International Court of Arbitration of the
International Chamber of Commerce
Case No. 21747/RD

Arbitration between

REFINERÍA DE CARTAGENA S.A.
(COLOMBIA)

CLAIMANT

and

1. CHICAGO BRIDGE & IRON COMPANY N.V.
(THE NETHERLANDS)

2. CB&I UK LTD.
(UNITED KINGDOM)

3. CBI COLOMBIANA S.A.
(COLOMBIA)

RESPONDENTS

PROCEDURAL ORDER NO. 3

The Arbitral Tribunal

Juan Fernández-Armesto (President)
Andrés Jana Linetzky (Co-arbitrator)
Sir Vivian A. Ramsey (Co-arbitrator)

Administrative Secretary
Deva Villanúa

Deputy Administrative Secretary
Bianca McDonnell

I. WHEREAS

1. On March 16, 2018 Respondents submitted their Exhaustive Statement of Counterclaim, Non-Exhaustive Statement of Defense and Addenda to the Non-Exhaustive Statement of Defense [collectively the "**Second Written Submissions**"], together with a large number of exhibits.

2. On March 20, 2018 Claimant submitted a request for the Tribunal's assistance in regards to a document on which Respondents were seeking to rely in their Second Written Submissions, referred to as 'Bates No. REF0000002029' ["**First Contested Document**"]. According to Claimant the First Contested Document had been inadvertently produced to Respondents during the document production exercise and contained information protected by attorney-client privilege[1].

3. On March 21, 2018 Respondents sent a communication denying that the First Contested Document was subject to privilege or confidentiality or had been inadvertently produced by Claimant; rather, Respondents stated that it had been sent to them by the Republic of Colombia through the *Contraloría General de la República* [the "***Contraloría***"] as evidence supporting the *Contraloría*'s Ordinary Fiscal Liability Proceeding against Respondents [the "***Contraloría* Proceeding**"]. In addition, Respondents stated that the printed versions of their Second Written Submissions were ready for distribution and would be sent by 6:00 p.m. on that same day, unless the Tribunal directed otherwise[2].

4. On the same day the Tribunal requested that the Parties attempt to resolve the issue between them[3]. The Tribunal permitted the Respondents to proceed with sending their Second Written Submissions with the First Contested Document included, with the *caveat* that they may be required to resubmit their Second Written Submissions if the First Contested Document was found to be subject to privilege. The Tribunal confirmed that it would refrain from reviewing the Parties' Second Written Submissions until the issue was resolved.

5. On April 26, 2018 Claimant and Respondents jointly advised the Tribunal that they had been unable to reach an agreement on the First Contested Document and requested the opportunity to provide written submissions articulating their respective positions[4].

6. In a separate communication of that same day, Claimant informed the Tribunal that it had notified Respondents of additional objections it had in relation to other documents tendered with Respondents' Second Written Submissions [together with the First Contested Document, the "**Contested Documents**"]. Claimant additionally requested that the Tribunal issue an interim measure preventing

[1] Communication C 33.
[2] Communication R 43.
[3] Communication A 34.
[4] Communications C 35 and R 48.

Respondents from disclosing confidential information whilst making submissions on the Contested Documents[5].

7. Respondents immediately replied confirming that they would not reveal the substance of the Contested Documents in their submissions on the matter[6].

8. On April 30, 2018, in light of Respondents' representation, the Tribunal declined to issue interim measures, but directed the Parties to treat the Contested Documents, *pro tem*, as subject to confidentiality and privilege[7].

9. On May 14, 2018 the Parties submitted their respective submissions regarding the Contested Documents[8].

10. On the same day, Respondents informed the Tribunal that Claimant had sent a letter to the *Contraloría* notifying it that Respondents had used documents obtained from the *Contraloría* Proceeding in this arbitration, which was subsequently reported in the Colombian news[9]. The Respondents requested the Tribunal[10]:

- (i) find Claimant in breach of the confidentiality clause in Section 8 of the Dispute Resolution Agreement;
- (ii) direct Claimant to withdraw its letter to the *Contraloría* and to discontinue its use of the *Contraloría* to attempt to conceal evidence from the Tribunal;
- (iii) direct Claimant to show cause why it should not be penalized for the alleged breach;
- (iv) permit Respondents to submit substantive briefing as to an appropriate penalty;
- (v) stay and extend the Procedural Timetable until after the issue is resolved; and
- (vi) award Respondents all legal costs incurred in preparing communication R 51.

11. On May 30, 2018 Claimant requested the Tribunal reject Respondents' requests for relief, stating that it was obligated to report Respondents' allegedly wrongful use of confidential information from the *Contraloría* Proceeding as it may constitute a breach of Colombian law[11]. Claimant further argued that as the

[5] Communication C 36.
[6] Communication R 49.
[7] Communication A 37.
[8] Communications C 37 and R 50.
[9] Communication R 51, para. 7, citing Exhibit 1.
[10] Communication R 51, para. 12.
[11] Communication C 38, pp. 3 – 4.

Contested Documents were obtained through the *Contraloría* Proceeding, they were not covered by the confidentiality clause in Section 8 of the DRA[12].

12. On July 16, 2018 Claimant raised additional objections to 28 documents relied upon by Respondents, which are allegedly confidential and contain material protected by attorney-client privilege[13] [collectively with all documents objected to by Claimant, the "**Contested Documents**"].

13. On July 23, 2018 Respondents submitted its response, opposing the exclusion of the 28 documents[14].

14. The Parties exchanged a number of additional submissions addressing Respondents' request and the use of the Contested Documents in these proceedings[15].

15. On August 22, 2018 the Arbitral Tribunal issued Procedural Order No. 2 ["**PO No. 2**"], resolving the question of the admissibility of the Contested Documents in this arbitration[16]. PO No. 2 established that the Parties were to notify the Tribunal of whether the *Contraloría* Proceeding case file had been released by November 7, 2018.

16. On September 25, 2018 the Arbitral Tribunal issued communication A 47, addressing clarifications raised by Claimant regarding certain aspects of PO No. 2.

17. On November 2, 2018 Respondents sent communication R 61 updating the Tribunal that due to procedural delays in the *Contraloría* Proceeding, the case file will not be publicly available by the November 7, 2018 deadline, and will likely not be released until January 8, 2019[17]. Respondents addressed the reasons for the delay and the implications for the arbitration[18].

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[12] Communication C 38, p. 4. Claimant states that the confidentiality clause of the DRA does not prevent Claimant from notifying the *Contraloría* about the use of documents that were obtained in the Fiscal Proceeding in this arbitration; further, Section 8.2. of the DRA specifically permits the disclosure of documents in good faith in accordance with the requirements of any applicable laws or any competent authority.
[13] Communication C 41. Claimant objects to 29 documents, however it had previously objected to one of those documents, R 888, and therefore the new objections pertain to only 28 documents.
[14] Communication R 53.
[15] Communication R 52 of June 1, 2018, Communication C 39 of June 3, 2018, Communication C 40 of June 12, Communication R 54 of July 25, Communication C 43 of July 26; Communication R 56 of August 2, 2018 and Communication C 45 of August 7, 2018.
[16] See PO No. 2, para. 15. Docs. R 626, R 454, R 888, R 476, R 489, R 491, R 541, R 577, R 614, R 645, R 959, R 1025, R 1040, R 1073, R 1339, R 1378, R 1420, R 1435, R 1467, R 1474, R 1497, R 1504, R 1522, R 1648, R 1657, R 1658, R 1714, R 1725, R 1802, R 1812, R 39, R 1521, R 1763, R 1764, R 1466, R 0547, R 0607, R 0608, R 0681, R 0455, R 0471, R 1508, R 1762, R 1811, R 1646, R 0448, R 1765, R 0604 and R 1453.
[17] Communication R 61, p. 2.
[18] Communication R 61, p. 1.

18. On November 12, 2018 Claimant submitted communication C 52, by which it marshalled:

- Two affidavits from Reficar's President and CEO, and Ecopetrol's Vice-President of Legal Affairs, affirming that neither Reficar nor Ecopetrol have access to the *Contraloría* Proceeding case file, and have not colluded with or influenced the *Contraloría* regarding the release of the case file[19];

- An expert report from the former *Contralor* of the *Contraloría de Bogotá D.C.*, Prof. Camilo Calderón Rivera ["**Opinion Calderón**"], who amongst other things, explains the *Contraloría* fiscal liability process and states that it will likely be years before the case file is released to general public, it is impossible to identify a date when it might be released, and that documents cannot be released to Claimant or used in this proceeding until their public release[20].

19. On November 5, 2018 the Tribunal provided Respondents until November 23, 2018 to respond to communication C 52.

20. On November 14, 2018 Respondents requested that the Tribunal[21]:

- (i) Suspend all deadlines in the Procedural Timetable;

- (ii) Provide Respondents with three weeks from the date that the Procedural Timetable is suspended to respond to C 52; and

- (iii) Direct the Parties to negotiate a new Procedural Timetable.

21. On November 18, 2018 Claimant submitted communication C 53 by which it marshalled the witness statement of Herman Galán, Vice-President of Legal Affairs and General Counsel of Reficar, and exhibits 1-A to 1-C. Claimant requested that the Tribunal[22]:

- (i) Deny Respondents' request to amend the Procedural Timetable due to their unclean hands;

- (ii) Order Respondents not to marshal any additional documents from the *Contraloría* Proceeding in the Third Written Submissions; and

- (iii) Order Respondents to amend their Second Written Submissions to remove documents from the *Contraloría* Proceeding.

[19] Communication C 52, p. 3.
[20] Communication C 52, p. 3.
[21] Communication R 62, p. 3.
[22] Communication C 53, p. 3.

22. On November 19, 2018 the Arbitral Tribunal decided that the deadline for submission of the Third Written Submissions would be delayed until January 31, 2019 to allow for the resolution of the dispute as to the Contested Documents[23].

23. On November 30, 2018 Respondents submitted communication R 63 alleging that Claimant has had access to the *Contraloría* Proceeding case file since at least September 24, 2018, due to its participation in a *public acción de tutela* filed against the *Contraloría* by Foster Wheeler USA Corporation and Process Consultants, Inc. before the 26th Criminal Circuit Judge in Bogotá [the "***Tutela* Proceeding**"][24]. Respondents additionally marshalled eight exhibits related to the *Tutela* Proceeding.

24. Respondents requested that the Tribunal[25]:

- (i) Confirm that it may use the documents from the *Contraloría* Proceeding in this arbitration;

- (ii) Order financial sanctions against Claimant to reimburse Respondents for the fees and costs incurred in responding to Claimant's objections, and for failing to notify the Tribunal of the *Tutela* Proceeding or that the entire case file of the *Contraloría* Proceeding had been submitted in that proceeding.

25. On December 3, 2018 Claimant responded denying knowledge that the *Contraloría* had submitted a copy of the case file in the *Tutela* Proceeding, stating that it had only submitted a short filing advising the court that it had no interest in the *Tutela* Proceeding as it involved the *Contraloría* Proceeding over which it had no control[26].

26. The Tribunal provided Claimant with the opportunity to provide a substantive response to communication R 63 by December 7, 2018; Respondents were additionally given until December 7, 2018 to provide a substantive response to communication C 55[27].

27. On December 7, 2018 Respondents submitted communication R 65 with the expert report of Prof. Jaime Alberto Arrubla Paucar ["**Opinion Arrubla Paucar**"]. On that same day Claimant submitted communication C 55 with a second witness statement of Herman Galán Barrera, Vice-President of Legal Affairs and General Counsel of Reficar.

[23] Communication A 50, p. 5.
[24] Communication R. 63, pp. 1-2.
[25] Communication R. 63, pp. 1, 5-6.
[26] Communication C 54.
[27] Communication A. 51 of 3 November 2018 and communication A. 52 of 4 November 2018.

II. THE DECISION

28. This decision concerns documents obtained from the case file of the *Contraloría* Proceeding, and specifically:

- 48 documents marshalled by Respondents with their Second Written Submissions[28], which formed the basis of the Tribunal's decision in PO No. 2;

- Additional documents deriving from defense submissions provided in the *Contraloría* Proceeding, received by Respondents on October 18, 2018 ["**Remaining Documents**", both groups collectively forming the "**Contested Documents**"].

29. The Tribunal must decide two things:

(i) Whether to allow the use of documents tendered by the *Contraloría* in the *Tutela* Proceeding in this arbitration;

(ii) Whether to allow the use of the Remaining Documents in this arbitration.

30. The Tribunal will firstly restate its findings in PO No. 2 (**2.**), summarize the Parties' positions (**3.1.** – **3.2.**), and then make its decision on the Contested Documents (**4.**).

2. THE TRIBUNAL'S RULING IN PO NO. 2

31. The Tribunal issued PO No. 2 under the assumption that the *Contraloría* would release the case file of the *Contraloría* Proceeding shortly, for the following reasons:

[28] A presentation from Reficar's former in-house counsel regarding contract negotiations with CB&I, to Reficar's Board of Directors during a May 2012 Board meeting (Doc. R 626) and a later presentation given by the former in-house counsel (Doc. R 454), and the Board meeting minutes summarizing the May 2012 Presentation (Doc. R 888); 27 of Reficar's Board of Directors meeting minutes (Docs. R 476, R 489, R 491, R 541, R 577, R 614, R 645, R 959, R 1025, R 1040, R 1073, R 1339, R 1378, R 1420, R 1435, R 1467, R 1474, R 1497, R 1504, R 1522, R 1648, R 1657, R 1658, R 1714, R 1725, R 1802 and R 1812); a communication from Reficar's former in-house counsel to Reficar's former presidents, (Doc. R 1521); Witness statements by former directors, officers and executives of Reficar and Ecopetrol given in the *Contraloría* Proceeding (Doc. R 1763: Barco García, Césarié Luis; Doc. R 1764: Bustillo Lacayo, Carlos Eduardo; Doc. R-1466: Castilla Canales, Felipe; Docs. R 0547 (Ex. 3), R 0607: Echeverry Garzón, Juan Carlos; Docs. R 0608, R 0681: Gómezó Restrepo, Hernando José; Docs. R 0455, R 0471: Gutiérrezé Pemberthy, Javier Genaro; Docs. R 1508, R 1762: Martínezí Ortiz, Astrid; Doc. R 1811: Reinoso Yánezá, Reyes; Doc. R 1646: Restrepo Lópezó, Gonzalo Alonso; Docs. R 0448, R 1765: Rosales Navarro, Pedro Alfonso; and Doc. R 0604: Steiner Sampedro, Roberto Ricardo.); one of Ecopetrol's Board of Directors meeting minutes (Doc. R 1453). This does not include R 39 which was marshalled in Respondents' First Written Submissions.

32. According to the Colombian Constitutional Court, the *Contraloría* has an obligation to release the case file upon the termination of the investigatory phase (*indagación preliminar*) and evidentiary phase (*práctica de pruebas*)[29]:

> "*... la reserva deberá levantarse tan pronto se practiquen las pruebas a que haya lugar y, en todo caso, una vez expire el término general fijado por la ley para su práctica*".

33. The Tribunal opined that the evidentiary period ends after the following phases are complete:

- First, the investigatory phase;
- Second, the issuance of an imputation order which opens the imputation phase; and
- Third, after expiry of the final 30-day period allocated under Art. 51 of Ley 610 de 2000, for the *Contraloría* to obtain evidence *sua sponte* or requested by the defendant[30].

34. Therefore, Colombian law requires the *Contraloría* to release the case file for the proceeding after the termination of the evidentiary period, known as the *práctica de pruebas*. The *práctica de pruebas* is mainly carried out in the investigatory phases (**i.**), but also at the commencement of the imputation phase (*imputación*) (**ii.**). As to how long the *práctica de pruebas* phase may take, Colombian law provides that:

35. (i) The *práctica de pruebas* within the investigatory phases must be performed within two years from the moment the *Contraloría* notifies the defendant of the order to obtain the evidence[31]. Evidence obtained after the two-year period will have no probative value.

36. (ii) The imputation phase starts with the notification to the defendants of the imputation order[32]. The defendants then have ten days to respond to the charges and request the production of evidence on which they wish to rely[33]. Upon the expiry of this period, the *Contraloría* has 30 days to obtain evidence on its own accord or at the request of the defendants[34].

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[29] *Sentencia* No. C-477 de 2001, para. 10.
[30] PO No. 2, para. 90.
[31] Ley 1474 de 2011, Art. 107: "*Los plazos previstos legalmente para la práctica de las pruebas en la indagación preliminar y en la etapa de investigación en los procesos de responsabilidad fiscal serán preclusivos y por lo tanto carecerán de valor las pruebas practicadas por fuera de los mismos. La práctica de pruebas en el proceso ordinario de responsabilidad fiscal no podrá exceder de dos años contados a partir del momento en que se notifique la providencia que las decreta. En el proceso verbal dicho término no podrá exceder de un año*".
[32] Communication C 40, fn. 17 and Communication R 56, p. 1.
[33] Ley 610 de 2000, Art. 50.
[34] Ley 610 de 2000, Art. 51.

37. On June 5, 2018 the *Contraloría* issued the imputation order[35], providing the defendants a chance to respond to the charges and request the production of evidence on which they wish to rely[36]. Upon the expiry of this 10-day period, the *Contraloría* had 30 days to obtain any outstanding evidence, upon the expiry of which, the case file was supposed to be released to the general public.

38. The Tribunal found that, due to the advancement of the procedural steps in the *Contraloría* Proceeding and the likelihood that the case file would be released prior to the deadline for the Third Written Submissions, it *pro tem* declared the Contested Documents admissible in this arbitration[37].

39. The Tribunal decided that, *pro tem*, the Second Written Submissions need not be amended and that all attached evidence should remain in the record. The Tribunal directed the Parties to proceed with the preparation of the Third Written Submissions under the assumption that the Contested Documents are admissible in this arbitration[38].

40. The Parties were requested to inform the Tribunal if the *Contraloría* had not released the Contested Documents by 7 November 2018 and to explain the reasons for the delay. Thereafter, the Tribunal would decide whether the assumption made *pro tem* was still viable[39].

41. In regard to the Privileged Documents, the Tribunal found that it could not anticipate how the *Contraloría* would treat the Privileged Documents. It thus decided that:

- If the Respondents are correct, and the Privileged Documents are made public without restrictions, the Respondents would be entitled to use any such documents in accordance with the decision articulated in paragraphs 89 – 95 of PO No. 2;

- If, however, the Claimant is right and the *Contraloría* releases the Contested Documents with privileged material protected, the Tribunal made a decision on the admissibility of the Privileged Documents within this arbitration, based upon whether Claimant's actions waived the privilege attaching to each document (PO No. 2, paras. 102 – 154).

3. THE PARTIES' POSITIONS

3.1 THE CLAIMANT'S POSITION

42. Claimant's case is that the Contested Documents cannot be used in this arbitration as they are subject to *reserva* and the date of release of the *Contraloría*

[35] Communication C 40, fn. 17 and Communication R 56, p. 1.
[36] Ley 610 de 2000, Art. 50.
[37] PO No. 2, para. 92.
[38] PO No. 2, para. 93.
[39] PO No. 2, para. 94.

Proceeding case file is unknown and will likely take years (**A**.), that the Contested Documents cannot be used by Respondents, as to do so would breach the *reserva* and by consequence, Colombian law (**B**.); Claimant denies acting in concert with the *Contraloría* (**C**.); Claimant additionally makes a number of arguments regarding the *Contraloría*'s submission of the case file in the *Tutela* Proceeding and why this does not change its argument that the Contested Documents are subject to *reserva* and cannot be used in this arbitration (**D**.).

A. The date of release of the *Contraloría* Proceeding case file is unknown

43. Claimant's case is that the Contested Documents form part of the confidential *Contraloría* Proceeding, which will not be made public for at least

- two years after the service of process of the last decree for the taking of evidence or
- five years after the commencement of the *Contraloría* Proceeding[40].

44. Claimant disagrees with Respondents' interpretation of Colombian legislation surrounding the *reserva* attaching to the case file. It states that one must look to Art. 107 of Law 1474 of 2011 to determine how long the period for the taking of evidence may last within the *Contraloría* Proceeding. This legislation establishes that there will be a maximum period of two years for the taking of any evidence after an order for the collection of evidence is made, which applies regardless of the stage of the proceeding. This means that regardless of when the evidence is ordered, the two-year clock restarts, making it impossible to predict when the *reserva* will be lifted pursuant to Art. 51 of Law 610 of 2000[41].

45. In addition, Claimant states that the recusal requests filed by parties to the *Contraloría* Proceeding are a normal part of the fiscal liability process, and further complicate the ability to determine when the period of *práctica de pruebas* will terminate and the case file will be released to the general public[42].

B. The Contested Documents cannot be used by Respondents

46. Claimant reiterates its argument that it is not a party to the *Contraloría* proceeding and therefore it is not permitted to access the case file[43]. The *reserva* additionally prevents Respondents from sharing the files with Claimant, or using them for any purpose other than presenting their defense in the *Contraloría* Proceeding[44].

[40] Communication C 52, 12 November 2018, p. 4.
[41] Communication C 52, 12 November 2018, p. 5.
[42] Communication C 52, 12 November 2018, pp. 5-6.
[43] Communication C 52, 12 November 2018, p. 6.
[44] Communication C 52, 12 November 2018, pp. 6-7.

47. Claimant and its expert explain that it would constitute a disciplinary offense for the *Contraloría*, or any party to the *Contraloría* Proceeding, to release the case file before the *reserva* has been lifted[45].

48. Claimant additionally argues that if the Tribunal were to review the case file it would be breaking Colombian law and could potentially be subject to criminal responsibility[46]. As outlined by Claimant's expert witness Prof. Calderón[47]:

> "Violation of the *reserva* by any of the subjects of the process […] constitutes a sanctionable disciplinary offense which may even result in a fine or […] criminal responsibility for all participants who have permitted the violation to occur."

49. Whilst Claimant agrees that there is an exception which allows judicial authorities to review files from the *Contraloría* fiscal liability proceedings, it argues that under Colombian law international arbitrators are considered contractual agents rather than judicial authorities, and therefore they do not meet the requirements for the judicial exception[48]. Colombian law distinguishes between domestic arbitrators and international arbitrators; domestic arbitrators can be considered judicial officers, whilst international arbitrators cannot be[49].

50. Further, Claimant states that to allow Respondents' selective use of documents from the *Contraloría* Proceeding case file violates the equality of arms between the Parties and Claimant's due process rights[50].

C. Claimant is not acting in concert with the *Contraloría*

51. Claimant denies what it calls Respondents' 'conspiracy theory', that it is working in concert with the *Contraloría*, as it states that

- Reficar and Ecopetrol are independent from the Republic of Colombia, and
- the *Contraloría* is wholly independent from the branches of the Colombian government by virtue of the Colombian Constitution[51].

52. It states that delays in the release of the case file are due to the *Contraloría*'s compliance with Colombian law and adherence to normal *Contraloría* procedures[52].

53. This is supported by the witness statements of Reficar's President and CEO, of Ecopetrol's Vice-President of Legal Affairs and of Reficar's General Counsel,

[45] Communication C 52, 12 November 2018, p. 4.
[46] Communication C 55, 7 December 2018, p. 6.
[47] Communication C 53, 18 November 2018, p. 2, citing Calderón Opinion, p. 112.
[48] Communication C 52, 12 November 2018, pp. 7-8.
[49] Communication C 52, 12 November 2018, p. 8.
[50] Communication C 52, 12 November 2018, pp. 15-16; Communication C 55, 7 December 2018, pp. 7-8.
[51] Communication C 52, 12 November 2018, pp. 12-14; Communication C 53, 18 November 2018, p. 2.
[52] Communication C 52, 12 November 2018, p. 16.

who all deny interfering with or influencing the *Contraloría* Proceeding, or having colluded with the *Contraloría* regarding the release of the case file, and deny having requested assistance from the *Contraloría* in this arbitration[53].

D. The submission of the case file to the *Tutela* Proceeding

54. Respondents have argued that Claimant had access to the Contested Documents through its participation in the *Tutela* Proceeding. Claimant's response is twofold:

a. Claimant did not know of or have access to the Contested Documents

55. Claimant avers that neither Reficar nor Ecopetrol were aware that the *Contraloría* had filed a hard drive in the *Tutela* action until the submission of R 63[54]. The *Tutela* Proceeding was filed by Foster Wheeler, and Claimant's only involvement was a short filing outlining that it had no interest in the *Tutela* Proceeding, and that it involved the *Contraloría* Proceeding, over which Reficar and Ecopetrol had no control[55]. Claimant states that neither Reficar nor Ecopetrol were served with the *Contraloría* filing attached to communication R 63[56].

56. Claimant recounts that after receiving Respondents' communication R 63, it investigated whether it could obtain access to the *Contraloría* Proceeding case file submitted in the *Tutela* Proceeding[57]. Claimant's initial in-person request for access was denied, and Reficar was told to submit a written request to the Court, which it did on December 3[58]. On December 5 the Court granted Claimant's request to obtain a copy of the hard drive submitted by the *Contraloría*, as an interested third-party in the *Tutela* Proceeding[59].

57. In any event, even though Claimant has not reviewed the content of the hard drive, it cannot contain the new defense materials received by Respondents on October 18, 2018, which they wish to include in their Third Written Submissions, as these materials were filed after the hard drive was submitted by the *Contraloría* in the *Tutela* Proceeding on September 24, 2018[60]. Thus, even if the Tribunal decides that materials from the case file submitted by the *Contraloría* can be used in this proceeding, it still must decide whether the files Respondents received from the *Contraloría* after September 24, 2018 can be used in this arbitration[61].

[53] Communication C 52, p. 3; Communication C 53, 18 November 2018, p. 2.
[54] Communication C 54, 3 December 2018; Communication C 55, 7 December 2018, p. 3.
[55] Communication C 55, 7 December 2018, pp. 2-3.
[56] Communication C 55, 7 December 2018, p. 3.
[57] Communication C 55, 7 December 2018, p. 4.
[58] Communication C 55, 7 December 2018, p. 4.
[59] Communication C 55, 7 December 2018, p. 4.
[60] Communication C 55, 7 December 2018, p. 8.
[61] Communication C 55, 7 December 2018, p. 8.

b. Submission to the *Tutela* Proceeding does not waive *reserva*

58. Claimant avers that the *Contraloría*'s submission of the case file to the *Tutela* Proceeding does not waive the *reserva* existing over the documents[62]. Claimant avers that the *Contraloría* produced the case file not voluntarily, but in response to the order of the judge in the *Tutela* Proceeding following Foster Wheeler's request[63]. If the *Contraloría* failed to produce the documents, it would have risked adverse inferences in the *Tutela* Proceeding[64].

59. Claimant argues that the *reserva* is not breached by the production of the case file in the *Tutela* Proceeding, as the relevant judge has an obligation to maintain the *reserva* and is not permitted to produce the documents to any person or entity not related to the *Tutela* Proceeding[65]. Claimant states that only those authorized by law can access the evidence in the *Tutela* Proceeding, and the Court is obligated to ensure that access is restricted accordingly[66]. This has been confirmed by the Colombian Constitutional Court, who when reviewing a *tutela* proceeding found that:

> "… attorneys, such as the petitioner, certainly have the right to review judicial files, even those in in which they are neither parties nor legal representatives, except for the existence of a special rule or reserve…"[67].

60. As the materials remain subject to *reserva*, Claimant states that it has been warned by experts and criminal lawyers of administrative, disciplinary and criminal consequences for merely possessing the hard drive[68]. Consequently, Claimant has not taken possession of a copy of the hard drive and still lacks knowledge of its contents[69].

E. <u>Claimant's requests for relief</u>

61. Claimant requests that the Tribunal orders that[70]:

- (i) Materials from the case file of the *Contraloría* Proceeding be excluded from this arbitration;

- (ii) CB&I refiles its Second Written Submission, excluding documents from the case file of the *Contraloría* Proceeding;

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[62] Communication C 55, 7 December 2018, p. 5.
[63] Communication C 55, 7 December 2018, p. 5.
[64] Communication C 55, 7 December 2018, p. 5.
[65] Communication C 55, 7 December 2018, p. 6.
[66] Communication C 55, 7 December 2018, p. 7, citing General Procedural Code, Art. 123.
[67] Communication C 55, 7 December 2018, p. 7, citing Constitutional Court of Colombia, Decision T-920 of 2012 (J. Nilson Pinilla Pinilla).
[68] Communication C 55, 7 December 2018, p. 4.
[69] Communication C 55, 7 December 2018, p. 4.
[70] Communication C 52, pp. 16-17; Communication C 53, 18 November 2018, p. 3; Communication C 55, 7 December 2018, p. 9. Claimant additionally requests that the Tribunal issue the ruling requested in communication C-43 of 26 July 2018 with respect to the Contested Documents.

- (iii) The Parties' Third Written Submissions be filed without documents from the case file of the *Contraloría* Proceeding;

- (iv) Respondents' request for sanctions against Claimant be denied.

62. Claimant additionally suggests an alternative solution: if the Tribunal continues to have questions after reviewing the Parties' submissions, it suggests that Reficar, CB&I and the Tribunal jointly seek clarification from the *Contraloría* as to whether the documents on the hard drive have been publicly released and are no longer subject to *reserva*[71]. Claimant states that only with such an approval from the *Contraloría* could it use the documents from the hard drive without risking criminal or disciplinary consequences[72].

63. In addition, Claimant states that if it is permitted to use the documents from the case file without violating Colombian law, basic principles of fairness dictate that Reficar would need time to review the file, which allegedly contains more than one terabyte of information, to which Respondents have already had access for the better part of a year. Claimant avers that to inject such a large amount of information into this arbitral proceeding, with only 129 days before the hearing, would extremely prejudice its due process rights, and its ability to present its case and to defend against Respondents' claims[73]; a prejudice which would only be avoided by a significant postponement of current deadlines[74].

3.2 THE RESPONDENTS' POSITION

64. Respondents aver that the *Contraloría* has delayed the release of the case file for the *Contraloría* Proceeding because it is attempting to help Claimant conceal evidence (**A**.). Regardless of when the case file is released, Respondents say that the Contested Documents should be admissible in this arbitration for the following reasons: this arbitration has strict confidentiality requirements that will ensure that the *reserva* is not breached and the Tribunal has authority under Colombian law to review the Contested Documents without breaching the *reserva* (**B**.), Claimant has access to the majority of the *Contraloría* Proceeding case file due to its participation in the *Tutela* Proceeding (**C**.), documents from the case file have been tendered in other public Colombian proceedings by defendants in the *Contraloría* Proceeding (**D**.).

A. Delay of the release of the case file of the *Contraloría* Proceeding

65. Respondents repeat the arguments made in relation to the requirements under Colombian law that establish the *Contraloría*'s obligation to release the case file at the conclusion of the imputation phase's 30-day evidence gathering period,

[71] Communication C 55, 7 December 2018, p. 9.
[72] Communication C 55, 7 December 2018, p. 9.
[73] Communication C 55, 7 December 2018, p. 9.
[74] Communication C 55, 7 December 2018, p. 9.

pursuant to Art. 51 of Law 610 of 2000, Art. 108 of Law 1474 and the Auditor General of the Republic's Handbook[75].

66. Respondents notified the Tribunal that the release of the case file of the *Contraloría* Proceeding was delayed by procedural actions within the *Contraloría* Proceeding, notwithstanding the *Contraloría*'s obligation to release the case file under Colombian law[76]. Respondents state that under the new expected timeline, the case file should be released to the public by January 8, 2019 and this date may only be extended through further procedural manipulation or a wilful violation of the Colombian Constitution[77].

67. Respondents argue that the *Contraloría*, an instrumentality of the Colombian government[78], is manipulating the *Contraloría* Proceeding to assist Claimant, another instrumentality of the Colombian government, in concealing important evidence from the Tribunal[79].

68. Claimant has previously requested the *Contraloría*'s assistance in concealing evidence[80], and the recent procedural delays within the *Contraloría* Proceeding reflect the *Contraloría*'s continual effort to assist Claimant and influence the outcome of this arbitration[81].

B. Marshalling the Contested Documents will not breach *reserva*

69. Respondents argue that allowing the Contested Documents into the record will not breach the *reserva,* because of the strict confidentiality requirements applicable to this arbitration as per the Dispute Resolution Agreement[82].

70. Further, according to the Respondents, the Tribunal has authority as a judicial power to review the Contested Documents and doing so will not breach *reserva*. Respondents state that the Tribunal is permitted to review the Contested Documents prior to their release to the public, pursuant to Art. 20 of Law 610 of 2000, which provides investigated parties with the right to obtain relevant *Contraloría* files for use in the exercise of their rights[83].

71. Respondents aver that Art. 20 also obligates the *Contraloría* to provide information and documents from fiscal liability proceedings if requested by a competent judicial, disciplinary or administrative authority. This is significant

[75] Communication R 63, 30 November 2018, pp. 13-14, citing the Colombian Constitutional Court, *Sentencia* No. C-477 de 2001.
[76] Communication R 61, 2 November 2018, pp. 2-4.
[77] Communication R 61, 2 November 2018, p. 4.
[78] Communication R 62, 14 November 2018, fn. 2.
[79] Communication R 61, 2 November 2018, p. 2; Communication R 65, 7 December 2018, pp. 16-17.
[80] Communication R 61, 2 November 2018, pp. 2, 5-6.
[81] Communication R 61, 2 November 2018, p. 2.
[82] Communication R 61, 2 November 2018, p. 9, citing JX-007, Dispute Resolution Agreement, Clause 8; Communication R 65, 7 December 2018, p. 15.
[83] Communication R 61, 2 November 2018, p. 6; Communication R 65, 7 December 2018, p. 2.

because arbitration is a "judicial" process in Colombia, and arbitrators are vested with judicial powers[84].

72. The Constitutional Court has ruled that arbitration represents a mechanism to impart justice, through which the public function of the State is effected and is supported by the Constitution[85]:

> "*Por ello, es necesario aclarar que contrariamente a lo manifestado por el demandante, el arbitramento representa un mecanismo para impartir justicia, a través del cual igualmente se hace efectiva la función pública del Estado en ese sentido, y claramente consagrado por el ordenamiento jurídico; es más, dicho instituto goza de autorización constitucional expresa, con determinadas características, ya señaladas anteriormente, en donde los árbitros quedan investidos transitoriamente de la función de administrar justicia, con los mismos deberes, poderes, facultades y responsabilidades, en razón de haber quedado habilitados por las partes para proferir fallos en derecho o en equidad, en los términos que señale la ley*".

73. Respondents cite various arbitral cases where the tribunals have reviewed records from *Contraloría* fiscal liability proceedings[86].

74. Respondents additionally argue that the *reserva* applying to a *Contraloría* proceeding case file is not absolute, as Colombian jurisprudence has found that the reserved nature of documents must always yield to the constitutional rights of defense and access to justice[87].

75. Therefore, the Tribunal can review the case file by either exercising judicial authority provided in Colombian law by ordering the *Contraloría* to produce the case file for use in this arbitration; or alternatively, the Tribunal can direct Respondents to provide Claimant with copies of the documents it received from the *Contraloría*[88].

76. To Claimant's argument that Colombian law treats domestic arbitrators and international arbitrators differently, Respondents disagree for the following reasons:

77. (i) First, Claimant fails to cite an authority to support its proposition that contractually appointed arbitrators have restricted judicial powers under Colombian law[89].

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[84] Communication R 61, 2 November 2018, p. 6.
[85] Communication R 61, 2 November 2018, p. 7, quoting Constitutional Court, *Sentencia* C-242 of 1997, per Justice: Hernando Herrera Vergara.
[86] Communication R 61, 2 November 2018, p. 7, citing *C.I. Avetex S.A. v. BBVA Seguros Colombia S.A.*, *Municipio de Santiago de Cali v. Compañía Suramericana De Seguros S. A.* and *Tribunal De Arbitramento De Indecon S.A.S – Olano Ingenieria S.A.S v. Alianza Fiduciaria S.A.*
[87] Communication R 61, 2 November 2018, pp. 8-9, citing Constitutional Court, *Sentencia* T-928 of 2004, per Justice: Clara Ines Vargas Hernandez.
[88] Communication R 65, 7 December 2018, p. 3.
[89] Communication R 65, 7 December 2018, p. 4.

78. (ii) Second, the Constitutional Court explained that the differences between international and domestic arbitrators are merely an academic distinction and do not represent a distinction in the function that arbitrators perform as judges that administer justice in the terms established by the law[90].

79. In addition, Art. 13 of Law 270 of 1996, the *Ley Estatutaria de Administration de Justicia,* which created the structure of the Colombian judicial branch, includes arbitrators alongside justices of the Supreme Court, the Council of State, the Constitutional Court, and the Higher Council of the Judiciary, as entities who perform a judicial function under the Colombian Constitution; the law does not distinguish between domestic and international arbitral tribunals[91].

80. (iii) Third, even if this type of restrictive policy existed, it would be unenforceable under the New York Convention, which provides internationally neutral guarantees of procedural fairness and imposes limits on the application of discriminatory local public policies[92].

81. (iv) Fourth, the Colombian Supreme Court and the Constitutional Court establish that international tribunals have judicial authority and arbitral tribunals are subject to challenge through an *acción de tutela*[93].

C. Access to the *Contraloría* Proceeding file through the *Tutela* Proceeding

82. Respondents report that on November 26, 2018 they discovered that Claimant has had free and open access to the *Contraloría* Proceeding case file since at least September 24, 2018, due to their involvement in the *Tutela* Proceeding, but deliberately concealed this information from Respondents and the Tribunal[94]. Based on this, Respondents aver that the *Contraloría* made the Contested Documents available to the general public by submitting the entire case file in the public *Tutela* Proceeding in support of its defense[95].

83. Under Colombian law the *Tutela* file should be available to the public under Art. 3 of Law 2591 of 1991; however, even if it is not, Art. 123 of the General Procedure Code permits any registered attorney to review a judicial case file after the defendant is notified, even when the attorney does not represent a party to the proceeding[96].

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[90] Communication R 65, 7 December 2018, p. 9, citing Constitutional Court, *Sentencia* C-157-16 of 2016, per Justice Gloria Stella Ortiz Delgado: "*El arbitraje internacional tiene su fundamento constitucional en el artículo 116 de la Carta Política y en las normas que buscan la internacionalización de las relaciones económicas del Estado colombiano*".
[91] Communication R 65, 7 December 2018, p. 10.
[92] Communication R 65, 7 December 2018, p. 4, citing the New York Convention, Article II.
[93] Communication R 65, 7 December 2018, pp. 4-7, citing Supreme Court of Justice, *Sentencia* STC 6226 and *Sentencia de Unificación* SU-500-015, p. 51.
[94] Communication R 63, 30 November 2018, pp. 1-2, citing Exhibits 5, 6 and 7; Communication R 63, 30 November 2018, p. 4-5; Communication R 65, 7 December 2018, p. 16.
[95] Communication R 63, 30 November 2018, pp. 1-3.
[96] Communication R 63, 30 November 2018, p. 3.

84. Therefore, according to Respondents, the *Contraloría*'s decision to release the case file in the *Tutela* Proceeding, to which Claimant has access, is dispositive and resolves any remaining issue regarding public access to the *Contraloría* files under the Colombian Constitution[97]; there is thus no legitimate reason to withhold important evidence from the file from the Tribunal[98]. If the Tribunal does not review such evidence, Respondents' due process rights will be violated and it will lead to an award which will most certainly be challenged[99].

D. Documents have been tendered in other public Colombian proceedings

85. Respondents argue that Claimant's objection to CB&I's use of the Contested Documents is contrived, as Claimant's current and former officers and directors have submitted the same information and documentation in their own defenses to various other proceedings in Colombia[100].

86. For example, during a public hearing on October 25, 2018 before the 24th Criminal Judge – which was allegedly attended by Claimant – the attorney for Diana Constanza Calixto Hernández (a former Reficar board member and former Head of the Corporate Finance Unit at Ecopetrol), declared that he was submitting documents obtained from the *Contraloría* file for use in her defense in a case brought against her by the *Fiscalía General de la Nación*[101].

E. Respondents' requests for relief

87. Respondents request that the Tribunal modify the Procedural Timetable to provide both Parties with sufficient time to incorporate documents and other evidence from the case file of the *Contraloría* Proceeding into the simultaneously exchanged Third Written Submissions[102].

88. Respondents state that they require time to translate, review, and incorporate defense submissions it received from the *Contraloría* on October 18, 2018 into its Third Written Submissions. Respondents aver that the materials contain memorials, expert reports, business records, and other evidence submitted by current and former Reficar and Ecopetrol representatives[103].

89. Respondents request that the Tribunal order financial sanctions against Claimant for the costs incurred as a result of its improper behaviour in attempting to conceal material evidence from the Tribunal for the last eight months through tactical

[97] Communication R 65, 7 December 2018, p. 2.
[98] Communication R 63, 30 November 2018, p. 4.
[99] Communication R 65, 7 December 2018, p. 2.
[100] Communication R 61, 2 November 2018, p. 2.
[101] Communication R 61, 2 November 2018, p. 2. The Free Versions of Fabio Echeverri, Joaquín Moreno, Federico Alfonso Rengifo, Roberto Ricardo Steiner, Mauricio Santamaría Salamanca, and Mauricio Cardenas Santamaría
[102] Communication R 61, 2 November 2018, p. 4.
[103] Communication R 61, 2 November 2018, p. 4.

omissions[104]; specifically that Claimant be ordered to reimburse all Respondents' fees and costs incurred in responding to Claimant's objections[105].

4. THE DECISION

90. There is one main issue before the Tribunal (**4.1**), namely, whether the Contested Documents can be marshalled by the Parties as evidence in this arbitration despite being subject to *reserva*:

- Claimant requests that the Tribunal exclude the Contested Documents from this arbitration, as it claims that they are covered by *reserva* and cannot be used by the Parties or reviewed by the Tribunal without breaching Colombian law;

- Respondents on the other hand deny that using the Contested Documents in this arbitration breaches the *reserva*, as the Respondents are permitted to tender the documents obtained from the *Contraloría* Proceeding in their defense, and the Tribunal has authority to review the Documents under Colombian law.

91. The Tribunal must decide on the request for an amendment of the Procedural Timetable (**4.2**) and for economic sanctions against Claimant (**4.3**).

4.1 MARSHALLING OF CONTESTED DOCUMENTS

92. The Arbitral Tribunal has carefully studied the Parties' arguments and has paid special attention to the expert opinions on Colombian law provided by them[106], and concludes that there is no limitation under Colombian law which would prevent Respondents (or Claimant) from producing the Contested Documents in this arbitration.

A. Right of defense and *reserva*

93. Both experts agree that the purpose of the *reserva* is to avoid interferences during the investigatory phases of the *Contraloría* Proceeding[107]. They also concur that the *reserva* is not absolute and may yield to fundamental rights[108]. Prof. Arrubla – Paucar further suggests that, provided that the purpose of the *reserva* is not jeopardized, the *reserva* should not curtail the right of defense, which is a fundamental right.

94. The Arbitral Tribunal is confident that these arbitral proceedings protect the purpose of the *reserva*:

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[104] Communication R 63, 30 November 2018, pp. 6-7.
[105] Communication R 63, 30 November 2018, p. 6.
[106] Expert opinions issued by Prof. Camilo Calderón Rivera (Opinion Calderón) and by Prof. Jaime Alberto Arrubla – Paucar (Opinion Arrubla – Paucar).
[107] Opinion Calderón, para. 117; Opinion Arrubla – Paucar, para. 41.
[108] Opinion Calderón, para. 80. Opinion Arrubla – Paucar, para. 28.

95. (i) The Tribunal's first reason why the *reserva* will not be breached by the submission of the Contested Documents in this arbitration is that this arbitration is subject to a confidentiality regime.

96. The Tribunal notes that Claimant conceded that documents did not lose the *reserva* protection as long as the judge reviewing the documents has an obligation to maintain the *reserva*[109].

97. The Parties and the Arbitral Tribunal in this arbitration are subject to strict obligations of confidentiality which protect the secrecy of the file, as outlined in Section 8.1. of the Parties' Dispute Resolution Agreement[110]:

> "In addition to each of the Parties' respective obligations as to confidentiality arising under the Project Agreements, the Parties agree that all and any documents and other records, in all formats and mediums, of the existence, terms, and resolution of any Dispute and the existence and contents of any Arbitration in respect of such Dispute shall be strictly confidential between the Parties to such Dispute and, to the extent of any other Party's notice of such Dispute or Arbitration, that Party. For the avoidance of doubt, all documents and communications (whether written or oral), including those in respect of or in any way connected to any proceedings, disclosure, hearing, negotiations (whether or not without prejudice), or Awards (whether interim or final), that arise out of, are created for the purpose of or are in any way connected with a Dispute or Arbitration in respect of such Dispute shall be confidential".

98. Thus, any Contested Documents marshalled by the Parties will be protected by the confidentiality regime of this arbitration, thereby protecting the *reserva* attaching to the Contested Documents.

99. This is supported by Prof. Arrubla – Paucar, who opines that since these arbitral proceedings are confidential and all documents tendered will be protected by the confidentiality agreement, the filing of the Documents would not breach the *reserva*[111].

100. (ii) The second reason why the *reserva* is upheld is that documents produced in this arbitration will only be exhibited to Claimant – and Claimant is not a third party alien to the fiscal liability investigation carried out by the *Contraloría*.

101. This conclusion was confirmed by the criminal Court (*Tribunal Superior de Bogotá Sala de lo Penal*) in charge of the *Tutela* Proceedings between Foster Wheeler and the *Contraloría*. The *Tutela* Proceeding will be developed further *infra*. At this point it is sufficient to note that the judge treated Claimant as a related party ("*parte vinculada*"), thereby granting it access to the file of the *Contraloría* Proceeding. The judge clearly did not consider the sharing of reserved documents with Claimant as a threat to the *reserva*.

[109] Communication C 55, 7 December 2018, pp. 56.
[110] Doc. C 9, pp. 12-13.
[111] Opinion Arrubla – Paucar, para. 48.

102. The Tribunal therefore finds that Respondents' use of reserved information in the exercise of its right of defense within this arbitration, in no way compromises the purposes of the *reserva*.

B. Submission of documents pursuant to Art. 20 of Ley 610/2000

103. The Parties accept that, pursuant to Art. 20 of Ley 610/2000 on the *responsabilidad fiscal* processes, all documents which form part of the case file of the *Contraloría* Proceeding are subject to *reserva* during the investigatory phase of the process of *responsabilidad fiscal*:

> "*Reserva y expedición de copias. Las actuaciones adelantadas durante la indagación preliminar y el proceso de responsabilidad fiscal son reservadas. En consecuencia, ningún funcionario podrá suministrar información, ni expedir copias de piezas procesales, salvo que las solicite autoridad competente para conocer asuntos judiciales, disciplinarios o administrativos.*
>
> *El incumplimiento de esta obligación constituye falta disciplinaria, la cual será sancionada por la autoridad competente con multa de cinco (5) a diez (10) salarios mínimos mensuales.*
>
> *Los sujetos procesales tendrán derecho a obtener copia de la actuación para su uso exclusivo y el ejercicio de sus derechos, con la obligación de guardar reserva sin necesidad de diligencia especial.*"

104. Art. 20 is a provision primarily directed to *Contraloría* officers and provides that on the basis of the *reserva*, it is a disciplinary offence to share information contained in the file or produce copies of part or the whole of the file, except if a competent authority, in the course of judicial, disciplinary or administrative proceedings, requested a copy.

105. Prof. Calderón focuses his expert opinion on the first two paragraphs of Art. 20 and explains that this arbitral tribunal, seated outside Colombia, would not qualify as an "*autoridad competente*" and could not order the *Contraloría* to produce a case file[112] – a conclusion shared by Prof. Arrubla – Paucar[113].

106. Prof. Arrubla – Paucar turns to the last paragraph of Art. 20, which provides that the parties to a *responsabilidad fiscal* process have the right to obtain a copy of the file, for their exclusive use (*uso exclusive*) and for the exercise of their rights (*el ejercicio de sus derechos)*, with the obligation to maintain *reserva*, with no special procedure to declare the *reserva* required.

[112] Opinion Calderón, para. 178.
[113] Opinion Arrubla – Paucar, para. 81.

107. Prof. Arrubla – Paucar construes this last paragraph as an express permission for parties to a *responsabilidad fiscal* process to use the file in the exercise of their defense rights in other proceedings, as long as the *reserva* is not jeopardised[114].

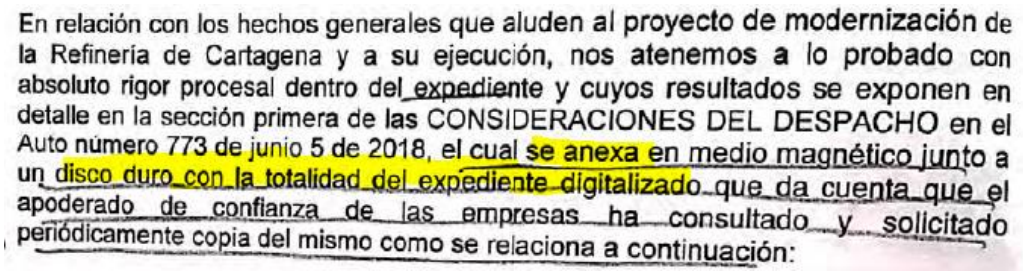
108. Since Prof. Calderón does not analyse the last paragraph of Art. 20, Prof. Arrubla – Paucar's opinion remains unchallenged. In any event, Prof. Arrubla – Paucar's interpretation of Art. 20 is in line with the conclusions already reached by the Arbitral Tribunal: as long as the purpose of the *reserva* is not compromised, a party may use reserved documents in the exercise of its procedural rights of defense. Prof. Arrubla – Paucar's opinion is further reinforced by the *Contraloría*'s own conduct, as will be analyzed in the following chapter.

C. The *Contraloría*'s conduct in the *Tutela* Proceeding

109. On September 14, 2018 AMEC Foster Wheeler Corporation and Process Consultants Inc. initiated an *acción de tutela* before the *Tribunal Superior de Bogotá*[115] based on an alleged violation of due process during the *Proceso Ordinario de Responsabilidad Fiscal número PFR-2017-00309-UC-PRF-005-2017*. This is the very same *Contraloría* Proceeding, which also involves Respondents. The defendant of the *acción de tutela* is the *Contraloría*.

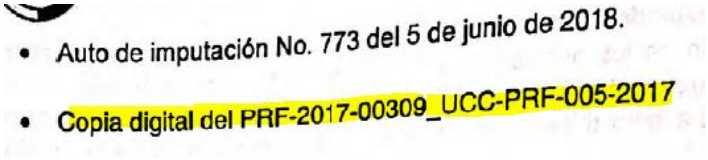
110. On September 19, 2018 the *Tribunal Superior de Bogotá Sala de lo Penal* admitted the *acción de tutela*, notified the *Contraloría* and other related entities including Claimant, and, as seen in para. 101 *supra*, gave them the opportunity to respond and to exercise their right of defense[116].

111. The *Contraloría* submitted its answer on September 24, 2018[117]. The *Contraloría*, among other arguments, claimed that the relevant facts had been rigorously proven in the file of the *Contraloría* Proceeding, which the *Contraloría* submitted in full to the *Tribunal Superior de Bogotá* in a hard drive[118]:


En relación con los hechos generales que aluden al proyecto de modernización de la Refinería de Cartagena y a su ejecución, nos atenemos a lo probado con absoluto rigor procesal dentro del expediente y cuyos resultados se exponen en detalle en la sección primera de las CONSIDERACIONES DEL DESPACHO en el Auto número 773 de junio 5 de 2018, el cual se anexa en medio magnético junto a un disco duro con la totalidad del expediente digitalizado que da cuenta que el apoderado de confianza de las empresas ha consultado y solicitado periódicamente copia del mismo como se relaciona a continuación:

112. The last page of the *Contraloría*'s defense lists the evidence submitted, and makes express reference to the case file of the *Contraloría* Proceeding:

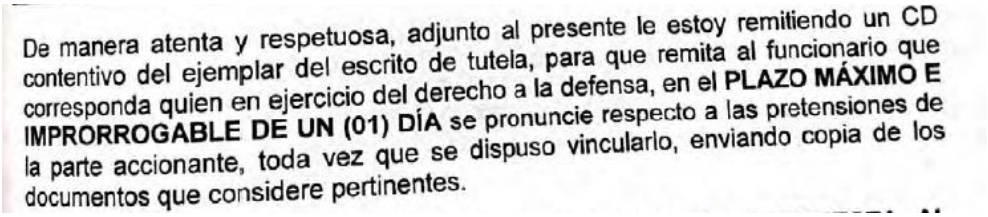
[114] Opinion Arrubla – Paucar, para. 58.
[115] Communication R 63, 30 November 2018, Exhibit 1.
[116] Communication R 63, 30 November 2018, Exhibit 2, p. 4 and 5.
[117] Communication R 63, 30 November 2018, Exhibit 8.
[118] Communication R 63, 30 November 2018, Exhibit 8, p. 3


• Auto de imputación No. 773 del 5 de junio de 2018.

• Copia digital del PRF-2017-00309_UCC-PRF-005-2017

113. Claimant now argues that the *Contraloría* only submitted the case file of the *Contraloría* Proceeding following instructions from the *Tribunal Superior de Bogotá*, thus giving the impression that the *Contraloría* was acting pursuant to the first paragraph of Art. 20, by providing a copy of the casefile in compliance with a request from a competent authority.

114. The evidence produced by Respondents on the *Tutela* Proceeding however, suggests otherwise. When the *Tribunal Superior de Bogotá* notified the *Contraloría* of the *acción de tutela* it said the following[119]:


De manera atenta y respetuosa, adjunto al presente le estoy remitiendo un CD contentivo del ejemplar del escrito de tutela, para que remita al funcionario que corresponda quien en ejercicio del derecho a la defensa, en el **PLAZO MÁXIMO E IMPRORROGABLE DE UN (01) DÍA** se pronuncie respecto a las pretensiones de la parte accionante, toda vez que se dispuso vincularlo, enviando copia de los documentos que considere pertinentes.

115. The *Tribunal Superior de Bogotá* granted the *Contraloría* one day to respond to the relief sought by the claimant and to submit a copy of all documents deemed relevant ("*enviando copia de los documentos que considere pertinentes*"). The *Tribunal Superior de Bogotá* was not requesting the casefile of the *Contraloría* Proceeding, it was simply giving the *Contraloría* the opportunity to exercise its right to defense, which encompasses the right to produce relevant evidence.

116. And in the exercise of its procedural right of defense, the *Contraloría,* out of its own free will, produced the casefile of the *Contraloría* Proceeding, which is still ongoing and subject to *reserva*.

117. This behaviour suggests that the *Contraloría* itself considers that documents subject to *reserva* can still be produced by a defendant in the exercise of its right of defense.

118. If this action was compliant with Art. 20, the same conclusion must be reached when it comes to Respondents exercising their right of defense in these arbitral proceedings.

D. Equality of arms

119. The Tribunal has decided that documents obtained from the case file of the *Contraloría* Proceeding are admissible in this arbitration and the *reserva* attaching

[119] Communication R 63, 30 November 2018, Exhibit 5, p. 8.

to such documents will be strictly protected by the arbitration's confidentiality regime.

120. In past submissions Claimant has argued that, if the Tribunal authorized Respondents to use the Contested Documents, a violation of its due process rights would occur, because, contrary to Respondents, Claimant does not have access to the case file of the *Contraloría* Proceeding. However, this argument is now moot, considering that Claimant has been provided access to the majority of the casefile containing the Contested Documents through its participation in the *Tutela* Proceeding.

121. The Tribunal, however, notes that since the *Contraloría* Proceeding outlived the *Tutela* Proceeding, the casefile made available to Claimant in the latter proceeding is no longer up to date. There are therefore a number of documents which are part of the *Contraloría* Proceeding to which Claimant does not have access. To uphold the principle of equality of arms, the Arbitral Tribunal finds that Claimant, if it so wishes, should be provided with a complete version of the case file.

122. The Tribunal notes that Respondents have previously offered to provide the casefile of the *Contraloría* Proceeding to Claimant. Thus, to the extent that Claimant wishes to obtain the Remaining Documents, Respondents should provide the Remaining Documents (received from the *Contraloría* on October 18, 2018), by Friday December 21, 2018.

E. Privileged documents

123. In anticipation of the presentation of the Third Written Submissions, the Tribunal wishes to remind the Parties of the rules which, pursuant to PO No. 2 section 3.2.B, protect from disclosure documents containing legal advice and communications exchanged between an attorney and their client.

124. To the extent that Claimant considers certain documents to be subject to attorney-client privilege, the Parties are directed to converse, guided by the principles repeated below, and attempt to come to an agreement regarding any such documents. If the Parties have any doubt regarding whether certain documents that are intended to be used are subject to privilege, the Parties should notify the Tribunal by January 11, 2019.

125. As outlined in PO No. 2, the International Bar Association Rules on the Taking of Evidence in International Arbitration (2010) ["**IBA Rules**"] provide that the Tribunal shall exclude evidence covered by "legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable"[120], unless such legal impediment or privilege is waived "by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or

[120] IBA Rules, Art. 9(2)(b).

advice contained therein, or otherwise"[121], provided that "fairness and equality as between the Parties [is maintained]"[122].

126. The New York Civil Practice Law provides that confidential communications made between an attorney and the client shall not be disclosed "unless the client waives the privilege"[123]. Thus for the communication to be protected by privilege, it must be confidential and the privilege must not be waived[124].

127. Under New York law, a client can waive its privilege by disclosing privileged information to third persons outside of the privileged relationship[125]. A waiver of privilege may be actual or implied through conduct[126]:

- Actual disclosure occurs if a party voluntarily provides documents containing privileged information to a third party[127], consents to its attorney's disclosure of privileged information to a third party, or affirmatively relies on a document containing privileged information; a party wishing to oppose an allegation of voluntary waiver must demonstrate that the waiver was either not voluntary or that it was made without the opportunity to claim the privilege[128];

- The New York courts have found an implied waiver to occur in various circumstances such as, by a party failing to object to its attorney disclosure of privileged information in the client's presence[129]; or by directly putting privileged information at issue in a proceeding through asserting an affirmative defense requiring an examination of privileged information[130].

128. Documents which are subject to attorney-client privilege, which has not been waived through the conduct of a party, should not be included in the Parties' Third Written Submissions.

4.2 REQUEST FOR SANCTIONS

129. Respondents request that the Tribunal order financial sanctions against Claimant for the costs incurred as a result of its improper behaviour in attempting to conceal material evidence from the Tribunal for the last eight months through tactical

[121] IBA Rules, Art. 9(3)(d).
[122] IBA Rules, Art. 9(3)(e).
[123] CPLR § 4503(a)(1).
[124] *United States v. Teller*, 255 F.2d 441, 447 (2d Cir. 1958).
[125] *People v. Patrick*, 182 N.Y.131, 175 (1905).
[126] *Drimmer v. Appleton*, 628 F. Supp. 1249, 1251 (S.D.N.Y. 1986), p. 1251.
[127] *People v. Calandra*, 120 Misc. 2d 1059, 1061 (Sup. Ct. N.Y. 1983).
[128] *In Re Penn Central Commercial Paper Litigation*, 61 F.R.D. 453, 463 – 464 (S.D.N.Y. 1973).
[129] *Drimmer v. Appleton*, 628 F. Supp. 1249, 1251 (S.D.N.Y. 1986), p. 1252.
[130] *Orco Bank, N.V. v. Proteinas Del Pacifico, S.A.*, 179 A.D.2d 390, 390 (1st Dep't 1992); *Vill. Bd. Of Vill. of Pleasantville v. Rattner*, 130 A.D.2d 654, 655 (2d Dep't 1987).

omissions[131]; specifically, that Claimant be ordered to reimburse all Respondents' fees and costs incurred in responding to Claimant's objections[132].

130. Claimant requests that the Tribunal deny Respondents' frivolous request for sanctions, and that the Tribunal caution Respondents regarding additional baseless ethical accusations for tactical purposes[133].

131. The Tribunal decides not to grant either request.

132. The Tribunal does not consider it appropriate to issue economic sanctions at this present moment or to caution Respondents regarding allegedly baseless ethical accusations.

133. However, the Tribunal reserves its decision on costs for the final award.

4.3 EXTENSION OF PROCEDURAL TIMETABLE

134. The Tribunal takes note that both Parties have requested that the Tribunal extend the deadlines established in the Procedural Timetable[134].

135. The Tribunal wishes to avoid a situation whereby the Parties feel that they are prejudiced by strict procedural deadlines. Therefore, the Tribunal decides to extend the deadline for the Third Written Submissions from January 31, 2019 until February 15, 2019. After the exchange of the Third Written Submissions, the Parties will have approximately two months to prepare for the Hearing.

136. The deadline for the Parties to confer regarding Hearing bundles and Hearing logistics is accordingly pushed back to March 1, 2019 and the deadline for the Parties to notify witnesses to be called to the Hearing is pushed back to March 4, 2019.

137. The Tribunal hereby reissues the Procedural Timetable attached as Annex I.

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138. For the foregoing reasons the Arbitral Tribunal decides:

1. That documents obtained from the case file of the *Contraloría* Proceeding are admissible in this arbitration and the *reserva* attaching to such documents will be strictly protected by the arbitration's confidentiality regime.

[131] Communication R 63, 30 November 2018, pp. 6-7.
[132] Communication R 63, 30 November 2018, p. 6.
[133] Communication C 55, 7 December 2018, p. 9.
[134] Communication R 61, 2 November 2018, p. 4; Communication C 55, 7 December 2018, p. 9.

2. To the extent that it has power, authorizes the Claimant to have access to the case file of the *Contraloría* Proceeding, obtained by virtue of its participation in the *Tutela* Proceeding.

3. In the event that Claimant wants access to the Remaining Documents from the case file of the *Contraloría* Proceeding, to order Respondents to provide Claimant with such Remaining Documents by Friday December 21, 2018.

4. To protect the documents which in PO No. 2, section 3.2.B. it ruled were subject to attorney-client privilege.

5. To order the Parties to attempt to come to an agreement on any disputes that may arise regarding other documents that they consider are subject to attorney-client privilege, following the review of the case file of the *Contraloría* Proceeding. If the Parties have any doubt regarding whether certain documents that are intended to be used are subject to privilege, the Parties should notify the Tribunal by January 11, 2019.

6. Not to order Respondents' request for economic sanctions against Claimant.

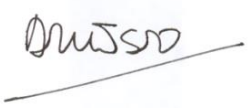
7. Not to order Claimant's request that Respondents be cautioned for allegedly baseless ethical accusations.

8. Decides to extend the deadline for the Third Written Submissions until February 15, 2019.

9. Decides to extend the deadline for the Parties to confer regarding Hearing bundles and Hearing logistics to March 1, 2019, and the deadline for the Parties to notify witnesses to be called to the Hearing to March 4, 2019.

10. Reserves its decision on costs for the final award.

On behalf of the Arbitral Tribunal,



Juan Fernández-Armesto
President of the Arbitral Tribunal