiento de requisitos previos en los siguientes casos: 1. Cuando los asuntos sean conciliables, el trámite de la conciliación extrajudicial constituirá requisito de procedibilidad de toda demanda en que se formulen pretensiones relativas a nulidad con restablecimiento del derecho, reparación directa y controversias contractuales. [...]*”.

<sup>834</sup> Doc. R-1.

<sup>835</sup> Doc. R-1, p. 10 and Doc. R-2, pp. 50-51 of the PDF.



**d. Referral of the Investment Dispute to International Arbitration**

912. In the meantime, the consultations with the Republic of Colombia under the BIT proved unsuccessful, and on 4 March 2016, Claimants exercised the option conferred by Art. 11(2) of the Treaty and decided to submit the Investment Dispute to adjudication by international arbitration. They formalized their decision by submitting a Request for Arbitration to ICSID,<sup>836</sup> putting the present arbitration in motion.

**e. Conciliation**

913. Three weeks thereafter, on 28 March 2016, the *Procuraduría* convened the oral conciliation meeting [the “**Conciliation**”] which had been requested by Prodeco in its Request for Conciliation. The *Contraloría*, Prodeco, and the other parties to the Fiscal Liability Proceeding were in attendance.<sup>837</sup>

914. The *Contraloría* rejected Prodeco’s request for conciliation, arguing that the Colombian Courts lacked jurisdiction to hear the dispute which Prodeco was intending to submit, because Glencore and Prodeco had opted to submit such dispute to ICSID arbitration (*pro memoria*: Claimants had indeed submitted the Investment Dispute to ICSID arbitration three weeks before).<sup>838</sup>

**f. Annulment Procedure**

915. On 1 April 2016, three days after the unsuccessful Conciliation, Prodeco filed the Annulment Procedure with the *Tribunal Administrativo de Cundinamarca*<sup>839</sup>. The remedies sought in the judicial claim were analogous to those discussed in the Conciliation:<sup>840</sup>

- Annulment of the *Contraloría*’s Decision,
- With the consequent restitution of the amounts already paid by Prodeco in compliance with the *Contraloría*’s Decision,
- Certain ancillary requests plus damages.

916. The reasons invoked by Prodeco in its Annulment Procedure were the following:<sup>841</sup>

- The *Contraloría* had violated Colombian law;
- The *Contraloría* lacked competence to adopt the Decision;

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<sup>836</sup> RfA, dated 4 March 2016.

<sup>837</sup> Doc. C-192, p. 2.

<sup>838</sup> Doc. C-192, p. 6.

<sup>839</sup> Doc. R-2. See also McManus I, para. 45.

<sup>840</sup> Subsidiarily Prodeco also claimed against Messrs. Martínez Torres, Ballesteros and Ceballos and the insurance companies, requesting reimbursement of the amounts paid to the *Contraloría*.

<sup>841</sup> Doc. R-2, pp. 58-98.

- The *Contraloría* breached Prodeco's due process rights;
- The *Contraloría*'s accusations and imputations against Prodeco are baseless;
- The Decision is poorly reasoned;
- Prodeco cannot be subjected to a fiscal liability procedure;
- The Republic has suffered no damage;
- Prodeco did not incur in *dolo*;
- There is no causal link between Prodeco's conduct and the alleged damage;
- The *Contraloría* has incurred in a misuse of powers ("*desviación de poder*").

917. The reasons invoked did not include the allegation that Colombia had breached its obligations under the Treaty. To the contrary, Prodeco explicitly reserved all its rights regarding the present ICSID Arbitration.<sup>842</sup>

918. A decision by the *Tribunal Administrativo de Cundinamarca* remains pending.

**B. Analysis and Decision of the Tribunal**

919. Under Art. 11(1) of the Treaty, an investor which considers that "a measure applied" by the host State "is inconsistent with an obligation of the Agreement", must "request consultations with a view to resolving the matter amicably".

920. It is undisputed that on 28 August 2015, Claimants requested such consultations, by filing a letter addressed to the President of the Republic. The letter stated the view that certain measures adopted by the Republic, including the *Contraloría*'s Decision, had resulted in the Republic breaching its obligations under Art. 4, 6 and 10(2) of the Treaty and that as a consequence thereof an Investment Dispute had arisen.<sup>843</sup>

**Art. 11(2) of the Treaty**

921. Art. 11(2) of the Treaty provides that, if the amicable consultation is unsuccessful, after "a period of six months from the date of the request for consultation" the investor is afforded an option: it can choose to submit the matter either

- to "the courts or administrative tribunals" of the host State, or
- to "international arbitration".

922. In the present case, the Investment Dispute formalized in the 28 August 2015 letter was not settled within a period of six months, and out of the two options offered by

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<sup>842</sup> Doc. R-2, p. 125.

<sup>843</sup> Doc. C-38, p. 7.

Art. 11(2), Claimants selected international arbitration: they did so on 4 March 2016 (*i.e.* more than six months after the request), by filing a Request for Arbitration with ICSID, and putting this arbitration in motion.

Art. 11(4) of the Treaty

923. Art. 11(4) of the Treaty contains the so-called “fork in the road” provision [previously defined as the “**FIR Clause**”]: “once the investor has referred the dispute” either to a national court or tribunal or to international arbitration, “the choice of the procedure shall be final”.

Respondent’s diverging positions

924. Respondent, at different times, has held two diverging positions as regards the option exercised by Claimants under the FIR Clause:
925. (i) In this arbitration, the Republic argues that, when on 30 December 2015 Prodeco filed a Request for Conciliation before the *Procuraduría*, Claimants exercised the option conferred under Art. 11(2) of the Treaty, and opted to submit the Investment Dispute (as defined in the 28 August 2015 letter addressed to the President of the Republic) to the administrative courts of Colombia.
926. Consequently – adds Colombia – when on 4 March 2016 Claimants filed the Request for Arbitration with ICSID, they breached the fork-in-the-road provision, with the implication that the Centre lacks jurisdiction and the Tribunal competence to adjudicate the Investment Dispute, and that such Investment Dispute must be adjudicated by the Colombian courts.
927. (ii) On 28 March 2016, however, Colombia held a contrary position.
928. In the Conciliation meeting which was held on that date, the Republic, acting through the *Contraloría*, formally stated that Claimants had opted to submit the dispute which was being conciliated to ICSID arbitration, and that consequently the Colombian courts in general, and the *Tribunal Administrativo de Cundinamarca* in particular, lacked jurisdiction to adjudicate such dispute.
929. The minutes of the Conciliation meeting clearly state Colombia’s position at that time, as expressed by the *Contraloría*:<sup>844</sup>

*“De manera respetuosa me permito informar que la solicitud de conciliación propuesta por CI PRODECO S.A. [...] fue estudiada en la sesión quinta (5ª) del comité de conciliación, resolviéndose por unanimidad, NO CONCILIAR las pretensiones de la convocante, y ordenarle al apoderado designado solicitar que el trámite sea declarado fallido, porque hay ausencia de jurisdicción para conocer del asunto.*

*Lo anterior, porque GLENCORE A.G. propietaria de CI PRODECO S.A. activó el mecanismo de resolución de disputas contemplado por el artículo 11*

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<sup>844</sup> Doc. C-192, p. 6.

*del “Convenio entre la República de Colombia y la Confederación Suiza [...]” y ya presentó demanda arbitral, ante el [CIADI] [...]*

*En tal sentido, conforme a lo dispuesto por el párrafo segundo y su literal a), en concordancia con el párrafo cuarto del referido artículo 11, surge claro que Glecore A.G. [sic] al haber optado por el arbitraje internacional para dirimir el conflicto excluyó de manera definitiva a la jurisdicción contencioso administrativa de Colombia [...]*. [Emphasis added]

#### The Tribunal’s Decision

930. The Tribunal does not agree with the position now adopted by Respondent in the present arbitration.
931. The reason is straightforward: on 4 March 2016, Claimants exercised their rights under the FIR Clause of Art. 11(2) of the Treaty and validly opted to submit the Investment Dispute to international arbitration.
932. Contrary to Respondent’s (present) argument, the non-judicial Request for Conciliation, which Prodeco had filed four months before with the *Procuraduría*, never constituted the exercise of the option conferred by the FIR Clause: Art. 11(4) of the Treaty requires, for the fork-in-the-road to apply, that the investor “referred the dispute” to a “national tribunal”. Prodeco’s Request for (non-judicial) Conciliation before the *Procuraduría*, an administrative agency of the Republic, failed to meet this test for two reasons:
- First, the Treaty requires that the investor “referred the dispute” to a domestic court or to international arbitration; this implies that the dispute be submitted to binding adjudication by an independent body, and that the decision of such body not be subject to consensual validation by the parties; a request for conciliation does not meet this standard: the request is simply an invitation to the other party, proposing that a meeting be held and a settlement be negotiated and eventually agreed upon;
  - Second, referral must be to a “national tribunal” [as expressed in Art. 11(4)] or to “courts or administrative tribunals” [the analogous expression preferred by Art. 11(2)]; the *Procuraduría* is neither a court nor a tribunal: it simply is an administrative agency of the Republic, entrusted (*inter alia*) with the organization of prejudicial conciliation procedures.
933. These conclusions are confirmed by Colombian law.

#### Colombian Law

934. Art. 161(1) of the Colombian Code of Administrative Procedure provides as follows:<sup>845</sup>

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<sup>845</sup> Doc. R-3.

*“Artículo 161. Requisitos previos para demandar. La presentación de la demanda se someterá al cumplimiento de requisitos previos en los siguientes casos:*

*1. Cuando los asuntos sean conciliables, el trámite de la conciliación extrajudicial constituirá requisito de procedibilidad de toda demanda en que se formulen pretensiones relativas a nulidad con restablecimiento del derecho, reparación directa y controversias contractuales”.* [Emphasis added, bold in the original]

935. Under Colombian administrative law, conciliation is a mandatory pre-requisite for introducing a judicial claim regarding the nullity of an administrative act. As enshrined in the law, this is an “extrajudicial”, amicable procedure, which is not filed with any judicial authority, but rather with an administrative agency as the *Procuraduría*.<sup>846</sup>

936. This conclusion is confirmed by Art. 3 of Law 640 of 2001, “*por la cual se modifican normas relativas a la conciliación y se dictan otras disposiciones*”, which provides that:<sup>847</sup>

*“La conciliación podrá ser judicial si se realiza dentro de un proceso judicial, o extrajudicial, si se realiza antes o por fuera de un proceso judicial”.* [Emphasis added]

937. In the present case, the wording of the Request for Conciliation filed by Prodeco further supports its extrajudicial nature:<sup>848</sup>

*“Referencia: remisión de la solicitud de Audiencia de Conciliación pre-judicial con destino al Ministerio Público, formulada por C.I. PRODECO S.A., en condición de Convocante, con citación tanto de LA NACIÓN – CONTRALORÍA GENERAL DE LA REPÚBLICA en calidad de Convocada [...]*

*Agotamiento del requisito de procedibilidad para el ejercicio del medio de control judicial de nulidad y restablecimiento del derecho [...]*”. [Emphasis added, bold in the original]

938. Summing up, on 4 March 2016, Claimants, by filing the Request for Arbitration, properly exercised their rights under the FIR Clause of Art. 11(2) of the Treaty and validly opted to submit the Investment Dispute to international arbitration. Prior to that date Claimants had never referred the Investment Dispute to adjudication by the national courts or tribunals of Colombia and hence the FIR Clause of Art. 11(4) of the Treaty had never been triggered.

939. Contrary to Respondent’s arguments, the Request for Conciliation which Prodeco filed with the *Procuraduría* in December 2015 was incapable of triggering the FIR

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<sup>846</sup> Doc. R-3, Art. 161.

<sup>847</sup> Doc. C-187

<sup>848</sup> Doc. R-1, pp. 1 and 3.

Clause: the Request did not refer any dispute to adjudication by an independent body, and the *Procuraduría* in any case does not qualify as “a national tribunal”.

940. The first time that Prodeco referred any dispute to “a national tribunal” was on 1 April 2016, when Prodeco filed the Annulment Procedure with the *Tribunal Administrativo de Cundinamarca*.<sup>849</sup> As this referral occurred three weeks after Claimants had filed the Request of Arbitration, it could never deprive this Tribunal of competence to adjudicate the Investment Dispute.
941. The Tribunal consequently dismisses Respondent’s Fork in the Road Objection. In light of this conclusion, it is unnecessary for the Tribunal to consider and resolve the issues raised by the Parties related to the identity of parties and the identity of disputes.
942. Likewise, it is not for the Tribunal to decide:
- whether for the purposes of the Annulment Procedure, the Annulment Dispute referred to in the Request for Conciliation and then formalized in the Annulment Procedure coincides or overlaps with the Investment Dispute which is being adjudicated in this arbitration; or
  - whether, in view of the fork-in-the-road provision of Art. 11(4) of the Treaty, and the filing of this arbitration, the *Tribunal Administrativo de Cundinamarca* has or lacks jurisdiction to adjudicate the Annulment Procedure filed by Prodeco.
943. These issues, raised by Colombia in the Conciliation, are for the *Tribunal Administrativo de Cundinamarca*, and the Colombian courts in general, to decide.

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<sup>849</sup> Doc. R-2.

### **V.3. UMBRELLA CLAUSE OBJECTION**

944. Respondent submits that, pursuant to Art. 11(3) of the Treaty, the Tribunal is precluded from exercising competence over Claimants' claims grounded on the Treaty's "umbrella clause", contained in Art. 10(2). Respondent also argues that Claimants' claim against the ANM based on Arts. 4(1) and 4(2) of the Treaty also falls outside the scope of the Tribunal's competence, because it is contractual in nature and the Mining Contract contains its own forum-selection clause **(1)**.<sup>850</sup>
945. Claimants argue that Respondent's interpretation of Art. 11(3) is incorrect, and that the Tribunal is competent over the claims based on the umbrella clause of the Treaty. Claimants also submit that all of their claims are based on breaches of the Treaty, not of the Mining Contract, and that Respondent's objection is groundless **(2)**.<sup>851</sup>
946. After summarizing the Parties' positions, the Tribunal will make its decision **(3)**.

#### **(1) RESPONDENT'S POSITION**

947. Respondent explains that Claimants' claims relate to the conduct of the *Contraloría* and to the conduct of the ANM:<sup>852</sup>
- One of Claimants' claims is that Colombia breached Art. 10(2) of the Treaty, which requires Colombia to observe obligations deriving from a written agreement concluded between its central government, or agencies thereof, and an investor of the other Party, with regard to a specific investment [the "**Umbrella Clause**"];<sup>853</sup>
  - Another of Claimants' claims is that Colombia breached Arts. 4(1) and 4(2) of the Treaty.
948. According to Respondent, Claimants' claims fall outside the scope of the Tribunal's competence for two reasons:<sup>854</sup>
- First, Colombia has not consented to arbitrate claims arising in relation with the Umbrella Clause contained in Art. 10(2) of the Treaty **(A.)**;
  - Second, the claim against the ANM is contractual in nature and must be tried before the Colombian courts, pursuant to the forum-selection clause contained in the Mining Contract **(B.)**.

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<sup>850</sup> R II, paras. 512 and 549.

<sup>851</sup> C II, para. 203.

<sup>852</sup> R II, para. 510.

<sup>853</sup> R II, para. 511.

<sup>854</sup> R I, para. 326; R II, para. 512.



**A. No Competence over Claims Grounded in the Umbrella Clause**

949. Respondent submits that Art. 11(3) of the Treaty contains a carve-out: Colombia has not given its consent to submit to international arbitration disputes which may arise on the basis of the Umbrella Clause of Art. 10(2). As a consequence, to the extent that Claimants' claims against the ANM and the *Contraloría* are grounded on the Umbrella Clause, they may not be heard in this arbitration.<sup>855</sup>
950. Respondent refers to two paragraphs of Claimants' Reply Memorial, and says that the claims in question fall outside the scope of the Tribunal's jurisdiction:<sup>856</sup>
- The claim that "the [*Contraloría's* Decision] effectively nullified the commitments in the Eighth Amendment with regard to 2010 by requiring Prodeco to pay royalties and compensation as if the Eighth Amendment did not exist"; and
  - The claim that "the State Mining Agency's efforts to abrogate its commitments under the Eighth Amendment [which] breach its obligations to perform the Mining Contract and the Eighth Amendment in good faith".
951. Respondent says that Claimants' position is that the exception contained in Art. 11(3) means that Colombia has given its consent to arbitrate claims which fall under the Umbrella Clause, but that this consent is "conditional" and "revocable". Respondent finds that Claimants' position is untenable for four reasons.<sup>857</sup>
952. First, Respondent argues that the language of the Treaty is unequivocal and does not call for interpretation: Colombia has not given its consent to arbitrate claims related to the Umbrella Clause. This conclusion has been supported by several commentators of the Treaty.<sup>858</sup>
953. Respondent submits that it is a matter of policy for Colombia to exclude umbrella clauses from the scope of its consent to arbitrate, so as to avoid extending the jurisdiction of an international investment tribunal over claims arising out of contract breaches.<sup>859</sup>
954. Second, even assuming that the wording of Art. 11(3) is unclear and interpretation is necessary, such interpretation must be made in accordance with Art. 31 of the VCLT, considering the ordinary meaning of the terms of the Treaty in their context. According to Art. 31(2) of the VCLT, such context includes the preamble and any annexes to the Treaty. One of these annexes is the Protocol to the Treaty [the "**Protocol**"].
955. The Protocol provides that on request of a party five years after the entry into force of the Treaty, or at any time thereafter, the parties shall consult to assess whether

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<sup>855</sup> R I, para. 327; R II, paras. 513-514.

<sup>856</sup> R I, paras. 330-331 and 333; R II, para. 514.

<sup>857</sup> R I, paras. 334-336; R II, para. 515.

<sup>858</sup> R II, paras. 516-517.

<sup>859</sup> R I, paras. 339-340; R II, paras. 518-519.

the provision on consent with respect to Art. 10(2) is still appropriate, in view of the way in which the Treaty has been performed. Respondent finds that the Protocol provides the parties with an opportunity to assess whether the exclusion of consent is still appropriate – and that it is implicit that, should the parties find that it is no longer appropriate to exclude consent, they could consider extending it to disputes related to Art. 10(2).<sup>860</sup>

956. Third, Respondent submits that the evolution of the negotiations of the Treaty between Colombia and Switzerland is consistent with their intention to exclude – rather than to qualify – their consent to arbitrate Umbrella Clause claims. A draft version of the Treaty did not contain the limitation to consent, which was later introduced in Art. 11(3).<sup>861</sup>
957. Fourth, Respondent contends that Claimants’ argument, according to which the words “unconditional and irrevocable” must be taken to mean that the parties to the Treaty intended to qualify their consent to arbitrate Umbrella Clause disputes, because otherwise such words would be deprived of *effet utile*, is also unavailing.<sup>862</sup>
958. Respondent argues that if its offer to arbitrate disputes with regard to Art. 10(2) matters were conditional, it would be expressly conditioned upon a specific uncertain event; Claimants have not even tried to prove that there was such an event.<sup>863</sup>
959. Respondent avers that, in any event, the terms “unconditional” or “irrevocable” were simply used to embellish and emphasize the significance of the offer to arbitrate made by the contracting States to the Treaty.<sup>864</sup>
960. In light of the above, Respondent concludes that to the extent that the claim against the *Contraloría* and the claim against the ANM are grounded on the Umbrella Clause, they fall outside the scope of the Tribunal’s competence.<sup>865</sup>

**B. Claim against the ANM is Contractual in Nature**

961. Respondent submits that, even assuming that the Umbrella Clause were not excluded from the scope of Colombia’s consent to arbitration (*quod non*), the claim against the ANM would still have to be excluded: the claim against the ANM is purely contractual in nature, and the Mining Contract contains its own dispute-resolution clause. Consequently, the claim against the ANM cannot be tried in the present proceedings.<sup>866</sup>

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<sup>860</sup> R II, paras. 520-522.

<sup>861</sup> R I, para. 341; R II, paras. 524-525.

<sup>862</sup> R II, para. 526.

<sup>863</sup> R I, para. 345; R II, paras. 527-528.

<sup>864</sup> R II, paras. 529-530.

<sup>865</sup> R I, para. 348; R II, para. 531.

<sup>866</sup> R I, para. 349; R II, para. 532.

962. First, Respondent argues that in this arbitration Claimants are submitting a purely contractual claim against the ANM:<sup>867</sup> the contention that the ANM's pursuit of the Procedure for Contractual Annulment implies a breach of Colombia's obligations under Arts. 4(1) and 4(2) of the Treaty.
963. Respondent says that in order to determine whether, as a matter of jurisdiction, a claim is contractual in nature or presupposes a Treaty violation, the Tribunal must apply the "fundamental basis" test enunciated by the *Vivendi* annulment committee:<sup>868</sup>
- If the fundamental basis of the claim is "a treaty laying down an independent standard by which the conduct of the parties is to be judged", the claim in question is a treaty claim;
  - Conversely, when the standard against which conduct must be measured is a contract, the claim is contractual in nature and must be determined in the contractually-selected forum.
964. Respondent argues that in the present case, the fundamental basis of the claim against the ANM, as described by Claimants, is the State agency's alleged attempt to have the Eighth Amendment declared null and void. Claimants view this as a lack of good faith in the performance of contractual obligations, which, under Colombian law, is a breach of a contractual obligation. Claimants do not argue that, in seeking the nullification of the Eighth Amendment, the ANM would have gone beyond acting as an ordinary party to a contract.<sup>869</sup>
965. Respondent contends that even if the claim against the ANM is grounded in Art. 10(2) of the Treaty, its fundamental basis is the Eighth Amendment. Even when they seek to frame this claim as a Treaty claim for breach of the fair and equitable standard of treatment, Claimants still only describe it as a contractual breach.<sup>870</sup>
966. Second, Respondent points out that Clause 39 of the Mining Contract contains a contractually agreed upon dispute resolution clause. This means that contractual claims cannot be decided in treaty-based arbitration, but have another contractually-agreed forum. This was confirmed in the *SGS* and *Bureau Veritas* cases.<sup>871</sup>
967. Respondent finds that the fact that the contractual claim against the ANM is submitted by Glencore, instead of Prodeco, does not change this conclusion. It is undisputed that the contractually agreed dispute resolution clause of the Mining

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<sup>867</sup> R I, paras. 356 *et seq.*; R II, para. 533; Doc. H 2, Vol. 2, slide 5; HT, Day 2, p. 488, ll. 1-18.

<sup>868</sup> R I, para. 353; R II, paras. 534-536, referring to *Vivendi*, para. 96, and to *Pantechniki*, para. 64.

<sup>869</sup> R I, paras. 354-355.

<sup>870</sup> R II, paras. 539-540.

<sup>871</sup> R I, paras. 349-352; R II, paras. 543-544, referring to *SGS*, para. 16, and to *Bureau Veritas*, paras. 9 and 13; Doc. H 2, Vol. 2, slides 8-9.

Contract does not bind Glencore. However, Glencore cannot raise contractual claims precisely because Glencore is not privy to the Mining Contract.<sup>872</sup>

968. In sum, Respondent argues that the claim against the ANM falls outside the scope of the Tribunal's competence, since it is contractual in nature and the Mining Contract contains its own dispute resolution clause.<sup>873</sup>

**(2) CLAIMANTS' POSITION**

969. Claimants argue that Colombia's objections to the Umbrella Clause claim have no merit and should be dismissed (**A.**). Similarly, Claimants argue that their Treaty claims regarding the ANM's actions are not contractual in nature, and therefore are not precluded by the forum selection clause in the Mining Contract (**B.**).

**A. Umbrella Clause Objection Lacks Merit**

970. Claimants note that Colombia argues that Claimants' Umbrella Clause claims are excluded from the jurisdiction of the Tribunal pursuant to Art. 11(3) of the Treaty. Claimants find that Colombia's interpretation of the Treaty is incorrect.<sup>874</sup>
971. According to Claimants, the Parties agree that Art. 11(3) creates an exception for claims regarding breaches of the Umbrella Clause, set out in Art. 10(2) of the Treaty, from the general regime of "unconditional and irrevocable consent" to submit investment disputes to international arbitration. However, the Parties disagree on whether the meaning of the text is that the exception relates to the State's consent itself (Respondent's position) or to the unconditional and irrevocable nature of the consent (Claimants' position).<sup>875</sup>
972. Claimants contend that both Parties acknowledge that the provision of Art. 11(3) of the Treaty must be interpreted in accordance with Art. 31 of the VCLT, considering the ordinary meaning of the terms in their context, which includes the preamble and annexes to the Treaty.<sup>876</sup>
973. Claimants submit that the context of the Treaty text is the structure of Art. 11 itself:<sup>877</sup>
- Art. 11(1) provides that an investor that "considers that a measure applied by [Colombia] is inconsistent with an obligation of this Agreement" may request amicable consultations;

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<sup>872</sup> R II, para. 548.

<sup>873</sup> R II, paras. 532 and 549.

<sup>874</sup> C III, para. 115.

<sup>875</sup> C II, paras. 205-206; C III, paras. 116-117.

<sup>876</sup> C III, para. 118.

<sup>877</sup> C III, para. 119.

- Art. 11(2) provides that if the matter is not settled within six months, it may be referred to arbitration, to a venue to be chosen by the investor, thereby entitling the investor to resort to arbitration;
  - Art. 11(3) notes that the consent to resort to arbitration “in accordance with paragraph 2” is “unconditional and irrevocable”, “except for disputes with regard to Article 10 paragraph 2 [the umbrella clause]”.
974. According to Claimants, the principle of *effet utile* requires that the term “unconditional and irrevocable” be given meaning. Claimants submit that the meaning is that Colombia was empowered to condition or revoke its consent to arbitrate Umbrella Clause claims until that consent was perfected.<sup>878</sup>
975. Claimants find that this interpretation is confirmed by Art. 11(2) of the Protocol of the Treaty, which expressly describes Art. 11(3) as a “provision on consent with respect to Article 10 of paragraph 2”, over which the parties could consult in the future with a view to assessing its appropriateness. Claimants argue that the text implies that there is “consent with respect to Article 10 of paragraph 2”.<sup>879</sup>
976. Similarly, an early draft of the relevant Umbrella Clause reads that each contracting party gives its consent to the submission of an investment dispute to international arbitration. Claimants say that if Colombia intended to exclude claims under the Umbrella Clause from its consent to arbitrate, it merely needed to add “except for disputes with regard to [...]” at the end of this text. However, the text of this provision only changed the reference to the consent by qualifying it as “unconditional and irrevocable”.<sup>880</sup>
977. Contrary to Respondent’s submission, Claimants explain that Art. 11(2) of the Protocol does not describe Art. 11(3) as providing qualified consent. If the parties to the Treaty had not consented at all to arbitrate Umbrella Clause claims, they would not have referred to their “consent with respect to the umbrella clause claims” in the Protocol.<sup>881</sup>
978. Claimants argue that Art. 11(3) would have allowed Colombia to impose conditions to its consent to arbitrate Umbrella Clause claims (e.g., prior resort to the contractual forum) until Claimants provided their reciprocal consent, just as it would have allowed Colombia to revoke its consent to arbitrate Umbrella Clause claims until that consent was perfected.<sup>882</sup>

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<sup>878</sup> C II, para. 206; C III, para. 119.

<sup>879</sup> C II, para. 207; C III, para. 120.

<sup>880</sup> C II, paras. 208-209.

<sup>881</sup> C III, para. 120.

<sup>882</sup> C III, para. 122.

**B. No Contractual Claims Against the ANM**

979. Claimants find that Respondent's arguments, according to which the "Claim against the ANM" is purely contractual in nature and cannot be heard by this Tribunal, are incorrect.<sup>883</sup>
980. First, Claimants note that Colombia's references to the "Claim against the ANM" are a mischaracterization of Claimants' claims. Claimants bring claims under the Treaty against Colombia, not the ANM. These Treaty claims are predicated upon Colombia's coordinated measures, through the *Contraloría* and the ANM, to nullify the commitments in the Eighth Amendment upon which Claimants relied to invest in the expansion of the Mine. These are not separate claims and are not "purely contractual in nature".<sup>884</sup>
981. Claimants explain that the measures taken by Colombia were inconsistent with Colombia's international obligations under the Treaty (not the ANM's domestic law obligations under the Mining Contract), including the obligations:<sup>885</sup>
- To accord Claimants' investments fair and equitable treatment pursuant to Art. 4(2) of the Treaty;
  - Not to impair the management, use, enjoyment and expansion of Claimants' investments through unreasonable measures pursuant to Art. 4(1) of the Treaty;
  - To "observe any obligation deriving from a written agreement concluded between its central government or agencies thereof and an investor of the other Party with regard to a specific investment, which the investor could rely on in good faith when establishing, acquiring or expanding the investment", pursuant to Art. 10(2) of the Treaty.
982. Claimants submit that the mere reference in Claimants' Memorial to the State's obligations under the Eighth Amendment does not affect the characterization of Claimants' treaty claims. If mere references to contractual obligations were sufficient to render a treaty claim inadmissible, investment treaties would be deprived of meaningful effect, since most foreign investment is made through a contract (and most investment claims concern government interference in contractual rights). According to Claimants, this does not make the claims contractual, particularly where, as here, Colombia is seeking to repudiate the entire contractual amendment and has made no allegations that the amendment has been breached.<sup>886</sup>
983. Second, Claimants' claims relating to Colombia's breach of Arts. 4(1) and 4(2) of the Treaty are not contractual in nature. Claimants argue that the ANM acted

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<sup>883</sup> C III, para. 123.

<sup>884</sup> C III, paras. 124-125.

<sup>885</sup> C II, para. 212.

<sup>886</sup> C II, para. 213; Doc. H-1, p. 248.

inconsistently, unreasonably and in breach of Claimants' legitimate expectations when it initiated the Procedure for Contractual Annulment. The ANM went back on its representations, after negotiating the Eighth Amendment and approving the investment plan for the expansion of the Mine, and after Claimants had already made investments.<sup>887</sup>

984. Claimants accept that the relevant test to determine if Claimants' claims are contract-based or treaty-based is the "fundamental basis" test. Claimants submit that the fundamental basis of Claimants' claims is the Treaty: the claims are brought by reference to Treaty standards – *i.e.* the frustration of legitimate expectations through the unreasonable and arbitrary repudiation of the State's contractual commitments upon which investors relied to make a massive investment in the expansion of the Mine – not contractual provisions.<sup>888</sup>
985. According to Claimants, the mere fact that their claims relate to State conduct in relation to a contract does not mean that the claims are contractual in nature, as expressed by the tribunal in the *Crystallex* case. In the *Crystallex* case, the investor did not complain that a State agency breached specific contract provisions, but rather that it sought to repudiate the entire contract upon which the investor had relied in making its investments. The tribunal rejected the State's assertion that the claim was purely contractual in nature.<sup>889</sup>
986. Claimants admit that the forum-selection clause of the Mining Contract applies to contractual claims; however, this clause is irrelevant for jurisdictional purposes in this case, given that Claimants have not raised contractual claims. In any event, the dispute resolution clause in the Mining Contract does not bind Glencore, as recognised by Colombia.<sup>890</sup>
987. Third, Claimants argue that Colombia, through the conduct of the ANM and the *Contraloría*, failed to observe its obligations under the Eighth Amendment, in violation of the Umbrella Clause of the Treaty. Claimants submit that, as in all umbrella clause claims, these claims are predicated on the State's failure to observe municipal law and contractual obligations in relation to investments, although the finding of liability under an umbrella clause is ultimately a determination made under international law.<sup>891</sup>
988. Claimants explain that when a claimant brings a claim under an umbrella clause, that investor is not bringing the claim under a contract – it remains a claim for the violation of a Treaty standard; otherwise, umbrella clauses would be deprived of meaning.<sup>892</sup> In the *SGS* case, the tribunal distinguished between contract claims and treaty claims. Similarly, the tribunal emphatically denied that a contractual forum-

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<sup>887</sup> C III, para. 126; HT, Day 1, p. 237, ll. 9-11.

<sup>888</sup> C III, paras. 127-128; Doc. H-1, pp. 246-247; HT, Day 1, p. 237, l. 11 – p. 238, l. 9.

<sup>889</sup> C III, paras. 129-131, referring to *Crystallex*, para. 474; HT, Day 1, p. 238, ll. 10-21.

<sup>890</sup> C III, paras. 132-135.

<sup>891</sup> C III, paras. 136-137.

<sup>892</sup> C III, paras. 137-138; HT, Day 1, p. 239, ll. 1-4.



selection clause could deprive the tribunal of jurisdiction to hear the investor's umbrella clause claim under the treaty.<sup>893</sup>

989. Claimants conclude that there is no basis for the Tribunal to decline competence over Claimants' claims.<sup>894</sup>

### **(3) DECISION OF THE ARBITRAL TRIBUNAL**

990. The Tribunal is tasked with determining whether Claimants can bring a claim against Colombia under the Umbrella Clause of the Treaty: the Tribunal will first establish the relevant provisions **(3.1)** and will then turn to the interpretation of one of these provisions, Art. 11(3) of the Treaty **(3.2)**. Thereafter, the Tribunal will examine the nature of the so-called "Claim against the ANM" **(3.3)**

#### **(3.1) RELEVANT PROVISIONS**

991. Art. 10 of the Treaty establishes certain obligations of the State parties to the Treaty. One of these obligations is enshrined in paragraph 2 of Art. 10 and reads as follows:<sup>895</sup>

"Each Party shall observe any obligation deriving from a written agreement concluded between its central government or agencies thereof and an investor of the other Party with regard to a specific investment, which the investor could rely on in good faith when establishing, acquiring or expanding the investment".

992. This Umbrella Clause imposes on the State, as a matter of Treaty law, the observance of obligations stemming from a written agreement concluded between its government or agencies and the investor.<sup>896</sup>

993. On the other hand, Art. 11 of the Treaty provides for the settlement of disputes between a host State and an investor. Art. 11(2) establishes that if such investor considers that a measure applied by the host State is inconsistent with an obligation under the Treaty, it may refer the matter to the national courts of the host State or to international arbitration, once the six-month period for amicable settlement has expired. Pursuant to Art. 11(3):<sup>897</sup>

"Each [State] Party hereby gives its unconditional and irrevocable consent to the submission of an investment dispute to international arbitration in accordance with paragraph [11(2)] above, except for disputes with regard to Article 10 paragraph 2 of this Agreement". [Emphasis added]

994. Respondent submits that in accordance with Art. 11(3), it has not given its consent to arbitrate disputes which fall under the scope of the Umbrella Clause set out in

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<sup>893</sup> C III, paras. 138-139, referring to *SGS v. Paraguay*, para. 130, and also to *Garanti Koza*, paras. 331-332; HT, Day 1, p. 239, ll. 4-21.

<sup>894</sup> C III, para. 140; HT, Day 1, p. 240, ll. 4-7.

<sup>895</sup> Doc. C-6, p. 8.

<sup>896</sup> Doc. RL-164, p. 18 of the PDF.

<sup>897</sup> Doc. C-6, p. 9.

Art. 10(2) of the Treaty. As a consequence, argues Respondent, the Tribunal lacks competence to decide on Claimants' claims to the extent they are grounded on Art. 10(2) of the Treaty.

995. Claimants disagree and argue that Respondent makes an incorrect reading of Art. 11(3): in Claimants' view, Colombia has given its consent to arbitrate disputes with regard to Art. 10(2), just not an "unconditional and irrevocable" consent.
996. The Tribunal must interpret the meaning of Art. 11(3). To do so, the Tribunal will resort to the VCLT, which both Parties agree contains the relevant standard for the interpretation of the Treaty.<sup>898</sup>

### **(3.2) INTERPRETATION OF ART. 11(3) OF THE TREATY**

997. Art. 31 of the VCLT provides the "General Rule of Interpretation" of treaties:<sup>899</sup>

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended". [Emphasis added]

998. In accordance with the primary rule of interpretation, the Tribunal must interpret the ordinary meaning of the terms (**A.**) in their context; the context is understood as not only the text of the Treaty, but also its preamble and any annexes (**B.**).

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<sup>898</sup> R II, paras. 516-522; C III, para. 118.

<sup>899</sup> Doc. CL-7, p. 340.

999. Art. 32 of the Treaty contains “Supplementary Means of Interpretation”:

“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) Leaves the meaning ambiguous or obscure; or

(b) Leads to a result which is manifestly absurd or unreasonable”. [Emphasis added]

1000. In order to confirm that the primary interpretation is correct, the Tribunal may avail itself of the preparatory works of the Treaty, including any drafts (C.). Before turning to the scholarly interpretation of Art. 11(3) (E.), the Tribunal will address Claimants’ *effet utile* counter-argument (D.).

**A. Ordinary Meaning**

1001. Pursuant to Art. 11(3):

“each Party hereby gives its unconditional and irrevocable consent to the submission of an investment dispute to international arbitration in accordance with paragraph 2 above, except for disputes with regard to Article 10 paragraph 2 of [the Treaty]”.<sup>900</sup> [Emphasis added]

1002. The plain reading of Art. 11(3) leaves little room for doubts: each State party gives its unconditional and irrevocable consent to have investment disputes submitted to international arbitration, with one exception: disputes with regard to Art. 10(2), the Umbrella Clause.

1003. Thus, in accordance with the ordinary meaning of the terms, Colombia’s interpretation of Art. 11(3) is correct: Colombia has given its consent to arbitrate investment disputes which may arise from the Treaty, except for those which fall under the Umbrella Clause.

**B. Context**

1004. The context confirms the ordinary meaning of Art. 11(3).

1005. Pursuant to Art. 31(2) of the VCLT, the context includes the preamble and annexes to the Treaty. One of these annexes is the Protocol of the Treaty, which contains “provisions which shall be regarded as an integral part of the said Agreement”.<sup>901</sup>

1006. Adding to Art. 11 of the Treaty, Art. 11(2) of the Protocol provides that:<sup>902</sup>

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<sup>900</sup> Doc. C-6.

<sup>901</sup> Doc. C-6, pp. 13 *et seq.*

<sup>902</sup> Doc. C-6, pp. 15-16.

“(2) With regard to paragraph 3 of the said Article [11], on request of a Party five years after the entry into force of this Agreement or at any time thereafter, the Parties shall consult with a view to assessing whether the provision on consent with respect to Article 10 paragraph 2 is appropriate considering the performance of this Agreement”. [Emphasis added]

1007. The Parties disagree on what should be understood from this provision:

- Respondent argues that the Protocol provides the State parties with an opportunity to assess whether the exclusion of consent remains appropriate;<sup>903</sup>
- Claimants, on the other hand, contend that the Protocol implies that there is “consent with respect to Article 10 of paragraph 2”; and they further aver that the qualified nature of consent need not be referenced in the Protocol, since it was already set out in Art. 11(3) itself.<sup>904</sup>

1008. The Tribunal agrees with Respondent’s argument on this point.

1009. The wording of Art. 11(2) of the Protocol, combined with the ordinary meaning of Art. 11(3) of the Treaty, supports only one conclusion: in Art. 11(3) of the Treaty the State parties excluded Umbrella Clause disputes from their consent to arbitrate; but, conscious that such exclusion in practical terms deprived the Umbrella Clause of effectiveness, in Art. 11(2) of the Protocol they agreed to review their decision, after a five-year period of experience, in light of the performance of the Treaty and upon request of one of the State parties.

### **C. Preparatory Work**

1010. For the sake of exhaustiveness, the Tribunal will also analyse a draft Treaty of July 1996. Art. 9 of said draft, on “Disputes between a Contracting Party and an investor of the other Contracting Party”, contained two “options” for the relevant text.

1011. Art. 9(3) of “Option 1” provided that:<sup>905</sup>

“(3) Each Contracting Party hereby consents to the submission of an investment dispute to international arbitration.”

1012. Thus, in this draft, the State parties agreed to give their consent to the submission of investment disputes to international arbitration, without any exception. It is interesting to note that this draft Treaty did not contain an umbrella clause or any similar provision.

1013. It thus seems that in the 1996 negotiations, Switzerland and Colombia did not contemplate the possibility of having an umbrella clause, and consequently did not exclude such disputes from the scope of their consent to international arbitration.

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<sup>903</sup> R II, para. 522.

<sup>904</sup> C III, para. 120.

<sup>905</sup> Doc. R-188.

This is consistent with Colombia's policy not to include an umbrella clause in its model bilateral investment treaty;<sup>906</sup> and it confirms the Tribunal's analysis of Art. 11(3) so far.

**D. Claimants' *effet utile* Counter-Argument**

1014. Claimants argue that the principle of *effet utile* requires that the terms "unconditional and irrevocable" used in Art. 11(3) of the Treaty be given meaning. To achieve this aim, Claimants propose to construe the provision as implying that Colombia's general consent to international arbitration is unconditional and irrevocable, with one exception: Colombia can condition and revoke its consent to arbitrate Umbrella Clause claims before such consent has been perfected.

1015. Claimants' argument is premised on the use by the Treaty of the words "unconditional and irrevocable consent". Claimants then argue that consent, by its nature, is "unconditional and irrevocable", and that, for a proper construction of the Treaty, it is necessary to provide these words with *effet utile*. In an effort to solve this self-imposed riddle, Claimants propose an idiosyncratic interpretation, differentiating two different types of consent:<sup>907</sup>

- "conditional and revocable consent", which applies to Umbrella Clause claims, and
- "unconditional and irrevocable consent", which applies to all other types of claims.

1016. The Tribunal is unconvinced.

1017. Art. 11(3) reads as follows:

"Each [State] Party hereby gives its unconditional and irrevocable consent to the submission of an investment dispute to international arbitration in accordance with paragraph [11(2)] above, except for disputes with regard to Article 10 paragraph 2 of this Agreement."

1018. Claimants' proposed construction is simply an *a contrario* interpretation of the text. The Treaty says that consent to international arbitration is unconditional and irrevocable – not that consent for Umbrella Clause disputes can be conditioned and even revoked by the State. Claimants' construction creates more doubts than it dispels: assuming Claimants' interpretation, how States can condition their consent,

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<sup>906</sup> Doc. RL-46, p. 40 of the PDF: "As a strict policy matter, the Model does not include an 'umbrella clause', which arguably could automatically render a breach of a contract related to an investment into a treaty breach, regardless of the failure to comply with any of the usual treaty obligations of an IIA [...]. Reasons not to incorporate an umbrella clause in the Model include the broad and general commitment of accepting investor-State arbitration if an investor alleges a breach [...] of any investment commitment or contract related to an investment, and the unassessed costs that this type of commitment could involve for the State and agencies thereof. [...] The practice of Colombia in rejecting the inclusion of an umbrella clause has been highly consistent [...]"

<sup>907</sup> C III, para. 119.

and what temporal limits apply to the right of revocation, are questions which remain unanswered.

1019. In fact, the proper interpretation of Art. 11(3) is much more straightforward: the parties to the Treaty were simply trying to assert that they consented to international arbitration for all types of investment disputes, except for those deriving from the Umbrella Clause. The terms “unconditional and irrevocable” were used to specify the nature of the generic consent that the State parties to the Treaty were making – not to extend a phantom “conditional and revocable” consent to Umbrella Clause disputes.

1020. Further, Claimants’ *effet utile* argument seems to rest on a false premise, *i.e.* that consent to arbitration is inherently unconditional and irrevocable. That premise is false because, on a blank canvas (that is, without regard to the specific provisions of the Treaty), a State may give its consent to arbitration conditionally. Art. 26 of the ICSID Convention specifically authorizes a Contracting State to require the exhaustion of administrative or judicial remedies as a condition of its consent to arbitration under the Convention.<sup>908</sup> Similarly, in principle a State may give its generic consent to arbitration but reserve the right to revoke such consent in the future unilaterally. It is precisely to prevent such unilateral revocation that Art. 25(1) of the ICSID Convention deprives any such revocation of effect once all parties to the dispute have given their consent in writing to submit their dispute to ICSID arbitration.<sup>909</sup> Therefore, the term “unconditional and irrevocable” used to qualify the generic consent given by the State parties to the Treaty already has useful effects, and very important ones, without having to postulate additional effects based on Claimants’ *a contrario* argument.

#### **E. Scholarly Opinions**

1021. The Tribunal’s opinion is confirmed by that of several scholars who have analysed the provisions of the Treaty.

1022. As explained by Profs. T. Gazzini and Y. Radi in an article on the “Practice and Interpretation of ‘Umbrella Clauses’ in the Latin American Experience”:<sup>910</sup>

“The second category of umbrella clauses, less common than the previous one, imposes upon the parties as a matter of treaty law the observance of obligations stemming from external legal instruments, but excludes the settlement of the related disputes from the procedural provisions of the treaty. [...]

The BIT between Colombia and Switzerland contains an interesting drafting variant. According to Article 10(2): [...]

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<sup>908</sup> ICSID Convention, Art. 26 *in fine*. The extent to which the States Parties to the Treaty availed themselves of this authorization is analysed in section **V.3.(3.2).E** *infra*.

<sup>909</sup> *Id.*, Art. 25(1) *in fine*.

<sup>910</sup> A. Tanzi *et al.* [eds.], *International Investment Law in Latin America*, Chapter 11, pp. 355-356 (Doc. RL-164).

The arbitral clause contained in Article 11(3) of the same treaty provides for the unconditional and irrevocable consent to the submission of disputes to international arbitration with the express exclusion of those related to Article 10(2).

This type of provision can be treated as an umbrella clause under the broad definition provided in the introduction. Indeed, the contracting parties undertake to comply as a matter of treaty law with the obligations arising out of legal instruments external to the treaty. Needless to say, the fact that foreign investors have no access to international arbitration with regard to violations of these obligations – as it is potentially the case for the first category of clauses – clearly diminishes the added value of the clause from the standpoint of the protection of foreign investments.” [Emphasis added]

1023. Similarly, Mr. José Antonio Rivas, who served as Director of Foreign Direct Investment of the Ministry of Trade of Colombia between 2006 and 2009, and participated in the drafting of the Treaty,<sup>911</sup> affirmed in a chapter dedicated to Colombia of the *Commentaries on Selected Model Investment Treaties* that:<sup>912</sup>

“The Switzerland–Colombia BIT (2007) and Japan–Colombia BIT (2011) have typical umbrella clauses, but the parties to these treaties have not given their consent to investor-State arbitration when an investor alleges a breach of the respective umbrella clause.” [Emphasis added]

1024. The opinion of these commentators confirms the Tribunal’s interpretation of Art. 11(3): the State parties to the Treaty withheld their consent to solve Umbrella Clause disputes by way of international arbitration.

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1025. For all the above reasons, the Tribunal concludes that it lacks competence to adjudicate claims brought under the Umbrella Clause contained in Art. 10(2) of the Treaty.

### **(3.3) COMPETENCE OVER THE “CLAIM AGAINST THE ANM”**

1026. Respondent contends that the “Claim against the ANM” is purely contractual in nature and thus cannot be heard in the present arbitration, since the Mining Contract contains a dispute resolution clause.<sup>913</sup>

1027. Clause 39 of the Mining Contract indeed provides that:

“[...] Este contrato se rige en todas sus partes por la Ley Colombiana y EL CONTRATISTA se somete a la jurisdicción de los tribunales colombianos”.  
[Emphasis added]

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<sup>911</sup> R II, fn. 775.

<sup>912</sup> Doc. RL-46, p. 41.

<sup>913</sup> R II, paras. 512 and 532.



1028. The Tribunal's task is then to determine whether in the present arbitration Claimants have indeed filed contractual claims – if they had done so, such claims would fall outside the scope of the Tribunal's competence.

1029. The Tribunal notes, as a preliminary matter that, contrary to Respondent's assertion, Claimants have not brought a "Claim against the ANM". Claimants have brought claims against Colombia. These claims include Colombia's decision (adopted through its successive mining agencies, SGC and ANM) to file the Procedure for Contractual Annulment and seek nullification of the Eighth Amendment. Claimants say that this filing resulted in a breach of the FET standard, because the measure

- was an attempt to repudiate the Republic's commitments and frustrates Claimants' legitimate expectations;<sup>914</sup>
- was arbitrary, unreasonable and in bad faith.<sup>915</sup>

1030. According to Claimants, by adopting the *Contraloría's* Decision and starting the Procedure for Contractual Annulment, Colombia breached its obligations under the Treaty.<sup>916</sup>

#### **A. Fundamental Basis Test**

1031. The Parties agree that in order to determine whether a claim is contractual in nature, the Tribunal must analyse the "fundamental basis of the claim", as established by the *Vivendi* annulment committee. In particular, the Tribunal must establish:<sup>917</sup>

- whether the fundamental basis of the claim is a treaty laying down an independent standard by which the conduct of the Parties is to be judged, or
- whether the standard against which the conduct of the Parties must be measured is a contract.

1032. In its decision, the *Vivendi* annulment committee explained that:<sup>918</sup>

"95. As to the relation between breach of contract and breach of treaty in the present case, it must be stressed that Articles 3 and 5 of the BIT do not relate directly to breach of a municipal contract. Rather they set an independent standard. A state may breach a treaty without breaching a contract, and vice versa, and this is certainly true of these provisions of the BIT. The point is made clear in Article 3 of the ILC Articles, which is entitled "Characterization of an act of a State as internationally wrongful":

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<sup>914</sup> C I, para. 198.

<sup>915</sup> C I paras. 201-202 and 216.

<sup>916</sup> See Section VI.1 *infra*.

<sup>917</sup> R II, para. 536; C III, para. 127. See also *Vivendi*, para. 101.

<sup>918</sup> *Vivendi*, paras. 95-96.

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

96. In accordance with this general principle (which is undoubtedly declaratory of general international law), whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law – in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract [...].”

1033. These conclusions were confirmed by the *Crystallex* tribunal. That tribunal also explained that in order to determine the fundamental basis of the claimant’s claim, it had to start by analysing claimant’s prayers for relief (B.) and the formulation of its claims (C.).<sup>919</sup> Since the Parties have validated the approach of the *Crystallex* tribunal,<sup>920</sup> the Arbitral Tribunal will follow the same methodology.

#### **B. Claimants’ Prayers for Relief**

1034. Claimants’ main request for relief is a declaration: that Colombia’s measures (including its decision to file the Procedure for Contractual Annulment) have resulted in breach of Arts. 4(1) and 4(2) of the Treaty. Claimants also ask for a declaration that Colombia has breached the Umbrella Clause, Art. 10(2) of the Treaty; but the Tribunal has already found in Section V.3(3.2) *supra* that it lacks competence to adjudicate any dispute relating to the Umbrella Clause.<sup>921</sup>

1035. As a consequence of such declaration, Claimants request that the Tribunal order the Republic of Colombia to procure the cessation of the Procedure for Contractual Annulment with prejudice.<sup>922</sup>

1036. *Prima facie*, Claimants have made no claims for breach of contractual provisions and none of the above claims is contractual in nature. Claimants’ claims are based on the standards of the Treaty, which Claimants allege have been breached by Colombia.

1037. Yet, as explained by the *Crystallex* tribunal:<sup>923</sup>

“[...], it would of course not be sufficient for a claimant to simply label contract breaches as treaty breaches to avoid the jurisdictional hurdles present in a BIT. The Tribunal’s jurisdictional inquiry is a matter of objective determination, and the Tribunal would in case of pure “labeling” be at liberty and have the duty to re-characterize the alleged breaches.” [Emphasis added]

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<sup>919</sup> *Crystallex*, paras. 474-475.

<sup>920</sup> R II, para. 538; C III, para. 131.

<sup>921</sup> C II, para. 374(a); the request was confirmed in CPHB, para. 92.

<sup>922</sup> C II, para. 374(c).

<sup>923</sup> *Crystallex*, para. 475.

1038. The Tribunal must thus go further than Claimants' prayers for relief, in order to determine whether Claimants' claims are contractual or Treaty-based.

**C. Formulation of Claimants' Claims**

1039. According to Respondent, even when Claimants

“seek to frame the Claim against the ANM as a treaty claim for breach of the fair and equitable standard of treatment under Articles 4(1) and 4(2) of the Treaty, Claimants still only describe it as a contractual breach.”

To prove its assertion, Respondent makes reference to para. 223 of Claimants' Memorial of 16 December 2016.<sup>924</sup>

1040. The Tribunal finds Respondent's argument unconvincing.

1041. Para. 223 of Claimants' Memorial relates to Claimants' claims which are grounded on the Umbrella Clause, not on Arts. 4(1) and 4(2) of the Treaty. The Tribunal has already found that it does not have competence over claims grounded on Art. 10(2).

1042. The basis of Claimants' claim relating to the conduct of the ANM is the State agency's alleged attempt to have the Eighth Amendment declared null and void by the Colombian administrative courts. Claimants argue that the mere filing of the Procedure for Contractual Annulment breached Colombia's obligations under Arts. 4(1) and 4(2) of the Treaty, because:<sup>925</sup>

- it contravened Claimants' legitimate expectations, since the Procedure was started after Claimants had relied on the Eighth Amendment and made significant investments in Colombia;
- it failed to treat Claimants' investments in a consistent, predictable, and transparent manner, since the Procedure took place after Prodeco and Ingeominas had negotiated extensively, and after Ingeominas had approved Prodeco's 2010 PTI; and
- it took an arbitrary and unreasonable stance, since it sought unilaterally to withdraw the undertakings and assurances given by Ingeominas to Claimants, without a reasoned judgment.

1043. Claimants measure Colombia's conduct against the standards of the Treaty and not against contractual standards: the fundamental basis of Claimants' claims is the Treaty, not the Mining Contract.

1044. As established by the *Crystallex* tribunal, whether the Claimants' claims are well-founded in law and whether the facts underlying those claims may implicate the

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<sup>924</sup> R II, para. 540.

<sup>925</sup> C II, para. 270.

Respondent's liability under the substantive standards of the Treaty are questions to be dealt with in the merits.<sup>926</sup>

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1045. In sum, the Tribunal is unconvinced that the so-called "Claim against the ANM" is contractual in nature and falls outside the scope of the Tribunal's competence insofar as it is grounded in Arts. 4(1) and 4(2) of the Treaty. Therefore, Respondent's objection is dismissed.

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<sup>926</sup> See *Crystallex*, para. 477.

## **V.4. INADMISSIBILITY OBJECTION**

1047. Respondent contends that if, *par impossible*, the Tribunal were to decide that either Claimants' claim against the *Contraloría*, or the claim against the ANM, fall within the scope of its jurisdiction, such claims are not yet ripe for adjudication and are, thus, inadmissible (1).

1048. Claimants say that their claims concern measures already adopted by the State, which are in breach of the Treaty, and have caused a loss or damage to Claimants' investment. These claims are therefore fully ripe for adjudication (2).

1049. The Tribunal will start by summarizing the Parties' positions and then make its decision (3).

### **(1) RESPONDENT'S POSITION**

1050. Respondent avers that Claimants' claims are premature and, therefore, inadmissible, for several reasons.

1051. As a preliminary point, Respondent notes that Claimants ask that the Tribunal order Colombia to "continue to perform and observe the Eighth Amendment". Yet, Respondent argues, Claimants continue to own and operate the Calenturitas Mine and the Parties continue to comply with the Eighth Amendment. In sum, Claimants want to be placed in the same condition in which they are today. According to Respondent, this shows that Claimants' claims are pre-emptive and hypothetical.<sup>927</sup>

#### Absence of a measure by the State

1052. Respondent submits that under the Treaty the Tribunal's jurisdiction extends only to "a measure applied by the other Party [which] is inconsistent with an obligation of this Agreement, thus causing loss or damage to [the investor] or his investment".<sup>928</sup> According to Respondent, a claim based on potential harm to the investment, arising out of a measure which has not yet been implemented, is not admissible under international law.<sup>929</sup>

1053. Respondent refers to the *Gabčíkovo-Nagymoros* case, in which the International Court of Justice ["ICJ"] distinguished between the internationally wrongful act itself, and the conduct which preceded such act, which is of preparatory nature and does not qualify as an internationally wrongful act.<sup>930</sup>

1054. Respondent argues that in the present case, the Procedure for Contractual Annulment, which consists in submitting a contract for review and annulment to a court of law, does not constitute an internationally wrongful act, and cannot give

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<sup>927</sup> R I, para. 371. See also HT, Day 2, p. 500, ll. 19-20.

<sup>928</sup> R II, paras. 551 and 557.

<sup>929</sup> R I, para. 373; R II, para. 551. See also HT, Day 2, p. 501, ll. 1-22.

<sup>930</sup> R I, paras. 374-375 and 377, referring to *Gabčíkovo-Nagymoros*, para. 79.

rise to any compensable harm;<sup>931</sup> indeed, there has been no breach of the State's obligations.<sup>932</sup>

Absence of harm to the investor

1055. Respondent further contends that the Treaty requires that the State's measure caused a "loss or damage" to the investor or its investment. In the present case, Claimants' claims are premature and inadmissible, because Claimants have suffered no harm whatsoever.<sup>933</sup>

1056. First, regarding the claim against the ANM's conduct, Respondent points out that the Procedure for Contractual Annulment is still pending before the *Tribunal Administrativo de Cundinamarca* and it is unknown whether the Eighth Amendment will be annulled. Respondent avers that "loss or damage" can only occur if and when the *Tribunal Administrativo de Cundinamarca* renders a decision nullifying the Eighth Amendment.<sup>934</sup>

1057. Respondent further argues that Claimants' claim against the ANM's conduct must fail, since Claimants have not suffered any monetary harm.<sup>935</sup> Tellingly, Claimants did not disclose any contingency or record any impairment loss arising out of the Procedure for Contractual Annulment. Instead, Claimants expressed to the market their utmost confidence that the validity of the Eighth Amendment would be confirmed.<sup>936</sup>

1058. Second, as to Claimants' claim against the *Contraloría*, Respondent argues that it is also inadmissible and not ripe, since Claimants have suffered no harm. The claim against the *Contraloría* is currently limited to recovering the Fiscal Liability Amount. Respondent notes that Claimants have challenged the *Contraloría*'s Decision before the *Tribunal Administrativo de Cundinamarca*, and a decision is pending. In its financial statements, Prodeco has characterized the chance of losing the claim against the *Contraloría*'s Decision as remote.<sup>937</sup> As a result, assuming that the claim against the *Contraloría* is not dismissed on the basis of the Fork in the Road Objection, such claim is, in any event, not ripe.<sup>938</sup>

Review by the competent State authority

1059. According to Respondent, international case-law shows that the State cannot be held liable for the acts of a State's official if the investor has not attempted, when possible, to have the act reviewed by the competent State authority. This approach

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<sup>931</sup> R II, para. 559.

<sup>932</sup> HT, Day 2, p. 500, ll. 21-22.

<sup>933</sup> R I, para. 378; R II, para. 560.

<sup>934</sup> R II, paras. 560-561.

<sup>935</sup> R II, paras. 553-556.

<sup>936</sup> R I, paras. 382-383; R II, para. 558.

<sup>937</sup> R I, para. 389; R II, para. 558.

<sup>938</sup> R I, paras. 387-388; R II, paras. 562-564.

was adopted by the *Generation Ukraine* and by the *EnCana* tribunals.<sup>939</sup> Respondent submits that in the present case, this condition for a claim to be ripe has even more impact, since the Treaty requires that the investor show that it has suffered “loss or harm” before submitting a claim.<sup>940</sup>

1060. Respondent notes that this requirement is not the same as a requirement to exhaust local remedies. Respondent points to the award in *Generation Ukraine*, in which the tribunal found that exhaustion of local remedies is entirely distinct from the principle that a State official’s conduct cannot ripen into an international delict, absent an effective attempt by the investor to have such act reviewed by the competent State authority.<sup>941</sup>

### Conclusion

1061. In sum, Respondent argues that the local proceedings that Claimants have commenced must run their course as a pre-condition to the ripeness of Claimants’ claims against the *Contraloría* and the ANM. For now, Claimants have suffered no definitive harm as a result of the conduct of any organs of the Colombian State.<sup>942</sup>

### Alternative argument: abuse of process

1062. *Ex abundante cautela*, Respondent submits that if the Tribunal were to consider that Claimants’ claims are ripe for adjudication, the Tribunal should decline to hear such claims because their introduction constitutes an abuse of process. Indeed, Claimants are trying to block or inhibit the operation of Colombia’s judiciary process. In the *Rompetrol* case, the tribunal found that such type of pre-emptive action was not permitted.<sup>943</sup>

1063. Respondent concludes that Claimants’ claims are not ripe for adjudication and calls for the dismissal of such claims by the Tribunal.<sup>944</sup>

## **(2) CLAIMANTS’ POSITION**

1064. Claimants argue that Respondent’s Inadmissibility Objection is unfounded.

### Relief sought by Claimants

1065. Claimants explained at the Hearing that:<sup>945</sup>

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<sup>939</sup> R II, paras. 565-567, referring to *Generation Ukraine*, para. 20.30 and to *EnCana*, para. 194.

<sup>940</sup> R II, para. 568.

<sup>941</sup> R II, para. 569. See also HT, Day 2, p. 504, ll. 4-15.

<sup>942</sup> R II, paras. 570-571.

<sup>943</sup> R II, paras. 572-574, referring to *Rompetrol*, para. 152.

<sup>944</sup> R I, para. 393; R II, para. 576.

<sup>945</sup> HT, Day 1, p. 241, l. 7 – p. 242, l. 19.



- The primary remedies sought are restitutionary in nature – *i.e.* that Colombia give appropriate guarantees of non-repetition and make restitution of the Fiscal Liability Amount within 90 days;
- Alternatively, if Colombia does not comply with the restitutionary relief, Claimants ask the Tribunal to order Colombia to pay, as monetary damages, the Fiscal Liability Amount, and to hold Claimants harmless of all retroactive Royalty and GIC payments;
- Finally, Claimants claim forward-looking damages from the date of the Award, which would be the NPV of the investment, estimated at USD 336 million.

Existence of a loss or damage

1066. Claimants acknowledge that the Treaty establishes the requirements that claimants must satisfy to submit an investment claim. Of those requirements, Respondent mainly disputes that Claimants have suffered “loss or damage” with respect to the conduct of the ANM and the *Contraloría*. Claimants find that Respondent’s argument is flawed.<sup>946</sup>

1067. First, Respondent contends that Claimants have not suffered any monetary harm as a result of the ANM’s conduct because the Eighth Amendment remains in force. Claimants counter-argue that the Treaty does not require that the relevant “loss or damage” involve an outlay of funds, for instance in the form of the payment of higher royalties as a result of the annulment of the Eighth Amendment. The majority of investment cases do not involve an outlay of funds, but rather a loss in the fair market value of the investment.<sup>947</sup>

1068. Claimants say that the ANM’s actions, together with other conduct attributable to Colombia, have already negatively affected the NPV of their investments; the extent of that loss in value is a matter to be determined in the merits.<sup>948</sup> Indeed, the ANM has adopted the position that the Eighth Amendment should be annulled, and has commenced legal proceedings in that respect, in essence copying the reasons of the *Contraloría*, with the consequent impact that such action by the regulator has on the fair market value of Claimants’ investment.<sup>949</sup>

1069. Claimants also say that Respondent’s argument that Claimants did not disclose any contingency or impairment as a result of the Procedure for Contractual Annulment, is unavailing. Such a disclosure has no bearing on the market value of Claimants’ investment and the independent views of a third-party buyer.<sup>950</sup>

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<sup>946</sup> C III, para. 142; HT, Day 1, p. 247, ll. 8-10.

<sup>947</sup> C II, paras. 221-222; C III, para. 143; HT, Day 1, p. 247, ll. 11-13.

<sup>948</sup> C II, para. 222; C III, para. 143.

<sup>949</sup> C II, para. 222.

<sup>950</sup> C III, para. 144.

1070. Second, Claimants note that as to the *Contraloría*'s measures, Claimants have already paid the Fiscal Liability Amount, and therefore Claimants have already suffered a so-called "monetary harm".<sup>951</sup>

1071. In addition, Claimants find that Respondent's Inadmissibility Objection contradicts the FIR Objection:

- Under the Inadmissibility Objection, Respondent argues that Claimants could not bring a claim under the Treaty, before having challenged the impugned measure before the local courts;
- At the same time, under the FIR Objection, Respondent says that if Claimants first submitted a claim to local courts, they are barred from submitting a claim under the Treaty.

1072. According to Claimants, Respondent's position would deprive them of any legal remedies.<sup>952</sup>

No requirement of exhaustion of local remedies

1073. Claimants also find that Colombia is trying to write into the Treaty a non-existent requirement of exhaustion of local remedies. Art. 11(3) of the Protocol provides that before submitting a claim for settlement in Colombia, "domestic administrative remedies" have to be exhausted in accordance with applicable laws and regulations; and Claimants have complied with this requirement. There is no requirement of exhaustion of judicial local remedies.<sup>953</sup>

1074. Claimants note that they do not claim a denial of justice that will only be perfected once internal remedies are exhausted or justice is sufficiently delayed; nor do they claim an expropriation. Rather, Claimants claim a breach of the fair and equitable treatment and other standards of the Treaty on the basis of measures that have already been adopted by Respondent.<sup>954</sup>

1075. According to Claimants, the case law invoked by Respondent does not support its case. Both the *Generation Ukraine* and the *EnCana* cases related to expropriations.<sup>955</sup>

Absence of an abuse of process

1076. As to Respondent's abuse of process claim, Claimants note that Respondent merely invokes the relief sought by Claimants, which, according to Respondent, is intended to block or inhibit the operation of Colombia's judiciary process. Claimants disagree: Claimants seek a declaration of breach, restitution, and an order that

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<sup>951</sup> C III, para. 145.

<sup>952</sup> C III, para. 141(a).

<sup>953</sup> HT, Day 1, p. 248, l. 2 – p. 249, l. 18.

<sup>954</sup> C II, paras. 225-226; C III, para. 141(b); HT, Day 1, p. 249, l. 20 – p. 250, l. 16.

<sup>955</sup> HT, Day 1, p. 256, l. 7 – p. 257, l. 16.

Colombia ceases its wrongful acts, a relief which does not require that the courts act or omit to act in any manner, since the wrongful acts are the acts of non-judicial actors.<sup>956</sup>

1077. As to the *Rompetrol* case, Claimants point out that the tribunal recognised that “the pursuit of crime – or even its mere invocation – cannot serve on its own as a justification for conduct that breaches the rights of foreign investors under applicable treaties”. Claimants say that in this particular case they are not asking the Tribunal to stop the Colombian authorities from investigating crimes or pursuing criminal procedures.<sup>957</sup>

1078. In any event, Claimants say that Colombia has not explained how a mere request for relief could be considered so abusive as to deprive the Tribunal of jurisdiction altogether. The appropriateness of the relief that Claimants seek is a matter for the merits, not jurisdiction.<sup>958</sup>

### Conclusion

1079. Claimants conclude that the primary relief they are seeking is prescriptive in nature, designed to ensure:

- (i) the cessation of wrongful measures already taken by Colombia in breach of the Treaty,
- (ii) the non-repetition of such measures, and
- (iii) continued compliance with the Eighth Amendment.

### **(3) DECISION OF THE ARBITRAL TRIBUNAL**

1080. The Tribunal will first establish the proven facts (A.), and then explain its decision (B.).

#### **A. Proven Facts**

1081. As previously explained,<sup>959</sup> it is important to bear in mind that under Colombian law there is a clear distinction between the (i) Administrative Fiscal Liability Proceeding and the (ii) Procedures for Judicial Annulment of administrative contracts.<sup>960</sup>

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<sup>956</sup> C III, para. 146.

<sup>957</sup> HT, Day 1, p. 258, l. 2 – p. 259, l. 10.

<sup>958</sup> C III, par. 147.

<sup>959</sup> See sections **III.(7)** and **III.(8)** *supra*.

<sup>960</sup> The distinction is clearly explained by the *Contraloría* in the Reconsideration Decision (Doc. C-35, p. 41).

### Fiscal Liability Proceeding

1082. The *Contraloría* is an agency of the Republic of Colombia. It is empowered to decide whether civil servants and private individuals incurred so-called “fiscal liability”, premised on the fulfilment of three conditions:<sup>961</sup>

- A “*conducta dolosa o culposa*”, committed by such civil servant or private individual,
- Which causes damage to the Colombian State or any of its agencies,
- And a causal link between conduct and damage.

1083. It is noteworthy that in a contractual environment fiscal liability does not require the violation of any norm, the breach of any contractual commitment, or any illegality affecting the contract. It is engaged whenever a civil servant or private individual incurs in *conducta dolosa o culposa* (e.g., when negotiating, executing, or performing a contract), and such behaviour provokes damage to the State.

1084. If the investigation by the *Contraloría* concludes that the three requirements are met, the *Contraloría* will issue an administrative act, deciding that the civil servant or private individual has incurred fiscal liability, and simultaneously ordering that such person pay compensation equal to the damage suffered by Colombia or its agency.<sup>962</sup>

1085. The *Contraloría*’s decision (“*declaratoria de responsabilidad fiscal*”) has no impact on the contract, which continues in full force and effect, and has to be complied with both by the private party and by the public party.<sup>963</sup>

1086. A first-instance administrative decision adopted by the *Contraloría* can be appealed within the *Contraloría* itself (“*recursos en vía gubernativa*”), by submitting a *recurso de reposición* or a *recurso de apelación*; once these appeals have been exhausted, the *acto administrativo* becomes *firme* and the *vía gubernativa* is closed. But this is not the end of the story: it is still possible to seek annulment of the *acto administrativo firme* by filing an Annulment Procedure (“*recurso judicial contencioso-administrativo*”) before the courts of justice.

### Procedure for Contractual Annulment

1087. Annulment of an administrative contract entered into with the Republic or any of its agencies is a completely different institution: such nullifications require a judicial Procedure for Contractual Annulment (“*declaratoria de nulidad*”), at the request of any of the parties to the Contract. The requesting party bears the burden of proving that a cause of nullity under Colombian law (e.g., illegality or lack of consent) has occurred.

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<sup>961</sup> Doc. C-71, Arts. 4 to 6.

<sup>962</sup> Doc. C-71, Art. 4.

<sup>963</sup> Doc. C-35, p. 41.

1088. Upon the decision rendered by the judge, the contract is annulled and ceases to produce effects. Depending on the circumstances, the cessation may have retroactive effects (*ex tunc*) or not (*ex nunc*), and the party *in bonis* may be entitled to claim compensation.<sup>964</sup>

1089. The proven facts regarding the Fiscal Liability Proceeding have already been detailed in Section V.3(3.1) *supra* and will be briefly recalled here (a.); the facts surrounding the Procedure for Contractual Annulment will be summarized thereafter (b.).

**a. Fiscal Liability Proceeding**

1090. On 30 April 2015, the *Contralora Delegada*, Ms. Vargas, issued the *Contraloría's* Decision, which found that by executing the Eighth Amendment Prodeco had incurred in liability and ordered Prodeco and certain civil servants jointly and severally to compensate the State for the damage caused.<sup>965</sup>

1091. On 11 May 2015, Prodeco filed:

- A *recurso de reposición* before the *Contralora Delegada*, the very authority who had issued Decision, asking for reconsideration of her Decision, and
- A *recurso de apelación* before the *Contralor General de la República*, the supervisor of the *Contralora Delegada*.<sup>966</sup>

1092. These administrative appeals proved unsuccessful:

- In July 2015, the *Contralora Delegada* rejected Prodeco's *recurso de reposición*;<sup>967</sup> and
- In August 2015, the *Contralor General* issued the Appeal Decision, thereby confirming the *Contraloría's* Decision.<sup>968</sup>

1093. After a mandatory Request for Conciliation and an unsuccessful Conciliation with the *Contraloría*, on 1 April 2016, Prodeco filed the Annulment Procedure against the *Contraloría's* Decision with the *Tribunal Administrativo de Cundinamarca*<sup>969</sup> seeking

- annulment of the *Contraloría's* Decision,

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<sup>964</sup> Doc. C-35, p. 41.

<sup>965</sup> Doc. C-32, p. 231.

<sup>966</sup> Doc. C-33.

<sup>967</sup> Doc. C-35.

<sup>968</sup> Doc. C-37.

<sup>969</sup> Doc. R-2. See also McManus I, para. 45.

- restitution of the amounts already paid by Prodeco in compliance with the *Contraloría*'s Decision, and
- certain ancillary requests plus damages.<sup>970</sup>

1094. A decision by the *Tribunal Administrativo de Cundinamarca* remains pending.

**b. Procedure for Contractual Annulment**

1095. Pursuant to clause 39 of the Mining Contract, the Mining Contract is subject to Colombian law and to the jurisdiction of Colombian courts.<sup>971</sup> Colombian courts are thus empowered to adjudicate all disputes arising out of the Mining Contract – including any dispute as regards the validity of the Contract or of its Amendments.

1096. On 30 March 2012, the SGC, invoking clause 39 of the Mining Contract, and after an unsuccessful request for mandatory conciliation, filed the Procedure for Contractual Annulment with the *Tribunal Administrativo de Cundinamarca*. The SGC requested that the court declare the nullity of the Eighth Amendment, arguing that such Amendment was detrimental to the general interest of the State: the Amendment had been executed on the assumption that it would generate benefits for the State, but this scenario had not materialized.<sup>972</sup>

1097. Subsidiarily, the SGC requested that the *Tribunal Administrativo* revise the Eighth Amendment, “*de tal manera que se preserve el interés general, recuperando y manteniendo a un futuro el equilibrio de la ecuación financiera del Contrato 044/89, perdido con el desarrollo del Otrosí No. 8*”.

1098. The SGC's claim was served on Prodeco in October 2012.<sup>973</sup>

1099. On 15 May 2013, the ANM (which had replaced the SGC) resubmitted its claim before the *Tribunal Administrativo de Cundinamarca*,<sup>974</sup> in terms which were practically identical to the initial ones. The ANM however updated the amount of the State's alleged losses resulting to USD 99 M.<sup>975</sup>

1100. On 7 October 2013, Prodeco filed its response to the ANM's resubmitted claim,<sup>976</sup> together with a report by KPMG.<sup>977</sup>

1101. Prodeco said that the Eighth Amendment had been executed in accordance with Colombia's legislation and had been necessary to permit an expansion of the Mine.

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<sup>970</sup> Subsidiarily Prodeco also claimed against Messrs. Martínez Torres, Ballesteros and Ceballos and the insurance companies, requesting reimbursement of the amounts paid to the *Contraloría*.

<sup>971</sup> Doc. C-2, clause 39, p. 38.

<sup>972</sup> Doc. C-140, pp. 3 and 34-35.

<sup>973</sup> Doc. C-149, p. 1.

<sup>974</sup> Doc. C-158.

<sup>975</sup> Doc. C-158, p. 46.

<sup>976</sup> Doc. C-170. It should be noted that Prodeco had already submitted a response to the SGC's initial claim on 21 May 2013 (Doc. C-160).

<sup>977</sup> Doc. C-168.

Prodeco also argued that the Eighth Amendment would increase Colombia's benefits in the long-term. According to Prodeco, the impact of the Eighth Amendment's on the State's finances could be determined only at the end of the life of the Mining Contract.<sup>978</sup>

1102. On 22 October 2013, the ANM filed its reply submission.<sup>979</sup>

1103. The Parties agree that to this day, the *Tribunal Administrativo de Cundinamarca* has not issued a decision in the Procedure for Contractual Annulment.<sup>980</sup>

### **B. Analysis and Decision of the Tribunal**

1104. Claimants' main request for relief is a declaration that Colombia's measures have resulted in breach of Arts. 4(1) and 4(2) of the Treaty.<sup>981</sup> As a consequence of such declaration, Claimants request that the Tribunal order the Republic of Colombia

- to continue to perform and observe the Eighth Amendment;<sup>982</sup>
- to procure the cessation of the Procedure for Contractual Annulment with prejudice;<sup>983</sup>
- to provide appropriate assurances and guarantees from the *Contraloría* that it will refrain from initiating any new proceedings in relation to the Eighth Amendment;<sup>984</sup> and
- to repay to Prodeco the Fiscal Liability Amount of USD 19.1 M plus interest.<sup>985</sup>

1105. Respondent contends that Claimants' claims against the *Contraloría* and the ANM are not yet ripe for adjudication and are, thus, inadmissible.

1106. Respondent argues that:<sup>986</sup>

- The local proceedings must run their course as a pre-condition to the ripeness of Claimants' claims against the *Contraloría* and the ANM;

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<sup>978</sup> Doc. C-170.

<sup>979</sup> Doc. C-172.

<sup>980</sup> C I, para. 143; Compass Lexecon I, para. 58; R I, para. 261; R II, para. 383; HT, Day 1, p. 155, l. 4.

<sup>981</sup> C II, para. 374(a); the request was confirmed in CPHB para. 92. Claimants also ask for a declaration that Colombia has breached the Umbrella Clause, Art. 10(2) of the Treaty; but the Tribunal has already found in Section V.3.(3.2) *supra* that it lacks competence to adjudicate any dispute relating to the Umbrella Clause.

<sup>982</sup> C II, para. 374(b).

<sup>983</sup> C II, para. 374(c).

<sup>984</sup> C II, para. 374(d-e).

<sup>985</sup> C II, para. 374(f). If Colombia does not comply with this order within 90 days, Claimants subsidiarily request (*inter alia*) forward-looking damages in an amount of USD 336.1 million, plus certain indemnifications.

<sup>986</sup> See section V.4.(1) *supra*.



- Claimants have suffered no harm and a claim based on potential harm to the investment is not admissible under the Treaty;
- Alternatively, Claimants' claims constitute an abuse of process, their aim being to effectively block Colombia's judiciary process.

1107. Claimants say that their claims concern measures already adopted by the State, which are in breach of the Treaty, and have caused a loss or damage to Claimants' investment. These claims are therefore fully ripe for adjudication.

1108. Claimants allege that:<sup>987</sup>

- The extent of the loss or damage sustained by Claimants is a matter to be determined in the merits;
- Claimants have already paid the Fiscal Liability Amount and have, therefore suffered a monetary harm;
- There is no requirement of exhaustion of local remedies, because Claimants are not claiming denial of justice; and
- As to the abuse of process, Claimants are not asking the Tribunal to stop the Colombian authorities from investigating crimes or pursuing criminal procedures; in any case, the mere request of relief can never be an abuse of process.

1109. Claimants' case is that by adopting two distinct measures the Republic has breached the assurances given in the Treaty: the *Contraloría's* Decision (**a.**) and the Procedure for Contractual Annulment (**b.**). The Tribunal will analyse each separately. Thereafter it will devote short sub-sections to two subsidiary arguments advanced by Respondent: non-existence of loss or damage (**c.**) and abuse of process (**d.**). Eventually, the Tribunal will dismiss Respondent's Inadmissibility Objection.

**a. The *Contraloría's* Decision**

1110. Claimants argue that the *Contraloría's* Decision violates Arts. 4(1) (unreasonable or discriminatory measures) and 4(2) (FET) of the Treaty. In essence, Claimants say that:<sup>988</sup>

- The *Contraloría's* Decision effectively revoked the State's commitments under the Eighth Amendment, thereby frustrating Claimants' legitimate expectations;<sup>989</sup>

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<sup>987</sup> See section V.4.(2) *supra*.

<sup>988</sup> C I, para. 204.

<sup>989</sup> C I, paras. 192-195.

- The *Contraloría*'s Decision is arbitrary, unreasonable and was issued in bad faith;<sup>990</sup>
- The *Contraloría*'s Decision required Prodeco to pay the Fiscal Liability Amount in order to avoid forfeiture of the Mining Contract as a whole; this amounted to a unilateral and coercive attempt to rewrite the negotiated terms of the Mining Contract;<sup>991</sup>
- Colombia has denied Claimants due process in the Fiscal Liability Proceeding, because Prodeco could not properly defend itself and the *Contraloría* did not act even-handedly in its conduct of the proceedings.

1111. Respondent argues that such claims are premature and, thus, inadmissible.

1112. On 30 April 2015, the *Contralora Delegada*, Ms. Vargas, issued the *Contraloría*'s Decision. Thereafter, Prodeco filed a *recurso de reposición* before the *Contralora Delegada* and a *recurso de apelación* to the *Contralor General de la República*, the superior of the *Contralora Delegada*.<sup>992</sup> Both appeals have been dismissed and the administrative act is now final (*firme en vía gubernativa*). Prodeco has filed a judicial Annulment Procedure with the *Tribunal Administrativo de Cundinamarca*, seeking to impeach the *Contraloría*'s Decision. The *Tribunal Administrativo* has not yet issued its decision.

1113. The matter which the Tribunal must address is whether a dispute arising from an administrative act which is already final *en via gubernativa*, but where the judicial recourse is still pending, is already ripe for adjudication before an international arbitration tribunal.

Art. 11(3) of the Protocol

1114. This very question is addressed in Art. 11(3) of the Protocol. The Spanish and English versions of the text read as follows:

*“Con respecto a Colombia, para poder someter una reclamación para su solución bajo dicho Artículo [11(3) del Tratado], se debe agotar la vía gubernativa de acuerdo a las leyes y regulaciones aplicables. Ese procedimiento en ningún caso deberá exceder seis meses desde la fecha de su inicio por el inversionista [...]”.*

“With respect to Colombia, in order to submit a claim for settlement under the said Article [11(3) of the Treaty], domestic administrative remedies shall be exhausted in accordance with applicable laws and regulations. Such procedure shall in no case exceed six months from the date of its initiation by the investor [...]”

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<sup>990</sup> C I, para. 202.

<sup>991</sup> C I, para. 203.

<sup>992</sup> Doc. C-33.

1115. Art. 11(3) of the Protocol is applicable only to investments in Colombia (“*Con respecto a Colombia...*”). It must have been inserted at the request of Colombia, to take account of its “*leyes y regulaciones*”; the Spanish text of the provision uses Colombian legal terminology and is of special relevance for its proper construction.

1116. The rule covers claims which an investor intends to submit, based on *actos administrativos* performed by the Republic or its agencies. Admissibility of such claims is subject to a special requirement:

- The *vía gubernativa* must be exhausted, *i.e.* all appeals within the public administration itself against the administrative act must have been filed and dismissed, so that the *acto administrativo* has become *firme en vía gubernativa*;
- Alternatively, more than six months must have elapsed since the investor filed the administrative appeal, without a final decision, which exhausts the *vía gubernativa*, having been rendered.

1117. The *Contraloría*’s Decision complies with the first alternative: all administrative appeals have been lodged and dismissed; it is *firme en vía gubernativa*, and consequently Art. 11(3) of the Protocol entitles Claimants to file a claim that the FET standard (including the prohibition of unreasonable or discriminatory measures) has been breached.

1118. The fact that Prodeco has also filed an Annulment Procedure against the *Contraloría*’s Decision with the *Tribunal Administrativo de Cundinamarca* is irrelevant. The Treaty does not require that investors, before filing claims based on breaches of Art. 4(1) or (2) of the Treaty, must exhaust local judicial remedies.<sup>993</sup>

1119. In this case, there is an additional reason to dismiss Respondent’s argument that Claimants’ claims regarding the *Contraloría*’s Decision are not ripe for adjudication: in the mandatory Conciliation which preceded the filing of the Annulment Procedure, Colombia argued that the *Tribunal Administrativo de Cundinamarca* lacked jurisdiction to hear such Annulment Procedure, Glencore and Prodeco having opted to submit the dispute to ICSID arbitration.<sup>994</sup> It is a *volte face* when Colombia now argues that Claimants, in order to gain access to international arbitration, must first exhaust the Annulment Procedure.

#### **b. The Procedure for Contractual Annulment**

1120. Claimants additionally submit that Colombia’s decision to file the Procedure for Contractual Annulment and seek nullification of the Eighth Amendment

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<sup>993</sup> Art. 11(3) of the Protocol only requires the exhaustion of administrative remedies.

<sup>994</sup> Doc. C-192, p. 6.

- is an attempt to repudiate the Republic's commitments and frustrates Claimants' legitimate expectations;<sup>995</sup>
- is arbitrary, unreasonable and in bad faith.<sup>996</sup>

1121. Respondent again argues that such claims are premature and inadmissible.

1122. The Tribunal would agree with Respondent's line of reasoning if Claimants were arguing that the judicial Procedure for Contractual Annulment had resulted in a denial of justice. A claim for denial of justice would indeed be premature – the *Tribunal Administrativo de Cundinamarca* not having issued the first instance decision and local judicial remedies not having been exhausted.

1123. Claimants do not deny that claims for denial of justice “will only be perfected once internal remedies are exhausted and/or justice sufficiently delayed”.<sup>997</sup> But they assert that they are not making a claim for denial of justice, their case being that Colombia's mere decision to file the judicial Procedure for Contractual Annulment already resulted in a breach of the of the FET standard.<sup>998</sup>

#### The Tribunal's Decision

1124. The matter which the Tribunal must address in order to accept or to dismiss the Inadmissibility Objection is whether Claimants' claims are already ripe for adjudication, or whether under the BIT an investor is bound to perform certain activity before being entitled to gain access to international arbitration.

1125. When the Tribunal approached the same issue regarding the *Contraloría's* Decision, it was able to rely on the guidance provided by Art. 11(3) of the Protocol. This rule is inapposite for the present discussion: Colombia's decision to file the judicial Procedure for Contractual Annulment does not constitute an *acto administrativo*, and cannot be impugned in *via gubernativa*.

1126. In the absence of any specific provision in the Treaty, of any guidance in the Protocol or any rule of general application deriving from international law, the Tribunal finds that access to international arbitration, in situations other than those covered by Art. 11(3) of the Protocol, is not burdened by any admissibility requirement. Colombia adopted a measure consisting in the filing of the judicial Procedure for Contractual Annulment; Claimants claim that this measure breached the Treaty; the claim is admissible, there being no further requirements which have to be complied with (whether the claim is ultimately accepted or dismissed is of course a question for the merits).

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<sup>995</sup> C I, para. 198.

<sup>996</sup> C I paras. 201-202; para. 216

<sup>997</sup> C II, para. 225.

<sup>998</sup> C II, paras. 225-226; C III, para. 141(b); HT, Day 1, p. 249, l. 20 – p. 250, l. 16.

*Lemire*

1127. The tribunal in *Lemire*, when faced with a similar situation, reached the same conclusion as the present Tribunal, but added the following *caveat*:<sup>999</sup>

“This does not mean that an investor can come before an ICSID tribunal with any complaint, no matter how trivial, about any decision, no matter how routine, taken by any civil servant, no matter how modest his hierarchical place.”

1128. In this case, however, the claim is not trivial, since it affects the validity of the Eighth Amendment. And the decision was not taken by a modest civil servant, but by the SGC, the agency entrusted by the Republic with the supervision of the mining sector. The test predicated by *Lemire* is fully met.

*Generation Ukraine*

1129. Respondent has invoked *Generation Ukraine* to support its case.

1130. The present arbitration has significant differences with *Generation Ukraine*,<sup>1000</sup> a case where the claimant abandoned the country as soon as the impugned measures were adopted and claimed that an expropriation had occurred. In the present arbitration, the situation is quite different: Claimants are not claiming an expropriation, and they have initiated this arbitration to ensure that they continue to enjoy their investment.

1131. In any case, the test proposed by *Generation Ukraine* is based on reasonableness: a claimant is required to put in a reasonable effort to obtain a correction of the wrong decision within the domestic legal system, before gaining access to international protection. In the present case, there is no reasonable measure which Claimants could have adopted to resist or correct Colombia’s decision to file the Procedure for Contractual Annulment.

**c. Loss or Damage**

1132. Art. 11(1) of the Treaty provides that an investor may request consultations, as a preliminary step to arbitration, if the measure applied by the host State is inconsistent with a Treaty obligation “thus causing loss or damage to him or his investment”.

1133. Respondent argues that the measures adopted by Colombia have caused no loss or damage to Claimants.

1134. The argument is without merit.

1135. Determination of loss and damage is a question which can only be adjudicated once the merits of the claim have been established. In any case, Prodeco was forced to

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<sup>999</sup> *Lemire*, para. 278.

<sup>1000</sup> *Generation Ukraine*, para. 20.30.

pay to the Republic the Fiscal Liability Amount, as required by the *Contraloría*'s Decision. *Prima facie*, Claimants seem to have suffered certain "loss or damage", and one of Claimants' requests in this arbitration is precisely repayment of such sum plus interest.

**d. Abuse of Process**

1136. Respondent finally submits that the Tribunal should decline to hear Claimants' claims, because by trying to inhibit the operation of Colombia's judiciary process, an abuse of process is being committed.<sup>1001</sup>

1137. The Tribunal disagrees.

1138. Claimants' claim is that certain measures adopted by Colombia's public administration (the *Contraloría*'s Decision and the filing of the Procedure for Contractual Annulment) breached the FET standard established in the BIT. The allegedly wrongful measures were performed by agencies of the Republic, and allegedly breached international law guarantees afforded by the Treaty. Claimants' allegations may be right or wrong – that is a question for the merits. But there is no indication that Claimants committed an abuse of process which would permit an early disposal of the claims.

1139. Respondent cites the *Rompetrol* award. That tribunal held the following:<sup>1002</sup>

"The Tribunal wishes to make it plain from the outset that it would be acutely sensitive to any well-founded allegation that the investment arbitration process before it was intended to (or was in fact operating in such a way as to) block or inhibit the legitimate operation of the State's inherent function in the investigation, repression and punishment of crime, including economic crime and corruption." [Emphasis added]

1140. The *Rompetrol* tribunal then went on to dismiss the respondent's inadmissibility objection.<sup>1003</sup>

1141. The findings in *Rompetrol* are *obiter dicta*, relate to criminal investigations, and resulted in the dismissal of Romania's inadmissibility objection<sup>1004</sup> – they do not support Respondent's case.

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1142. In sum, the Tribunal dismisses Respondent's Inadmissibility Objection-

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<sup>1001</sup> See section V.4.(1) *supra*.

<sup>1002</sup> *Rompetrol*, para. 152.

<sup>1003</sup> *Rompetrol*, para. 161.

<sup>1004</sup> *Rompetrol*, paras. 152-161.

## VI. MERITS OF THE CLAIMS

1143. The Tribunal has rejected three of Respondent's jurisdictional and inadmissibility objections and must now turn to the merits of Claimants' claims.

1144. At the Hearing, Claimants described that what they seek in the present arbitration "is very simple".<sup>1005</sup>

"That Colombia honor its word when it signed with Prodeco a contractual amendment which formed the incentive for a mine expansion and related infrastructure which cost hundreds of millions of dollars. Having received the benefit of that investment, Colombia cannot now turn its back on its solemn contractual commitments, put on its sovereign hat, and seek to unilaterally abrogate the rights contained in that Contract. If that were not the case, no contract signed with a sovereign State would be worth the paper it is written on. Such conduct is a textbook breach of the fair-and-equitable-treatment standard."

1145. More specifically, Claimants argue that by

- (i) starting the Fiscal Liability Proceeding and adopting the *Contraloría's* decision and
- (ii) filing the Procedure for Contractual Annulment and thereby seeking annulment of the Eighth Amendment

Colombia failed to provide Claimants with treatment consistent with the obligations set forth in Arts. 4(1) and 4(2) of the Treaty.<sup>1006</sup>

1146. Claimants also contend that Colombia has failed to observe its obligations with regard to Claimants' investment under Art. 10(2) of the Treaty.<sup>1007</sup> The Tribunal has already ruled, however, that it does not have competence to adjudicate claims to the extent they are grounded on the Umbrella Clause of the Treaty.<sup>1008</sup>

1147. The Tribunal will first summarize Claimants' position (**VI.1.**) and then Respondent's position (**VI.2.**) before analysing the issues and setting forth the reasons for its decision (**VI.3.**).

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<sup>1005</sup> HT, Day 1, p. 18, l. 22 – p. 19, l. 13.

<sup>1006</sup> C I, para. 187; Doc. H-1, p. 156.

<sup>1007</sup> C I, Section IV.C; C II, Section IV.C; HT, Day 1, p. 160, ll. 9-10.

<sup>1008</sup> See section **V.3.(3.2)** *supra*.



## **VI.1. CLAIMANTS' POSITION**

1148. Claimants explain that Art. 4(2) of the Treaty requires Colombia to accord FET to Claimants' investments.<sup>1009</sup> The Treaty does not define what constitutes FET. Claimants argue, however, that pursuant to Art. 31(1) of the VCLT, Art. 4(2) must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms, and in light of the object and purpose of the Treaty.<sup>1010</sup>

1149. Claimants point out that the contours of the FET standard have been developed by investment treaty tribunals over time. For instance, in the *Saluka* case,<sup>1011</sup> the tribunal concluded that the ordinary meaning of "fair" and "equitable" is "just", "even-handed", "unbiased", or "legitimate". Investment tribunals have also established that pursuant to the FET standard, the host State is required to ensure some essential features in its investment environment:<sup>1012</sup>

- Protection of the investor's legitimate expectations (1.): tribunals have held that when the host State creates expectations in the investor, these expectations are legitimate and are subject to protection. As held by the *Total* tribunal, legitimate expectations can arise from a variety of sources, including a contract, a concession or other commitments on which the investor is entitled to rely.<sup>1013</sup>
- Appropriate investment environment (2.): the host State must ensure an appropriate investment environment, by treating the foreign investment in a manner that is consistent, predictable, transparent, and not arbitrary.<sup>1014</sup> As enshrined in Art. 4(1) of the Treaty, the host State must not interfere with investments through unreasonable or discriminatory conduct.<sup>1015</sup> Finally, the State must act in accordance with the principle of good faith.<sup>1016</sup>
- Due process (3.): the host State must ensure that due process is accorded; this entails enabling an investor to present its case and to defend itself. A breach of due process must be objectively assessed and can occur even if there is no bias on the part of the State.<sup>1017</sup>

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<sup>1009</sup> C I, section IV.B.1; C II, para. 230.

<sup>1010</sup> C I, para. 178.

<sup>1011</sup> C I, para. 179, referring to *Saluka*, para. 298.

<sup>1012</sup> C I, paras. 180-186; C II, para. 231; HT, Day 1, p. 161, ll. 3-14.

<sup>1013</sup> C I, paras. 180-181; C II, paras. 232-234; HT, Day 1, p. 161, l. 15 – p. 162, l. 15, referring to *Saluka* and *Total*.

<sup>1014</sup> C I, para. 182, referring to *Metalclad*, para. 99; *MTD*, para. 163; *Tecmed*, para. 154; C II, paras. 246-248; HT, Day 1, p. 164, ll. 5-21.

<sup>1015</sup> C I, para. 184, referring to *CMS*, para. 290.

<sup>1016</sup> C I, para. 185, referring to *Tecmed*, para. 153.

<sup>1017</sup> C I, para. 183; C II, paras. 254-256.

1150. Claimants explain that the determination of “unreasonableness” or “unfairness” is not dependent upon the State’s motivation for taking the offending measures. FET is an objective standard that can be breached even if the State acted in good faith.<sup>1018</sup>

1151. Claimants submit that Colombia treated Claimants’ investment unfairly and inequitably and impaired it through unreasonable treatment, in violation of its obligations under the Treaty and customary international law.

**(1) FRUSTRATION OF LEGITIMATE EXPECTATIONS**

1152. According to Claimants, Colombia made specific commitments and assurances with respect to Claimants’ investments, which generated legitimate expectations, only then to breach those expectations.<sup>1019</sup>

1153. Claimants contend that the Eighth Amendment constituted Colombia’s core commitment, and that Claimants relied upon it to invest over USD 1 billion in Colombia since 2010. This Amendment was negotiated over a period of 20 months, was executed by Colombia’s Mining Agency and was registered with the national mining registry. The State Mining Agency gave three explicit commitments to Claimants in the Eighth Amendment:<sup>1020</sup>

- That Royalties on every additional 1 MTA of coal produced beyond 8 MTA would be subject to a marginal prorated 1% increase;
- That thresholds for the GIC payments would be indexed;
- That the Coal Reference Price for the liquidation of Royalties and GIC payments would be established using a lagging price formula reflecting reference prices from the previous three to eighteen months.

1154. The State Mining Agency reinforced these expectations by approving Prodeco’s 2010 PTI.

1155. Claimants argue that they legitimately expected that Colombia would honour these contractual commitments and act consistently with the representations given to Prodeco.<sup>1021</sup> Instead, through the actions of the *Contraloría* and the Mining Agency, Colombia repudiated and destroyed the commitments that it had negotiated and enshrined in the Eighth Amendment, after Claimants had made significant investments in reliance upon said Amendment, thereby frustrating Claimants’ legitimate expectations.<sup>1022</sup>

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<sup>1018</sup> C I, para. 186.

<sup>1019</sup> HT, Day 1, p. 162, ll. 16-19.

<sup>1020</sup> C I, paras. 188-191; HT, Day 1, p. 162, ll. 16-19.

<sup>1021</sup> C I, para. 191.

<sup>1022</sup> C I, paras. 192-194, 198; HT, Day 1, p. 162, l. 20 – p. 163, l. 8.

**A. The Contraloría's Conduct Contravened Claimants' Legitimate Expectations**

1156. Claimants argue that the *Contraloría's* decision to initiate and conduct the Fiscal Liability Proceeding, ultimately holding Prodeco fiscally liable, contravened Claimants' legitimate expectations, specifically that their investments would be treated in a consistent, predictable, and transparent manner.<sup>1023</sup>
1157. First, the *Contraloría's* Decision revoked the State's commitments under the Eighth Amendment for the year 2020. Colombia did not use its fiscal control powers in conformity with its usual function of supervising fiscal management of State resources, but rather to nullify, in effect, the commitments made in the Eighth Amendment.<sup>1024</sup>
1158. Second, the *Contraloría* acted unpredictably by adopting a decision which was radically incoherent and inconsistent with the conduct of other Colombian authorities. According to Claimants, there is no precedent for the *Contraloría's* decision to nullify an agreement with a specialized state entity concerning a large project like Prodeco's. Colombia also unilaterally withdrew the undertakings and assurances it gave Claimants to incentivize the investment in the expansion of the Mine.<sup>1025</sup>
1159. Third, the *Contraloría* applied different criteria to evaluate the Eighth Amendment from those considered by Ingeominas when negotiating and agreeing to it. The *Contraloría* also ignored that the Eighth Amendment had enabled the expansion of the Mine and that this expansion had been the basis of the negotiation between the parties.<sup>1026</sup>

**B. The ANM's Conduct Contravened Claimants' Legitimate Expectations**

1160. Claimants argue that the Procedure for Contractual Annulment, filed by the SGC/ANM, also repudiated the State's commitments under the Eighth Amendment and breached Claimants' legitimate expectations.
1161. This Procedure was started after Claimants, relying on the Eighth Amendment, had made significant investments. In the Procedure for Contractual Annulment, the Mining Agency argues that the Amendment should be nullified as being contrary to the State's general interest. According to Claimants, this directly contradicts the express representations given by Ingeominas upon the execution of the Eighth Amendment.<sup>1027</sup>

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<sup>1023</sup> C II, para. 259.

<sup>1024</sup> C II, para. 259(a).

<sup>1025</sup> C II, para. 259(b).

<sup>1026</sup> C II, para. 259(c).

<sup>1027</sup> C I, paras. 196-198; C II, para. 270(a); HT, Day 1, p. 163, l. 9 – p. 164, l. 1.

### **C. Rebuttal of Respondent's Arguments**

1162. As to Respondent's argument that contracts do not give rise to legitimate expectations, and that the breach of contractual expectations does not violate the FET provision, Claimants disagree. Investment case law has consistently recognised that contracts with a host State can give rise to legitimate expectations.<sup>1028</sup>

1163. Claimants recognise that not all contractual breaches violate the FET standard. Claimants argue, however, that in the present case the State did not just fail to perform a contract that it had previously recognised as binding; it sought the annulment of said contract. Claimants do not rely on "contractual expectations", but on the legitimate expectations protected under the Treaty, that Colombia generated by assuming explicit commitments and assurances towards the Claimants.<sup>1029</sup>

1164. Respondent also asserts that the State's enforcement of its legal, regulatory or control measures cannot amount to a breach of legitimate expectations. Claimants consider this allegation to be incorrect, since the VCLT expressly provides that a State may not invoke the provisions of its internal law as justification for its failure to perform a treaty. In addition, as held by the *Tecmed* tribunal, a State will frustrate an investor's legitimate expectations if it uses its legal and regulatory powers for a purpose other than that for which it was intended, to impair or deprive the investor of its investment.<sup>1030</sup>

#### **(2) FAILURE TO PROVIDE INVESTMENT ENVIRONMENT REQUIRED BY FET**

1165. Claimants further submit that Colombia has also breached the FET standard by frustrating Claimants' general expectation that Colombia would treat Claimants' investment in a transparent, consistent, and predictable manner, that Colombia would act in good faith, and that it would refrain from arbitrary or unreasonable treatment.<sup>1031</sup>

1166. Claimants note that the State has to act consistently between the branches of its government, as found in the *MTD* case. This means that the State as a whole must act coherently vis-à-vis the foreign investor.<sup>1032</sup> Claimants argue that this did not happen in the present case: Ingeominas executed the Eighth Amendment on the basis that it was in the interest of the State, only for the *Contraloría* arbitrarily to abrogate it on the basis of an opposite conclusion.<sup>1033</sup>

1167. Claimants contend that these findings are also supported by the finding of the *Occidental* decision, which held that confusion and lack of clarity in the actions of

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<sup>1028</sup> C II, paras. 236-237, referring to *Noble Ventures*, para. 182; *Toto Costruzioni*, para. 159; *Clayton et al.*, para. 282; *Murphy II*, para. 248.

<sup>1029</sup> C II, paras. 238-239.

<sup>1030</sup> C II, paras. 240-242, referring to *Tecmed*, para. 154.

<sup>1031</sup> C I, para. 199.

<sup>1032</sup> HT, Day 1, p. 165, ll. 6-13.

<sup>1033</sup> HT, Day 1, p. 165, ll. 14-19.

an administrative agency may result in some form of arbitrariness, even if not intended.<sup>1034</sup>

1168. Claimants aver that Colombia's agencies did not act consistently, predictably, and in good faith, for several reasons.

**A. The Contraloría's Decision was Non-Transparent, Arbitrary and Unreasonable**

1169. Claimants argue that the *Contraloría's* Decision, which led to the reversal of the Eighth Amendment, was non-transparent, arbitrary, unreasonable, and taken in bad faith for several reasons.<sup>1035</sup>

1170. First, the *Contraloría* found Prodeco guilty of negotiating and proposing the Eighth Amendment, and of not ensuring that Ingeominas properly analysed the consequences of the Eighth Amendment, as if Prodeco's role was that of the Colombian State's supervisory guardian and not that of a contractual counterparty. Ultimately, the *Contraloría* held Prodeco liable for the alleged misconduct of the State's mining agency. According to Claimants, holding a private company responsible for alleged failures of a State entity to perform its duties properly is unreasonable and arbitrary.

1171. Second, the *Contraloría's* Decision was based on the fact that several public officers allegedly failed to fulfil their duties. The Mining Agency never investigated any of those alleged wrongdoings, however. Only Prodeco was held liable by the *Contraloría*.

1172. Third, the *Contraloría* held that the Eighth Amendment was not in the State's interest, based on a narrow analysis of the first year of a long-term contract. This conclusion was reached despite the *Contraloría's* institutional guidelines requiring long-term analysis of long-term contracts; here the *Contraloría* illogically relied on the definition of "Transition Period" in the Mining Contract. Claimants submit that making a short-term analysis of the operation of a long-term contract is arbitrary and unreasonable.

1173. Fourth, the *Contraloría* reached its conclusions long before issuing the Decision and did not allow Prodeco to submit key evidence. Claimants argue that the *Contraloría's* actions involved prejudice, preference, and bias.

1174. In particular, the *Contraloría* committed many procedural irregularities in blatant disregard of Colombian law and the best practices reflected in the *Contraloría's* Evidence Manual. The *Contraloría* sought to manipulate the evidence so as to reach a pre-ordained and arbitrary conclusion.

1175. The *Contraloría* ignored the testimony of Ingeominas' officers, given under oath, that Ingeominas had properly analysed the Eighth Amendment. Instead, it relied

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<sup>1034</sup> HT, Day 1, p. 166, l. 21 – p. 167, l. 5.

<sup>1035</sup> C I, para. 202; C II, para. 259(d); HT, Day 1, p. 168, l. 6 – p. 170, l. 17.

almost exclusively on testimony from those same officers that contradicted their testimony given under oath. The *Contraloría* seems to have rewarded the officers who changed their testimony by dropping charges against them. Accordingly, Claimants submit that the *Contraloría*'s Decision was biased, rendered in bad faith, and subjective:

- The *Contraloría* did not act on the basis of legal standards, but repeatedly relied on its own discretion and preference to justify a finding of fiscal liability against Prodeco;
- The *Contraloría* exercised jurisdiction over Prodeco when it did not have such jurisdiction;
- The *Contraloría* did not base its actions on reasoned judgement.

1176. Finally, the *Contraloría*'s Decision required Prodeco to pay the Fiscal Liability Amount in order to avoid forfeiture of the Mining Contract as a whole. This amounted to a unilateral and coercive attempt to rewrite the negotiated terms of the Mining Contract.<sup>1036</sup>

**B. The State Mining Agency's Conduct was Arbitrary, Unpredictable, and Non-Transparent**

1177. Claimants also argue that the Mining Agency has conducted itself in an inconsistent, arbitrary, unpredictable, and non-transparent manner:<sup>1037</sup>

- On the one hand, after 20 months of negotiations, the State Mining Agency signed the Eighth Amendment in order to induce Claimants to make significant investments, claiming that the Amendment was in the State's interest because it would allow the expansion of the Mine; it registered the Eighth Amendment with the national mining registry, approved Prodeco's 2010 PTI and its officers then testified as to the benefits of the Eighth Amendment in the context of the Fiscal Liability Proceeding;
- On the other hand, after Claimants had made massive investments to expand the Mine, the Mining Agency, in direct contradiction with its prior conduct, sought to annul the Eighth Amendment, arguing that it reduced Colombia's royalty revenues for 2010 and 2011, even though it knew that the Amendment would bring significant benefits to the State in the medium to long term.

1178. Claimants further argue that the initiation of the Procedure for Contractual Annulment was non-transparent and arbitrary, since the Mining Agency sought unilaterally to withdraw the undertakings and assurances given to Claimants, without a reasoned judgement. The Mining Agency decided to request the nullity of the Eighth Amendment on the ground that it was not in the interest of the State,

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<sup>1036</sup> C I, para. 203.

<sup>1037</sup> C I, paras. 200-201; C II, para. 270(b); HT, Day 1, p. 170, l. 18 – p. 172, l. 8.

reneging its prior representations. There was no attempt to consult with Prodeco in good faith before taking such a drastic step.<sup>1038</sup>

1179. In light of these actions, Claimants submit that Colombia has failed to provide them with the investment environment required by the FET standard, in breach of Arts. 4(1) and 4(2) of the Treaty.<sup>1039</sup>

**C. Rebuttal of Respondent's Arguments**

1180. Claimants note that, contrary to what Respondent alleges, a State can breach the FET standard even if the measures it took were taken in good faith, for a legitimate purpose, and in accordance with its laws and regulations.<sup>1040</sup> Equally, a State may take measures which are arbitrary, even if not taken in bad faith.<sup>1041</sup>

1181. Claimants contend that it is not necessary to establish that Colombia acted in bad faith for this Tribunal to conclude that Colombia failed to accord FET to Claimants' investment. If Colombia had acted in bad faith, however, that would in itself evidence a breach of the FET.<sup>1042</sup>

1182. Finally, Claimants admit that there is no question that Colombia has a general right to exercise legal or regulatory review, but argue that such review, even if fully compliant with Colombian law and conducted in good faith, must be consistent with the international law obligation to provide FET. FET requires Colombia to act in a consistent, predictable, and transparent manner, and to refrain from arbitrary, unreasonable, or capricious conduct.<sup>1043</sup>

**(3) DENIAL OF DUE PROCESS**

1183. Claimants submit that due process is another essential feature of the investment environment required by the FET standard. This is an objective standard of treatment, by which a host State's legal and administrative system may be judged.<sup>1044</sup>

1184. Claimants contend that Colombia has denied Claimants due process in the Fiscal Liability Proceeding, in two primary ways.<sup>1045</sup>

**A. Prodeco Lacked a Proper Opportunity to Defend Itself**

1185. Claimants first argue that Prodeco was denied the opportunity to present evidence and to question witnesses, and consequently, to defend itself properly.<sup>1046</sup>

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<sup>1038</sup> C II, para. 270(c).

<sup>1039</sup> C I, section IV.B.3.b; HT, Day 1, p. 172, ll. 9-16.

<sup>1040</sup> C II, paras. 244-245.

<sup>1041</sup> C II, para. 248; HT, Day 1, p. 173, ll. 10-19.

<sup>1042</sup> C II, para. 251, referring to *Frontier Petroleum*, para. 300.

<sup>1043</sup> C II, para. 252.

<sup>1044</sup> HT, Day 1, p. 173, l. 20 – p. 174, l. 12.

<sup>1045</sup> C I, para. 204; C II, para. 260. See also, HT, Day 1, p. 174, l. 13 – p. 176, l. 17.

<sup>1046</sup> C I, para. 205; C II, para. 260.



- The *Contraloría* refused to admit the oral testimony of the independent experts presented by Prodeco, even though their testimony was directly relevant;
- The *Contraloría* refused to allow Prodeco to question the *Contraloría*'s technical team;
- The *Contraloría* refused to admit the testimony of Prodeco's employees who had carried out the technical analyses of the proposed Eighth Amendment, which Prodeco shared with the State's Mining Agency during negotiations.

**B. The *Contraloría*'s Decision was Biased**

1186. Claimants submit that the *Contraloría* did not act in an even-handed manner in its conduct of the proceedings. In fact, it conducted the proceedings with the aim of reaching a pre-ordained conclusion. This is evidenced by several facts:<sup>1047</sup>

- The *Contraloría* unfairly joined to the proceedings, and attached the assets and bank accounts of four civil servants; after those civil servants subsequently changed their prior sworn testimony by unsworn statements, the *Contraloría* released them on the grounds that their positions had not vested them with the requisite fiscal management powers to fall under the *Contraloría*'s jurisdiction in the first place; the *Contraloría* thus appears to have rewarded those officers who changed their testimony;
- The *Contraloría* ignored testimony given under oath in Prodeco's favour, and relied almost exclusively on unsworn testimony that was at odds with the testimony given under oath, but which supported the *Contraloría*'s charges; the *Contraloría* also failed to ask questions to seek the material truth regarding these testimonies;
- The *Contraloría* refused to allow Prodeco to present statements regarding the analysis of the impact of the Eighth Amendment on the basis that it was "superfluous", but admitted the testimony of a witness who had already testified multiple times before the *Contraloría*; in her fourth appearance, the witness changed her testimony so as to support the charges laid by the *Contraloría*.

1187. Furthermore, according to Claimants, the *Contraloría* conducted the Fiscal Liability Proceeding in a partial and non-transparent manner. Claimants argue that the *Contraloría* and Ms. Vargas had made up their minds to find Prodeco fiscally liable and were ready to bend applicable rules to achieve that outcome.<sup>1048</sup> Claimants suggest that the *Contraloría* wanted to "clean up" the irregularities surrounding the State Mining Agency. The *Contraloría* found, however, that other Colombian authorities were competent to investigate the irregularities concerning

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<sup>1047</sup> C I, paras. 206-209; C II, para. 260.

<sup>1048</sup> C II, paras. 261-262.

the Drummond and Cerro Matoso contracts, and Prodeco was the only mining company remaining under the *Contraloría*'s purview.<sup>1049</sup>

1188. According to Claimants, Ms. Morelli suggested in an interview of December 2013 that she had already decided that Prodeco was fiscally liable.<sup>1050</sup> Ms. Morelli had hand-picked Ms. Vargas to lead the Fiscal Liability Proceeding. In January 2014, after Ms. Morelli's declaration, Ms. Vargas rejected nearly all of Prodeco's requests to submit evidence. Claimants contend that both Ms. Morelli and Ms. Vargas ensured that Prodeco could not proffer exculpatory evidence that could change the determined outcome of the case.<sup>1051</sup>

1189. Finally, the *Contraloría*'s conduct was inconsistent with that of other State entities, such as the State Mining Agency and the decision of the Attorney General's office.<sup>1052</sup>

1190. Claimants conclude that this conduct, which is attributable to Colombia, destroyed Claimants' legitimate expectations, since Claimants saw their contractual rights nullified in a proceeding devoid of due process. It was the exact opposite of an even-handed and unbiased process based on appropriate and relevant considerations.

### **C. Rebuttal of Respondent's Arguments**

1191. Claimants note that Colombia does not dispute that a violation of due process may breach the FET standard. Colombia argues, however, that for a breach of FET to have occurred, the breach requires "severe bias", "must be manifest and it must offend judicial propriety". Colombia adds that administrative proceedings are subject to less demanding standards of due process than judicial proceedings.<sup>1053</sup>

1192. Claimants disagree. Case law cited by Claimants in their Memorial (*Deutsche Bank, Metalclad* and *Tecmed*) independently found that the host States had failed to provide due process in breach of the fair and equitable treatment standard and acted on the basis of bias. Commentary cited by Colombia confirms that due process reflects an objective standard of treatment, by which a host State's "legal and administrative system may be judged".<sup>1054</sup>

1193. Claimants further aver that Colombia's assertions regarding the due process standard allegedly applicable to this case are misguided, since they are based on cases concerning denial of justice<sup>1055</sup> or regulatory decision-making by administrative agencies<sup>1056</sup>— not administrative adjudication. Claimants deny that

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<sup>1049</sup> C II, paras. 263-264.

<sup>1050</sup> Referring to Doc. C-266.

<sup>1051</sup> C II, paras. 265-267.

<sup>1052</sup> HT, Day 1, p. 177, ll. 6-19.

<sup>1053</sup> C II, paras. 253-254.

<sup>1054</sup> C II, para. 255.

<sup>1055</sup> C II, para. 256, referring to *Arif*, para. 446 and to *Jan de Nul*, para. 195.

<sup>1056</sup> C II, para. 256, referring to *AES*, para. 9.3.41 and to *Tokios Tokelès*, para. 133.

administrative proceedings are subject to less demanding standards of due process. Claimants refer to the conclusions of the *Apotex* tribunal to support their position.<sup>1057</sup>

1194. According to Claimants, investment treaty case law has identified other due process failures that can amount to a breach of the fair and equitable treatment standard, such as “conduct [...] involv[ing] lack of due process leading to an outcome which offends judicial propriety – as might be the case with [...] a complete lack of transparency and candour in an administrative process”,<sup>1058</sup> “total lack of reasoning”,<sup>1059</sup> or a State “disregard[ing] its own rules”.<sup>1060</sup>

1195. Claimants conclude, in any event, that the analysis of a potential breach of the FET standard for failure to provide due process largely depends upon and must be adapted to the circumstances of each specific case.<sup>1061</sup>

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1196. In sum, Claimants argue that Colombia breached the FET standard and is liable to Claimants.<sup>1062</sup>

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<sup>1057</sup> C II, para. 257, referring to *Apotex*, para. 9.22.

<sup>1058</sup> C II, para. 258, referring to *Jan de Nul*, para. 187.

<sup>1059</sup> C II, para. 258, referring to *TECO Guatemala*, para. 458.

<sup>1060</sup> C II, para. 258, referring to *TECO Guatemala*, para. 457.

<sup>1061</sup> C II, para. 258.

<sup>1062</sup> HT, Day 1, p. 177, ll. 20-21.

## VI.2. RESPONDENT'S POSITION

1197. Respondent argues that Claimants' case rests on the assumption that Colombia's ordinary enforcement of its legal, regulatory, and control framework, which was already in place at the time of Claimants' investment, constitutes a breach of the Treaty. Respondent says that, essentially, Claimants' position is that:<sup>1063</sup>

- Claimants should not be subject to Colombia's ordinary control regime because "a large project like the Calenturitas mine" somehow deserves special treatment;
- Any review of the Eighth Amendment by an organ of the Colombia State, whether the *Contraloría* or the courts, constitutes a breach of international law.

1198. According to Respondent, if Claimants' position were true, any state action to enforce its legal, regulatory, and control framework would constitute a breach of the FET or non-impairment clauses.<sup>1064</sup> Respondent argues that foreign investors are not immunized from enforcement of domestic laws and regulations,<sup>1065</sup> especially not sophisticated multinational businesses such as Claimants, who knew about the Colombian legal, regulatory, and control environment.<sup>1066</sup>

1199. Thus, Respondent submits that Colombia's ordinary and reasonable actions in the Fiscal Liability Proceeding and in the Procedure for Contractual Annulment could not and did not breach Arts. 4(1) or 4(2) of the Treaty.<sup>1067</sup>

### Preliminary issue: new claims

1200. Respondent argues that in the Reply, Claimants have matched the various legal standards identified in the initial Memorial, with facts, and produced a largely new constellation of claims. These new claims include Claimants' allegations that:<sup>1068</sup>

- The *Contraloría's* Decision was inconsistent, unpredictable, and non-transparent;
- The *Contraloría's* Decision unreasonably withdrew the undertakings and assurances that Claimants had received;
- The *Contraloría's* Decision was not reasoned; and
- Mr. Paredes did not consult with Prodeco prior to initiating the Procedure for Contractual Annulment.

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<sup>1063</sup> R II, para. 579; HT, Day 2, p. 505, l. 14 – p. 506, l. 1.

<sup>1064</sup> R II, para. 579.

<sup>1065</sup> R I, para. 482; R II, para. 582; HT, Day 2, p. 508, ll. 4-13.

<sup>1066</sup> R I, para. 399.

<sup>1067</sup> R II, para. 579; HT, Day 2, p. 507, ll. 18-20.

<sup>1068</sup> R II, paras. 583-584.

1201. According to Respondent, all of Claimants' new allegations in the Reply are inadmissible, since ICSID Rule 31 establishes that the proper time to make allegations of fact and law is in the Memorial. Since Claimants' new allegations are untimely, they must be disregarded pursuant to ICSID Rule 26(3). Failure to do so would be contrary to Colombia's right to have two opportunities to respond with evidence.<sup>1069</sup>

1202. Respondent also argues that all of Claimants' allegations made in the Memorial that Claimants chose not to defend in the Reply must also be rejected, since it would be contrary to Colombia's procedural rights if Claimants were now allowed to introduce further arguments in defence of these claims, following their failure to do so in the Reply.<sup>1070</sup>

1203. In any event, Respondent considers that Claimants' case must fail since:<sup>1071</sup>

- Colombia acted in full compliance with Claimants' alleged legitimate expectations at all times **(1)**;
- The *Contraloría*'s Decision and the Procedure for Contractual Annulment, as ordinary regulatory and control measures, satisfied all requirements of the FET and impairment clauses **(2)**;
- The conduct of the *Contraloría* in the Fiscal Liability Proceeding fully respected any relevant standard of due process **(3)**; and
- Respondent finally adds that there was no violation of FET or of the impairment clauses on account of the ANDJE's submission of the Criminal Complaint.

#### **(1) NO BREACH OF LEGITIMATE EXPECTATIONS**

1204. Respondent notes that the concept of legitimate expectations does not appear in the terms of the Treaty and that Claimants have not explained how it could fall within the ordinary meaning of FET.<sup>1072</sup> Even if customary international law should be taken into account when interpreting the ordinary meaning of a Treaty term, according to customary international law, FET does not cover legitimate expectations.<sup>1073</sup>

1205. Respondent avers that even if the FET clause extended protection to legitimate expectations, Claimants' allegations would be no more availing, for two reasons:<sup>1074</sup>

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<sup>1069</sup> R II, paras. 585-586.

<sup>1070</sup> R II, para. 587.

<sup>1071</sup> R II, para. 588.

<sup>1072</sup> R I, paras. 403-404; R II, para. 592.

<sup>1073</sup> R I, para. 405.

<sup>1074</sup> R I, para. 406; R II, para. 593.

- First, because the allegations of a breach of FET are found solely on contractual expectations, and these cannot give rise to a Treaty breach (**A.**);
- Second, because any expectations that Claimants might have had from the Eighth Amendment must have included the possibility that Colombia would subject that contract to ordinary measures to enforce its legal and regulatory framework (**B.**).

**A. No Breach of Mere Contractual Expectations**

1206. Respondent says that Claimants' legitimate expectations arise directly from the Eighth Amendment and the contractual obligations it allegedly contained. However, contractual expectations are not protected by the FET clause of the Treaty.<sup>1075</sup>

1207. First, Respondent argues that an FET clause is not an umbrella clause, which would elevate any contractual breach into a Treaty breach.<sup>1076</sup> According to Respondent, Prof. Schreuer has established that if contractual expectations were admitted, the FET standard would be a broadly interpreted umbrella clause.<sup>1077</sup>

1208. Respondent says that a FET clause cannot be a broadly interpreted umbrella clause. That is even more so in a Treaty which contains an Umbrella Clause but excludes the Tribunal's competence to adjudicate disputes under said Clause.<sup>1078</sup>

1209. According to Respondent, these conclusions are confirmed by the *SAUR* tribunal and the line of decisions of which it forms a part, including *Parkering-Compagniets*, *Hamester*, *Bayindir*, and *Impregilo*.<sup>1079</sup> Similarly, the *UAB* tribunal rejected a claim for breach of FET on the ground that it was a contractual claim, brought under the veil of a breach of the investor's legitimate expectations.<sup>1080</sup>

1210. Second, Respondent holds that investors do not enjoy an unconditional right to legal or contractual stability absent a stabilization clause.<sup>1081</sup> Respondent recognizes that many investments are made through the vehicle of contracts. Yet Respondent argues, it does not follow that contractual expectations are the fundamental basis of FET claims in every international arbitration.<sup>1082</sup>

1211. Finally, Respondent finds that the case law invoked by Claimants – namely the *Noble Ventures*, and *Murphy* decisions – does not support the argument that

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<sup>1075</sup> R I, paras. 407-408.

<sup>1076</sup> R II, paras. 594-595.

<sup>1077</sup> R I, para. 409; R II, para. 596.

<sup>1078</sup> R I, para. 410; R II, paras. 596-597.

<sup>1079</sup> R I, para. 411; R II, para. 599, referring to *SAUR*, para. 483; *Parkerings*, para. 344; *Hamester*, paras. 334-337; *Bayindir*, para. 180; *Impregilo*, para. 294.

<sup>1080</sup> R II, para. 600, referring to *UAB*, paras. 846 and 853; and also to *Urbaser*.

<sup>1081</sup> R II, para. 601; HT, Day 2, p. 511, ll. 13-16.

<sup>1082</sup> R II, para. 602.

virtually every foreign investment and investment claim is based on a breach of contractual expectations.<sup>1083</sup>

1212. Respondent concludes that since Claimants have not put forth any supposed legitimate expectation other than the contractual expectations arising from the Eighth Amendment, Claimants do not have a claim under the FET standard.<sup>1084</sup> Indeed, the Eighth Amendment did not give rise to any expectations entitled to Treaty protection.<sup>1085</sup>

**B. No Breach Through Ordinary Legal, Regulatory and Control Measures**

1213. Respondent maintains, in any event, that the investor's expectations (if any) must include the possibility that the State will enforce its legal and regulatory framework.<sup>1086</sup>

1214. According to Respondent, not every ordinary measure of regulatory or legal enforcement carried out against a foreign investor can be considered to be an FET breach. If legitimate expectations exist at all, they must take into account the entire legal and regulatory framework of the State, including any ordinary review mechanisms, as well as the broader economic and social context in which the expectations were formed. These conclusions are supported by the *Total* and *Roussalis* tribunals.<sup>1087</sup>

1215. Respondent notes that Claimants rely on the *ECE* decision to try to demonstrate that they legitimately expected that the Colombian authorities would refrain from implementing the legal and regulatory framework. However, the *ECE* tribunal rejected the proposition that an administrative decision, even an erroneous one, can breach legitimate expectations.<sup>1088</sup>

1216. Respondent further submits that, since investors should not be treated by investment tribunals as if they were legally incapable, Claimants are presumed to have known the contents of the Colombian legal and regulatory system when investing in Colombia.<sup>1089</sup>

1217. Respondent finds that Claimants' argument pursuant to which the VCLT precludes Colombia from invoking the provisions of its internal law to justify a breach of the Treaty is unavailing. Respondent does not argue that its internal law is a circumstance that justifies or precludes the wrongfulness of the alleged Treaty breach. Colombia's argument is that the FET provision of the Treaty, when properly

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<sup>1083</sup> R II, paras. 603-606.

<sup>1084</sup> R I, paras. 413-414; R II, paras. 607-610.

<sup>1085</sup> R I, para. 414.

<sup>1086</sup> R I, para. 417; R II, para. 611.

<sup>1087</sup> R I, paras. 416-417; R II, para. 612, referring to *Total*, para. 149; *Roussalis*, para. 691; HT, Day 2, p. 509, ll. 3-16.

<sup>1088</sup> R II, para. 613, referring to *ECE*, para. 4.764; HT, Day 2, p. 509, l. 17 – p. 510, l. 1.

<sup>1089</sup> R II, para. 614.



interpreted, cannot preclude the State parties from the ordinary enforcement of their legal and regulatory frameworks.<sup>1090</sup>

1218. Respondent stresses that its argument is that an investor can have no legitimate expectation that the State will refrain from reasonable enforcement of its legal and regulatory framework, not that the State is exempted from a duty to respect legitimate expectations (although Colombia denies that any such duty is part of the FET standard).<sup>1091</sup>

1219. Respondent thus submits that it did not breach Claimants' expectations, because it merely took ordinary measures to enforce its legal and regulatory framework.<sup>1092</sup>

The Fiscal Liability Proceeding was an Ordinary Measure

1220. Respondent submits that the Fiscal Liability Proceeding was an ordinary legal and regulatory enforcement measure, which did not breach Claimants' legitimate expectations. Proceedings of fiscal liability are common within the Colombian legal framework and in other frameworks across Latin America. Claimants have submitted no evidence that they had expectations that they would not be subject to a review by the *Contraloría*.<sup>1093</sup>

1221. In a 234-page long reasoned decision, the *Contraloría* found that Prodeco's actions satisfied all of the elements of fiscal liability, namely that it had exercised "*gestión fiscal*" over public resources and had contributed through the Eighth Amendment to the "*lesión a los intereses del Estado*".<sup>1094</sup>

1222. According to Respondent, the *Contraloría*'s Decision was correctly based on two premises:<sup>1095</sup>

- First, that under Colombian law, the exploitation of non-renewable natural resources cannot be dissociated from the royalties that the private contractor has to pay to the State as consideration; this is why the *Contraloría* found that Prodeco was a fiscal manager of public goods;
- Second, that the *Contraloría* may initiate Fiscal Liability Proceeding against anyone who directly causes or contributes to damage to the public patrimony of the State; this is why the *Contraloría* made a reasoned judgement and concluded that it has jurisdiction over Prodeco.

1223. Respondent submits that even if it were true (which it is not) that Prodeco had no "decision-making power" over royalties and compensation, the *Contraloría* would nevertheless have had jurisdiction. Its jurisdiction extends not only to those who

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<sup>1090</sup> R II, paras. 616-618; HT, Day 2, p. 510, ll. 13-18.

<sup>1091</sup> R II, para. 619.

<sup>1092</sup> R I, para. 418; R II, para. 621.

<sup>1093</sup> R I, para. 419; HT, Day 2, p. 512, l. 16 – p. 514, l. 9.

<sup>1094</sup> R I, paras. 420-424; R II, paras. 622-325.

<sup>1095</sup> R I, paras. 428-431; R II, paras. 626-628.

exercise “*gestión fiscal*” but also to those who contribute to harming to the public patrimony of the State “*con ocasión de la gestión fiscal*”.<sup>1096</sup>

1224. Respondent says that, in any event, according to the *ECE* tribunal, it is not the role of an international tribunal to sit on appeal against the legal correctness or substantive reasonableness of individual administrative acts.<sup>1097</sup>

Procedure for Contractual Annulment was an Ordinary Measure

1225. Respondent argues that a state action before the courts to nullify a state contract is equally foreseeable in Colombian legislation and practice. The Procedure for Contractual Annulment involved ordinary legal recourse to the courts to review state contracts and so could not be contrary to Claimants’ legitimate expectations.<sup>1098</sup>

1226. Absent actions tantamount to denial of justice, it is no breach of FET to submit a contract for nullification, as follows from the *Azinian* tribunal’s conclusions.<sup>1099</sup> According to Respondent, this is simply the application of the general principle that domestic courts are competent to decide on questions of domestic law, absent a denial of justice.<sup>1100</sup>

1227. In any event, Respondent argues that the Procedure for Contractual Annulment could be expected under Colombian law and therefore could not breach Claimants’ legitimate expectations. Claimants do not deny that Colombian law, as most legal systems do, provides for the absolute nullity of a contract that is found to be contrary to mandatory law; and it permits the counterparty to a contract, whether the State or the private individual, to seek a declaration of its absolute nullity before the courts.<sup>1101</sup>

1228. Respondent submits that pursuant to the Colombian Code of Administrative Procedure, either party to a state contract (such as the Mining Contract) is expressly entitled to request a declaration of its absolute nullity. And Claimants have failed to deny that the Eighth Amendment would be null if it was contrary to Art. 84 of the 1988 Mining Code, which provides for equitable remuneration in exchange for mining rights.<sup>1102</sup>

1229. Finally, Respondent notes that only after the State Mining Agency sought conciliation of the controversy did it initiate its actions before the *Tribunal Administrativo de Cundinamarca*. The decision was taken after the Mining Agency was informed by the *Contraloría* that the Eighth Amendment had reduced the

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<sup>1096</sup> R I, paras. 425-427; R II, para. 630; HT, Day 2, p. 512, l. 20 – p. 513, l. 18.

<sup>1097</sup> R I, para. 424; R II, para. 628, referring to *ECE*, para. 4.764.

<sup>1098</sup> R I, para. 433; R II, para. 632.

<sup>1099</sup> R I, para. 434; R II, para. 633 referring to *Azinian*, para. 100; and to *Alghanim & Sons*, para. 350; HT, Day 2, p. 525, l. 10 – p. 526, l. 1.

<sup>1100</sup> R I, para. 435; R II, para. 634, referring to *OI European*, para. 491 and *Eli Lilly and Co.*, para. 224.

<sup>1101</sup> R I, para. 433; R II, paras. 636-637.

<sup>1102</sup> R I, para. 437-439; R II, para. 638; HT, Day 2, p. 525, ll. 2-9.

income under the Mining Contract and that the necessary studies had not been performed.<sup>1103</sup>

1230. In sum, Respondent says that there is no substance to the complaint that either the Fiscal Liability Proceeding or the Procedure for Contractual Annulment breached Claimants' alleged legitimate expectations.<sup>1104</sup>

**(2) COLOMBIA TOOK ORDINARY LEGAL, REGULATORY AND CONTROL MEASURES**

1231. Respondent also contests Claimants' allegations of arbitrariness, unreasonableness, or non-transparent conduct.

**A. The Contraloría's Decision was Consistent, Predictable, and Transparent**

1232. Preliminarily, Respondent reiterates its position that Claimants' arguments that the *Contraloría's* Decision was inconsistent, unpredictable, and non-transparent are inadmissible because they were advanced in an untimely manner. But even if Claimants' belated arguments were admissible, Respondent considers that they should be unsuccessful.<sup>1105</sup>

1233. According to Respondent, the enforcement of the existing legal and regulatory framework can be inconsistent, unpredictable, and non-transparent only when it is arbitrary and unreasonable.<sup>1106</sup> Respondent points out that Claimants are unable to define, much less to prove, when an ordinary enforcement measure is inconsistent, unpredictable, or non-transparent. In each of the cases cited by Claimants (*Lemire*, *MTD*, *Crystallex*) the enforcement actions were found to be inconsistent, non-predictable, and non-transparent only because the actions had been arbitrary or unreasonable.<sup>1107</sup>

1234. Respondent explains that the *UAB* tribunal recently held that actions to enforce laws and regulations do not violate the requirements of stability and predictability.<sup>1108</sup> Similarly, Respondent maintains that as the *Unglaube* tribunal concluded, investment tribunals should defer to state measures taken in furtherance of valid public policies, in the present case expressed in the legal and regulatory framework.<sup>1109</sup>

1235. According to Respondent, Claimants have left unaddressed and un rebutted Colombia's actual positions, having instead relied on an inaccurate account of Colombia's position:<sup>1110</sup>

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<sup>1103</sup> R II, para. 639.

<sup>1104</sup> R I, para. 442; R II, paras. 631 and 640.

<sup>1105</sup> R II, paras. 644-645.

<sup>1106</sup> R II, para. 645.

<sup>1107</sup> R II, paras. 649-650.

<sup>1108</sup> R II, para. 647, referring to *UAB*, para. 836.

<sup>1109</sup> R I, para. 477; R II, para. 648, referring to *Unglaube*, para. 246.

<sup>1110</sup> R II, para. 651.

- Colombia's position is that, whenever an ordinary enforcement action is consistent with the legal and regulatory framework, it is consistent, predictable, and transparent;
- Contrary to what Claimants say, Colombia does not try to justify failure to perform the Treaty; instead, it argues that the Treaty does not and cannot require a State to refrain from enforcement actions consistent with its legal and regulatory framework (unless arbitrary or unreasonable);
- Colombia does not argue that the FET standard includes only protections against arbitrary actions; it argues that consistency, predictability, and transparency standards, when applied to state enforcement actions, do not and cannot require more than reasonable and non-arbitrary conduct.

1236. According to Respondent, the relevant test to determine whether the *Contraloría's* Decision was predictable and consistent is to determine whether it acted in accord with the applicable legal and regulatory framework. And Respondent says it did. The fact that the *Contraloría* may have reached a different conclusion from other state authorities and based this decision on criteria of fiscal control is no indication of wrongdoing. It simply means that the *Contraloría* was doing its job.<sup>1111</sup>

1237. Respondent notes, in addition, that the officials from Ingeominas never represented that the *Contraloría* would refrain from reviewing the Eighth Amendment pursuant to its criteria for fiscal review.<sup>1112</sup> This review was entirely predictable (as well as coherent, consistent, and transparent) given the Colombian legal and regulatory framework. Given that Prodeco's actions caused illicit harm to state income, it was predictable that it would be subject to Fiscal Liability Proceeding.<sup>1113</sup>

1238. Respondent submits that it was also predictable that the *Contraloría* would evaluate the Eighth Amendment as it did. The Colombian legal framework permitted the *Contraloría* to analyse the economic effects of the Transition Period under the Eighth Amendment. Prodeco failed to prove an expansion of the Mine and consequent higher revenues. Nor had Ingeominas prepared a prior viability report on the potential future benefits from the Eighth Amendment, leaving it unestablished whether production levels would, in fact, increase, as Prodeco claimed.<sup>1114</sup>

1239. As to the lack of pursuit of officers by the Mining Agency, Respondent argues that this is irrelevant. The *Contraloría* held some of Ingeominas' decision-makers fiscally liable. And the Prosecutor, without questioning the *Contraloría's* Decision, concluded that the facts underlying the fiscal liability did not rise to the level of criminal action (although he did not have access to the Disputed Documents).<sup>1115</sup>

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<sup>1111</sup> R I, paras. 449-452; R II, paras. 653-654.

<sup>1112</sup> R II, para. 655.

<sup>1113</sup> R II, para. 656.

<sup>1114</sup> R II, paras. 657-658.

<sup>1115</sup> R II, para. 659.

1240. In sum, Respondent argues that the *Contraloría*'s Decision was consistent, predictable, and transparent with the legal and regulatory framework and the actions of other state entities.

**B. The *Contraloría*'s Decision was Transparent, Non-Arbitrary, Reasonable and Afforded Due Process**

1241. Respondent contends that the standard for demonstrating arbitrary, unreasonable, or capricious conduct is a very high one, requiring a demonstration of conduct that shocks or surprises a sense of judicial propriety, as is clear from the conclusions of the *Crystallex* tribunal.<sup>1116</sup>

1242. Respondent also points to the *Lemire* decision, in which that tribunal found that an arbitrary action substitutes "prejudice, preference or bias" "for the rule of law". And put together, an action is arbitrary or unreasonable if its prejudice, preference or bias shocks or surprises a sense of juridical propriety.<sup>1117</sup>

1243. According to Respondent, it is difficult to discharge the burden of proving this. Arbitrariness is especially difficult to prove when, as observed by the *Cargill* tribunal,<sup>1118</sup> it requires the second-guessing of state legal, regulatory, or control measures. Respondent says that the recent *Cervin* award further confirms that an application of the national normative framework is arbitrary only if it constitutes a deliberate repudiation of that framework, and even then, only if there are no domestic means available to correct that application.<sup>1119</sup>

1244. According to Respondent, Claimants had an obligation to prove prejudice, preference or bias that shocks or surprises a sense of judicial propriety, in order to determine that Respondent's conduct was arbitrary, unreasonable, or capricious. Yet, Claimants failed to do so. By any standard, the Fiscal Liability Proceeding were transparent, reasonable, and non-arbitrary.<sup>1120</sup>

1245. First, Claimants argue that Colombia unilaterally withdrew the undertakings and assurances it had given Claimants to incentivize an investment in the Mine. This is nothing more than a repackaging of Claimants' arguments on legitimate expectations. As the Fiscal Liability Proceeding did not breach any such legitimate expectations, they were not unreasonable.<sup>1121</sup>

1246. Second, Respondent submits that it is false that the *Contraloría* did not act based on legal standards, but instead relied on its own discretion. Prodeco's conduct with respect to the Eighth Amendment was within the *Contraloría*'s jurisdiction. In

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<sup>1116</sup> R I, para. 447; R II, paras. 661-662, referring to *Crystallex*, para. 577; HT, Day 2, p. 514, l. 19 – p. 515, l. 8.

<sup>1117</sup> R I, paras. 446-447; HT, Day 2, p. 515, ll. 9-14.

<sup>1118</sup> R I, para. 460; R II, para. 663, referring to *Cargill*, para. 292; see also, HT, Day 2, p. 515, l. 20 – p. 516, l. 5.

<sup>1119</sup> R II, para. 664, referring to *Cervin*, para. 527.

<sup>1120</sup> R II, paras. 665-669.

<sup>1121</sup> R II, paras. 671-672.

addition, Respondent argues that the *Contraloría* was legally permitted to focus its analysis on the economic effects of the Eighth Amendment's Transition Period. The economic terms for the Transition Period were not supported by any legal or economic justification. The appropriateness of relying on this period is confirmed by the fact that Prodeco did not provide evidence of a significant expansion of the Mine.<sup>1122</sup> In any event, the Tribunal cannot second-guess the economic reasoning of the *Contraloría*'s Decision.<sup>1123</sup>

1247. Third, Respondent finds that Claimants wrongly alleges that the *Contraloría* failed to base its actions on reasoned judgement. This argument should be dismissed because it is untimely. In any event, it is frivolous. The Fiscal Liability Proceeding concluded after a four-year proceeding that generated a record that is 4349 pages long. The *Contraloría* issued several reasoned evidentiary decisions. The *Contraloría*'s Decision was a 234-page document, with detailed and careful factual and legal analysis. Claimants do not dispute that the *Contraloría* did provide reasoning; they seem simply to disagree with the substance of that reasoning.<sup>1124</sup>

1248. Fourth, Claimants' allegation that the *Contraloría* was biased for its refusal to hear witness evidence, or that it reached conclusions before issuing the Decision, is unavailing. The *Contraloría* did not breach international or domestic norms when it excluded some of Prodeco's proposed evidence on a reasoned basis and in accordance with applicable evidentiary rules. The Colombian Supreme Court ultimately upheld all of the *Contraloría*'s evidentiary determinations.<sup>1125</sup>

1249. Even if the *Contraloría* had formed preliminary views at the time of its evidentiary decision, it hardly follows that it was biased or prejudged the matter. According to Respondent, it is normal for an adjudicator to form preliminary views during the course of a proceeding, especially when such proceeding lasts for three years.<sup>1126</sup>

1250. Finally, Respondent notes that Prodeco was not held liable for failure to act as the Colombian state's supervisor, but for its own conduct in negotiating the Eighth Amendment.<sup>1127</sup>

1251. Respondent also notes that in the Reply, Claimants seem to have abandoned their argument in the Memorial that the *Contraloría*'s Decision was made in bad faith because it "required Prodeco to pay the Fiscal Liability Amount [...] in order to avoid the forfeiture of the Mining Contract as a whole". Having abandoned this argument, Claimants should not be permitted to resuscitate it in the future.<sup>1128</sup>

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<sup>1122</sup> R I, paras. 459-463; R II, paras. 673-675.

<sup>1123</sup> HT, Day 2, p. 517, ll. 5-11.

<sup>1124</sup> R II, paras. 676-678; HT, Day 2, p. 516, l. 11 – p. 517, l. 4.

<sup>1125</sup> R II, paras. 679-682.

<sup>1126</sup> R II, para. 684.

<sup>1127</sup> R I, paras. 455-458; R II, para. 685.

<sup>1128</sup> R II, para. 680. See also R I, paras. 464-469.



**C. The Procedure for Contractual Annulment is Consistent, Predictable and Transparent**

1252. Respondent claims that it is no breach of the applicable FET standard for a state to submit a contract to its courts for review and possible annulment, unless such an ordinary action were arbitrary or unreasonable.<sup>1129</sup> Respondent argues that none of the Claimants' allegations about the Procedure for Contractual Annulment can succeed.
1253. First, Respondent notes that the core of Claimants' complaint is that the Mining Agency entered into the Eighth Amendment and then subsequently sought to have it annulled. This is nothing else than a restatement that the Mining Agency violated Claimants' legitimate expectations.<sup>1130</sup>
1254. In any event, the mere fact of concluding a contract cannot make it unfair and inequitable to subsequently seek annulment of that contract, especially for a counterparty that discovers a ground for nullity. The same applies to state contracts. The Colombian legislation allows state contracts to be submitted to the courts for review and possible annulment.<sup>1131</sup>
1255. In addition, Respondent argues that there was a fundamental change of circumstances between the moment when the Eighth Amendment was concluded and when the Mining Agency submitted it to the courts for annulment: the *Contraloría* had commenced its Fiscal Liability Proceeding, and found that there was a harm to the state income. It was on this basis that the Mining Agency challenged the validity of the Amendment.<sup>1132</sup>
1256. Second, Claimants' allegations that the Mining Agency failed to base its actions on a reasoned judgement should also be dismissed. The Mining Agency based its decision on evidence from the *Contraloría* that the Eighth Amendment had reduced state income and had not been subject to proper economic and technical studies.<sup>1133</sup>
1257. Third, Respondent contests Claimants' argument that the Mining Agency failed to consult with Prodeco prior to submitting the Eighth Amendment to the courts for annulment. The Mining Agency had no obligation to consult Prodeco. The *Swisslion* tribunal considered that the failure to engage the investor in and of itself was not sufficient to constitute a breach of FET.<sup>1134</sup>

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<sup>1129</sup> R I, para. 472; R II, paras. 687-688; HT, Day 2, p. 524, ll. 7-21.

<sup>1130</sup> R II, para. 689.

<sup>1131</sup> R I, para. 481; R II, paras. 690-693.

<sup>1132</sup> R I, paras. 473-475; R II, para. 693.

<sup>1133</sup> R II, paras. 695-697 and 702-703; HT, Day 2, p. 527, ll. 2-22.

<sup>1134</sup> R II, paras. 698-699, referring to *Swisslion*, para. 291.



1258. In any event, the Mining Agency commenced a formal conciliation procedure before the *Procuraduría*. During this procedure, the parties met to discuss a settlement, but to no avail.<sup>1135</sup>

1259. In sum, Respondent argues that the actions of the State Mining Agency were entirely reasonable under the circumstances.<sup>1136</sup>

### **(3) THE FISCAL LIABILITY PROCEEDING RESPECTED DUE PROCESS**

1260. Respondent notes that Claimants allege that the *Contraloría* conducted the Fiscal Liability Proceeding without according due process to Claimants, because of its treatment of evidence, the inclusion of civil servants in the proceedings and its bias. According to Respondent, none of these allegations make out a breach of international due process.<sup>1137</sup>

1261. Respondent says that the international due process standard is clear: FET is breached only by a “manifest disrespect of due process that [...] offend[s] a sense of judicial propriety”.<sup>1138</sup> Respondent submits that the high standard applies whether or not reference is made to denial of justice.<sup>1139</sup>

1262. Respondent further argues that it is particularly difficult for administrative proceedings to breach the due process standard. According to Respondent, Claimants have not been able to deny this proposition.<sup>1140</sup> Respondent submits that it is perfectly logical that administrative due process is less demanding than judicial due process, since administrative proceedings are designed to be more agile and efficient and are typically subject to subsequent review by courts. This was confirmed by the *Thunderbird* tribunal,<sup>1141</sup> cited with approval by the *Cervin*, *Philip Morris*, and *Convial Callao* tribunals.<sup>1142</sup>

1263. In addition, Respondent notes that Claimants have appealed the *Contraloría*’s Decision and are actively pursuing its annulment before the Colombian administrative courts. The Colombian courts are positioned to correct any deviations from Colombian procedural norms applicable to the Fiscal Liability Proceeding.<sup>1143</sup>

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<sup>1135</sup> R II, paras. 700-701.

<sup>1136</sup> R II, para. 705.

<sup>1137</sup> R II, paras. 706-707.

<sup>1138</sup> R I, para. 484; R II, para. 707, referring to *Arif*, para. 447; HT, Day 2, p. 518, ll. 6-11.

<sup>1139</sup> R II, para. 712, referring to *Jan de Nul*, para. 187; *Cervin*, para. 655; *Deutsche Bank*, para. 420; *Tokios Tokelès*, para. 133.

<sup>1140</sup> R I, para. 485; R II, paras. 713-714.

<sup>1141</sup> R II, para. 715, referring to *Thunderbird*, para. 200; HT, Day 2, p. 518, ll. 12-22.

<sup>1142</sup> R II, para. 715, referring to *Cervin*, para. 655; *Philip Morris*, para. 569; *Convial Callao*, fn. 427.

<sup>1143</sup> R II, para. 717; HT, Day 2, p. 519, ll. 1-14.

**A. No Breach of Due Process for Rejecting Evidence**

1264. Respondent finds that Claimants' argument, according to which the *Contraloría* breached due process because it did not allow Prodeco to submit additional evidence, is false.<sup>1144</sup>

1265. Respondent says that Claimants had extensive opportunities to present evidence and question witnesses during the four years of the proceeding, and that they took advantage of these opportunities. According to Respondent, the applicable standard requires that Claimants demonstrate a complete lack of any opportunity to present evidence or to question witnesses, or otherwise a severe bias, and Claimants have failed to demonstrate any of these elements of breach.<sup>1145</sup>

1266. Even cases invoked by Claimants (*Deutsche Bank, Metalclad, Tecmed*) found that due process was only breached when there was a complete lack of opportunity to be heard.<sup>1146</sup>

1267. In sum, the administrative due process standard is breached only when there is a complete lack of any opportunity to present evidence or question witnesses. Respondent submits that it granted Claimants extensive opportunities to argue, to present evidence, and even to challenge the *Contraloría's* Decision over the course of a multiyear process:<sup>1147</sup>

- Prodeco made at least seven distinct written submissions (and multiple oral submissions) to the *Contraloría* during the Fiscal Liability Proceeding; at least four of these were made after the *Contraloría* filed formal charges on August 2013;
- Prodeco submitted extensive evidence into the record of the Fiscal Liability Proceeding, including witness testimony, expert reports, and technical opinions.

1268. As to Claimants' complaint that the *Contraloría* did not admit into the record a handful of additional pieces of evidence, Respondent notes that the *Contraloría* admitted Claimants' proffered testimony from Ms. Natalia Amaya and declined to admit the rest of the new evidence in an extensively reasoned decision from 2014. These reasons included that the requests were legally impermissible, lacked legal basis, or were manifestly superfluous. In any event, Respondent finds that for an administrative adjudication to reject some, but not all, evidentiary submissions in a reasoned decision, does not violate international law.<sup>1148</sup>

1269. Respondent further notes that, at Prodeco's request, the Colombian Supreme Court reviewed and upheld the *Contraloría's* reasoned decision on evidence, finding that

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<sup>1144</sup> R II, para. 720.

<sup>1145</sup> R I, paras. 488 and 490; R II, paras. 720-723; HT, Day 2, p. 520, ll. 3-12.

<sup>1146</sup> R I, para. 489; R II, para. 723, referring to *Deutsche Bank*, para. 478; *Metalclad*, para. 91; *Tecmed*, para. 162.

<sup>1147</sup> R I, paras. 490-491; R II, paras. 725-726; HT, Day 2, p. 520, l. 21 – p. 521, l. 5.

<sup>1148</sup> R I, paras. 492-494; R II, para. 728.

Prodeco had been granted a proper opportunity to present evidence. The Supreme Court's judgment definitively establishes that the *Contraloría*'s evidentiary decision was legal and correct under Colombian law. It also definitively buries Claimants' allegation of violation of due process.<sup>1149</sup>

1270. Finally, Respondent avers that Claimants' reliance on the so-called *Contraloría*'s Evidence Manual is unavailing, since this manual did not even exist at the time of the *Contraloría*'s evidentiary determination (and was rejected as legally erroneous shortly after its enactment).<sup>1150</sup>

**B. No breach of Due Process for Joining Public Servants to the Proceedings**

1271. Respondent argues that it is untrue that due process was breached by the *Contraloría*'s decision to join four civil servants as defendants in the proceeding and to attach their assets.<sup>1151</sup>

1272. Respondent explains that the initial statements of the Ingeominas' officials were ordered at the request of Mr. Ceballos, who was a defendant in the Fiscal Liability Proceeding. During these statements, the officials made extensive reference to the Viability Report as justification for the conclusion of the Eighth Amendment. These four officials were subsequently joined to the Proceeding because they had authored the Viability Report. Indeed, the *Contraloría* determined that the Viability Report contained a poor and unsubstantiated feasibility analysis, referred to no other official documents for support, and contradicted prior reports that recommended against accepting the Eighth Amendment. All this indicated that the officials had possibly contributed to patrimonial harm to Colombia, which was sufficient to satisfy the standard under Colombian law to join them as defendants in the Fiscal Liability Proceeding.<sup>1152</sup>

1273. Respondent submits that the mere fact of consolidating proceedings does not breach the international due-process standard.<sup>1153</sup> Respondent asserts that Claimants' additional arguments should also be dismissed:

- Contrary to Claimants' assertions, the *Contraloría* did not fail to ask questions to seek the truth regarding the officials' testimonies; Law 610 of 2000 requires that anyone potentially subject to fiscal liability must be permitted to provide a "*libre y espontánea*" declaration, which is what the *Contraloría* allowed them to do;<sup>1154</sup>

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<sup>1149</sup> R I, para. 495; R II, paras. 731-733; HT, Day 2, p. 521, ll. 6-15.

<sup>1150</sup> R II, paras. 729-730.

<sup>1151</sup> R II, paras. 734-735.

<sup>1152</sup> R II, paras. 735-736; HT, Day 2, p. 522, ll. 3-9.

<sup>1153</sup> R II, para. 737; HT, Day 2, p. 521, l. 16 – p. 522, l. 2.

<sup>1154</sup> R II, paras. 739-740.

- Before this arbitration, Claimants had never argued that the *Contraloría* relied only on unsworn statements which were prejudicial for Prodeco;
- In any event, the *Contraloría* did not base its decision to hold Prodeco liable on the statements of the Ingeominas' officers, but rather on extensive documentary evidence; the statement of Ms. Aristizabal, for instance, is not once mentioned in the section of the *Contraloría's* Decision on Prodeco's liability; as to the limited references in the *Contraloría's* Decision to the other three officials' statements, these were not the basis of the decision.<sup>1155</sup>

1274. Respondent concludes that Claimants' allegations concerning the *Contraloría's* treatment of evidence lack merit.<sup>1156</sup>

### **C. Absence of Bias**

1275. Respondent notes that Claimants allege that the Fiscal Liability Proceeding were carried out "in a partial and non-transparent manner" and "in bad faith in order to reach its desired result [...]". Respondent considers that Claimants appear to be saying that the Fiscal Liability Proceeding breached due process as a result of bias.<sup>1157</sup>

1276. Colombia explains that "severe bias is necessary to breach the due process strand of the FET clause" and Claimants have failed to show any bias at all, much less severe bias.<sup>1158</sup>

1277. Respondent contends that it is impossible to infer any bias from the *Contraloría's* actions: the *Contraloría* exercised jurisdiction over Prodeco in accordance with Colombian law principles, conducted the Proceeding consistently with both international and domestic procedural norms, and determined in a reasoned decision applying the relevant law and regulations that the Transition Period of the Eighth Amendment was unlawful. There is no bias in these ordinary and legal actions.<sup>1159</sup>

1278. Respondent notes that Claimants' primary argument for bias is that the Fiscal Liability Proceeding were in such gross violation of Colombian law that it could not be explained except by a conspiracy to "get" Prodeco. Yet, Claimants have failed to satisfy their burden of proof in respect of this contention.<sup>1160</sup>

1279. Respondent finds that Claimants' accusations against Ms. Morelli and Ms. Vargas are devoid of any substance; the only evidence to which Claimants point is the other alleged breaches of due process that the *Contraloría* supposedly committed.<sup>1161</sup> Respondent avers that Claimants' made-for-arbitration argument that the Fiscal

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<sup>1155</sup> R I, paras. 500-501; R II, paras. 741-743.

<sup>1156</sup> R II, para. 744.

<sup>1157</sup> R II, para. 745.

<sup>1158</sup> R I, paras. 498-504; R II, paras. 746-747, referring to *Deutsche Bank, Metalclad*, and *Tecmed*.

<sup>1159</sup> R II, para. 748.

<sup>1160</sup> R II, para. 750.

<sup>1161</sup> R II, para. 749.

Liability Proceeding was in fact a conspiracy against them by Ms. Morelli and Ms. Vargas makes no sense.<sup>1162</sup>

- Ms. Morelli is a prominent and respected Colombian lawyer who has also sat as an arbitrator in three different ICSID proceedings; Ms. Vargas is an accomplished lawyer and public servant in her own right;
- Ms. Morelli was not even working at the *Contraloría* when the *Contraloría* Decision was issued on 30 April 2015;
- Ms. Vargas had not yet become involved in the Fiscal Liability Proceeding at the time when the Ingeominas' civil servants were joined to the Proceeding;
- Ms. Morelli's declarations in December 2013 prove nothing; by that time, the *Contraloría* had already issued formal charges against Prodeco.

1280. Respondent submits that, in any event, false conspiracy theories cannot satisfy the international standard for a due process breach, which is very high.<sup>1163</sup>

1281. In sum, Respondent submits that Claimants have concocted a conspiracy against them in order to give a modicum of plausibility to their claims of bias. But the conspiracy theory is implausible and no breach of due process can be found on this basis.<sup>1164</sup>

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<sup>1162</sup> R II, paras. 751-755; HT, Day 2, p. 522, l. 10 – p. 523, l. 8.

<sup>1163</sup> HT, Day 2, p. 518, ll. 4-6.

<sup>1164</sup> R II, para. 756.

### **VI.3. DECISION OF THE ARBITRAL TRIBUNAL**

1282. Claimants argue that Colombia breached its international law obligations assumed under Arts. 4 (1) and 4(2) of the Treaty by adopting two measures:

- the Fiscal Liability Proceeding, instituted by the *Contraloría* and resolved in the *Contraloría*'s Decision, which declared that Prodeco, by executing the Eighth Amendment, had incurred fiscal liability, and
- the Procedure for Contractual Annulment, filed by SGC/ANM (Ingeominas' successors) against Prodeco with the *Tribunal Administrativo de Cundinamarca*, seeking annulment of the Eighth Amendment.

1283. The Republic denies any wrongdoing.

1284. The Tribunal will first consider Respondent's procedural objections (1) and then will devote separate subchapters to the alleged responsibility of Colombia resulting from the actions of the *Contraloría* (2) and those of the SGC/ANM (3).

#### **(1) RESPONDENT'S PROCEDURAL OBJECTIONS**

1285. Respondent argues that in the Reply Claimants rewrote "the claims previously presented"<sup>1165</sup>.

1286. Respondent submits that Claimants introduced the following untimely new allegations:

- The claim that the *Contraloría*'s Decision was inconsistent, unpredictable, and non-transparent;
- The claim that the *Contraloría*'s Decision unreasonably withdrew the undertakings and assurances Claimants had received;
- The claim that the *Contraloría*'s Decision was not reasoned; and
- The factual allegation that Mr. Paredes did not consult with Prodeco before initiating the Mining Agency Proceedings.

1287. Respondent further argues that those new claims are inadmissible, because ICSID Rule 31 establishes that the proper time to make allegations of fact and law is in the Memorial. Claimants' new allegations are untimely and must be disregarded pursuant to ICSID Rule 26(3). Failure to do so would be contrary to Colombia's rights to have two opportunities to respond with evidence.<sup>1166</sup>

1288. Respondent also argues that all of Claimants' allegations from the Memorial that Claimants chose not to defend in the Reply must also be rejected, since it would be

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<sup>1165</sup> R II, para. 584.

<sup>1166</sup> R II, paras. 585-586.

contrary to Colombia's procedural rights if Claimants were now allowed to introduce further arguments in defence of these claims, following their failure to do so in the Reply.<sup>1167</sup>

### ICSID Rules

1289. ICSID Rule 31 establishes the content of the parties' main pleadings:

#### **"Rule 31- The Written Procedure**

"(1) In addition to the request for arbitration, the written procedure shall consist of the following pleadings, filed within time limits set by the Tribunal:

(a) a memorial by the requesting party;

(b) a counter-memorial by the other party;

and, if the parties so agree or the Tribunal deems it necessary:

(c) a reply by the requesting party; and

(d) a rejoinder by the other party.

[...]

(3) A memorial shall contain: a statement of the relevant facts; a statement of law; and the submissions. A counter-memorial, reply or rejoinder shall contain an admission or denial of the facts stated in the last previous pleading; any additional facts, if necessary; observations concerning the statement of law in the last previous pleading; a statement of law in answer thereto; and the submissions".

1290. And ICSID Rule 26(3) provides as follows:

#### **"Rule 26 – Time Limits**

[...]

(3) Any step taken after expiration of the applicable time limit shall be disregarded unless the Tribunal, in special circumstances and after giving the other party an opportunity of stating its views, decides otherwise".

1291. In Procedural Order No. 1, the Parties agreed on the presentation of two rounds of pleadings.

### Discussion

1292. Respondent's objection is dismissed for being totally devoid of merit.

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<sup>1167</sup> R II, para. 587.



1293. The objection is presented in a confusing manner: Respondent first complained that in the Reply Claimants submitted new claims, but later appeared to limit its complaint to Claimants' introduction of new legal and factual allegations.

1294. First, Respondent says that in their Reply Claimants introduced new claims with regard to FET and impairment.

1295. That is not so: Claimants' claims with regard to FET and impairment in the Memorial and in the Reply are identical.<sup>1168</sup> There is also no indication that Claimants have abandoned any claim.

1296. In a surprising contradiction, Respondent itself admits in the Rejoinder (the same document in which the procedural objection is argued) that in their essence Claimants' claims have not changed between Memorial and Reply:<sup>1169</sup>

"The heart of Claimants' case in the Reply remains the same as it was in the Memorial. Claimants complain that Colombia breached FET and impairment clauses of the Treaty because it failed to refrain from enforcing its legal and regulatory framework in the ordinary manner." [Emphasis added]

1297. Second, Respondent additionally submits that Claimants introduced in their Reply three legal allegation and one factual allegation, which (Respondent says) are new, thus breaching ICSID Rule 31(3).

1298. The Tribunal disagrees.

1299. Even if the four allegations were new, as Respondent submits, the introduction of those allegations in Claimants' Reply would not constitute a breach of ICSID Rule 31(3).

1300. ICSID Rule 31(3) defines on broad terms the content of a reply memorial. The Rule provides that a reply "shall contain":

- an admission or denial of the facts stated in the last previous pleading,
- any additional facts,
- observations on the statement of law in the last previous pleading,
- statements of law in answer thereto, and
- submissions.

1301. The three legal and one factual allegation impugned by Respondent fit within the scope of a reply memorial, as authorized by ICSID Rule 31(3),

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<sup>1168</sup> C I, para. 310 and C II para. 375; there is no difference regarding the merits claims; differences relate to the amounts of compensation claimed and the applicable interest rate.

<sup>1169</sup> R II, para. 581.

- because the legal allegations constitute “observations concerning the statement of law” in Respondent’s Counter-Memorial, or “statement of law” in answer to Respondent’s Counter-Memorial, and
- because the factual allegation fits within the category of “additional facts”.

**(2) THE ALLEGED RESPONSIBILITY OF COLOMBIA ARISING OUT OF CONDUCT OF THE *CONTRALORÍA***

1302. Claimants argue that the *Contraloría* treated Claimants’ investment unfairly and inequitably, in violation of the FET standard, and impaired such investment through unreasonable measures, resulting in a breach by Colombia of its obligations under Arts. 4(1) and (2) of the Treaty.<sup>1170</sup>

1303. Art. 4(1) of the Treaty requires Colombia to refrain from impairing the management, use, enjoyment and expansion of Claimants’ investments through unreasonable or discriminatory measures:<sup>1171</sup>

“Each Party shall protect within its territory investments made in accordance with its laws and regulations by investors of the other Party and shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale and, should it so happen, liquidation of such investments”. [Emphasis added]

1304. Art. 4(2) imposes a second obligation. Colombia must accord fair and equitable treatment [already defined as “FET”] within its territory to the investments of Swiss investors:<sup>1172</sup>

“Each Party shall ensure fair and equitable treatment within its territory of the investments of investors of the other Party. [...] .”

1305. Art. 4(2) provides an additional rule: the FET treatment must not be less favourable than the treatment granted to investments made by Colombian investors, or by investors of the most favoured nation, if this latter treatment is more favourable. Since Claimants do not allege a violation of this rule, it is unnecessary for the Tribunal to discuss it further.

1306. The Tribunal will separately analyse the claims that, through the conduct of the *Contraloría*, Respondent breached the FET obligation imposed by Art. 4(2) **(2.1)** and adopted unreasonable measures in violation of Art. 4(1) **(2.2)**.

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<sup>1170</sup> C I, para. 187.

<sup>1171</sup> Doc. C-6, Art. 4(1).

<sup>1172</sup> Doc. C-6, Art. 4(2).

## **(2.1) BREACH OF THE FET STANDARD**

1307. Art. 4 of the Treaty is headed “Protection and treatment”. Paragraph (2) of Art. 4 simply says that each State party “shall ensure fair and equitable treatment” to protected investments.

1308. Absent any further guidance from the Treaty itself, it is generally accepted that the obligation to afford fair and equitable treatment (FET) contained in a treaty is a requirement that host States abide by a certain standard of conduct *vis-à-vis* protected investors. The fair and equitable standard is a legal concept which, though typically not further defined, has a content that can be established by the rules of interpretation of the VCLT, aided by the jurisprudence of international tribunals. A host State breaches such minimum standard and incurs international responsibility if its actions (or in certain circumstances omissions) violate certain thresholds of propriety or contravene basic requirements of the rule of law, causing harm to the investor.<sup>1173</sup>

1309. The obligation to provide FET binds the State, and accordingly can be breached by the conduct of any branch of government. In principle, then, the FET standard *can* be breached *inter alia*

- By the executive or administrative branch or its separate agencies, by means of administrative acts that directly target the investor or the investment;
- By the State’s judicial system, as a whole, when it commits a denial of justice; or
- By legislation or regulation of general application which modifies the applicable legal framework to the detriment of the investor or the investment.

1310. The threshold of propriety required by FET must be determined by the tribunal in light of all the relevant circumstances of the case. To this end, the tribunal must carefully analyse and take into consideration all the relevant facts, among them the following factors:

- whether the host State has engaged in harassment, coercion, abuse of power, or other bad-faith conduct against the investor;
- whether the State made specific representations to the investor before the investment was made and then acted contrary to such representations;
- whether the State has respected the principles of due process, consistency, and transparency when adopting the measures at issue;
- whether the State has failed to offer a stable and predictable legal framework, in breach of the investor’s legitimate expectations.

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<sup>1173</sup> *Rusoro*, para. 523; *Glamis*, para. 616; *OI European*, para. 491.

1311. In evaluating the State's conduct, the Tribunal must balance the investor's right to be protected from improper state conduct against other legally relevant interests and countervailing factors. First among these factors is the principle that legislation and regulation are dynamic, and that (absent a treaty obligation to the contrary) States enjoy a sovereign right to amend their laws and regulations and to adopt new ones in furtherance of public interest, the conception of which can change over time. Other countervailing factors affect the investor: it is the investor's duty to perform an appropriate pre-investment due diligence review and to observe a proper conduct both before and during the investment.<sup>1174</sup>

1312. Claimants plead that Colombia, acting through the *Contraloría*, breached the FET standard in three ways:

- by denying Prodeco due process in the course of the Fiscal Liability Proceeding (A.)
- by acting with bias and bad faith (B.) and
- by breaching Claimants' legitimate expectations (C.).

**A. Due Process**

1313. As a first line of argumentation, Claimants say that the *Contraloría*'s conduct of the Fiscal Liability Proceeding denied Claimants' due process:

- First, the *Contraloría* decided to join four junior civil servants to the Proceedings, then attached their assets, and then agreed to release them once those civil servants had changed their prior sworn witness statements and in their new depositions incriminated Prodeco;
- Second, the *Contraloría* improperly denied Prodeco the opportunity to submit certain additional evidence in its defence.<sup>1175</sup>

1314. Respondent disagrees.

1315. The Republic argues that the *Contraloría* did not flout procedural rules in order to force Ingeominas' officials to change their testimony against Prodeco:<sup>1176</sup> it properly joined the officials to the Fiscal Liability Proceeding and then reasonably released them.<sup>1177</sup> Furthermore, to conclude the Prodeco had incurred fiscal liability Dra. Vargas relied on extensive documentary evidence – not on the versions *libres y espontáneas* of the civil servants.<sup>1178</sup>

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<sup>1174</sup> *Rusoro*, para. 525; *Lemire*, para. 285.

<sup>1175</sup> R II, para. 260.

<sup>1176</sup> R II, para. 284

<sup>1177</sup> R II, para. 302.

<sup>1178</sup> R II, para. 272

1316. As regards Claimants' second argument, Respondent says that the *Contraloría* excluded some of Prodeco's requests to adduce further evidence on a reasoned basis and in accordance with applicable evidentiary rules and such exclusions did not breach international law.<sup>1179</sup>

1317. The Tribunal will first analyse whether breaches of due process amount to a violation of the FET standard (a.), and then apply the principle to the present factual situation (b. and c.).

**a. Due Process as a Breach of FET**

1318. The rule of law requires that in judicial proceedings (administered by a court of law or a tribunal) and in administrative proceedings (administered by the public administration) due process be respected: the adjudicator, be it a judge, tribunal member, or administrative authority, must give each party a fair opportunity to present its case and to marshal appropriate evidence, and then must assess the submissions and the evidence in a reasoned, even-handed, and unbiased decision.<sup>1180</sup>

1319. It is undisputed that a breach of due process, whether in judicial proceedings or in administrative proceedings, may result in the violation of the FET standard.<sup>1181</sup> But the due process standard operates differently in different settings. In administrative proceedings, like those before the *Contraloría*, the decision-maker is often the investigator, the accuser, and the adjudicator, and a related officer (who may be the senior officer of the decision-maker) is often the one who rules on appeal. Due process does not require strict separation of these functions - provided that the final administrative decision is subject to full judicial review. The private individual must have an opportunity to have the case revisited, this time by an independent and impartial judge, with the guarantee of a formal adversarial procedure.

1320. Other investment arbitration tribunals have reached similar conclusions. In *Thunderbird*, the tribunal rejected the proposition that the due process standard necessarily requires a formal adversarial procedure.<sup>1182</sup> In *AES*, the tribunal accepted that the due process standard "is not one of perfection" and stated that

"[I]t is only when a state's acts or procedural omissions are [...] manifestly unfair or unreasonable (such as would shock, or at least surprise a sense of

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<sup>1179</sup> R II, para. 682.

<sup>1180</sup> C I, para. 183; *Deutsche Bank*, paras. 476-478; *Metalclad*, paras. 92-93; *Tecmed*, para. 162; *Mondev*, para. 127.

<sup>1181</sup> *Jan de Nul*, para. 187.

<sup>1182</sup> C. McLachlan, L. Shore, M. Weiniger, *International Investment Arbitration: Substantive Principles*, 2nd ed., 2017, para. 7.193 (Doc. RL-44). In *Thunderbird* (para. 200) the tribunal reached the conclusion that the due process standard in an administrative process is lower than in a judicial process, an issue that this Tribunal need not reach.

juridical propriety) [...] that the standard can be said to have been infringed.”<sup>1183</sup>

\* \* \*

1321. Claimants argue that two measures adopted by the *Contraloría* breached Prodeco’s right to due process:

- The *Contraloría*’s decision to join four civil servants to the Proceedings and to attach their assets, in order to force them to change their prior statements (**b.**);
- The *Contraloría*’s decision to deny Prodeco the right to submit additional evidence after Prodeco’s formal indictment (**c.**).<sup>1184</sup>

**b. The *Contraloría*’s Behaviour vis-à-vis Four Civil Servants**

**(i) Proven Facts**

1322. The facts can be summarized as follows:

1323. On 11 July 2012, the *Contraloría* took the decision to extend the investigation not only to the former Minister of Mines and to the former Director of Ingeominas, but also to four junior civil servants of Ingeominas (Ms. Aristizábal, Ms. Cabezas, Mr. Balcerro, and Ms. Gómez). A few days thereafter, the *Contraloría* ordered the attachment of the personal assets of each accused person, including the junior civil servants, for the totality of the allegedly outstanding damage – USD 29 M.

1324. One year later, between April and May 2013, Dra Vargas, the *Contralora Delegada* who was conducting the Fiscal Liability Proceeding, received the depositions of the four civil servants. Because those individuals were no longer witnesses but defendants in the Fiscal Liability Proceeding, under Colombian law they were not required to swear to tell the truth, lest they be placed in a position where they might incriminate themselves – they presented what in Colombian practice is known as a “*versión libre y espontánea*”.

1325. Except in the case of Ms. Aristizábal, these *versiones libres y espontáneas* (which have been summarized in section **III.(7).G supra**) were different, in important respects, from the officials’ prior sworn witness declarations, made in the initial phase of the procedure. The *versiones libres y espontáneas* of Ms. Cabezas, Mr. Balcerro, and Ms. Gómez confirmed that the Viability Report had been prepared after the signature of the Eighth Amendment and in general they incriminated Director Ballesteros.

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<sup>1183</sup> AES, para. 9.3.40; C. McLachlan, L. Shore, M. Weiniger, *International Investment Arbitration: Substantive Principles*, 2nd ed., 2017, para. 7.196 (Doc. RL-44).

<sup>1184</sup> R II, para. 260.

1326. In August 2013, Dra. Vargas issued the *auto de imputación*. She dismissed the accusation and closed the file with respect to Ms. Cabezas, Mr. Balcerro, and Ms. Gómez, but not with regard to Ms. Aristizábal, who was now formally indicted.
1327. Nine months later, in April 2014, Ms. Aristizábal made a new deposition before Dra. Vargas, this time also incriminating Director Ballesteros.
1328. The *Contraloría*'s Decision was issued in 2015. It convicted Director Ballesteros and acquitted Ms. Aristizábal.

(ii) Discussion

1329. The *proceso de responsabilidad fiscal* is a purely inquisitorial procedure, in which the *Contraloría* investigates the facts and then issues a decision. The inquisitorial character is reinforced by the fact that the same officer – in the present case Dra. Vargas – led the (major part of the) investigation, decided to indict or release individuals, and ordered preliminary attachments of the assets.<sup>1185</sup>
1330. Dra. Vargas indeed made full use of the extensive powers which the law vested in her. But Claimants have failed to prove that she used these powers in a manner to cause a breach of *Prodeco*'s right to due process.
1331. First, the persons affected by Dra. Vargas' decisions were primarily the four junior civil servants (who suffered the indictment and the attachment of their assets), and Dr. Ballesteros (who was incriminated by the new depositions and eventually was found guilty of fiscal liability) – but not *Prodeco*. The *Contraloría* did not support its decision to hold *Prodeco* fiscally liable on the *versiones libre y espontáneas* of the four junior civil servants. The *fallo* against *Prodeco* is based on documentary evidence, not on depositions by witnesses.
1332. Second, this conclusion is confirmed by the fact that, in the course of the Fiscal Liability Proceeding, *Prodeco* never voiced concerns about the changes in the successive depositions made by the civil servants.
1333. It follows that *Prodeco*'s due-process rights were not violated by Dra. Vargas' decision to join the junior civil servants and attach their assets or by the particular treatment given to Ms. Aristizábal. The right to be afforded due process, which is a component of the right to be afforded FET under the Treaty, is a personal right of *Prodeco*. Actions allegedly directed against and causing injury to third parties, even if those parties were co-defendants in the Fiscal Liability Proceeding, could not have breached Colombia's obligations owed to *Prodeco* under the Treaty.
1334. Third, the Tribunal additionally considers, by a majority, that Claimants have failed to prove that the *Contraloría*'s conduct regarding the four junior civil servants

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<sup>1185</sup> See section **III.(7).E** *supra*; Doc. C-18; Doc. C-19; Doc. C-20.



breached due process.<sup>1186</sup> Claimants imply that, after having joined the four junior civil servants to the case, Dra. Vargas offered them a *quid pro quo*: if you provide incriminating depositions against Director Ballesteros, the *Contraloría* will release you.

1335. There are only two indicia in the file which support this allegation:

- The case of Ms. Aristizábal: she initially failed to submit an incriminating deposition, was not released with the other three junior civil servants, and was eventually acquitted after having changed her deposition;
- The deposition of Minister Hernández: he stated under oath that, towards the end of the Fiscal Liability Proceeding, he received a phone call from “Jeswaldo Villeros”, who identified himself as a Director in the *Contraloría* and who proposed to meet Mr. Hernández outside of his office; Minister Hernández added: “I never wanted to agree to such a meeting, and a week later they found me guilty”.<sup>1187</sup>

1336. In the Tribunal’s opinion, by majority, the first indication is undermined by the fact that Ms. Aristizábal indeed had a more senior role in the negotiation of the Eighth Amendment than her colleagues: it was she who regularly briefed the *Consejo Directivo* of the progress of the negotiations and of Ingeominas’ views.

1337. As regards the second indication, the Tribunal agrees that it was highly irregular for a Director of the *Contraloría* to propose a secret meeting with a former Minister who had been indicted. Testifying under oath, Dra. Vargas denied having any involvement in or knowledge of Mr. Villeros’ telephone call.<sup>1188</sup> The meeting in any case never happened, according to the former Minister, and the mere telephone call is insufficient to prove Claimants’ allegation.

### **c. Denial of Request to Marshal Evidence**

1338. Claimants say that a second measure by the *Contraloría* infringed its due-process rights: the denial of a request to marshal additional evidence.

#### **(i) Proven Facts**

1339. The facts can be summarized as follows:

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<sup>1186</sup> Arbitrator Garibaldi disagrees with the majority’s conclusion on this point and the supporting analysis in paragraphs 1334-1337. In Mr. Garibaldi’s view, once the Tribunal has established that the *Contraloría*’s conduct regarding the four junior civil servants did not breach *Prodeco*’s due-process rights under the Treaty (paragraph 1333), it is unnecessary and inappropriate for the Tribunal to consider whether such conduct might have breached the applicable due-process standard in the abstract or *Prodeco*’s due-process rights if the conduct had been directed against or caused harm to *Prodeco*. In addition, the Tribunal has no competence to determine whether such conduct might have breached the due-process rights of *Prodeco*’s co-defendants.

<sup>1187</sup> HT, Day 4, p. 1128, ll. 10-17.

<sup>1188</sup> HT, Day 5, p. 1359, l. 13 - p. 1360, l. 1.

1340. After being indicted, Prodeco requested that some additional evidence be marshalled: a new expert report and the deposition of several witnesses. In a reasoned decision, the *Contraloría* rejected most of the request, accepting only the deposition of a single witness, with the argument that the new evidence was either superfluous or useless.

1341. Prodeco unsuccessfully challenged the *Contraloría*'s decision *en vía gubernativa* first before the *Contralora Delegada*, and then before the *Contralora General*. Thereafter, Prodeco filed an *acción de tutela* before the Colombian courts, which proved unsuccessful in first instance. Prodeco eventually appealed to the *Corte Suprema*, which reviewed the case and concluded:<sup>1189</sup>

“[...] dentro del proceso de responsabilidad fiscal no se ha vulnerado el derecho al debido proceso y a la defensa de la accionante;” [Emphasis added]

(ii) Discussion

1342. The Tribunal is not persuaded by Claimants' argument.

1343. The Tribunal understands Prodeco's dissatisfaction with the *Contraloría*'s stance. The request for the opportunity to submit additional evidence was made at the beginning of 2014, and the final Decision was not issued until April 2015. There would thus have been ample time to depose the witnesses proposed by Prodeco and to analyse the expert report which Prodeco proposed to incorporate. In hindsight, the *Contraloría*'s decision unnecessarily limited Prodeco's right to defend itself.

1344. That said, the Tribunal does not see any wilful or otherwise egregious breach of the foreign investor's due-process rights for which Colombia should assume international responsibility. The *Contraloría* duly reasoned its decision, the legal system permitted Prodeco to challenge the decision before the courts, which Prodeco did, and there is no allegation that, in finally dismissing Prodeco's appeals, the Colombian courts committed a denial of justice.

**B. Bias and Bad Faith**

1345. Claimants further submit that the *Contraloría* and Dra. Vargas had made up their minds to find Prodeco fiscally liable and were ready to bend applicable rules to achieve that outcome. In August 2010, immediately after President Santos took office, a new *Contralora General*, Ms. Morelli Rico, was appointed. The new *Contralora* took it upon herself to clean up alleged irregularities in Ingeominas, and reviewed contracts with Drummond, Cerro Matoso, and Prodeco. After excluding the first two, Prodeco was the only mining company remaining within the purview of Ms. Morelli's initiative. Claimants contend that Ms. Morelli hand-picked Ms. Vargas to run the Fiscal Liability Proceeding and to obtain a conviction of Prodeco.<sup>1190</sup>

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<sup>1189</sup> Doc. C-31, p. 9.

<sup>1190</sup> C II, para. 261.

1346. Claimants invoke a public interview in December 2013, in which Ms. Morelli Rico indicated that she had already prejudged her decision in the Prodeco investigation.

1347. Respondent rejects Claimants' accusations, labels them evidence-free character assassination, and explains that in the public interview Ms. Morelli simply explained that the *Contraloría* had already issued charges against Prodeco and that there was at least some evidence of fiscal liability.<sup>1191</sup>

**a. Bias as a Breach of FET**

1348. Bias of a decision maker results in a breach of the FET standard.<sup>1192</sup> A decision based on prejudice for or against a person or a group cannot be said to be fair and equitable. Case law confirms this conclusion, regardless of whether the biased decision maker is a court or an administrative authority. In *Deutsche Bank*, the Chief Justice acknowledged that the Supreme Court's decision in question had been issued for political motives – and the tribunal found that the FET standard had indeed been breached.<sup>1193</sup> In *Metalclad*<sup>1194</sup> the bias affected an administrative authority, the Town Council, and was caused by popular opposition to the investor's hazardous-waste landfill project.

1349. While the principle that bias is inconsistent with the FET standard is clear, applying that principle in a particular case is not always easy, because it must be established that the offending decision was substantially based on spurious inclination and prejudice, and not on other (valid) reasons. As in other cases of inherent difficulty in proving facts, the existence and effects of bias can be proved by direct evidence or by reasonable inferences drawn from proven indicia. Claimants base their allegation of bias on the public interview given by the *Contralora General* while the Fiscal Proceeding was underway.

**b. Proven Facts**

1350. On 12 December 2013, the *Contralora General*, Ms. Sandra Morelli, gave an interview to the weekly *Semana Sostenible*, which published a report of her activities and quoted several of her statements *verbatim*<sup>1195</sup>. The timing of the interview is relevant: the *Contraloría* had already issued the *auto de imputación* against Prodeco, and Prodeco had already filed its defence in October 2013. The final decision of the *Contralora Delegada* was still pending; it would be issued in 2015.

1351. Another important consideration is that the decision to be made by the *Contralora Delegada* might be subject to a *recurso de apelación*, which would be decided by

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<sup>1191</sup> R II, paras. 751-755.

<sup>1192</sup> C I, para. 183; R I, para. 498.

<sup>1193</sup> Doc. CL-92, para. 479.

<sup>1194</sup> Doc. CL-19, para. 92.

<sup>1195</sup> Doc. C-266.

the *Contralora General* herself. Hence it was for Ms. Morelli to have the final say regarding Prodeco's fiscal liability.

1352. The *Semana Sostenible* article refers to a variety of policies and measures adopted by the *Contraloría*. It devotes a single paragraph to the Prodeco file:<sup>1196</sup>

*“Así mismo, encontró que Prodeco, propiedad de Glencore Xstrata International y cuya actividad está basada en el carbón, no pagaba efectivamente las regalías y la suma, de acuerdo con el proceso que está en curso, asciende a cerca de 50 mil millones de pesos. «El tema es sorprendente, porque lo que hace la empresa es demandar al Estado por cobrar lo que aparentemente debió habersele pagado. Y digo aparentemente porque hay un principio de prueba, pero esto se definirá procesalmente», afirma Morelli”.*

1353. There is no evidence in the file that Ms. Morelli ever publicly denied the information provided by *Semana Sostenible* or the statements attributed to her.

1354. The paragraph quoted from the press article contains three statements attributed to the *Contralora General*:

- A first statement, where the newspaper states Ms. Morelli's opinion that Prodeco was not properly paying the royalties due under the Mining Contract, in an amount of almost COP 50 billion,
- A second statement, attributed *verbatim* to Ms. Morelli, expressing surprise that Prodeco was suing the state (presumably by filing this investment arbitration),
- A third statement, again literally attributed to her, that there was “*un principio de prueba*” against Prodeco, “*pero esto se definirá procesalmente*”.

### c. Discussion

1355. It is unfortunate that Ms. Morelli, the highest authority within the *Contraloría*, saw fit to make a public statement with regard to a file which was still being investigated, and where she would be called upon to make the final decision. It is even more unfortunate that she disclosed that Prodeco had failed to pay royalties (in an amount that almost reached COP 50 billion), and that there was “*un principio de prueba*” against Prodeco. Ms. Morelli did qualify her comments by saying “*esto se definirá procesalmente*”, that is, the matter will be definitively settled in the administrative process.

1356. Respondent tries to justify Ms. Morelli's public statement by arguing that the *Contraloría* had already indicted Prodeco, that there was at least some evidence of fiscal liability, and that Ms. Morelli was stating nothing more.<sup>1197</sup>

1357. The Tribunal agrees that an indictment can be issued only if the investigating officer of the *Contraloría* finds “*indicios*” (i.e. a “*principio de prueba*” or preliminary

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<sup>1196</sup> Doc. C-266, p. 2.

<sup>1197</sup> R II, para. 755.

evidence) of malfeasance. But the existence of preliminary evidence in the file supporting the indictment of Prodeco does not justify Ms. Morelli's public comments, which reveal not only her knowledge of the file but also her opinion that Prodeco was not properly paying royalties and owed almost COP 50 billion. Since that opinion dealt with the very issue that Ms. Morelli, as the highest authority within the *Contraloría*, was called upon to adjudicate on appeal, it appears that Ms. Morelli had already made up her mind, without having properly analysed Prodeco's defences and its arguments on appeal.

1358. Ms. Morelli's public statements were reprehensible and ill-advised, and if she had indeed ruled on appeal they might have breached the FET standard, but in the end they were inconsequential. In August 2014, Ms. Morelli left office, and was replaced by Mr. Maya as new *Contralor General*.<sup>1198</sup> It was Mr. Maya who reviewed and decided Prodeco's *recurso de apelación*.

1359. Claimants have not marshalled any evidence proving that either Ms. Vargas, the *Contralora Delegada* who approved the *Contraloría*'s Decision, or her superior, the *Contralor General*, Mr. Maya, who dismissed the *recurso de apelación*, had any bias against Prodeco or otherwise incurred in conduct which can be considered as acting in bad faith.

1360. For these reasons, Claimants' bias claim must be dismissed.

### **C. Legitimate Expectations**

1361. Claimants argue that the *Contraloría*'s decision to initiate and conduct the Fiscal Liability Proceeding, ultimately holding Prodeco fiscally liable, contravened Claimants' legitimate expectations:<sup>1199</sup>

- First, Colombia did not use its fiscal control powers in conformity with its usual function of supervising fiscal management of state resources, but to nullify, in effect, the commitments made in the Eighth Amendment for the first year;<sup>1200</sup>
- Second, the *Contraloría* adopted a decision that was radically incoherent and inconsistent with the conduct of other Colombian authorities, for which there is no precedent, and applied criteria to evaluate the Eighth Amendment different from those considered by Ingeominas when negotiating and concluding the Amendment;<sup>1201</sup>
- Third, the *Contraloría* ignored the fact that the Eighth Amendment had enabled the expansion of the Mine, that this expansion had been the basis of the negotiation between the parties, and that in the Eighth Amendment Ingeominas

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<sup>1198</sup> R II, para. 753.

<sup>1199</sup> C II, para. 259.

<sup>1200</sup> C II, para. 259(a).

<sup>1201</sup> C II, para. 259(b).

represented to Prodeco that the amendment “guarantees the interests of the State”.<sup>1202</sup>

1362. Respondent says *in limine* that legitimate expectations do not fall within the ordinary meaning of FET.<sup>1203</sup>

1363. Respondent then argues that Claimants’ legitimate expectations arise directly from the Eighth Amendment and the contractual obligations it allegedly contained; however, contractual expectations are not protected by the FET clause of the Treaty.<sup>1204</sup>

1364. Colombia adds that Claimants must be presumed to know the contents of the Colombian legal and regulatory system and cannot plead that their legitimate expectations did not take into account the ordinary functioning of that system.<sup>1205</sup>

1365. The Tribunal will first analyse the concept of legitimate expectations in general (**a.**); then it will summarize the legal framework which Colombia applies to administrative contracts in general and mining contracts in particular (**b.**); and thereafter it will discuss in separate sub-sections the three breaches alleged by Claimants: misuse of the *Contraloría*’s powers (**c.**), incoherence between different Colombian authorities (**d.**), and incoherence in the criteria used by Ingeominas and the *Contraloría* regarding the expansion of the Mine (**e.**).

#### **a. Legitimate Expectations Within the FET Standard**

1366. The Tribunal has already established that a State breaches the FET standard guaranteed in Art. 4(2) of the Treaty if it adopts measures that violate certain thresholds of propriety (including basic requirements of the rule of law), causing harm to the investor’s investment. The appropriate threshold of propriety requires a careful analysis of all the relevant circumstances, and the consideration of a number of factors.

1367. Among these factors are the frustration of an investor’s legitimate expectations.<sup>1206</sup> Such expectations arise when a State (or its agencies) makes representations or

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<sup>1202</sup> C II, para. 259(c).

<sup>1203</sup> R II, para. 592.

<sup>1204</sup> R II, para. 594.

<sup>1205</sup> R II, para. 614.

<sup>1206</sup> Arbitrator Garibaldi concurs in the use of the term “legitimate expectations” only in the understanding that it means the same as “objectively reasonable expectations.” Mr. Garibaldi does not accept the applicability of any unstated criterion of legitimacy other than objective reasonableness. In his view, the term “legitimate expectations”, though commonly used, is singularly infelicitous, because “legitimate” presupposes a criterion of legitimacy that is not always made explicit in the discussion of expectations protected by the FET standard. In ordinary language, a reference to “legitimacy” presupposes, expressly or tacitly, a legal, political, moral, religious, etc. criterion of legitimacy. Using the expression “legitimate expectations” without anchoring it to a criterion of legitimacy based on objective reasonableness leaves the term open to redefinition by changing the criterion of legitimacy to include or exclude expectations (on moral, political, religious or other grounds) and so distort the original meaning of the term. Mr. Garibaldi understands that when an investor’s expectations began to be considered as a factor in the FET analysis,



commitments or gives assurances, upon which the foreign investor (in the exercise of an objectively reasonable business judgement) relies, and the frustration occurs when the State thereafter changes its position as against those expectations in a way that causes injury to the investor.<sup>1207</sup> The protection of legitimate expectations is closely connected with the principles of good faith, estoppel, and the prohibition of *venire contra factum proprium*.<sup>1208</sup>

1368. A State can create legitimate expectations *vis-à-vis* a foreign investor in two different contexts. In the first context, the State makes representations, assurances, or commitments directly to the investor (or to a narrow class of investors or potential investors). But legal expectations can also be created in some cases by the State's general legislative and regulatory framework: an investor may make an investment in reasonable reliance upon the stability of that framework, so that in certain circumstances a reform of the framework may breach the investor's legitimate expectations.

1369. In the present case, this second type of legitimate expectations is not at issue, as Claimants do not allege that the general Colombian legal framework gave rise to legitimate expectations. Claimants' case is much more specific: when Colombia agreed to sign the Mining Contract, it is said to have created the legitimate expectation that the Republic would not repudiate the obligations assumed therein. These legitimate expectations were violated by an administrative act, the *Contraloría's* Decision, for which Colombia should assume international responsibility.

#### Respondent's first counter-argument

1370. Respondent says that the ordinary meaning of FET excludes any protection for legitimate expectations and invokes, as support, the separate opinion of Judge Nikken in *Suez*.<sup>1209</sup>

1371. The Tribunal does not agree with Colombia's position.

1372. Virtually unanimous case law identifies legitimate expectations of the investor as an important element of the FET standard.<sup>1210</sup> So does scholarly opinion.<sup>1211</sup> The

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the original idea was to refer to an investor's reasonable expectations, that is, expectations that an (objective) investor of ordinary prudence would have, as distinguished from the actual expectations of a particular investor. He believes that this is still the right concept, and this is the sense in which he understands the term "legitimate expectations".

<sup>1207</sup> C F Dugan, D Wallace Jr, N D Rubins and B Sabahi, *Investor-State Arbitration* (2008), p. 510 (Doc. CL-54); *Tecmed*, para. 154; *Cervin*, para. 509; *ECE*, paras. 4-762; *Parkerings*, para. 331.

<sup>1208</sup> *Thunderbird*, para. 147.

<sup>1209</sup> R I, para. 404; *Suez (Separate opinion by Judge Nikken)*, para. 21.

<sup>1210</sup> C I, para. 180; see e.g. *Saluka*, paras. 301-302 (calling legitimate expectations the "dominant element" of the fair and equitable treatment standard); *Lemire*, para. 264; *Suez*, para. 203.

<sup>1211</sup> C F Dugan, D Wallace Jr, N D Rubins and B Sabahi, *Investor-State Arbitration* (2008), p. 513 (Doc. CL-54); C. McLachlan, L. Shore, M. Weiniger, *International Investment Arbitration: Substantive Principles*, 2nd ed., 2017, para. 7.179 (Doc. RL-44).



only dissenting opinion seems to be that of Judge Nikken, who acknowledges that his position is contrary to the finding in “recent awards”.<sup>1212</sup>

Respondent’s second counter-argument

1373. Respondent submits a second counter-argument: Colombia contends that contracts between the investor and the State are incapable of creating legitimate expectations, and that consequently no treaty breach can result from an investor’s mere contractual expectations.<sup>1213</sup>

1374. Legitimate expectations arise out of representations, assurances, or commitments made by the State, on which the investor reasonably relies. The Tribunal has already concluded that, depending on the circumstances, such representations, assurances, or commitments can be generated by acts specifically addressed to the investor or by the general legislative framework. The Tribunal sees no difficulty in including State-investor contracts among the instruments which can generate such representations, assurances, and commitments:<sup>1214</sup> the essence of any contract is a reciprocal undertaking that each party will comply with the obligations stated therein.

1375. The question is not so much whether representations and assurances formalized in contracts generate legitimate expectations (they do), but rather whether the subsequent breach by the State of obligations undertaken by contract results in a violation of the FET standard.

1376. The *status quaestionis* has been summarized by Schreuer:<sup>1215</sup>

“It is unlikely that a view will prevail that sees each and every violation of a contract as a breach of the FET standard. Where the outer limits of FET with regard to contracts will be drawn is another matter. A formal repudiation of the contract by way of a sovereign act may not be the best criterion. In fact, an action that abrogates a contract through an act of *puissance publique* would probably more accurately be described as an expropriation. A more relevant test for the violation of the FET standard with respect to contracts would be whether the investor’s legitimate expectations regarding a secure and stable legal framework are affected. Not every violation of a contract would trigger a finding to this effect. [...].” [Emphasis added]

1377. The tribunal in *SAUR*<sup>1216</sup> reached a similar conclusion:

“*El estándar de TJE [...] es diferente del deber de los Estados de atenerse a su propia legislación y de cumplir los compromisos contractualmente asumidos frente a terceros. [...]. El Derecho internacional no cubre todo incumplimiento normativo o contractual de un Estado en todas las*

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<sup>1212</sup> *Suez (Separate opinion by Judge Nikken)*, para. 2.

<sup>1213</sup> *R I*, para. 408.

<sup>1214</sup> *Clayton et al*, para. 282.

<sup>1215</sup> Ch. Schreuer, “Fair and Equitable Treatment: Interactions with other Standards”, *Transnational Dispute Management*, Vol. 4, Issue 5, 2007, p. 20 (Doc. RL-56).

<sup>1216</sup> *Saur*, para. 483 (RL-14).

*circunstancias – en estos casos el perjudicado debe buscar protección a través del sistema judicial interno; la protección del APRI solo entra en vigor cuando la conducta del Estado, por su gravedad y trascendencia, y por el carácter soberano de los actos, es incompatible con el estándar internacional.” [Emphasis added]*

1378. Summing up, different kinds of acts and measures, including contracts between the investor and the State, can give rise to an investor’s legitimate expectations. But a mere contractual breach by the State will not *per se* result in a violation of the international law FET standard.<sup>1217</sup> An additional element (be it the special significance of the breach, an act of *puissance publique*, loss of a secure and stable legal framework, and so on) is required to trigger international responsibility.

#### **b. Colombian Legal Regime Applicable to State Contracts**

1379. To analyse Claimants’ argument that Colombia’s actions breached their legitimate expectations, it is necessary, as a preliminary step, to summarize the legal framework applicable to Colombian administrative contracts in general, and mining contracts in particular.

1380. The Colombian legal framework for mining contracts is idiosyncratic. The contractual relationship between a private party and the Republic (or any of its agencies) is simultaneously subject to two starkly different systems, ruled by different laws, administered by separate agencies, which wield different levels of power and pursue different (and sometimes conflicting) objectives:

- the first system is the law of contracts, administered by the Mining Agency, and subject to the competence of the *tribunales contencioso-administrativos* (i), and
- the second system is the fiscal liability regime, under the aegis of the *Contraloría* (ii).

##### **(i) Law of Contracts**

1381. Under the law of (administrative) contracts, the Mining Contract is considered as a “*contrato de aporte*”, governed primarily by the 1988 Mining Code<sup>1218</sup> and subsidiarily by the general rules on civil and commercial contracts,<sup>1219</sup> which cover (*inter alia*) the parties’ obligations, the consequences of a breach of such obligations, and the causes and effects of annulment.

1382. *Contratos de aporte* may include dispute resolution clauses. In the Mining Contract, the parties agreed that all disputes deriving from the Contract would be settled by

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<sup>1217</sup> *UAB*, paras. 846 and 853. see also *Waste Management II*, paras. 73 and 139.

<sup>1218</sup> Doc. C-1; Doc. R-16; CPHB, para. 8; *Contratos de aporte* continued to be generally governed by the 1988 Mining Code notwithstanding its derogation by Law 685 of 2001, Doc R-196, Art 351.

<sup>1219</sup> Consejo de Estado, Judgement of 2 December 2015 (Carbocol and Drummond), p. 21, Doc. R-300.

the Colombian courts (“*rama jurisdiccional del poder público colombiano*”), unless the parties agreed *ex post* to submit a dispute to domestic arbitration.<sup>1220</sup>

(ii) Fiscal Liability Regime

1383. One of the unusual characteristics of Colombian law is that administrative contracts, including *contratos de aporte*, are also subject to the so-called “*control fiscal*” (best translated into English as “treasury control”) by a specialized agency, the *Contraloría*.

1384. The requirement that the Republic’s use of public funds be subject to special control derives from the Constitution: pursuant to Art. 267 of the *Constitución Política*, fiscal control is a public function exercised by the *Contraloría*,<sup>1221</sup> an autonomous organ of the Colombian State, in charge of supervising the use of funds by the state treasury.<sup>1222</sup>

1385. The *Contraloría*, which is governed by Law 610 of 2000, has sweeping powers to initiate and conduct a so-called “Fiscal Liability Proceeding”, not only against civil servants, but also against private individuals, provided that these individuals exercise public functions or use assets of the Nation.<sup>1223</sup>

“[...] *determinar y establecer la responsabilidad de los servidores públicos y de los particulares, cuando en el ejercicio de la gestión fiscal o con ocasión de ésta, causen por acción u omisión y en forma dolosa o culposa un daño al patrimonio del Estado*”. [Emphasis added]

1386. The extension of fiscal liability to private individuals has been upheld by the Colombian Constitutional Court.<sup>1224</sup>

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<sup>1220</sup> Doc. C-2, Clause 32.1.

<sup>1221</sup> Doc. C-68, Art. 267: “*El control fiscal es una función pública que ejercerá la Contraloría General de la República, la cual vigila la gestión fiscal de la administración y de los particulares o entidades que manejen fondos o bienes de la Nación*”.

<sup>1222</sup> Doc. C-68, Art. 267; Doc. C-72, Arts. 1 and 3.

<sup>1223</sup> Doc. C-71, Art. 1; Doc. C-72, Art. 4.12.

<sup>1224</sup> The Colombian Constitutional Court explained in Judgment T-1012/08 (Doc. R-192, p. 2), “*En relación con la interpretación de las normas constitucionales y legales y, en especial, respecto de la calidad de destinatario del proceso fiscal del particular contratista con el Estado, tanto la jurisprudencia de la Corte Constitucional como la del Consejo de Estado, ha sido enfática en sostener no sólo que los contratistas con el Estado son sujetos de vigilancia fiscal, sino también que el control sobre la gestión adelantada por las autoridades públicas y los particulares en la contratación pública se justifica por la naturaleza misma del control fiscal que fue diseñado para defender el erario público y garantizar la eficiencia y eficacia los recursos públicos*”. Similarly, the Constitutional Court in Judgment C-840/01 (Doc. R-37, p. 18) held that “*la esfera de la gestión fiscal constituye el elemento vinculante y determinante de las responsabilidades inherentes al manejo de fondos y bienes del Estado por parte de los servidores públicos y de los particulares. Siendo por tanto indiferente la condición pública o privada del respectivo responsable, cuando de establecer responsabilidades fiscales se trata*”.

### Requirements

1387. The requirements for the establishment of fiscal liability mirror those for extra-contractual responsibility:

- (i) a “*conducta dolosa o culposa*” by the civil servant or the private individual engaged in “*gestión fiscal*”,
- (ii) which causes patrimonial damage to the Republic, and
- (iii) a causal link between the conduct and the damage.<sup>1225</sup>

1388. This derives from Art. 5 of Law 610 of 2000, which provides that:<sup>1226</sup>

*“La responsabilidad fiscal estará integrada por los siguientes elementos:*

- *Una conducta dolosa o culposa atribuible a una persona que realiza gestión fiscal.*
- *Un daño patrimonial al Estado.*
- *Un nexo causal entre los dos elementos anteriores”.*

1389. The fiscal liability procedure is a purely administrative and inquisitorial procedure, in which the *Contraloría* investigates the facts and then issues a decision (*fallo*), which can be appealed first “*en vía gubernativa*” (before the administration) and thereafter to the *tribunales contencioso-administrativos* (specialized courts having competence on administrative matters).

1390. If the investigation by the *Contraloría* concludes that fiscal liability has indeed been engaged, the consequence is that the civil servant or private individual must pay compensation equal to the damage suffered by the State.<sup>1227</sup>

### (iii) Fiscal Liability in Administrative Contracts

1391. Fiscal liability can also arise when a private individual enters into a contract with the Colombian State or with any of its agencies. Liability will extend not only to the civil servants and other officers who authorized the contract, but potentially also to the private counterparty – even if the counterparty has duly performed its side of the bargain.

1392. Fiscal liability does not require the violation of any norm, the breach of any contractual commitment, or any illegality affecting the contract. Its requirements are the same as those of a generic tort (*damnum injuria datum*): liability is engaged whenever a private individual incurs in *conducta dolosa o culposa* when

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<sup>1225</sup> Doc. C-71, Arts. 4 and 6.

<sup>1226</sup> Doc. C-71, Art. 5.

<sup>1227</sup> Doc. C-71, Art. 4.

negotiating, executing, or performing a contract, and such behaviour causes damage to the State.

1393. Conversely, the *Contraloría*'s decision has no impact on the contract, which continues in full force and effect, and has to be complied with by the private party and by the public party.<sup>1228</sup>

(iv) Precedents

1394. The Tribunal asked the parties to identify published precedents where the *Contraloría* declared the fiscal liability of a private counter-party which had entered into a contract with the Colombian State and had ordered such counter-party to restitute to the State amounts accrued and paid under the contract.

1395. Respondent has drawn the attention of the Tribunal to the following precedents:

Decision 015

1396. The leading case in this matter seems to be Decision 015 of 15 April 2002, [**“Decision 015”**], issued two years after the enactment of Law 610 of 2000.<sup>1229</sup> In that case the *Contraloría* analysed two separate contracts:

1397. First: the company Aurea Ltda. had signed a contract with the *Cámara de los Representantes* for the creation of an inventory of assets. The *Contraloría* initiated a fiscal liability procedure against Aurea Ltda., the President of the *Cámara de Representantes*, and certain civil servants. The *Contraloría* concluded that Aurea Ltda. had breached its contractual obligations, and that such breach implied “*conducta culposa*”, causing the *Cámara de Representantes* to forfeit the advance payment.<sup>1230</sup> Aurea Ltda. (together with the President and certain civil servants of the *Cámara*) was ordered to pay the damage caused to the Republic.

1398. Second: Implegráficas Cabrini, a firm owned by a certain Mr. Cabrera, had sold paper to the *Cámara de Representantes* and, taking advantage of the lack of knowledge and diligence of the civil servants, had applied a price which exceeded market prices by 100%.<sup>1231</sup> The *Contraloría* found that the firm had incurred in *mala fe* and *dolo*, by quoting prices which were exaggerated. The *Contraloría* made the following statements:

*“El señor CABRERA VEGA no estaba en ejercicio de su actividad privada o particular, estaba contratando con el Estado y esto le generaba obligaciones, las que consistían en coadyuvar a cumplir los fines esenciales del Estado, tenía esa importantísima función social y por ende era su obligación actuar con lealtad; lealtad hacia el Estado en el que él mismo se desenvuelve y respecto del cual él mismo se sirve.*

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<sup>1228</sup> Doc. C-35, p. 41.

<sup>1229</sup> Doc. RL-208.

<sup>1230</sup> Doc. RL-208, p. 48.

<sup>1231</sup> Doc. RL-208, p. 50.

*Colombia es un Estado Social de Derecho y como tal impone obligaciones y deberes no solo a sus servidores sino también a los particulares que se desenvuelven dentro del territorio nacional. Por eso, el artículo 3 de la ley 80 de 1.993, preceptua como obligación para los particulares cuando contratan con el Estado, además de su derecho a obtener utilidades, las que están protegidas por el mismo Estado, colaborar en el logro de sus fines sociales, **cumpliendo una función social que como tal, implica obligaciones**".* [Emphasis added, bold in the original]

1399. The *Contraloría* used the following definition of *dolo*:<sup>1232</sup>

*"Pregunta [el Sr. Cabrera] dónde está la mala fe, se le responde que es precisamente en esa actitud mezquina y de desapego en donde está la mala fe, en donde está el dolo, su mala intención de aprovecharse de unas circunstancias erradas para sacar mayor provecho y mayor lucro del que las reglas del mercado en ese momento le estaban ofreciendo".* [Emphasis added]

1400. The consequence of the *Contraloría*'s finding was that the President of the *Cámara*, certain civil servants, Implegráficas Cabrini, and Mr. Cabrera himself were jointly ordered to compensate the damage caused to the State.

#### Other Decisions

1401. Decision 015 became a leading case and led to numerous decisions in which the *Contraloría* held private parties fiscally liable for failing to provide the services for which they had been retained by public entities or for embezzling funds advanced by public entities.<sup>1233</sup>

1402. One of the cases is Decision 013 of 2011, in which the *Contraloría* held a bank fiscally liable for breach of a checking account contract. The *Consejo Superior de la Judicatura* – the owner of the checking account – had expressly requested that significant checks be confirmed before payment. Banco Popular failed to do so, and was made responsible of the damage caused:<sup>1234</sup>

*"[...] el actuar negligente del Banco al incumplir con los deberes contractuales establecidos para la operación cambiaria, como lo era la confirmación de los cheques previa a su monetización".*

1403. Another group of cases refers to construction contracts. The *Contraloría* repeatedly held private contractors responsible for the damage to the State, caused by breach of contractual obligations.<sup>1235</sup>

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<sup>1232</sup> Doc. RL-208, p. 50.

<sup>1233</sup> Cases are summarized in RPHB, para. 86 (Doc. RL-211; Doc. RL-204; Doc. RL-219; Doc. RL-220).

<sup>1234</sup> Doc. RL-207, p. 27.

<sup>1235</sup> Cases are summarized in RPHB, paras. 99-101. In CPHB, para. 50 Claimants submit that, further to Decision 015 there is only one further precedent, namely Decision 130 of 2012 (Doc. RL-200), in which the *Contraloría* criticized the price set out in a State contract, adding that "importantly in that decision the *Contraloría* only held the agent of the State party liable". This conclusion is contradicted by Decision 130,



1404. Summing up, at least since Decision 015, adopted in 2002, the *Contraloría* has been regularly using its fiscal powers to review administrative contracts entered into between the State, including its agencies, and private individuals.
1405. In this process of review, the *Contraloría* has frequently focused not only on the officials who negotiated or authorized the transaction, but also against the private party that contracted with the State. The *Contraloría* has concluded that the private counterparty had indeed incurred fiscal liability (jointly with the officials) when obligations were breached, excessive prices were applied, or public funds were embezzled.
1406. In reaching these conclusions, the *Contraloría* adopted an expansive interpretation of the concepts of *culpa* and *dolo*, and of the good faith obligation owed by private contractors *vis-à-vis* the State.
1407. The Tribunal will now analyse Claimants' claim that the *Contraloría* violated their legitimate expectations in three ways: misuse of fiscal powers (c.), inconsistent conduct (d.), and expansion of the Mine (e.).

**c. First Alleged Violation: Misuse of Fiscal Control Powers**

1408. Claimants argue that Colombia violated their legitimate expectations because the Republic did not use its fiscal control powers in conformity with their usual function of supervising fiscal management of state resources, but rather effectively to nullify the commitments in the Eighth Amendment for the year 2010.<sup>1236</sup>

Discussion

1409. Claimants' contention has two aspects: (i) that they had legitimate expectations that the fiscal control regime would not be applied to Prodeco or the Eighth Amendment, and (ii) that they had legitimate expectations that the fiscal control regime would not be applied to Prodeco in an abusive, improper, or unreasonable manner.
1410. With regard to the first aspect of Claimants' contention, the Tribunal considers that Claimants have failed to prove that their legitimate expectations were frustrated by the mere fact that the fiscal control regime was applied to Prodeco and the Eighth Amendment.
1411. Prodeco and Ingeominas discussed the content of the Eighth Amendment between 2008 and January 2010. During those negotiations, Prodeco, a sophisticated company using in-house and outside counsel, was aware (or must be deemed to have been aware) of the idiosyncratic nature of the Colombian legal regime applicable to administrative contracts in general and to *contratos de aporte* and their amendments in particular:

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which on p. 55 and on p. 103 (the very pages quoted by Claimants) comes to the opposite conclusion and declares the fiscal responsibility of the private party. Given the clear wording of the Decision, the Tribunal wonders how this apparent mistake could creep into Claimants' submission.

<sup>1236</sup> C II, para. 259(a).



- On one side, Prodeco must be taken to have assumed that in due course Ingeominas (or its successor) could raise disputes against Prodeco, including claims regarding the validity of the contract, before the domestic administrative courts, as agreed upon in the dispute-resolution clause of the Mining Contract;
- On the other side, Prodeco (after enactment of Law 610 of 2000 and adoption by the *Contraloría* of Decision 015 in 2002 and the line of decisions which follow this precedent) must be taken to have envisaged the possibility that the supervisory agency might review the Eighth Amendment, find that Prodeco acted with *dolo* or *culpa* in the negotiation or execution of the Amendment, and order Prodeco to compensate the damage caused to the State.

1412. Claimants' allegation that they had a legitimate expectation that the *Contraloría* would abstain from using its fiscal powers and filing a Fiscal Liability Proceeding is baseless. Colombia never made a representation to that effect. To the contrary: Claimants were aware that Ingeominas denied registration of the Initial Version of the Eighth Amendment, precisely because it considered the terms of such agreement "*lesivo[s] para el Estado*". The requirement that the Eighth Amendment be favourable to the interests of Ingeominas, and hence the State, had been a constant contention during the negotiation.<sup>1237</sup>

1413. The same conclusion applies to the *Contraloría's* Decision as applied to Prodeco. By subjecting Prodeco to the Fiscal Liability Proceeding Colombia used its fiscal control powers in a way which was not materially different from that applied in previous cases. In this respect, the Decision was not an unexpected outlier: it follows interpretations of the law and uses arguments which the *Contraloría* had already applied in numerous precedents. That the Prodeco Decision was not unexpected, and follows a long line of similar resolutions, is confirmed by the *Cerro Matoso* decision, a case involving another mining company. This decision was adopted in 2018, and the criteria applied by the *Contraloría* are similar to those in the present case.<sup>1238</sup>

1414. Summing up, Colombia's dual legal framework for administrative contracts permits that disputes be adjudicated either

- by a court, applying the law of contract,
- and/or by the *Contraloría*, applying its idiosyncratic law, akin to the law of tort.

1415. When Prodeco and Ingeominas negotiated and executed the Eighth Amendment, Colombia's dual legal framework for administrative contracts had been in existence for more than a decade. Prodeco was aware (or with minimal due diligence could

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<sup>1237</sup> See section **III.(4)** *supra*.

<sup>1238</sup> RPHB, paras. 102-108, referring to Doc. RL-235.

have been aware) of its existence and implications.<sup>1239</sup> As the Republic rightly says:<sup>1240</sup>

“Claimants must accept that they are presumed to know the contents of the Colombian legal and regulatory system. They cannot be heard to plead that their legitimate expectations did not take into account the ordinary functioning of the system”.

1416. Consequently, the Tribunal dismisses Claimants’ argument that the mere fact that such legal framework was applied to the Eighth Amendment violated their legitimate expectations.

1417. The second aspect to Claimants’ argument is that the *Contraloría* frustrated their legitimate expectations that the fiscal control regime would not be applied to Prodeco in an abusive, improper, or unreasonable manner. This second aspect of Claimants’ FET claim coincides with Claimants’ separate claim that their investment in Colombia was impaired by Colombia adopting “unreasonable measures” in breach of Art. 4(1) of the Treaty. Section **VI.3.(2.2)**. *infra* will analyse these arguments in depth.

**d. Second Alleged Violation: Inconsistent Conduct of Colombia**

1418. Claimants also argue that Colombia breached their legitimate expectations because various Colombian authorities, and specifically Ingeominas and the *Contraloría*, adopted decisions that were radically incoherent and inconsistent with each other.<sup>1241</sup>

Discussion

1419. The Tribunal agrees with Claimants that an investor may legitimately hold the expectation that different branches of government will not take inconsistent actions affecting the investment: a government agency should not make a decision that contradicts a prior decision made by the same or another agency, acting within the same sphere of powers, on which the investor has relied, causing harm to the investor.<sup>1242</sup> This is part of the core meaning of the FET standard.

1420. There is no inconsistency and no breach of legitimate expectations, however, when the second agency, applying substantive legal criteria established in a pre-existing legal framework, takes a decision which diverges from that previously adopted by another agency. The reason is simple: The modern nation-state typically endows different agencies with different legal and policy responsibilities and objectives.

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<sup>1239</sup> *UAB*, para. 837.

<sup>1240</sup> *R II*, para. 614.

<sup>1241</sup> *C II*, para. 259 (b).

<sup>1242</sup> *MTD*, paras. 163-167.

1421. Claimants say that, to evaluate the Eighth Amendment, the *Contraloría* applied criteria different from those considered by Ingeominas when negotiating and agreeing to such amendment, resulting in a breach of their legitimate expectations.
1422. That is not the proper test.
1423. Claimants' legitimate expectations to consistent conduct on the part of Colombia could have been violated if the *Contraloría* had made its decision on the basis of criteria different from those set forth in the pre-existing legal framework. In fact, the *Contraloría* did base its decision on the pre-existing fiscal-liability regime. Whether the *Contraloría* applied those pre-existing criteria in an abusive, unreasonable, or improper manner is a separate question, to be analysed in Section **VI.3.(2.2)**. *infra*.
1424. Ingeominas approved and executed the Mining Contract, and then the *Contraloría* reviewed Ingeominas' decision, applying its powers under the Colombian fiscal liability regime, as it had stood at least since 2002 (and which has been described in detail in Section **VI.3.(2.1).C.b.** *supra*).
1425. Claimants' legitimate expectations of consistency were not breached by the application of the fiscal liability regime: every diligent investor must be assumed to know and to accept that Colombia has implemented a dual framework for administrative contracts, submitting such contracts (and their amendments) not only to the law of contract, but also to the fiscal liability regime entrusted to the *Contraloría*.

**e. Third Alleged Violation: Expansion of the Mine**

1426. Finally, Claimants say that their legitimate expectations were breached, because Ingeominas expressly acknowledged that the expansion of the Mine was "the basis of the negotiations among the parties", and the *Contraloría* ignored this acknowledgement.<sup>1243</sup>
1427. The Tribunal again disagrees. Claimants' argument in this respect is a variant of its consistency argument, already addressed, and must be dismissed for the same reason.
1428. There is abundant evidence that the expansion of the Mine was indeed the principal basis for the negotiations between Prodeco and Ingeominas and the execution of the Eighth Amendment. This is also reflected in *Considerando 6* of the Eighth Amendment, which reads as follows:

*"6. Que con el presente acuerdo se garantizan los intereses del Estado y la viabilidad de la expansión del proyecto minero, lo cual ha sido el fundamento de la negociación entre las partes".*

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<sup>1243</sup> C I, paras. 196-198; C II, para. 270(b).

1429. But this established fact did not create a legitimate expectation that, in applying pre-existing substantive legal criteria, the *Contraloría* would not review the Eighth Amendment, applying the fiscal liability regime.

1430. A separate question is whether, in calculating damages, the *Contraloría* should have taken into consideration the agreed expansion of the Mine capacity. This issue is addressed in section **VI.3.(2.2).B.c.(iv)** *infra*.

## **(2.2) UNREASONABLE MEASURES**

1431. In accordance with the Treaty, Colombia has assumed not only a positive obligation – to provide FET – but also a negative one: to abstain from unreasonable or discriminatory measures affecting protected investments.

1432. Claimants are not pleading discrimination, and consequently it is not necessary that the Tribunal delve into its meaning.

1433. Claimants however plead that the measures adopted by Colombia were not only unreasonable but also “arbitrary” – a concept not mentioned in the Treaty.<sup>1244</sup> In essence, Claimants say that the *Contraloría*’s findings

- that Prodeco acted with *dolo* with the intention of causing damage to the State,<sup>1245</sup> and
- that the damage caused to the State should be calculated based on the Transition Period, the first year of the long-term Mining Contract<sup>1246</sup>

constitute an “arbitrary and unreasonable” measure,<sup>1247</sup> contrary to Art. 4(1) of the Treaty.

1434. Respondent disagrees on the following grounds:

- The *Contraloría* properly decided that Prodeco satisfied the elements for fiscal liability in a 234-page reasoned opinion after four years of proceedings, and found that Prodeco had acted with *dolo*; after extensive analysis of Prodeco’s bad-faith negotiations of the Eighth Amendment, the *Contraloría* concluded that Prodeco had performed a number of manoeuvres to reduce the compensation and thus failed to comply with its duties as a collaborator of the State;<sup>1248</sup>
- Claimants’ disagreement with the calculation of damage in the *Contraloría*’s Decision must be rejected because it interferes with the right of domestic authorities to regulate within the State’s territory;<sup>1249</sup> additionally, the

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<sup>1244</sup> C I, para. 184.

<sup>1245</sup> C II, para. 259(d), (iii) and (v).

<sup>1246</sup> C I, para. 202(b).

<sup>1247</sup> C II, para. 259.

<sup>1248</sup> R I, paras. 421-422.

<sup>1249</sup> R I, para. 460.

calculation is based on the Transition Period of the Mining Contract because it constituted a distinct contractual period with its own economic formula.<sup>1250</sup>

1435. The Tribunal will first establish the meaning of “unreasonable measure” as used in Art. 4(1) of the Treaty (A.), then it will discuss whether two specific findings of the *Contraloría* meet the test of reasonability: the calculation of damages (B.) and the finding that Prodeco acted with *dolo* (C.). Finally, the Tribunal will address the postponed question whether the way in which the *Contraloría* applied the Fiscal Control Regime to Prodeco frustrated the Claimants’ legitimate expectations in violation of the FET standard of the Treaty (D.)

**A. Impairment of an Investment by Unreasonable Measures**

1436. The Parties have discussed the precise meaning of the term “unreasonable measures” as used in Art. 4(1) of the Treaty.

1437. Claimants accepts Respondent’s proposition that unreasonable conduct includes actions involving prejudice, preference, or bias that shocks a sense of judicial propriety.<sup>1251</sup>

1438. But Claimants add that measures are also arbitrary when they inflict damage on the investor without serving any apparent legitimate purpose, are not based on legal standards but rather on discretion, are taken for reasons that are different from those put forward by the decision-maker, or are in wilful disregard of due process and proper procedure.<sup>1252</sup>

1439. Claimants finally submit that confusion and lack of clarity, even if unintended, may result in arbitrariness. It follows that measures may be arbitrary even if not adopted in bad faith. Measures may also be arbitrary when they are adopted without engaging in a rational decision-making process or when the State fails to base its actions on reasoned judgement.<sup>1253</sup>

1440. Claimants finally say that that the actions of the *Contraloría* are not entitled to automatic and unlimited deference as to their conformity with the Treaty.<sup>1254</sup>

**Respondent**

1441. Respondent argues that the standard for arbitrary conduct is a high one, requiring a showing of conduct tainted by prejudice, preference or bias that shocks or surprises a sense of judicial propriety.<sup>1255</sup> Satisfying that standard is still more difficult when it comes to second-guessing legitimate regulatory or control measures, because

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<sup>1250</sup> R I, para. 463.

<sup>1251</sup> C II, para. 247.

<sup>1252</sup> C II, para. 247.

<sup>1253</sup> C II, para. 248.

<sup>1254</sup> C II, para. 250.

<sup>1255</sup> R I, paras. 446-448; R II, para. 662.

States enjoy a high level of deference.<sup>1256</sup> The application of the national normative framework is arbitrary only if it constitutes a deliberate repudiation of that framework, and even then, only if there are no domestic resources available to correct the application.<sup>1257</sup>

1442. In summary, Respondent submits that the *Contraloría*'s Decision does not come close to being arbitrary according to the international standard. Claimants have not alleged any improper motive behind the actions of the *Contraloría*. To the contrary, the *Contraloría*'s Decision complied with the agency's mandate.<sup>1258</sup>

Art. 4(1) of the Treaty

1443. Art. 4(1) of the Treaty obliges the contracting State not to:

“[...] impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale and, should it so happen, liquidation of such [protected] investments.”

1444. An interesting feature of Art. 4(1) of the Treaty is its drafters' choice of terminology. Other BITs – including certain treaties signed by Colombia-<sup>1259</sup> include a prohibition against “arbitrary or discriminatory” measures. The Swiss-Colombian BIT however uses the expression “unreasonable or discriminatory” measures (in Spanish, “*medidas no razonables o discriminatorias*”). Are “unreasonable measures” and “arbitrary measures” synonyms?

1445. As a matter of ordinary meaning, the term “unreasonable measures” seems to define a set of actions which is wider than “arbitrary measures”.

1446. According to the Oxford English Dictionary, arbitrary decisions are based on random choice or personal whim, rather than reason.<sup>1260</sup> If a measure is arbitrary, it cannot simultaneously conform to reason. It follows that all measures which are arbitrary are also unreasonable – but not *vice-versa*. The set of unreasonable measures is wider than that of arbitrary measures.

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<sup>1256</sup> R I, para. 448.

<sup>1257</sup> R II, para. 664.

<sup>1258</sup> R I, para. 449.

<sup>1259</sup> Colombia-France BIT (2014), Art. 4(1): “[...] Para mayor certeza, la obligación de otorgar un trato justo y equitativo, incluye, inter alia: (...) b) La obligación de actuar de una manera transparente, no discriminatoria y no arbitraria...” [emphasis added]; Colombia-Spain BIT (2005), Art. 2(3): “Las inversiones realizadas por inversionistas de una Parte Contratante en el territorio de la otra Parte Contratante recibirán un tratamiento justo y equitativo y disfrutarán de plena protección y seguridad, no obstaculizando en modo alguno, mediante medidas arbitrarias o discriminatorias, la gestión, el mantenimiento, el uso, el disfrute y la venta o liquidación de tales inversiones”. [Emphasis added]

<sup>1260</sup> Oxford Learner's Dictionaries. Available at:

[https://www.oxfordlearnersdictionaries.com/definition/american\\_english/arbitrary](https://www.oxfordlearnersdictionaries.com/definition/american_english/arbitrary); See also Cambridge English Dictionary. Available at: <https://dictionary.cambridge.org/dictionary/english/arbitrary>

**a. Arbitrary Measures**

1447. What does “arbitrary” mean?

1448. Arbitrariness has been described as “founded on prejudice or preference rather than on reason or fact”;<sup>1261</sup> “[...] contrary to the law because...[it] shocks, or at least surprises, a sense of juridical propriety;<sup>1262</sup>” or “wilful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety”;<sup>1263</sup> or conduct which “manifestly violate[s] the requirements of consistency, transparency, even-handedness and non-discrimination”.<sup>1264</sup>

1449. In *EDF*, Professor Schreuer, appearing as an expert, defined as “arbitrary”,

“a. a measure that inflicts damage on the investor without serving any apparent legitimate purpose;

b. a measure that is not based on legal standards but on discretion, prejudice or personal preference;

c. a measure taken for reasons that are different from those put forward by the decision maker;

d. a measure taken in wilful disregard of due process and proper procedure.”

And the Tribunal seemed to accept such definition when it analysed and ultimately rejected the claimant’s claim that Romania had taken unreasonable or discriminatory measures.<sup>1265</sup>

1450. Summing up, the underlying notion of arbitrariness is that prejudice, preference, or bias is substituted for the rule of law.<sup>1266</sup>

**b. Unreasonable Measures**

1451. The Parties have discussed whether the prohibition of Art. 4(1) of the Treaty extends not only to arbitrary measures, but also to those adopted without reasoned judgement or without a rational decision-making process.

1452. The very wording of the Treaty provides the answer to this question. The Treaty does not refer to “arbitrary measures”. It prohibits the wider set of “unreasonable measures”. As already found, “unreasonable measures” include not only “arbitrary measures” but also measures that are irrational in themselves or result from an irrational decision-making process.

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<sup>1261</sup> *Occidental*, para. 162; *Lauder*, para. 221.

<sup>1262</sup> *ELSI*, para. 128; *Tecmed*, para. 154.

<sup>1263</sup> *ELSI*, para. 128; *Loewen*, para. 131.

<sup>1264</sup> *Saluka*, para. 307.

<sup>1265</sup> *EDF*, para. 303.

<sup>1266</sup> *Lemire*, paras. 262-263.



1453. In this question, the Tribunal subscribes to the finding of the tribunal in *LG&E*, when it said that the contracting states (in that case Argentina and the United States)<sup>1267</sup>

“wanted to prohibit themselves from implementing measures that affect the investments of nationals of the other Party without engaging in a rational decision-making process”. [Emphasis added]

1454. The *LG&E* tribunal added:

“Certainly a State that fails to base its actions on reasoned judgement, and uses abusive arguments instead, would not ‘stimulate the flow of private capital’.”<sup>1268</sup>

#### High Threshold

1455. Respondent insists that the threshold for proving that conduct is unreasonable should be a high one.

1456. The Tribunal, by majority, tends to agree.

1457. Investment arbitration tribunals are not called to adjudicate appeals against measures adopted by States or their agencies. Their task is to establish whether the state’s conduct *vis-à-vis* protected foreign investors is tainted by prejudice, preference or bias or is so totally incompatible with reason that it constitutes an international wrong.

1458. The Tribunal, by majority, also agrees with the Republic that satisfying the standard is more difficult when it comes to reviewing regulatory or control measures, because States, and especially supervisory agencies, should enjoy deference. Supervisors are frequently required to take decision in short timeframes, making complex assessments of countervailing interests. Arbitral tribunals, sitting comfortably in the future, with full knowledge of the supervening events, must take the individual circumstances of each decision into consideration and avoid the temptation of using hindsight as the basis for assessing reasonableness.<sup>1269</sup>

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<sup>1267</sup> Doc. CL-46, para. 158; *LG&E* applies a treaty where the words used were “arbitrary or discriminatory measures”; the reasoning of *LG&E* is even more appropriate in a Treaty like the Swiss-Colombian BIT which refers to “unreasonable or arbitrary measures”.

<sup>1268</sup> *LG&E*, para. 158. Contrary to Respondent’s submission, the *LG&E* award does not state that a finding of unreasonable measures requires a showing of conduct that shocks or surprises a sense of judicial propriety. *LG&E* mentions this requirement when analyzing discrimination – not when referring to measures not based on reasoned judgement.

<sup>1269</sup> Arbitrator Garibaldi disagrees with the majority’s position stated in paragraphs 1456 and 1458. First, he does not agree with the characterization of the standard of unreasonableness as a high one (or low or medium one, for that matter). He considers that such characterizations are useless in the absence of comparators or an agreed yardstick; they are rhetorical devices that have their proper place in counsel’s arguments, not in a tribunal’s decision. A tribunal’s duty is to apply the standard laid down in the applicable treaty, whatever that standard is and however it might be characterized. Second, Mr. Garibaldi does not agree that “satisfying the standard is more difficult when it comes to reviewing regulatory or control

## **B. Damages**

1459. Claimants finally say that the *Contraloría*'s Decision constitutes an unreasonable measure because the determination of the existence of damage to the State is based on a narrow analysis of the first year of the long-term Mining Contract, illogically relying on the Transition Period.<sup>1270</sup>

1460. Respondent disagrees: the Transition Period constitutes a distinct contractual period with its own economic formula, and this justifies the use of such period for the calculation of damages.<sup>1271</sup>

1461. The Tribunal will summarize the *Contraloría*'s calculation of damages (a.), including the Tovar-Silva Report (b.), will then analyse the meaning of the Transition Period within the Mining Contract (c.), and finally it will reach its conclusions applying the standards of the Treaty (d.)

### **a. The Methodology of the Tovar-Silva Report**

1462. The methodology for the calculation of damages in the *Contraloría*'s Decision is based on the Tovar-Silva Report. This report was prepared in March 2011, *i.e.* four years before the *Contraloría*'s Decision was issued, by a junior officer of the *Contraloría*, Ms. Johanna Tovar Silva.

1463. The Tovar-Silva Report based its finding on the Eighth Amendment's so-called Transition Period, which was the period between 1 January and 31 December 2010.<sup>1272</sup> Ms. Tovar Silva explained that:<sup>1273</sup>

*“Los presentes cálculos fueron efectuados sobre los embarques realizados durante el período de transición pactado por las partes [...] sin perjuicio del cálculo que pueda presentarse con posterioridad al embarque 555-2010 de 03 de noviembre de 2010, toda vez que de acuerdo con las directrices institucionales el daño causado habrá de ser determinable y por extensión cuantificable, situación que en los contratos de tracto sucesivo se diluye ante la posibilidad de compensación de cargas contractuales, pero que en el caso objeto de estudio se ha consolidado plenamente como daños por haber vencido el término definido por las partes como ‘período de transición’”.*  
[Emphasis added]

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measures, because states, and especially supervisory agencies, should enjoy deference” (paragraph 1458). He is unable to find anything in the Treaty or in general international law requiring this Tribunal to defer in any way to state agencies in matters concerning the application of the Treaty standards. This is not to say that the Tribunal is free to impose its own conception of reasonableness or to ignore the circumstances referred to in paragraph 1458. This and any other treaty standard must be interpreted and applied in good faith under the rules of the VCLT. But the interpretation and application process must be impartial, not influenced by any sense of deference to one party to the dispute or solicitude to the other.

<sup>1270</sup> C I, para. 202(b); C II, para. 259(d)(ii).

<sup>1271</sup> R I, para. 463.

<sup>1272</sup> In the additional report to the Tovar-Silva Report, Ms. Tovar Silva explains that she calculated the Royalties for the period 1 January through 31 December 2010, and the Additional Royalty from 7 November 2009 through 6 November 2010; Doc. C-147, p. 4.

<sup>1273</sup> Doc. C-125, p. 26.

1464. Ms. Tovar Silva's analysis draws attention to one of the main problems in the *Contraloría's* analysis: how to calculate the existence and amount of damage caused to the State in a long-term contract.

1465. As Ms. Tovar Silva explains, in this type of contract there is a possibility that losses in one year are set-off by gains in succeeding years – making the calculation more uncertain. To solve this difficulty, Ms. Tovar Silva decided to focus on the one-year “*período de transición*” foreseen in the Eighth Amendment, which in her opinion “*se ha consolidado plenamente*”, and then to calculate the damage as the loss of income suffered by the Republic in that period – disregarding all possible events in subsequent years.

Clarifications by Ms. Tovar Silva

1466. As a consequence of Prodeco's challenge to the Tovar Silva Report, on 29 October 2012, the *Contraloría* asked Ms. Tovar Silva to provide clarifications.<sup>1274</sup> Accordingly, on 9 November 2012, Ms. Tovar Silva explained that she had examined the impact of the Eighth Amendment on the State's finances only during the Transition Period because this was the only period for which there was actual data.<sup>1275</sup> This is her precise explanation:<sup>1276</sup>

“[...] *es de aclarar que en el caso de regalías se tomó este período, que coincide con el definido contractualmente como “período de transición” en el numeral 14.3 de la Cláusula Décima Cuarta del Contrato 044-89, en razón a que es el período en el que se encontraban materializados los hechos generadores de regalías y contraprestaciones económicas; y a que dentro de la Indagación Preliminar correspondiente al Auto No. 000720 del 19 de octubre de 2010 y a la fecha de elaboración del informe de apoyo técnico se contó únicamente con los soportes de los embarques debidamente efectuados y reportados por C.I. Prodeco a Ingeominas de los cuatro (4) trimestres de 2010 [...]*”. [Emphasis added, bold in the original]

**b. The Transition Period**

1467. The “*periodo de transición*” is defined in clause 3 of the Eighth Amendment. This clause amended the agreed procedure for the calculation of Royalties and provided a new formula.

1468. Under the new pricing formula, on each given date the Coal Reference Price is established by considering not only the FOB Price on such date, but also the FOB Prices in the previous 18 months, weighted by Prodeco's sales in the respective periods, on the basis of annual weighting coefficients, established *ex ante* (before 15 January of each year) by an independent auditor. The auditor must be appointed by Ingeominas at the end of October of each year, and the auditor's weightings are applied throughout the next year.

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<sup>1274</sup> Doc. C-146.

<sup>1275</sup> Doc. C-147.

<sup>1276</sup> Doc. C-147, p. 4.

1469. This new system created a difficulty: how to determine the weighting coefficient for the first year, a period preceding the appointment of the independent auditor.

1470. To solve this problem, Clause 3 of the Eighth Amendment includes the following sub-section:

**Período de Transición:** Toda vez que la aplicación de la formula indicada en el presente otrosí, implicaría la utilización de índices anteriores a la fecha de suscripción del mismo, se hace necesario establecer un periodo de transición. Por lo tanto entre la fecha de inicio de vigencia del presente otrosí y el 31 de diciembre de 2010, el cálculo de las regalías de que trata el numeral 14.1 se hará tomando como precio FOB de referencia el resultado de la siguiente fórmula:

$$\text{PdeR}_{(m)} = 0.3333 \times \text{ICR}_{(m-3)} + 0.3333 \times \text{ICR}_{(m-6)} + 0.3334 \times \text{ICR}_{(m-9)}$$

El precio así determinado se ajustará al poder calorífico de cada embarque del mes  $(m)$ . Para ello se tomará el poder calorífico certificado, de conformidad con lo dispuesto en el numeral 14.5 de la Cláusula Décima Cuarta del Contrato. Dicho precio para el período de transición no será objeto de ajuste retroactivo con base en el concepto de la auditoría que se emita en enero de 2011; por lo que el primer ajuste retroactivo al que se refiere este numeral 14.3 se efectuará con base en el concepto de la auditoría que se emita en enero de 2012.

1471. The solution agreed upon by the parties to solve the lack of auditor consisted in establishing a *período de transición* during the first year of the Eighth Amendment (*i.e.* during the year 2010). During this Transition Period the parties agreed that

- the weighting coefficients would be a fixed factor of 0.333; and
- these coefficients were to be applied to the FOB Price applicable three, six, and nine months before each determination date.

1472. Once the Transition Period elapsed at the end of 2010, the standard system of weighting would apply, using those established *ex ante* by the independent auditor, who was to be appointed at the end of 2010.

### **c. Discussion**

1473. Claimants say that the *Contraloría's* calculation of damages constitutes an unreasonable or arbitrary measure in violation of Art. 4(1) of the Treaty.<sup>1277</sup>

1474. The Tribunal agrees.

1475. The determination of the existence and quantum of damages made by the *Contraloría* in its Decision is biased, contrary to basic principles of legal reasoning and financial logic, and incompatible with the standard of conduct which Colombia undertook to provide to protected Swiss investors under Art. 4(1) of the Treaty.

1476. The Tribunal is mindful of its own majority conclusions, namely that the standard for labelling the conduct of a State as unreasonable or arbitrary should be high, and

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<sup>1277</sup> C II, para. 259(d)(ii).

that regulatory agencies, when performing the mission entrusted to them by law, should enjoy a high level of deference.<sup>1278</sup>

1477. But even applying these reinforced thresholds, the conclusion does not change. The calculation of damages is arbitrary and unreasonable.<sup>1279</sup>

1478. In reaching this conclusion, the Tribunal has found the following arguments to be compelling:

(i) Failure to Update and Improve the Tovar-Silva Report

1479. First, the *Contraloría*'s Decision expressly states that the basis for the calculation of damages is the Tovar-Silva Report – a report which had been prepared four years before, at the start of the investigation, and a few months after the Transition Period had ended. It is difficult to understand why the *Contraloría* failed to update the Report by integrating and evaluating the market and production data that had been generated since the Report was first written.

(ii) Flaws in the Methodology

1480. Second, the methodology applied by the Tovar-Silva Report is of startling simplicity: Ms. Tovar Silva simply calculated

- (i) the Royalties which Colombia would have received during the Transition Period applying the formula agreed upon before the Eighth Amendment, and
- (ii) those which it actually received applying the formula agreed upon in the Eighth Amendment.

The calculation was performed for the 12 months of the year 2010 (except for the Additional Royalties, where the calculation was from November 2009 through November 2010). The difference between both calculations was the amount of damage that Colombia was found to have incurred.

First explanation

1481. Ms. Tovar Silva herself was aware of the weakness of her methodology. She understood that in long-term contracts like the Mining Contract, which was to run until 2032, it is legally improper and financially illogical to base the calculation of damages exclusively on the results for the first year in the life of the agreement.

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<sup>1278</sup> Arbitrator Garibaldi does not agree with the conclusions to which this paragraph refers, for the reasons stated in footnote 1269.

<sup>1279</sup> Arbitrator Garibaldi agrees with this conclusion, on the ground that the calculation of damages is arbitrary and unreasonable to the point of shocking, or at least surprising, a sense of juridical propriety.

1482. To solve this problem, in her report Ms. Tovar Silva gave the following reasoning:<sup>1280</sup>

*“[...] de acuerdo con las directrices institucionales el daño causado habrá de ser determinable y por extensión cuantificable, situación que en los contratos de tracto sucesivo se diluye ante la posibilidad de compensación de cargas contractuales, pero que en el caso objeto de estudio se ha consolidado plenamente como daños por haber vencido el término definido por las partes como ‘período de transición’”. [Emphasis added]*

1483. The sole argument proffered by Ms. Tovar Silva, to justify her use of the one-year “período de transición” was that

*“[el daño causado] se ha consolidado plenamente como daños por haber vencido el término definido por las partes como ‘periodo de transición’”.*

1484. This argument is difficult to follow. Once the one-year term agreed upon by the parties passed, the Transition Period expired. This is self-evident. What remains unexplained is why this self-evident occurrence should produce the effect that the damage allegedly suffered is “fully consolidated” as damages.

#### Second Explanation

1485. In November 2012, Ms. Tovar Silva was asked by the *Contraloría* to provide a second report, clarifying her initial findings. In this supplementary report, Ms. Tovar Silva explained that she had examined the impact of the Eighth Amendment on the State’s finances only during the Transition Period because this was the only period for which there was actual data.<sup>1281</sup> This is her precise explanation:<sup>1282</sup>

*“[...] es de aclarar que en el caso de regalías se tomó este período, que coincide con el definido contractualmente como “período de transición” en el numeral 14.3 de la Cláusula Décima Cuarta del Contrato 044-89, en razón a que es el período en el que se encontraban materializados los hechos generadores de regalías y contraprestaciones económicas; y a que dentro de la Indagación Preliminar correspondiente al Auto No. 000720 del 19 de octubre de 2010 y a la fecha de elaboración del informe de apoyo técnico se contó únicamente con los soportes de los embarques debidamente efectuados y reportados por C.I. Prodeco a Ingeominas en los cuatro (4) trimestres de 2010 [...]”. [Emphasis added, bold in the original]*

1486. In other words: Ms. Tovar Silva used the data from the Transition Period simply because these were the only available when she issued her Report in March 2011.

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<sup>1280</sup> Doc. C-125, p. 26.

<sup>1281</sup> Doc. C-147.

<sup>1282</sup> Doc. C-147, p. 4.



The Tribunal's Opinion

1487. Ms. Tovar Silva failed to submit any remotely persuasive argument justifying her position, *i.e.* that the relevant period for the calculation of damages should be limited to the Transition Period.
1488. Within the structure of the Eighth Amendment, the Transition Period does not represent a time segment with a separate content. Prodeco's and Ingeominas' obligations during the Transition Period are the same as those during the remainder of the Contract life. So is the methodology for calculating the Coal Price.
1489. The *raison d'être* for the Transition Period is ancillary. The calculation of the Coal Reference Price requires that certain weighting coefficients be verified *ex ante* by an independent auditor. Ingeominas had not designated such auditors when the Eighth Amendment was executed in January of 2010. To solve this timing issue, the parties simply agreed to take three quarterly readings during 2010, and to give equal weight to each of them.
1490. Summing up, neither the Tovar-Silva Report, nor the *Contraloría's* Decision, nor the Reconsideration Decision, nor the Appeal Decision proffer any reasonable justification explaining why the one-year Transition Period, defined in the Eighth Amendment to solve the delay in Ingeominas' designating an independent auditor, should have any impact at all on the methodology used to calculate the damages suffered by Colombia as a consequence of Prodeco's actions.

(iii) Failure to Use Simulations

1491. Third, if damage is not to be assessed at the very end of a long-term contract, the proper methodology for establishing damages prior to that time must be forward-looking and take into account the total duration of the agreement.
1492. This does not imply that the calculation cannot be performed until the end of the contract. It is also possible to run one or more simulations of the future development of a long-term contract, to make comparisons between different scenarios, and to discount the predicted cash flows to a common date. This was acknowledged by Ingeominas in its letter to Prodeco dated 12 June 2009, where it undertook to evaluate the interests of the Nation, measured in terms of "the net present value" of the project in its integrity.<sup>1283</sup>
1493. In the course of the Hearing, Dra. Vargas was specifically asked by the Tribunal whether the *Contraloría* had followed the approach of using simulations. Her answer was that the economists within the *Contraloría* had indeed performed such simulations and that they were included in the Fiscal Liability Proceeding.<sup>1284</sup> If such simulations were indeed performed, it is totally incomprehensible why the

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<sup>1283</sup> Doc. R-110, p. 1.

<sup>1284</sup> HT, Day 5, p. 1407, ll. 15-17.



Decision failed to take them into account, and instead settled for the deeply flawed calculation used in the Tovar-Silva Report.

(iv) Additional Investment and Expansion of the Mine

1494. Fourth, the methodology for calculation of damages used in the *Contraloría*'s Decision is not only unreasonable; it is also biased.

1495. The proven facts show that, as a *quid pro quo* for the reduction of the Royalties, Prodeco undertook the obligation to carry out additional investments and to expand the capacity of the Mine.

1496. The evidence is compelling:

- *Considerando 6* of the Eighth Amendment makes a reference to the fact that its execution guarantees “*la viabilidad de la expansión del proyecto minero*”;
- Mr. Nagle, Prodeco's CEO, said in his deposition that the investments and production levels projected in the 2010 PTI were “negotiation commitment(s)” that “led to them [Ingeominas] agreeing and us [Prodeco] agreeing to this *Otrosí*”;<sup>1285</sup>
- The final piece of evidence comes from former Minister Martínez Torres himself; he confirmed in his deposition before the Tribunal that through the Eighth Amendment, Prodeco committed to increase production of the Mine beyond 8 MTA.<sup>1286</sup>

1497. The precise increase in investment was not formalized in the Eighth Amendment, but rather in the 2010 PTI, a quasi-contractual document, proposed by Prodeco and approved by Ingeominas, which included all the relevant figures.

1498. A simple comparison between the 2006 PTI and the 2010 PTI shows the additional investment and expansion promised by Prodeco, and the additional Royalties which it was expected Ingeominas would receive:<sup>1287</sup>

	2006 PTI	2010 PTI
Mine-life production	116 MT	254 MT
Mine-life investment	USD 1,184 M	USD 1,477 M
Mine-life Royalties	USD 671 M	USD 1,782 M

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<sup>1285</sup> HT, Day 3, (Mr. Nagle's deposition), p. 875, l. 22 – p. 876, l. 2.

<sup>1286</sup> HT, Day 4, p. 1129, l. 5 – p. 1130, l. 7.

<sup>1287</sup> Doc. C-117, pp. 61, 191 and 200; Doc. C-78, p. 173. See paras. 368, 370 and 372 *supra*.

1499. To be proper, any calculation of damages must take into account the expansion of the Mine undertaken by Prodeco in exchange for the reduction of the Royalties, and the impact that such expansion would cause on the Royalties earned by Ingeominas.

1500. It is not appropriate to compare – as the *Contraloría* did – the Royalties which Ingeominas is receiving applying the Eighth Amendment *vis-à-vis* those it would have received if the Eighth Amendment had not been executed.

1501. The proper comparison is between

- the Royalties which Prodeco would have paid, under the original Mining Contract (*i.e.* excluding the Eighth Amendment), assuming the production of coal deriving from the 2006 PTI, and
- the Royalties Prodeco undertook to pay under the Eighth Amendment, assuming the increased production foreseen in the 2010 PTI.

1502. The methodology used in the *Contraloría*'s Decision totally disregarded the fact that, under the 2010 PTI, Prodeco assumed an obligation to increase its investment and to expand the Mine, resulting in an increased production of coal. Any evenhanded and fair calculation of the damage suffered by Colombia cannot obviate this commitment – especially because the proven facts show that Prodeco not only achieved the levels of investment promised in the 2010 PTI, but even substantially exceeded them.<sup>1288</sup> These levels of investment led to an increase in the amount of coal mined, and eventually to an increase in the Royalties paid to Colombia.<sup>1289</sup>

1503. In essence, the *Contraloría*'s Decision blew hot and cold at the same time:

- To calculate the royalties owed, it took into consideration increased production of coal resulting from the expansion of the mine;
- But it disregarded the financial effort made by Prodeco precisely to find those increased levels of production.

#### **d. Decision**

1504. Summing up, Claimants argue that the *Contraloría*'s decision, establishing that the Eighth Amendment had caused damage to Colombia, is arbitrary and unreasonable. The Tribunal finds that the methodology on which the *Contraloría* based its decision to establish the damages allegedly caused to Colombia under the Eighth Amendment was indeed arbitrary and unreasonable. The level of arbitrariness and

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<sup>1288</sup> In Section **III.(6).D** the Tribunal includes the details: Prodeco invested in the period 2011-2014 USD 885 M, exceeding the investment anticipated in the 2010 PTI by USD 231 M.

<sup>1289</sup> See Section **III.(6).E** with precise figures.

unreasonability is high and cannot be protected by the deference accorded to state agencies when performing supervisory tasks entrusted by law.<sup>1290</sup>

1505. The Tribunal recalls, however, that the standard to be applied under Art. 4(1) of the Treaty is “unreasonable measures”, not “arbitrary measures”. Consequently, the finding of arbitrariness has in itself no effects under the Treaty, except to the extent that, as already pointed out, arbitrariness implies unreasonableness. Therefore, the Tribunal finds that Colombia adopted an unreasonable measure, which impaired the investment in Colombia belonging to a protected Swiss investor, in breach of Art. 4(1) of the Treaty.

### C. Dolo

1506. Claimants submit that the *Contraloría*’s Decision was unreasonable when it found that Prodeco acted wilfully to cause damage to the State; while the Republic argues the contrary: that in a well-reasoned decision the *Contraloría* found that Prodeco, a collaborator of the State, incurred in *conducta dolosa* and thus managed to reduce the compensation owed to Ingeominas.

1507. The Tribunal will first explore the concept of *dolo* in Colombian law (a.), it will then summarize the *Contraloría*’s findings with regard to Prodeco’s *dolo* (b.), and finally it will analyse whether the finding of *dolo* in the *Contraloría*’s Decision can be labelled as arbitrary or unreasonable (c.).

#### a. The Concept of *Dolo*

1508. Art. 5 of Law 610 of 2000 defines the requirements for incurring in fiscal liability:<sup>1291</sup>

“La responsabilidad fiscal estará integrada por los siguientes elementos:

- Una conducta dolosa o culposa atribuible a una persona que realiza gestión fiscal.

- Un daño patrimonial al Estado.

- Un nexo causal entre los dos elementos anteriores”.

1509. The first requirement is *dolo*.<sup>1292</sup>

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<sup>1290</sup> Arbitrator Garibaldi agrees with the conclusions reached in this paragraph (as well as the supporting analysis) but not, for the reasons set forth in footnote 1269, with the reference to “deference accorded to state agencies”.

<sup>1291</sup> Doc. C-71, Art. 5.

<sup>1292</sup> Or *culpa*. There is no discussion in the present case that Prodeco might have incurred in *culpa*.

1510. As Law 610 does not contain an independent definition of *dolo*, the meaning of this concept must be sought in the general principles of law.<sup>1293</sup> Art. 63 of the Civil Code defines *dolo*:<sup>1294</sup>

“El dolo consiste en la intención positiva de inferir injuria a la persona o propiedad de otro”.

1511. This notion of *dolo*, enshrined in the Civil Code, has been formally adopted by the *Contraloría* (and by the *Consejo de Estado* when reviewing such decisions)<sup>1295</sup>; but in the fiscal liability decisions the interpretation given by the *Contraloría* has been expansive, and has tended to connect *dolo* with the contractor’s fiduciary duties towards the State (blurring the distinction between *dolo* and *culpa*, the alternative requirement for the existence of fiscal liability).

1512. In its leading case, Decisión 015, the *Contraloría* followed this approach, stressing the contractor’s duty to defend the *función social* of the public contract:<sup>1296</sup>

“Pregunta [el Sr. Cabrera] dónde está la mala fe, se le responde que es precisamente en esa actitud mezquina y de desapego en donde está la mala fe, en donde está el dolo, su mala intención de aprovecharse de unas circunstancias erradas para sacar mayor provecho y mayor lucro del que las reglas del mercado en ese momento le estaban ofreciendo.

Es precisamente su conducta dolosa, su engaño, de aprovecharse de las condiciones ofrecidas por la Cámara de Representantes para contratar, de transgredir su función social que como contratista del Estado le obligaba a cumplir, que se le endilga y se le impone responsabilidad fiscal”. [Emphasis added]

1513. Mr. Cabrera, the private individual who had contracted with the public administration, had delivered paper at the price offered by the *Cámara de los Diputados*, but the *Contraloría* found that he had acted with *dolo*, because he should have known that the price was excessive, and by not denouncing the situation he breached the “*función social*” which he was bound to respect as a state contractor.

## **b. The *Contraloría*’s Finding of *Dolo***

### **(i) The *Contraloría*’s Decision**

1514. The *Contraloría*’s Decision was issued in April 2015 and confirmed that Prodeco had incurred fiscal responsibility based on *dolo*.

1515. The starting point of the *Contraloría*’s analysis was that Prodeco had wilfully permitted damage to the State’s financial interests, in order to obtain more benefits,

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<sup>1293</sup> RPHB, para. 59, citing Colombian Constitutional Court Judgement C-619/02 (Doc. R-198).

<sup>1294</sup> Doc. CL-172, p. 38.

<sup>1295</sup> RPHB, pp. 61-62, quoting numerous supporting decisions.

<sup>1296</sup> Doc. RL-208, p. 50.

thereby acting with *dolo*.<sup>1297</sup> Although the *Contraloría* recognized that any private contractor had the right to receive benefits from its economic activity, it found that it was improper for a contractor to try to receive higher benefits to the detriment of the State's interests.<sup>1298</sup>

1516. The *Contraloría* additionally found that Prodeco had put in place a series of manoeuvres to pay a lower compensation to the State,<sup>1299</sup> in particular:<sup>1300</sup>

*“El grado de culpabilidad que se le ha endilgado a PRODECO no se basa en la intención legítima de impedir o detener pérdidas, ni en la obtención de mayores ingresos, circunstancias que por sí solas no constituyen irregularidad alguna, como bien lo ha dicho el apoderado. Se fundamenta en la serie de maniobras desplegadas por PRODECO que se materializan, en cómo rechazadas sus propuestas por INGEOMINAS, planteaba diferentes escenarios, cómo [sic] pasó entre otros, de desequilibrio económico contractual, desacuerdo en la interpretación de cláusulas contractuales, falta de competitividad en el mercado aduciéndose entonces desigualdad con otras empresas explotadoras de carbón en Colombia, hasta expansión, pero con ésta disminuyendo el porcentaje de regalías a favor del Estado con el argumento de que entre mayor producción mayores ingresos a favor del mismo. En este último escenario se sostiene que tal disminución se compensará más adelante, sin que se hubiese determinado de antemano forma y término para ello, salvo enunciados abstractos y genéricos”.* [Emphasis added]

1517. The *Contraloría* added that Prodeco was Ingeominas' “collaborator”:<sup>1301</sup>

*“Pasa por alto el señor apoderado que PRODECO tiene una relación contractual sui generis, producto del contrato estatal suscrito mediante el cual se busca el cumplimiento de los fines del Estado, vínculo jurídico en el que está involucrado el interés general, y por tal razón, adquirió la calidad o condición de ‘colaborador’ en el cumplimiento de tales fines”.*

1518. The *Contraloría* concluded that Prodeco had indeed incurred in *dolo* and justified its decision with the following argument:<sup>1302</sup>

*“Así las cosas, como se puede deducir de las pruebas, PRODECO desarrolló una serie de maniobras con el fin de obtener la disminución de las contraprestaciones económicas, maniobras de las cuales se desprende, entre otras circunstancias, que esta firma quería obtener el resultado sin parar en mientes en que podría ocasionarle una [sic] daño a los intereses patrimoniales del Estado. Significa esto, que su interés primordial era obtener su propio beneficio, para lo cual desatendió en grado sumo su condición de colaborador en la consecución de los fines estatales y teniendo al otro*

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<sup>1297</sup> Doc. C-32, p. 109.

<sup>1298</sup> Doc. C-32, pp. 85, 93 and 106.

<sup>1299</sup> Doc. C-32, p. 106.

<sup>1300</sup> Doc. C-32, p. 85.

<sup>1301</sup> Doc. C-32, p. 87.

<sup>1302</sup> Doc. C-32, p. 106.

contratante (INGEOMINAS) como un particular, por lo que su conducta se califica de manera definitiva a título de DOLO.” [Emphasis added]

(ii) Reconsideration Decision

1519. In July 2015, the *Contralora Delegada* rejected Prodeco’s *recurso de reposición*.<sup>1303</sup>

1520. The Reconsideration Decision insisted that Prodeco was a collaborator of the public administration and that the contractual relationship with the State implied a heightened responsibility for Prodeco.<sup>1304</sup>

1521. Finally, in an extensive sub-section the Reconsideration Decision gave a further explanation of the reasons which led to the *Contraloría*’s conclusion that Prodeco had acted with *dolo*.<sup>1305</sup>

1522. First, the Reconsideration Decision details the manoeuvres which gave rise to *dolo*.<sup>1306</sup>

- First, in fabricating interpretative differences and forcing Ingeominas to the negotiation table;
- Second, in presenting successive alternatives, once the previous alternative had been rejected by Ingeominas;
- Third, in submitting different alternatives, which all implied a reduction of the income for the state.

1523. The conclusion is the following:<sup>1307</sup>

“Ahora, ¿en qué consiste el dolo entonces en este caso? Tanto PRODECO como algunos funcionarios de INGEOMINAS estaban tan conscientes que una disminución en las regalías ya pactadas en el contrato era lesivo [sic] a los intereses patrimoniales del Estado, que tuvieron que acudir a un argumento como un mayor volumen de explotación cuando ni siquiera se había alcanzado el volumen acordado en el contrato inicial. Tal propuesta necesariamente tendría que parecer razonable en la medida que para la mayor explotación se requeriría, según los argumentos de los implicados una mayor inversión. Pero es de advertir que tampoco esa mayor producción ni la inversión se dio en el periodo de transición tal como se soportó en fallo”.

[Emphasis added]

1524. The Reconsideration Decision thus gives a different reasoning to support its finding of *dolo*: Prodeco and Ingeominas were aware that a reduction of Royalties would injure the interests of the State. Consequently, Prodeco and Ingeominas had to resort

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<sup>1303</sup> Doc. C-35.

<sup>1304</sup> Doc. C-35, p. 54.

<sup>1305</sup> Doc. C-35, pp. 58-70.

<sup>1306</sup> Doc. C-35, p. 60.

<sup>1307</sup> Doc. C-35, p. 61.

to the argument of a higher production, when the volume agreed upon in the initial Contract had been achieved. But this higher production and investment did not materialize during the Transition Period.

(iii) Appeal Decision

1525. In August 2015, the *Contralor General de la República* issued the Appeal Decision in the *recurso de apelación*, confirming the *Contraloría*'s Decision.<sup>1308</sup>

1526. As to the issue of *dolo*, the *Contralor General* noted the following:

1527. First, Prodeco, by signing a contract with the public administration, became its collaborator and entered into a special relationship.<sup>1309</sup>

1528. Second, Prodeco failed to adhere to this heightened level of responsibility. It imposed its desire to obtain profits over the collective interests of society, and it took advantage of the institutional frailty of Ingeominas.<sup>1310</sup>

1529. Third, the characterization of Prodeco's conduct as *dolosa* in the *Contraloría*'s Decision was accurate.<sup>1311</sup> There were two fundamental reasons why Prodeco acted with *dolo*:

- Its actions showed “*una intención de incrementar ilegítimamente sus ganancias derivadas del negocio, sin hacer un mínimo esfuerzo por armonizarlas con los intereses estatales, obligación que se deriva de su condición de colaborador de la administración*”;
- Additionally, *dolo* derives from the fact that Prodeco resorted to the argument that it would increase its investments and the volume of coal mined, but such increases did not materialize during the Transition Period (*i.e.* during the year 2010).<sup>1312</sup>

**c. Discussion**

1530. The question before the Tribunal is whether the finding of the *Contraloría* that Prodeco acted with *dolo* constitutes an “unreasonable measure”, which impairs Claimants' use and enjoyment of its investment and violates Art. 4(1) of the Treaty.

1531. Art. 63 of the Civil Code provides the general definition of *dolo* in Colombian law – a definition which is also relevant for the purposes of establishing fiscal liability:<sup>1313</sup>

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<sup>1308</sup> Doc. C-37.

<sup>1309</sup> Doc. C-37, p. 61.

<sup>1310</sup> Doc. C-37, p. 62.

<sup>1311</sup> Doc. C-37, pp. 62-64.

<sup>1312</sup> Doc. C-37, pp. 63-64.

<sup>1313</sup> Doc. CL-172, p. 38.



*“El dolo consiste en la intención positiva de inferir injuria a la persona o propiedad de otro”.*

1532. *Dolo* is thus intimately associated with the actor’s intention of causing harm or damage to the counterparty or its assets.

Fiscal Liability Proceeding

1533. In the various decisions adopted in the Fiscal Liability Proceeding, the *Contraloría* developed three separate lines of reasoning to support its finding of *dolo*; all three are based on Prodeco’s alleged intention of reducing its Royalty payments, thus causing damage to the Republic:

- In the *Auto de Imputación* the *Contraloría* finds that Prodeco had acted “*a sabiendas de que con esta modificación se disminuirían los ingresos*” for the State;<sup>1314</sup> the *Contraloría*’s Decision took up the same argument, adding that as a collaborator of the State, Prodeco had a heightened responsibility in avoiding that the State suffers damages;<sup>1315</sup>
- The Decision also argued that Prodeco had had carried out “a number of maneuvers” to achieve a reduction in Royalties and to maximize its own profits;<sup>1316</sup>
- The Reconsideration Decision reiterated and further developed the argument that Prodeco had carried out manoeuvres with the aim of causing damage to the financial interests of the State,<sup>1317</sup> but then gave a twist to the argument: the *dolo* consisted in that Prodeco promised an increase in production and investment, but that increase had not materialized during the Transition Period.<sup>1318</sup>

1534. The three lines of reasoning developed by the *Contraloría* require, as a condition for the existence of *dolo*, that Prodeco sought to cause damage to the Republic by reducing its Royalty payments. The *Contraloría*’s position echoes Art. 63 of the Civil Code, which defines *dolo* by reference to the intention of causing harm or damage to a person or its assets.

1535. In the previous section, the Tribunal has already established that, as regards the determination of damages, the *Contraloría*’s Decision constituted an unreasonable measure, in breach of Art. 4(1) of the Treaty. The *Contraloría* has thus failed to prove that the execution of the Eighth Amendment caused any damage to Colombia.

1536. The Tribunal is now called to decide whether the *Contraloría*’s finding that Prodeco acted with *dolo* also implied an unreasonable measure, contrary to Art. 4(1) of the Treaty.

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<sup>1314</sup> Doc C-24, p. 186.

<sup>1315</sup> Doc. C-32, p. 109.

<sup>1316</sup> Doc. C-32, p. 85.

<sup>1317</sup> Doc. C-35, p. 60.

<sup>1318</sup> Doc. C-35, p. 61.

1537. In the present case, there is no certainty that Prodeco's conduct caused any damage to the Republic. Since no damage has been validly established, the question whether Prodeco acted with *dolo*, *i.e.* with the intention to cause damage to the Republic, and whether in so finding the *Contraloría* acted unreasonably, is moot. Such question will only become relevant if and when the *Contraloría* properly determines that the Eighth Amendment actually was harmful to the interests of the Republic.

**D. Legitimate Expectations to a Non-Arbitrary and Not Unreasonable Application of the Fiscal Control Regime**

1538. *Pro memoria*: Claimants allege that:

- they had legitimate expectations that the fiscal control regime, if applied to Prodeco, would be applied fairly, that is, in applying the criteria of liability of that regime the *Contraloría* would not act in an abusive, improper, or unreasonable manner, and that
- the *Contraloría* frustrated those expectations, in breach of Art. 4(2) of the Treaty.

The Tribunal postponed consideration of this claim, because the issue rests on considerations that largely coincide with those best examined in respect of the claim based on unreasonable measures.

1539. The Tribunal has found that the *Contraloría* applied an unreasonable methodology to establish the damages allegedly caused to Colombia by the Eighth Amendment and, accordingly, Respondent took an unreasonable measure that impaired Claimants' investment, in violation of Art. 4(1) of the Treaty. In light of this conclusion, the analysis of Claimants' remaining claim for breach of Art. 4(2) can be brief.

1540. The Tribunal considers that, although Claimants did not have legitimate expectations that the fiscal liability regime would not be applicable to Prodeco, they did have legitimate expectations that the regime, if applied at all, would be applied in a reasonable manner. Since the *Contraloría*'s finding of damage caused by Prodeco to the State was unreasonable, Claimants' legitimate expectations were frustrated. In this respect, then, the *Contraloría*'s actions also breached the FET standard of Art. 4(2) of the Treaty.

**(3) THE ALLEGED RESPONSIBILITY OF COLOMBIA ARISING FROM THE CONDUCT OF THE SGC/ANM**

1541. Claimants submit that, apart from their claim based on the conduct of the *Contraloría*, Colombia incurred responsibility as a consequence of the conduct of the SGC/ANM. The conduct of the SGC/ANM that allegedly gave rise to such responsibility was filing the Procedure for Contractual Annulment with the Colombian courts:

- First, Claimants submit that the conduct of the SGC/ANM breached their legitimate expectations: such conduct directly contradicted the express representation given by Ingeominas in the Eighth Amendment, stating that such Amendment was in the interest of the State;<sup>1319</sup>
- Second, Claimants also argue that the SGC/ANM has conducted itself in an inconsistent, arbitrary, unpredictable, and non-transparent manner, because the Eighth Amendment induced Prodeco to make investments and expand the Mine, and the Mining Agency is now reneging on the commitments assumed therein.<sup>1320</sup>

1542. Respondent counters that the filing of the Procedure for Contractual Annulment involves an ordinary legal recourse to state courts, which cannot be contrary to Claimants' legitimate expectations. Absent denial of justice, which Claimants are not pleading, it is no breach of the FET standard to submit a contract for nullification by the courts.<sup>1321</sup>

#### Facts

1543. Pursuant to clause 39, the Mining Contract is subject to Colombian law and to the jurisdiction of the Colombian courts.<sup>1322</sup> Colombian courts are thus empowered to adjudicate all disputes arising out of the Mining Contract – including any dispute as regards the validity of the Contract or of its Amendments.

1544. On 30 March 2012, after an unsuccessful request for mandatory conciliation, the SGC filed the Procedure for Contractual Annulment with the *Tribunal Administrativo de Cundinamarca*, invoking clause 39 of the Mining Contract. The SGC requested that the court declare the nullity of the Eighth Amendment, arguing that such Amendment was detrimental to the general interest of the State: the Amendment had been executed on the assumption that it would generate benefits for the State, but this scenario had not materialized.<sup>1323</sup>

1545. Subsidiarily, the SGC requested that the *Tribunal Administrativo* revise the Eighth Amendment, “*de tal manera que se preserve el interés general, recuperando y manteniendo a un futuro el equilibrio de la ecuación financiera del Contrato 044/89, perdido con el desarrollo del Otrosí No. 8*”.

1546. It is undisputed that in the Procedure for Contractual Annulment the *Tribunal Administrativo de Cundinamarca* has not issued a decision on the merits of the case.<sup>1324</sup>

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<sup>1319</sup> C I, paras. 196-198; C II, para. 270(a); HT, Day 1, p. 163, l. 9 – p. 164, l. 1.

<sup>1320</sup> C II, para. 270(b) and (c).

<sup>1321</sup> R II, paras. 632-633, referring to *Azinian*, para. 100 and to *Alghanim & Sons*, para. 350.

<sup>1322</sup> Doc. C-2, clause 39, p. 38.

<sup>1323</sup> Doc. C-140, pp. 3 and 34-35.

<sup>1324</sup> C I, para. 143; Compass Lexecon I, para. 58; R I, para. 261; R II, para. 383; HT, Day 1, p. 155, l. 4.

### Discussion

1547. The Tribunal finds for Respondent: the filing of the Procedure for Contractual Annulment does not constitute a violation of Art. 4 of the Treaty.

1548. Claimants say that their legitimate expectations have been breached (**A.**), and that the conduct of the SGC/ANM was unreasonable (**B.**). The Tribunal considers these arguments to be without merit.

#### **A. Legitimate Expectations**

1549. The conduct imputed to the SGC/ANM simply consists in the filing of the Procedure for Contractual Annulment, an action before the domestic court with jurisdiction to adjudicate disputes arising from the Mining Contract. The SGC/ANM is entitled to do so under clause 39 of the Contract.

1550. In the Tribunal's opinion, the conduct of the SGC/ANM does not breach Claimants' legitimate expectations: Colombia never made any representation or gave any assurance to Claimants that its Mining Agency would abstain from enforcing such rights as it might have under the Contract or under Colombian law.

1551. It is true that Ingeominas executed, registered and initially complied with the Eighth Amendment, while its successor organizations are now seeking annulment of the Amendment before the Colombian courts. It is also true that in *Considerando 6* Ingeominas represented that "*con el presente acuerdo se garantizan los intereses del Estado*".

1552. But the execution of a contract, even if such contract includes a representation that it is valid and binding, does not create a legitimate expectation that, if subsequently one of the parties discovers that an alleged cause for annulment pre-existed or has arisen, such party will abstain from raising a dispute in the proper forum. To understand the contrary would lead to the untenable general conclusion that actions requesting annulment of a contract are barred because such actions will breach the counter-party's legitimate expectations.

#### **B. Arbitrariness or Unreasonableness**

1553. Claimants also submit that the SGC/ANM's conduct was arbitrary and unreasonable.

1554. The Tribunal does not share this opinion.

1555. Under the Mining Contract, the SGC/ANM is obligated to submit disputes to the jurisdiction of the Colombian courts. It is a fact that a dispute has arisen: the SGC/ANM now takes the view that the Mining Contract executed by Ingeominas is null and void (or subsidiarily that it must be revised). In such case, the proper conduct, in accordance with the very provisions of the Contract, is to submit the case to adjudication in the agreed forum. That is precisely what the SGC/ANM has done - as it was entitled to and obliged under the Mining Contract.

1556. There is a second argument. The Colombian courts have not yet ruled on the merits in the Procedure for Contractual Annulment. Consequently, there can be no argument that Claimants have already suffered a denial of justice – and Claimants acknowledge that no claim for denial of justice is being pursued in this procedure.<sup>1325</sup>
1557. Respondent says that, absent an action tantamount to denial of justice, it is no breach of FET to submit a contract for nullification before the proper court.<sup>1326</sup> The Tribunal concurs: the mere filing by the SGC/ANM of the Procedure for Contractual Annulment cannot give rise to a violation of Art. 4 of the Treaty.
1558. It is important to note that the conduct of SGC/ANM of which Claimants complain is merely filing with the competent Colombian court a claim for the annulment of the Eighth Amendment. As the Colombian judiciary has not made a decision on the matter, Claimants cannot (and in fact do not) make a claim for breach of the FET standard in the form of denial of justice. And since the Eighth Amendment has not been annulled, but remains in full force and effect, Claimants have suffered no damage attributable to the actions of the Colombian judiciary or the filing of the claim for annulment by the SGC/ANM.

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<sup>1325</sup> C II, para. 225.

<sup>1326</sup> R II para. 633, invoking *Azinian*; para. 100 and *Alghanim & Sons*, para. 350.

## VII. REPARATION

1559. In this section, the Tribunal must establish the reparation to which Claimants are entitled to offset the effects of Colombia's international wrong on Claimants' investment. The Tribunal will first briefly summarize the Parties' positions ((1) and (2)) and will then decide the issue (3).

### (1) CLAIMANTS' POSITION

1560. Claimants are claiming by way of restitution an order that Respondent:<sup>1327</sup>

- repay to Prodeco the Fiscal Liability Amount, and
- any other sums that Colombia may, up to the date of the Award, have ordered Prodeco to pay by way of Royalties or GIC calculated on the basis that the Eighth Amendment should not apply,

1561. They are also claiming as compensation that the above payments be:

- adjusted from the date of payment to the time of the date of the award at an annual rate of 9.69%, compounded semi-annually.

### (2) RESPONDENT'S POSITION

1562. Respondent says that Claimants cannot be compensated for the Fiscal Liability Amount paid for three reasons:

- First, because Claimants and their legal advisors have expressed their utmost confidence that the *Contraloría* Decision will be revoked and Prodeco will be fully reimbursed for the amount paid; this has been stated in Prodeco's 2015 financial statements;<sup>1328</sup>
- Second, even if the judicial recourse against the *Contraloría's* Decision were not successful, Prodeco could recover the amounts paid from the Government officers who were held jointly and severally liable by the *Contraloría*; Prodeco's failure to do so is contrary to its duty to mitigate damages;<sup>1329</sup>
- Third, Prodeco could have requested the suspension of the effects of the *Contraloría's* Decision, which would have enabled them to delay payment until a decision in the Procedure for Contractual Annulment is rendered.<sup>1330</sup>

1563. Finally, Respondent argues that any recovery by Claimants must be significantly reduced to reflect Claimants' contribution to their own losses. Claimants' behaviour

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<sup>1327</sup> C I, para. 310(f); C II, para. 374(f).

<sup>1328</sup> R I, para. 563, R II, para. 854.

<sup>1329</sup> R I, para. 567, R II, para. 858.

<sup>1330</sup> R I, para. 568.

materially contributed to the losses, providing Ingeominas with misleading information, influencing Ingeominas' Director Ballesteros and breaching mandatory procedures for amending *Contratos de Gran Minería*.<sup>1331</sup>

### (3) DECISION OF THE ARBITRAL TRIBUNAL

1564. The Tribunal has reached the conclusion that the *Contraloría* applied an unreasonable and arbitrary methodology to establish the damages allegedly suffered by Colombia due to the execution of the Eighth Amendment. This conduct of the *Contraloría* is attributable to the Republic of Colombia and implies a violation of Arts. 4(1) and 4(2) of the Treaty.<sup>1332</sup>

1565. The Tribunal must now determine the appropriate reparation for Claimants' loss.

#### A. The Standard of Full Reparation

1566. The legal standard which the Tribunal must apply is not disputed by the Parties: it is the principle of full reparation of the injury caused, firmly established in jurisprudence since the PCIJ's seminal *Chorzów Factory* decision.<sup>1333</sup> The PCIJ held that full reparation was an essential and consistent principle of customary international law and should be applied even in the absence of any specific provision setting forth an indemnification obligation in the treaty underlying the dispute.<sup>1334</sup>

“It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.”

1567. The principle of full reparation, as adopted by the *Chorzów Factory* decision, was subsequently codified in the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts [**“ILC Articles”**].<sup>1335</sup>

1568. Art. 11(1) of the Treaty permits an investor to claim for breaches of the Treaty if those breaches cause “loss or damage to him or his investment”. However, the only compensation standard expressly set out in the Treaty is that for lawful expropriation (Art. 6). The Treaty provides no compensation formula for non-expropriatory breaches of the Treaty. This gap must be covered applying customary international law, and, to the extent possible, extending by analogy certain rules, which the Treaty provides for expropriation, to other violations.

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<sup>1331</sup> R I, paras. 700-710.

<sup>1332</sup> See para. VI.3.(2.2).B.d *supra*.

<sup>1333</sup> *Case concerning the Factory at Chorzów* (Germany v. Poland), PCIJ, Claim for Indemnity (Jurisdiction), 26 July 1927, Series A, No. 9 (1927).

<sup>1334</sup> *Chorzów Factory* (as quoted in Art. 31 of the ILC Articles, Doc. CL-24).

<sup>1335</sup> International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001), Doc. CL-24.



1569. Customary international law rules on reparation for breaches of international law are set out in the ILC Articles<sup>1336</sup>.

1570. Art. 31 of the ILC Articles states the principle that the injury caused by internationally wrongful acts must give rise to full reparation<sup>1337</sup>:

“1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.”

1571. This principle of full reparation has been consistently applied by investment tribunals – including in cases of non-expropriatory breaches<sup>1338</sup>.

#### Restitution

1572. Pursuant to Art. 35 of the ILC Articles, restitution - as opposed to compensation - is the first of the forms of reparation available to a party injured by an internationally wrongful act. It involves the re-establishment, as far as possible, of the situation which existed prior to the commission of the internationally wrongful act:

“A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(a) is not materially impossible;

(b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.”

#### Discussion

1573. Claimants’ basic claim is straightforward: Claimants request that, by way of restitution, Colombia repay to Prodeco de Fiscal Liability Amount, which is the only amount that Prodeco paid to the *Contraloría*.

1574. The Tribunal agrees.

1575. Respondent’s treaty breach – the *Contraloría*’s wrongful calculation of the damage caused by the execution of the Eighth Amendment – resulted in Prodeco paying to the *Contraloría* the Fiscal Liability Amount, on 19 January 2016. Consequently, in order to re-establish the situation that existed before Colombia violated the Treaty, the Republic is under an obligation to repay to Prodeco the amount improperly collected.

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<sup>1336</sup> Doc. CL-24.

<sup>1337</sup> Doc. CL-24, Art. 31.

<sup>1338</sup> *Azurix*, paras. 421-422; *S.D. Myers*, paras. 303-319; *MTD*, para. 238; and *Feldman*, para. 197.

1576. The Tribunal notes that in this case restitution is not materially impossible nor does it impose a disproportionate burden on the party in breach – the two factors which exclude the possibility of restitution pursuant to Art. 34 of the ILC Articles.

1577. In certain cases, to ensure full reparation restitution must be completed by compensation. Art. 36 of the ILC Articles provides further guidance<sup>1339</sup>:

“1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.”

1578. This rule is relevant in this case since the Tribunal must supplement restitution with compensation in the form of interest in order to achieve full reparation. Claimants’ proven damage resulting from Colombia’s breach of the Treaty is limited to the payment of the Fiscal Liability Amount (and the payment of interest – a question addressed in Section VIII *infra*).

**B. Respondent’s Counter-Arguments**

1579. Respondent alleges that Claimants should not be awarded the Fiscal Liability Amount for three reasons:

- That Claimants are confident that the Annulment Procedure will be successful and, as a result the *Contraloría*’s Decision will be revoked and Prodeco will be reimbursed the Fiscal Liability Amount;<sup>1340</sup>
- Prodeco can recover the Fiscal Liability Amount from the government officials who were held jointly and severally liable by the *Contraloría*;<sup>1341</sup> and
- Claimants could have requested the suspension of the effects of the *Contraloría*’s Decision, and this would have enabled Claimants to delay payment until a decision in the Procedure for Contractual Annulment but decided not to do so.<sup>1342</sup>

1580. Respondent’s counter-arguments have no merit.

1581. First, whether Claimants are confident that the Annulment Procedure will be successful and that the *Contraloría* will reimburse the Fiscal Liability Amount, is irrelevant. Colombia has committed an international wrong, and Claimants are entitled to full reparation. The hypothetical future outcome of the Annulment

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<sup>1339</sup> Doc. CL-24, Art. 36.

<sup>1340</sup> R I, paras. 563-566.

<sup>1341</sup> R I, para. 567.

<sup>1342</sup> R I, paras. 568-569.

Procedure does not affect Claimants' right *hic et nunc* to have their existing damage compensated.

1582. Second, Colombia's second argument is also without merit. Prodeco may or not have the right under Colombian law to claim against the civil servants who were found guilty in the Fiscal Liability Proceeding.<sup>1343</sup> But this right, even if it exists, does not permit Colombia to evade responsibility for its own Treaty breaches. Based on a demand that has been found to be inconsistent with Colombia's international obligations, Prodeco paid the alleged damages to the *Contraloría*; the legal consequence under international law is that Claimants are entitled to restitution of such damages from Colombia, regardless of whether Prodeco may have an action under Colombian law against the other civil servants, who incidentally cannot be held responsible for Colombia's wrongdoing under the Treaty.

1583. Third, Prodeco took the decision to pay the Fiscal Liability Amount in January 2016, under protest and in order to avoid forfeiture of the Mining Contract:<sup>1344</sup>

*"De manera expresa aclaro que el pago aludido lo efectuó PRODECO con el único propósito de mitigar los efectos asociados a la responsabilidad fiscal que incorrecta e indebidamente se le atribuyó [...] lo cual de ninguna manera minimiza, ni afecta y menos puede entenderse como una renuncia a los argumentos de PRODECO y de sus accionistas [...]".* [Emphasis in the original]

1584. Prodeco then filed the Annulment Procedure with the *tribunal contencioso-administrativo* in April 2016. Respondent's argument that Prodeco could have asked the Court for the suspension of the payment is factually wrong: Prodeco had already paid the Fiscal Liability Amount four months before. Legally, the argument is irrelevant: the possibility of asking a local judge for the suspension of a payment does not relieve Colombia from its international-law obligation to repair in full the harm caused.

1585. Finally, Respondent also argues that any recovery by Claimants must be significantly reduced to reflect Claimants' contribution to their own losses.

1586. The argument is without merit. The wrongful act committed by Colombia was the unreasonable calculation of damage by the *Contraloría*. Respondent argues that Claimants' allegedly contributory behaviour was to provide Ingeominas with misleading information, to influence Ingeominas' Director Ballesteros and to breach mandatory procedures for amending *Contratos de Gran Minería*.<sup>1345</sup> These

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<sup>1343</sup> The right is doubtful: Claimants initially added Mr. Ballesteros, Mr. Martínez, Mr. Ceballos, and Ms. Aristizábal as potential co-defendants in their request for annulment filed before Colombian Courts in March 2016. However, the Court refused to admit Prodeco's request unless it excluded such parties (see Doc. R -2, p. 7 and Doc. C-273, p. 7).

<sup>1344</sup> Doc. C-180, p. 3.

<sup>1345</sup> R I, paras. 700-710.

assertions remain unproven,<sup>1346</sup> but even if proven the alleged facts did not contribute to Respondent's wrongful behaviour.

**C. Summary**

1587. Summing up, the Arbitral Tribunal finds that, by way of restitution for Colombia's breach of Arts. 4(1) and (2) of the Treaty, the Republic must repay Prodeco the Fiscal Liability Amount.

1588. The amount claimed by the *Contraloría* in its Decision was denominated in COP, and amounted to COP 60.0 billion.<sup>1347</sup> Prodeco paid this amount, plus 12% interest accrued until the actual date of payment on 19 January 2016, resulting in a total amount of COP 63 billion.<sup>1348</sup> In accordance with Claimants' expert, this amount in COP equated to USD 19.1 million, based on the exchange rate on the date of payment.<sup>1349</sup> The calculation is not disputed. Respondent has explicitly accepted that the amount paid by Prodeco amounted to USD 19.1 million.<sup>1350</sup>

1589. Claimants are asking the Tribunal in its Reply that it order repayment of the Fiscal Liability Amount denominated in USD.<sup>1351</sup>

1590. Art. 6 of the Treaty says that compensation for expropriation shall be paid in "freely convertible currency". This rule can be extended by analogy to compensation due for other breaches of the Treaty. Claimants ask that the compensation be denominated in US currency. The USD indeed being the primary "freely convertible currency" in the world, and Respondent having accepted that the Fiscal Liability Amount equals USD 19.1 million, the Tribunal sees no difficulty in accepting the request.

1591. The impact of currency denomination on the calculation of interest will be addressed in Section **VIII** *infra*.

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<sup>1346</sup> See section **V.1.(5)** *supra*.

<sup>1347</sup> The precise amount is COP 60.023.730.368,33; see Doc. C-32.

<sup>1348</sup> The precise amount is COP 63.003.538.571,82; see Doc. CLEX-4.

<sup>1349</sup> Compass Lexecon I, para. 96.

<sup>1350</sup> R I, para. 560.

<sup>1351</sup> C II, para. 374(f).

## VIII. INTEREST

1592. Claimants claim pre and post-award interest at a rate equivalent to Prodeco's cost of capital as reflected in its WACC, compounded semi-annually, on all amounts awarded. Respondent does not agree with Claimants' proposed calculation of the applicable interest rate. The Tribunal will briefly summarize the Parties' positions (1. and 2.) and will render its decision (3.)

### (1) CLAIMANTS' POSITION

1593. Claimants submit that interest is a component of full compensation under customary international law.<sup>1352</sup> Claimants explain that a State's duty to make reparation arises immediately after its unlawful actions cause harm. Thus, to the extent that payment is delayed, the investor loses the opportunity to invest the compensation.<sup>1353</sup>

1594. Claimants have requested that the Fiscal Liability Amount be adjusted from the date of payment of such amount to the Colombian authorities until the date of the Award, at an annual rate of 9.69%, compounded semi-annually.<sup>1354</sup> Claimants also request post-award interest on the same terms, or at such other rate and compounding period as the Tribunal determines will ensure full reparation.<sup>1355</sup>

1595. According to Claimants, the rate at which interest should accrue must ensure full reparation; therefore, the applicable rate should be equivalent to the return that Claimants would have earned had they been able to invest the funds of which they were deprived.<sup>1356</sup> In Claimants' submission, interest should accrue at Prodeco's WACC (calculated by Claimants' expert to be 8.5% and later updated to 9.69%), because:

- Claimants' cost of capital is a reasonable proxy for the return that Claimants would otherwise have earned on the amounts owed to them as a result of Colombia's Treaty breaches;<sup>1357</sup> and
- The cost of raising funds to replace the Fiscal Liability Amount is Prodeco's cost of capital, not a risk-free rate.<sup>1358</sup>

1596. Interest is not an award in addition to reparation, it is rather a component of full reparation which gives effect to that principle.<sup>1359</sup> This full reparation would not be achieved if the award were to deprive Claimants of compound interest. For this

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<sup>1352</sup> C I, para. 293.

<sup>1353</sup> C I, para. 293.

<sup>1354</sup> C I, para. 310(f); C II, para. 374(f).

<sup>1355</sup> C II, para. 374(i).

<sup>1356</sup> C I, paras. 297-298.

<sup>1357</sup> C I, para. 305.

<sup>1358</sup> C II, para. 354.

<sup>1359</sup> C I, para. 296.

reason, Claimants request that any interest awarded be subject to reasonable compounding.<sup>1360</sup>

1597. As regards the periodicity of the compounding, Claimants assert, on the basis of case law, that a commercially reasonable period for compounding both pre-and post-award interest would be six months.<sup>1361</sup>

## **(2) RESPONDENT'S POSITION**

1598. Respondent does not dispute that interest is due in this case but claims that the applicable interest rate should not be Prodeco's cost of capital but a risk-free rate. Moreover, the Tribunal should award simple interest, and if it were to award compound interest, compounding should be made annually.

1599. Colombia argues that the Tribunal should not use the Project's WACC to calculate interest but a risk-free rate because the Fiscal Liability Amount does not represent an investment (or bore any risk) that warrants compensating them for risk.<sup>1362</sup> Alternatively, if the Tribunal considers that Claimants should be awarded pre-award interest at a rate that compensates for risk, interest should be calculated based on Colombia's sovereign default risk because by paying the Fiscal Liability Amount to Colombia, Prodeco has effectively extended a loan to the State.<sup>1363</sup>

1600. As regards compounding, although increasingly used in investment arbitration, Respondent submits that it cannot be considered as a principle of international law,<sup>1364</sup> and it is banned by Art. 2235 of Colombian Civil Code.<sup>1365</sup> Thus, Colombia requests that simple interest is awarded, and if the Tribunal were to award compound interest, compounding be carried out annually.<sup>1366</sup>

## **(3) DECISION OF THE ARBITRAL TRIBUNAL**

1601. Every decision on interest must distinguish the rate, calculation methodology, *dies a quo*, *dies ad quem*, and principal amount.

1602. Since the Tribunal has determined that the compensation due to Claimants is equivalent to the Fiscal Liability Amount, *i.e.* USD 19.1 million, that is the principal amount.

### Rate

1603. Claimants have requested that interest be granted over the Fiscal Liability Amount from the date of payment at an annual rate of 9.69%, because they consider that

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<sup>1360</sup> C I, para. 306; CII, paras. 356-357.

<sup>1361</sup> C I, para. 308; C II para. 357.

<sup>1362</sup> R I, paras. 676-685; R II paras. 953-959.

<sup>1363</sup> R I, paras. 686-690; R II, paras. 961-963.

<sup>1364</sup> R I, para. 692.

<sup>1365</sup> R I, para. 695; R II, paras. 964-972.

<sup>1366</sup> R I, paras. 698-699; R II, paras. 973-974.

Prodeco could have invested the Fiscal Liability Amount in their mining operations, which would have generated an expected return equal to the cost of capital of the project.<sup>1367</sup>

1604. Respondent says that, if the Tribunal were to award restitution, interest should be calculated at a risk-free rate, or alternatively, based on Colombia's sovereign default risk.

1605. Art. VI of the BIT provides that compensation for expropriation shall include "interest at a normal commercial rate". Although the rule refers to expropriation, it can be extended by analogy to compensation for violations of other provisions of the BIT.<sup>1368</sup>

1606. None of the interest rates proposed by the Parties can be said to fit into the definition of "normal commercial rates". Claimants' proposal that the interest rate be equivalent to its WACC would over-compensate Prodeco, since it would allow it to earn a return without bearing commensurate risk. Respondent's proposal that interest be calculated applying the short-term rate on US treasury bills also fails to qualify as "normal commercial rates" – US treasury bills finance the US Government, not commercial enterprises.

1607. The Arbitral Tribunal is of the view that LIBOR is the most widely used "normal commercial rate", since it is universally accepted as a valid reference for the calculation of variable interest rates. LIBOR is determined by the equilibrium between supply and demand, representing the interest rate at which banks can borrow funds from other banks in the London interbank market; it is fixed daily by the British Bankers' Association for different maturities and for different currencies.

1608. Since the compensation is expressed in USD, the appropriate rate of reference for the calculation of interest should be the LIBOR rates for six-month deposits denominated in USD.

1609. Loans to customers invariably include a surcharge, which must be inserted in the calculation of interest to reflect the financial loss caused to Prodeco by the temporary withholding of money. Claimants would not be fully compensated if the interest rate applied did not include an appropriate margin.<sup>1369</sup> The Tribunal considers that 2% is a reasonable margin, reflecting the surcharge that an average borrower would have to pay for obtaining financing based on LIBOR.<sup>1370</sup>

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<sup>1367</sup> Compass Lexecon I, para. 96.

<sup>1368</sup> *Lemire (Award)*, para. 352.

<sup>1369</sup> Respondent admits as much when it points to the fact that Claimants have obtained financing at LIBOR + 0.87% (R II, para. 956).

<sup>1370</sup> R III, para. 31; *Lemire (Award)*, para. 356; *PSEG*, para. 90; *Sempra*, para. 137; and *Rumeli*, para. 227.



Calculation methodology

1610. Claimants have requested that interest should be compounded semi -annually, while Respondent proposes that simple interest be applied, alleging that capitalisation is banned by Art. 2235 of Colombian Civil Code.<sup>1371</sup> Alternatively, Colombia requests that if the Tribunal were to award compound interest, compounding ought to be carried out annually.<sup>1372</sup>
1611. The question whether interest should be accumulated periodically to the principal has been the subject of diverging decisions in international investment case law. Older case law<sup>1373</sup> tended to repudiate this possibility, but more recent case law tends to accept annual or semi-annual capitalisation of unpaid interest.<sup>1374</sup>
1612. The Tribunal agrees with the more recent decisions. Loan agreements in which interest is calculated on the basis of LIBOR plus a margin usually include a provision that unpaid interest must be capitalised at the end of the interest period, and will thereafter be considered as capital and accrue interest. The financial reason for this provision is that an unpaid lender has to resort to the LIBOR market in order to fund the amounts due but defaulted, and the lender's additional funding costs have to be covered by the defaulting borrower.
1613. This principle implies that, if Claimants had taken out a LIBOR loan to pay the Fiscal Liability Amount, the bank would have insisted that unpaid interest be capitalised at the end of each interest period. Consequently, if Claimants are to be kept fully indemnified for the harm suffered, interest owed under the Award should be capitalised at the end of each six-month interest period.
1614. Respondent has alleged that compound interest is prohibited under Art. 2235 of Colombian Civil Code.<sup>1375</sup> The rule is inapposite, because the accrual of interest on compensation due under the Treaty is a question of international law.<sup>1376</sup>

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<sup>1371</sup> R I, para. 695; R II, paras. 964-972.

<sup>1372</sup> R I, paras. 698-699; R II, paras. 973-974.

<sup>1373</sup> CMS, paras. 470-471.

<sup>1374</sup> MTD, para. 251; PSEG, para. 348; Lemire (Award), para. 361.

<sup>1375</sup> R I, para. 695; R II, paras. 964-972.

<sup>1376</sup> Moreover, Article 2235 of the Colombian Civil Code refers to mutual or consumer loans, which have no bearing for the present case. Furthermore, the Judgment of the Colombian State Council – which was materially misquoted by Respondent – clarifies that Colombian law only bans compound interest if the interest is due and accrued, but otherwise compound interest is allowed. Colombian Council of State, Judgment of 27 March 1992, Doc. R-348, p. 9-10. In the paragraph immediately below the one quoted by Respondent the State Council states:

*"La regla tercera del artículo 1617 del C.C. [...] prohíbe el cobro de intereses sobre aquéllos "atrasados", es decir, aplicando el criterio del artículo 28 ib., lo pendiente, lo insatisfecho o no cumplido en su oportunidad, vale decir, para el caso sub-lite, los intereses que no fueron cubiertos en el tiempo u oportunidad señalado para ello en el respectivo negocio jurídico. Y, la razón de la disposición, es el querer del legislador de evitar que se sancione doblemente el incumplimiento contractual, lo que acontecería si se permitiese el cobro de intereses sobre intereses atrasados pendientes de pago.*

1615. Accordingly, the Tribunal decides that due and unpaid interest shall be capitalised semi-annually, from the *dies a quo*.

*Dies a quo*

1616. Claimants request that interest be awarded since the date of payment of the Fiscal Liability Amount. The Arbitral Tribunal agrees. Interest should start accruing from the date of payment of the Fiscal Liability Amount, *i.e.* 19 January 2016, the date when Claimants' damage materialized, and consequently the appropriate date for interest to start accruing.

*Dies ad quem*

1617. Interest shall accrue until all amounts owed in accordance with this Award have been finally paid.

1618. In summary, the Tribunal decides that from 19 January 2016 until the date of payment, the principal amount of USD 19.1 million shall accrue interest at rate of LIBOR for six- month deposits plus a margin of 2% capitalised semi-annually.

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Por consiguiente, son estos intereses colocados en condiciones moratorias los que no permiten, de conformidad con la norma reglamentada del C.C. el cobro de nuevos intereses. Pero, a contrario sensu, los intereses no atrasados si pueden llegar a producir intereses.

Ahora bien; no se opone a lo anterior, [...] la norma establecida en el artículo 2235 del mismo Código Civil, según la cual "se prohíbe estipular intereses de intereses" que se refiere específicamente al mutuo o préstamo de consumo, La "armonía legis" impone la necesidad de concluir, para evitar la oposición entre los dos artículos del mismo Estatuto o el sometimiento del contrato de mutuo a un criterio diferente a aquél que opera para el resto de las obligaciones dinerarias provenientes de fuente distinta, lo cual no parece razonable, que el artículo 2235, en cuanto prohíbe cobrar intereses de intereses, debe entenderse y aplicarse teniendo en cuenta el criterio sentado por la regla tercera del artículo 1617 del mismo Código Civil. Y, sirve también de fuente de interpretación, para determinar los alcances del artículo 2235 del C. C., la estipulación que contiene el artículo 886 del Código de Comercio, en cuanto marca claramente una voluntad del legislador en el sentido de prohibir el cobro de intereses sobre intereses únicamente respecto de aquéllos que sean exigibles, en la medida en que la precitada norma emplea la expresión "pendientes", es decir, lo que se debe, lo exigible, que no es equivalente a lo "causado", que sólo se, debe, cuando se, dan los supuestos para que se produzca su exigibilidad, y con ello la consiguiente situación de mora, si es que no se cancelan; prohibición que, por lo demás, no es absoluta sino relativa, ya que los permite en las relaciones jurídicas entre comerciantes, cuando a causa de la mora se produce demanda judicial del acreedor, causándose en tal evento desde la presentación de aquélla; cuando se trate de intereses debidos con un año de anterioridad, por lo menos; o, cuando se produce un acuerdo posterior al vencimiento.

[Emphasis added]

## **IX. TAXATION**

1619. Claimants submit that they are entitled to a tax indemnification. Colombia rejects Claimants' contention and submits that the Tribunal should deny this request.

1620. The Tribunal will advance the Parties' positions with respect to Claimants' claim for tax indemnification **(1.)** and adopt a decision **(2.)**.

### **(1) THE PARTIES' POSITION**

1621. In their request for relief, Claimants ask that the Tribunal:<sup>1377</sup>

- declare that the award of damages and interest granted to Claimants is net of all applicable Colombian taxes;<sup>1378</sup>
- declare that Colombia may not deduct taxes in respect of the payment of the award of damages and interest;<sup>1379</sup>
- order Colombia to indemnify Claimants in full for any Colombian taxes imposed on the compensation awarded to the extent that such compensation has been calculated net of Colombian taxes;<sup>1380</sup> and
- order Colombia to indemnify Claimants in respect of any double taxation liability that would arise in Switzerland or elsewhere that would not have arisen but for Colombia's adverse measures.<sup>1381</sup>

1622. Claimants have not made any further allegations and Respondent has submitted no defences regarding Claimants' tax indemnity requests.

### **(2) DECISION OF THE ARBITRAL TRIBUNAL**

1623. Claimants make two distinct requests:

- that the Tribunal declare that the amounts awarded be net of Colombian taxes, so that Colombia may not deduct any taxes in respect of such amount and would have to indemnify Claimants for any Colombian taxes imposed thereon;
- that the Tribunal order Colombia to indemnify Claimants in respect of any double taxation liability that would arise in Switzerland or elsewhere as a result of Colombia's Treaty breaches.

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<sup>1377</sup> See section **IV.(1)** *supra*.

<sup>1378</sup> C I, para. 374(j)(i).

<sup>1379</sup> C I, para. 374(j)(ii).

<sup>1380</sup> C I, para. 374(k).

<sup>1381</sup> C I, para. 374(l).

1624. The Tribunal agrees with Claimants as regards the first set of claims, but not as regards the latter.
1625. The BIT specifies that the compensation for expropriation must be “prompt, effective and adequate”<sup>1382</sup> and “shall be settled in freely convertible currency, be paid without delay and be freely transferable”.<sup>1383</sup> The Tribunal has already mentioned that although the rule refers to expropriation, it can be extended by analogy to compensation for violations of other provisions of the BIT.<sup>1384</sup>
1626. These rules support Claimants’ position. Colombia is a sovereign State that can tax any assets or payments located in or originating from its territory. If Colombia were to impose or deduct a tax on Claimants’ award, Colombia could reduce the compensation “effectively” received by Prodeco. A *reductio ad absurdum* proves the point: Colombia could practically avoid the obligation to pay Claimants the restitution awarded by fixing a 99% tax rate on income derived from compensations issued by international tribunals, thereby ensuring that Prodeco would only effectively receive a restitution of 1% of the amount granted.
1627. Thus, in order to guarantee that Claimants receive full reparation for Colombia’s international wrong, the restitution and interest awarded to Prodeco by this Tribunal must be tax neutral. This implies that neither
- (i) the payment of the Fiscal Liability Amount by Prodeco to the *Contraloría* and the State’s repayment of such amount to Prodeco, taken together, nor
  - (ii) the interest awarded in this procedure must result in any tax liability to Prodeco.
1628. Claimants also seek indemnity in respect of any double taxation of the Award that may rise in Switzerland (or elsewhere), to the extent that such liability would not have arisen had Colombia observed its international commitments under the Treaty.
1629. The claim is moot, because the compensation is awarded to Prodeco, not to Glencore. Furthermore, any tax liability arising under Swiss tax laws (or any other fiscal regime, save for that of Colombia), would not qualify as consequential loss arising from Colombia’s breach of the Treaty and would not engage Colombia’s liability.
1630. In conclusion, the Tribunal, in order to guarantee that Claimants receive full reparation for Colombia’s international wrong, declares that the restitution and interest awarded to Prodeco in accordance with this Award must be neutral with regard to Colombian taxes (with the consequences set forth above), and orders Respondent to indemnify Claimants with respect to any Colombian taxes in breach of such principle.

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<sup>1382</sup> Art. VI of the BIT. Emphasis by the Tribunal.

<sup>1383</sup> Art. VII.1 of the BIT.

<sup>1384</sup> See para. 1605 *supra*.

## **X. COSTS**

1631. Rule 47(1)(j) of the Arbitration Rules establishes that

“The award shall be in writing and shall contain [...] (j) any decision of the Tribunal regarding the cost of the proceeding”.

1632. The Parties submitted their statements of cost on 24 September 2018. None of the Parties challenged the items or the amounts claimed by the counterparty.

1633. The Parties have incurred two main categories of costs:

- the lodging fee and advance on costs paid to ICSID [the “**Costs of the Proceeding**”]; and
- the expenses incurred by the Parties to further their position in the arbitration [the “**Defense Expenses**”].

### **(1) CLAIMANTS’ POSITION**

1634. Claimants request that the Tribunal order Colombia to bear Claimants’ costs in their entirety, plus interest from the date at which such costs were incurred until the date of payment by Colombia.<sup>1385</sup>

1635. Claimants request the following amounts:<sup>1386</sup>

#### Costs of the Proceeding

- ICSID administrative costs: USD 625,000.

#### Defense Expenses

- Legal Fees: USD 8,564,303.43,<sup>1387</sup> and COP 398,480,503.<sup>1388</sup>
- Expert Fees and expenses: USD 1,604,858.49.<sup>1389</sup>
- Reasonable travel costs and other expenses incurred by Claimants’ witnesses and representatives: USD 61,093.83; ZAR<sup>1390</sup> 249,934.05 and CHF<sup>1391</sup> 7,170.75.

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<sup>1385</sup> C IV, paras. 2 and 44.

<sup>1386</sup> C IV, para. 44.

<sup>1387</sup> Fees and disbursements of Claimants’ international counsel, Freshfields Bruckhaus Deringer US LLP.

<sup>1388</sup> Fees and disbursements of Claimants’ Colombian counsel, Alvarez Zárate & Asociados.

<sup>1389</sup> Compass Lexecon.

<sup>1390</sup> South African Rand.

<sup>1391</sup> Swiss Francs.

- Miscellaneous costs: USD 39,288.68.<sup>1392</sup>

1636. Claimants' Costs of the Proceeding amount to a total of USD 625,000 and its Defense Expenses amount to USD 10,819,544.43; COP 398,480,503; ZAR 249,934.05; and CHF 7,170.75.

1637. Claimants request that the Tribunal order Colombia to pay all these amounts including interest from the date at which such costs were incurred until the date of payment by Colombia.<sup>1393</sup>

## **(2) RESPONDENT'S POSITION**

1638. Colombia requests that Claimants be ordered to cover the entire cost of the proceedings.<sup>1394</sup> Specifically, Colombia requests the reimbursement of the following costs and expenses, plus simple interest on costs at the economically reasonable rate of LIBOR + 2%, or alternatively at another commercially reasonable rate from the date Colombia incurred such costs until the date of full payment.<sup>1395</sup>

### Costs of the Proceeding

- ICSID administrative costs: USD 600,000 (of which USD 75,000 were yet to be paid as of the date of the Award).

### Defense Expenses

- Legal Fees: USD 1,808,703<sup>1396</sup> and COP 214,566,385.40.<sup>1397</sup>
- Miscellaneous costs: USD 168,112.01 and COP 1,062,000.
- Expert Fees and expenses: USD 794,024.<sup>1398</sup>
- Travel costs for witnesses and counsel: USD 129,032.25 and COP 145,500,763.75.

1639. Respondent's Cost of the Proceeding amount to USD 600,000 (of which USD 75,000 were yet to be paid as of the date of the Award), and its Defense Expenses to a total of USD 3,424,871.26 and COP 361,129,149.15.

## **(3) DECISION OF THE ARBITRAL TRIBUNAL**

1640. Art. 61(2) of ICSID Convention establishes that:

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<sup>1392</sup> Fees and disbursements of Claimants' graphics and technology consultant, RLM | TrialGraphix.

<sup>1393</sup> C IV, para. 44(a).

<sup>1394</sup> R III, para. 29.

<sup>1395</sup> R III, para. 31.

<sup>1396</sup> Fees and disbursements of Respondent's international counsel, Dechert (Paris) LLP.

<sup>1397</sup> Fees and disbursements of Respondent's Colombian counsel, ANDJE.

<sup>1398</sup> Brattle.

“In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.”

**A. Criteria for the Decision on Costs**

1641. Neither the Arbitration Rules nor the BIT contain any guidelines for the apportionment of costs. Therefore, the Tribunal has wide discretion to decide on how the costs of this proceeding shall be apportioned.

1642. Both Parties have requested that the other bear the costs of the proceedings<sup>1399</sup> based on the principle that “costs follow the event”<sup>1400</sup>. Each Party additionally argues that the counterparty needlessly complicated the proceedings and engaged in procedural misconduct.<sup>1401</sup>

1643. The Tribunal will follow the principle that costs follow the event, which is the customary principle in arbitral practice. The Tribunal will disregard the Parties’ allegations of procedural misconduct – the Mining Contract being still in force for many years, the Tribunal does not wish unnecessarily to disrupt the future relationship between the Republic of Colombia and Claimants.

1644. As regards the outcome of this procedure, each Party can legitimately claim that it has succeeded in part:

- Claimants have succeeded, to the extent that three of Respondent’s four jurisdictional objections have been dismissed and that Claimants have prevailed in their main claim that Colombia breached the BIT and Claimants ought to be awarded restitution;
- But Respondent has also succeeded, because the Tribunal accepted their Umbrella Clause Objection and has dismissed Claimants’ ancillary petitions.

**B. Application of the “Costs Follow the Event” Principle**

1645. The Tribunal will apply the principle that costs follow the event to the two main categories of costs: the Costs of the Proceeding and the Defense Expenses.

**a. Costs of the Proceeding**

1646. Claimants claim the Costs of the Proceedings paid to ICSID, i.e. the advances made by Claimants to cover the fees and expenses of the Tribunal and administrative fees of ICSID.

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<sup>1399</sup> C IV, paras. 2 and 44(a); R III, paras. 29 and 31.

<sup>1400</sup> C IV, para. 7; R III, para. 2.

<sup>1401</sup> C IV, para. 8; R III, para. 12.



1647. The Tribunal finds that these costs should be assumed by Respondent, given that Claimants have prevailed in the majority of the jurisdictional objections and the Tribunal has found a breach by Colombia of the BIT.

1648. Thus, Colombia must reimburse Claimants the totality of the Costs of the Proceeding made to ICSID (net of any final reimbursements made by ICSID).

**b. Defense Expenses**

1649. As a first step, the Tribunal must establish the amount of reasonable defense expenses which a standard claimant has to incur, in order properly to present and defend its claim [**“Reasonable Defense Expenses”**]. Taking into consideration the complexity of the case, the amount in dispute and the work of legal counsel and experts, the Arbitral Tribunal considers that Claimants’ Reasonable Defense Expenses amount to USD 3.3 million.

1650. Colombia must only assume that part of the Claimants’ Reasonable Defense Expenses that results from applying the principle that cost follow the event. To determine such amount, the Tribunal must:

- First, determine the main legal issues that have been decided;
- Second, give each legal issue a ponderation; and
- Third, determine the success rate of Claimants’ claims in each legal issue and apply it to Claimants’ Reasonable Defense Expenses.

1651. In this arbitration, the Arbitral Tribunal has had to make three significant decisions:

- whether the Disputed Documents ought to be admitted into the record in Respondent’s Counter-memorial on the Merits and through document production,
- whether it had jurisdiction,
- whether Colombia had violated the Treaty and the consequences thereof.

1652. The Parties declare to have dedicated approximately 60% of their costs to the merits of the case, approximately 30% to jurisdiction and approximately to 10% to document production. Thus, the Tribunal will assign each of the legal issues the weight given by the Parties.

1653. As a consequence, Claimants’ Reasonable Defense Expenses must be divided as follows:

- Jurisdiction: 30% of USD 3.3 million amounts to USD 990,000;
- Merits: 60% of USD 3.3 million amounts to USD 1,980,000;
- Document Production: 10% of USD 3.3 million amounts to USD 330,000.

1654. The Tribunal must now determine Claimants' rate of success in each legal issue:

- Jurisdiction: Since Claimants were successful in  $\frac{3}{4}$  of the jurisdictional objections, their success rate was 75%.
- Merits: Claimants were successful in two (partially on letters a) and f) of their request for relief) out of the six main claims requested; they were successful in 33% of their claims.
- Document Production: Claimants succeeded in their general petition that the Disputed Documents be excluded in PO No. 2, where the Tribunal found that the "proper procedure to obtain evidence from the counterparty is through the agreed document production exercise"<sup>1402</sup>; in the Revised Document Production exercise both parties made use of their right to request documents: Claimants submitted a total of seven requests, while Respondent presented 39; in PO No. 3 the Tribunal denied 11 and reduced the scope of 19 of the 22 requests granted to Colombia; the Tribunal granted all of Claimants' requests; the Tribunal subsequently ruled in PO No. 4 that Claimants' invocation of privilege for all of the Disputed Documents was admissible and settlement privilege over certain of the Disputed Documents was properly asserted; in summary, the Tribunal considers that Claimants' success rate as regard Document Production was of 90%.

1655. The Tribunal will now apply the success rate to Claimants' Reasonable Defense Expenses for each legal issue:

- Jurisdiction: 75% of USD 990,000, which amounts to USD 742,500;
- Merits: 33% of USD 1,980,000, which amounts to USD 653,400;
- Document Production: 90% of USD 330,000, which amounts to USD 297,000.

#### **(4) INTEREST**

1656. The Parties have requested that interest be awarded over the amounts awarded as costs.<sup>1403</sup> And the Tribunal agrees.

1657. The Tribunal has already decided that the restitution awarded to Claimants shall accrue interest at a LIBOR rate for six months deposits denominated in USD plus a 2% surcharge compounded semi-annually.

1658. The same shall be applied to the amounts that Respondent is ordered to reimburse as costs.

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<sup>1402</sup> PO No. 2, para. 70.

<sup>1403</sup> C IV, para. 44(a); R III, para. 31 (The Tribunal notes that Respondent considers that LIBOR +2% is a commercially reasonable interest rate).

1659. The *dies a quo* shall be the date of issuance of this award.

1660. The *dies ad quem* shall be the date of effective payment.

\* \* \*

1661. In summary, Colombia must reimburse Claimants (i) the Costs of the Proceedings (net of any final reimbursements by ICSID) and (ii) USD 1,692,900 as Defense Expenses, plus (iii) interest on both amounts at a rate of LIBOR for six-month deposits with a margin of 2% capitalised semi-annually from the date of this award until the date of payment.

## XI. SUMMARY

1662. In this section, the Tribunal will review Claimants' and Respondent's requests for relief (which have been set-forth in detail in Section IV *supra*, and compare such requests with the Tribunal's findings.

### (1) CLAIMANTS' REQUESTS FOR RELIEF

1663. Claimants have made nine requests for relief, identified as (a) through (n).

#### A. Request (a)

(a) DECLARE that Colombia has breached Articles 4(1), 4(2) and 10(2) of the Treaty.

1664. The Tribunal has found that Colombia breached Arts. 4(1) and 4(2) of the Treaty, and that the improper measure consisted in the *Contraloría* applying an unreasonable methodology to establish the damages allegedly caused to Colombia by the Eighth Amendment.

#### B. Request (b)

(b) ORDER that Colombia, through the ANM or any other government agency that may in due course become the contractual counterparty of Prodeco under the Mining Contract, continue to perform and observe the Eighth Amendment and further that all organs of the Colombian state take any and all actions necessary to ensure and not interfere with such continued performance and observance.

1665. In this Request Claimants ask the Tribunal to order Colombia that it continue to perform and observe the Eighth Amendment.

1666. The Parties have discussed whether, from a theoretical point of view, an international arbitration tribunal constituted under the Treaty and the ICSID Convention is authorized to issue an order of this type to a sovereign State like Colombia.<sup>1404</sup>

1667. The theoretical question may remain unanswered, because in the present case, there is no cause-effect relationship between the Tribunal's findings (that the *Contraloría* wrongly calculated the damage caused to the Republic by the Eighth Amendment) and Claimants' request that Colombia be ordered to continue to perform the Eighth Amendment. Reparation of the international wrong committed by Colombia requires full reparation, and full reparation is achieved by restitution plus interest of the amounts improperly demanded and paid – not by ordering Colombia to perform the Eighth Amendment.

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<sup>1404</sup> CI, paras. 228-243; C II, para. 281-295; R I, paras. 525-547; R II, paras. 775-797.

**C. Requests (c) and (e)**

(c) ORDER that Colombia, through the ANM, procure the immediate and unconditional cessation of the ANM Proceedings with prejudice.

(e) ORDER that Colombia, through the ANM, give appropriate assurances and guarantees that it will refrain from initiating any new proceedings in relation to the Eighth Amendment.

1668. Claimants' Requests (c) and (e) cannot succeed, because the Tribunal has found that a breach of the Treaty did not arise when the SGC/ANM filed with the competent Colombian court a claim for the annulment of the Eighth Amendment. Since the *tribunal contencioso-administrativo* has not yet made any decision on the SGC/ANM's request for annulment, Claimants cannot and in fact do not make a claim for breach of the FET standard in the form of denial of justice. Any hypothetical future claim for denial of justice would have to be adjudicated in a new proceeding.

1669. Furthermore, Request (e) is drafted in terms which are too broad: the Tribunal's findings do not support a blanket order to Colombia not to initiate new proceedings of any kind in relation to the Eighth Amendment. If, for example, Prodeco breaches the Eighth Amendment, there is no reason why the Mining Agency should be prohibited to start appropriate proceedings.

**D. Request (d)**

(d) ORDER that Colombia provide appropriate assurances and guarantees from the [*Contraloría*] that it will refrain from initiating any new proceedings in relation to the Eighth Amendment.

1670. The Tribunal has found that the *Contraloría*'s methodology for calculating the damage suffered by Colombia was unreasonable and in breach of Arts. 4(1) and 4(2) of the Treaty.

1671. The Tribunal has provided a number of reasons which justify its findings of unreasonableness:<sup>1405</sup>

- The methodology of the Tover-Silva Report, based on a simple analysis of the Transition Period, is flawed;
- The methodology to be used by the *Contraloría* must be forward looking and be based on simulations as of the date of the Eighth Amendment;
- That methodology must take into account the fact that under the 2010 PTI Prodeco assumed an obligation to increase investment and to expand the Mine, resulting in an increased production of coal.

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<sup>1405</sup> For details see Section **VI.3.(2.2).B.c** *supra*.

1672. Should the *Contraloría* decide to initiate new proceedings against Prodeco in relation to the Eighth Amendment, it will be bound to respect these findings — otherwise the new calculation of damages will be unreasonable for the same reasons and Colombia will again incur in breach of Arts. 4(1) and 4(2) of the Treaty.
1673. In the operative part of this Award, the Tribunal will declare that the *Contraloría*'s conduct in calculating the damage suffered by the Republic was in breach of Arts. 4(1) and 4(2) of the Treaty. Not only does the Tribunal's decision legally obligate Colombia to repair the harm caused as a consequence of the wrongful conduct in the past; it also implies that the *Contraloría* (and Colombia) are required by the Treaty to abstain from incurring in the same wrongful conduct in the future. The Tribunal considers that, in the circumstances of this case, the specific assurances or guarantees by the Republic that Claimants request in their Request (d) are unnecessary.

**E. Request (f)**

(f) ORDER that, by way of restitution, Colombia repay to Prodeco the Fiscal Liability Amount of US\$19.1 million<sup>1406</sup> paid by Prodeco to Colombia on 19 January 2016 in the context of the Fiscal Liability Proceedings, and any sums that the GCO or any other organ of the Colombian State or Colombian court may, up to the date of the Tribunal's Award, have ordered Prodeco to pay by way of royalties or GIC calculated on the purported basis that the Eighth Amendment should not apply, adjusted from the date of payment to the date of the Award at an annual rate of 9.69%, compounded semi-annually;

1674. As regards this Request, the Tribunal will find in favour of Claimants, and will order Colombia to repay to Prodeco, by way of restitution, USD 19.1 million, *i.e.* the totality of the Fiscal Liability Amount, denominated in USD, plus interest as set forth in Section VIII.

**F. Requests (g), (h) and (i)**

(g) ORDER that if Colombia does not comply with orders requested in (b), (c), (d), (e), and (f) above within 90 days of the date of the Award, Colombia:

- (A) pay Claimants the Fiscal Liability Amount of US\$19.1 million plus interest to the date of the Award;
- (B) pay Claimants forward-looking damages as of the date of the Award computed as the difference in expected net revenues between a scenario with and without the royalty and GIC provisions in the Eighth Amendment between the date of Award and the end of the Calenturitas mine life as assessed by Claimants' experts at US\$336.1 million as of 31 December 2017; and
- (C) fully indemnify and hold harmless Claimants in respect of all retroactive royalty and GIC amounts that Claimants are ordered to pay

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<sup>1406</sup> C II, fn. 991: "Je 63 billion Colombian Pesos converted into US Dollars at the 19 January 2016 date of payment. *See* Compass Lexecon I, para. 96; Compass Lexecon II, para. 92".

in relation to the years 2011 to the date of the Award as a consequence of a failure to apply the Eighth Amendment, assessed at US\$238.6 million as of 31 December 2017.

(h) In order to avoid double recovery, in the event that subsection (g) is triggered, and solely upon Colombia's payment and Claimants' effective receipt of all of the compensation set out in (g)(A) and g(B) above (duly updated to the date of the Award), and in light of the indemnification ordered in g(C) above, ORDER Claimants to pay royalties and GIC from the date of the Award onwards based on the regime that existed prior to the Eighth Amendment.

(i) ORDER Colombia to pay post-award interest on (f), or, alternatively, (g) above, at a rate of 9.69%<sup>1407</sup> per annum from the date of the Award, compounded semi-annually, or at such other rate and compounding period as the Tribunal determines will ensure full reparation.

1675. Requests (g), (h) and (i) assume that Colombia has failed to respect Requests (b), (c), (d) or (e). Since the Tribunal has already dismissed Requests (b), (c), (d) and (e), the necessary consequence is that Requests (g), (h) and (i) have become moot.

**G. Requests (j) and (k)**

(j) DECLARE that:

(i) The award of damages and interest in (f), (g) and (h) is made net of applicable Colombian taxes; and

(ii) Colombia may not deduct taxes in respect of the payment of the award of damages and interest in (f), (g) or (h);

(k) ORDER Colombia to indemnify the Claimants in full with respect to any Colombian taxes imposed on the compensation awarded to the extent that such compensation has been calculated net of Colombian taxes;

1676. The Tribunal has found that the restitution and interest awarded to Prodeco in accordance with this Award must be neutral with regard to Colombian taxes and has ordered Respondent to indemnify Claimants with respect to any Colombian taxes in breach of such principle.

**H. Request (l)**

(l) ORDER Colombia to indemnify Claimants in respect of any double taxation liability that would arise in Switzerland or elsewhere that would not have arisen but for Colombia's adverse measures;

1677. This Request (l) is inapposite: the Tribunal is ordering that Colombia repay the Fiscal Liability Award to Prodeco, not to Glencore. Claimants have failed to prove

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<sup>1407</sup> This figure was updated in Claimants' Reply Memorial, C II, para. 374(i).



that restitution to Prodeco will result in any double taxation liability in Switzerland or elsewhere.

**I. Request (m)**

(m) ORDER Colombia to pay all of the costs and expenses of this arbitration, including Claimants' 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 costs.

1678. The Tribunal has ordered that Colombia reimburse Claimants the amount of USD 625,000 (net of reimbursement by ICSID) as Costs of the Proceeding and USD 1,692,900 as Defense Expenses.

**(2) RESPONDENT'S REQUESTS FOR RELIEF**

1679. Respondent submits requests for relief on jurisdiction and admissibility and on the merits.

**A. Requests on Jurisdiction and Admissibility**

1004. To declare:

- That it lacks jurisdiction over all of Claimants' claims; and
- That all of Claimants' claims are, in any event, inadmissible;
- That Claimants' claims newly raised in the Reply are untimely and hence inadmissible

1680. The Tribunal has dismissed Respondent's

- Illegality Objection,
- Fork in the Road Objection, and
- Inadmissibility Objection,

but has accepted Respondent's Umbrella Clause Objection.

1681. The necessary consequence is that the Centre has jurisdiction and the Tribunal is competent to adjudicate claims grounded on breach of Arts. 4(1) and 4(2) of the Treaty.

1682. The Tribunal has also dismissed Respondent's additional request that certain claims allegedly raised for the first time in the Reply be declared untimely and inadmissible.

**B. Merits**

1006. If, *par impossible*, the Tribunal finds that it has jurisdiction on Claimants' claims and that such claims are admissible, to declare:

- That Colombia complied with its international obligations under the Treaty and international law;
- That Colombia did not breach Article 4(1) of the Treaty and that all Claimants' claims grounded therein are therefore dismissed;
- That Colombia did not breach Article 4(2) of the Treaty and that all Claimants' claims grounded therein are therefore dismissed;
- That Colombia did not breach Article 10(2) of the Treaty and that all Claimants' claims grounded therein are therefore dismissed; and

1683. The Tribunal has already set forth its findings: Respondent has indeed breached Arts. 4(1) and 4(2) of the Treaty, and consequently, the Tribunal has ordered that Claimants are compensated with the restitution of the amounts improperly paid, plus interest. As regards the breach of Art. 10(2), the Tribunal accepted Respondent's Umbrella Clause Objection, and consequently declared that it lacks competence (and the Centre jurisdiction) to adjudicate that claim.

**C. Quantum**

1008. If, *par impossible*, the Tribunal finds that Colombia has breached its international obligations under the Treaty and/or international law, to declare:

- That Claimants' non-monetary claims are beyond the Tribunal's jurisdiction and powers, or are inadmissible;
- That Claimants have not suffered any damages warranting compensation; and
- That, in any event, Claimants materially contributed to their alleged losses, and that any amounts the Tribunal may award to Claimants are to be reduced accordingly by, at least, 75%.

1684. As regards *quantum*, the Tribunal has found that Claimants have suffered harm as caused by Colombia's wrongful acts and has ordered full reparation in the form of restitution of the Fiscal Liability Amount - the sum which Prodeco had wrongly paid to the *Contraloría*, plus interest.

1685. The Tribunal has not accepted any of Claimants' non-monetary claims (except for the declaration of breach), for the reasons set forth in this section.

1686. Finally, the Tribunal has dismissed Respondent's argument that Claimants materially contributed to their own losses.

## **XII. DECISION**


1687. For the foregoing reasons, the Tribunal unanimously<sup>1408</sup> rules as follows:

1. Dismisses Respondent's Illegality Objection, Fork in the Road Objection, and Inadmissibility Objection, upholds Respondent's Umbrella Clause Objection, and declares that the Centre has jurisdiction and the Tribunal is competent to adjudicate claims grounded on breach of Arts. 4(1) and 4(2) of the Treaty.
2. Declares that the *Contraloría's* conduct in calculating the damage allegedly suffered by the Republic of Colombia as a result of the execution of the Eighth Amendment constitutes (i) an unreasonable measure which has impaired Claimants' investment in Colombia in breach of Art. 4(1) of the Treaty and (ii) a breach of fair and equitable treatment, in violation of Art. 4(2) of the Treaty.
3. Orders the Republic of Colombia to restitute to C.I. Prodeco S.A. the Fiscal Liability Amount in the sum of USD 19,100,000.
4. Orders the Republic of Colombia to pay interest over the amount established in para. 3 from 19 January 2016 until the date of actual payment, at the rate of LIBOR for six-month deposits plus a margin of 2%, capitalised semi-annually.
5. Declares that the payment of restitution and interest awarded to Prodeco in accordance with this Award must be neutral as regards Colombian taxes, with the consequences set forth in para. 1630 of this Award, and orders the Republic of Colombia to indemnify Prodeco with respect to any Colombian taxes in breach of such principle.
6. Orders the Republic of Colombia to reimburse Claimants (i) the Costs of the Proceedings (net of any final reimbursements by ICSID) and (ii) USD 1,692,900 as Defense Expenses, plus interest on both amounts at a rate of LIBOR for six-month deposits with a margin of 2%, capitalised semi-annually from the date of this award until the date of actual payment.
7. Dismisses all other claims, objections and defences.

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<sup>1408</sup> The Tribunal's decision is (i) unanimous on the result and (ii) unanimous on the supporting reasoning, except for Arbitrator Garibaldi's disagreement with certain aspects of the reasoning adopted by the majority, as explained in footnotes in the appropriate places.

THE ARBITRAL TRIBUNAL



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Oscar M. Garibaldi

**24 AUGUST 2019**



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Christopher Thomas QC

**24 AUGUST 2019**



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Juan Fernández-Armesto

**25 AUGUST 2019**