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Robert L. Sills  
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May 8, 2019

Via email: [notificacionesjudiciales@minicit.gov.co](mailto:notificacionesjudiciales@minicit.gov.co)

Ministerio de Comercio, Industria y Turismo  
Dirección de Inversión Extranjera y Servicios  
Ministerio de Comercio, Industria y Turismo  
Calle 28 # 13 A – 15, Bogotá D.C. – Colombia

**Re: Notice of Intent to Submit a Claim to Arbitration, dated  
December 26, 2018**

Dear Sir,

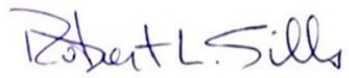
On behalf of our client, Joint Venture Foster Wheeler USA Corporation and Process Consultants Inc. (“JVFWP”), we refer to our notice of intent (the “Notice”) to submit a claim to arbitration under the United States – Colombia Trade Promotion Agreement (the “TPA”), dated December 26, 2018 and to the transmittal letter for the Notice, also dated December 26, 2018. For your convenient reference, copies of those documents, without the exhibits to the Notice, are attached to this letter.

In accordance with Article 10.15 of the TPA, JVFWP invited representatives of the Republic of Colombia (the “Republic”) to meet with representatives of JVFWP to attempt to reach an amicable resolution of the matters referred to in the Notice. Unfortunately, neither we nor our client ever received a response to that invitation.

The 90 day “cooling off” period prescribed by Article 10.16(2) of the TPA has now elapsed, and JVFWP is free to commence arbitration. However, our client would still far prefer an amicable resolution of the issues described in the Notice. To that end, we again invite representatives of the Republic to meet with us and representatives of our client in the near future, to address those issues. We look forward to your favorable reply.

May 8, 2019  
Page 2

Respectfully,

Handwritten signature of Robert L. Sills in black ink.

Robert L. Sills  
Partner

Handwritten signature of Charles C. Conrad in blue ink.

Charles C. Conrad  
Partner



Pillsbury Winthrop Shaw Pittman LLP  
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December 26, 2018

Via email: [notificacionesjudiciales@minicit.gov.co](mailto:notificacionesjudiciales@minicit.gov.co)  
Minister of Commerce  
Dirección de Inversión Extranjera y Servicios  
Ministerio de Comercio, Industria y Turismo  
Calle 28 # 13 A – 15, Bogotá D.C. – Colombia

**Re: Notice of Intent to Submit a Claim to Arbitration**

Dear Sir,

Please see the attached notice sent in conformity with the Trade Promotion Agreement between the Republic of Colombia and the United States of America.

Respectfully,

A handwritten signature in blue ink that reads "Robert L. Sills".

Robert L. Sills  
Partner

RLS:nj



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1540 Broadway | New York, NY 10036-4039 | tel 212.858.1000 | fax 212.858.1500

Robert L. Sills  
Partner  
tel: 212.858.1114  
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**Notice of Intent to Submit a Claim to Arbitration  
Under Chapter Ten of the United States-Colombia Free Trade Agreement**

**Joint Venture Foster Wheeler USA Corporation and  
Process Consultants Inc.,**

*Claimant,*

**v.**

**The Republic of Colombia,**

*Respondent.*

In accordance with Article 10.16 of the United States-Colombia Trade Promotion Agreement (“TPA”), Joint Venture Foster Wheeler USA Corporation and Process Consultants Inc. (together, “FPJVC” or the “Investor”) respectfully provides the Republic of Colombia (“Colombia” or the “Republic”) with this notice of its intention to submit a claim to arbitration pursuant to Chapter Ten of the TPA.

**I. Preliminary Statement**

1. In 2009, Refinería de Cartagena, S.A. (“Reficar”), a state-owned enterprise, entered into a contract with FPJVC to provide certain project management services in connection with the refurbishment of an oil refinery owned by the Republic (the “Contract”). The Contract contained various critical safeguards for FPJVC, including limitations on damages and remedies, and the right to have any dispute concerning the contract addressed by a neutral panel of three arbitrators in an arbitration seated in Paris conducted under the arbitration rules of the International Charter of Commerce.

2. In 2010, in order to reduce costs and accommodate the demand of the engineering, procurement and construction (“EPC”) contractor on the project, Reficar directed a material change in the scope of FPJVC’s work. That change – documented in correspondence, meeting minutes and a project evaluation commissioned by Reficar’s

own parent company – shifted project management responsibility to Reficar itself, stripped FPJVC of the authority to direct the EPC contractor’s work or control the EPC contractor’s expenditures, and limited FPJVC to providing Reficar with support and project recommendations. Through completion of the project in 2016, FPJVC acted in accordance with the agreed narrowed scope of work without objection or other direction from Reficar.

3. In 2017, the Contraloría General de la República of Colombia (the “CGR”), commenced administrative proceedings against various entities and individuals, including FPJVC, for alleged acts, gross negligence or willful misconduct in the expenditure of Republic’s funds in connection with the project. In June 2018, the CGR issued charges finding, in effect, that: (a) FPJVC was bound by the original text of the Contract with Reficar, without regard to the parties’ later agreement and the course of performance; (b) FPJVC breached the Contract by not preventing increases in project cost and execution delays ; (c) FPJVC was grossly negligent in managing state funds even though FPJVC had no authority over such expenditures and the conduct alleged amounted, on the face of the charges, at most to a breach of contract; and (d) FPJVC should be held jointly and severally liable for more than \$2.4 billion of project cost overruns, even though the Republic, acting through Reficar, promised at the time of the investment that any damages would be capped at 10% of the contract value absent an arbitral determination of gross negligence, and that FPJVC would bear no responsibility for indirect damages. Although 4,751 pages in length, the CGR charge wholly fails to describe, let alone document, any actions or omissions by FPJVC constituting gross negligence; rather, the charge is based on various cost overruns and the groundless assumption that FPJVC acted as the project manager.

4. The Investor hopes to be able to resolve these matters amicably, but in the event such a resolution cannot be achieved, now provides this notice of its intention to submit a claim to arbitration based on the Republic’s denial of FPJVC’s right to fair and equitable treatment (including, without limitations,) grossly departing from local law in finding FPJVC to be a fiscal manager, subjecting the Investor to conflicting directives of the Republic, denying FPJVC the same treatment afforded Reficar, depriving FPJVC of the right to arbitrate before the ICC all issues concerning the contract, stripping FPJVC of the limitations on liability and damages afforded in the contract, failing to give FPJVC with fair notice of the acts or omissions giving rise to the charges, and a reasonable opportunity to defend itself, all in breach of the TPA and the parties’ investment agreement.

## **II. The Parties**

5. The Investor is a contractual joint venture. Each of its members is a corporation organized under the laws of the State of Delaware, United States of America, and is hence a national of the United States within the meaning of the TPA. The Investor’s address is 17325 Park Row Dr., Houston, Texas 77084. Among other

things, the Investor provides engineering, management and consulting services to the oil and gas sector.

6. The Investor will be represented in all matters related to this dispute by its attorneys, Pillsbury Winthrop Shaw Pittman LLP. All correspondence and communications should be directed to:

Robert L. Sills  
Eric Fishman  
Pillsbury Winthrop Shaw Pittman LLP  
1540 Broadway  
New York, NY 10036  
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Email: robert.sills@pillsburylaw.com  
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909 Fannin, Suite 2000  
Houston, TX 77010  
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7. In accordance with the TPA, Respondent Republic of Colombia is represented by its Minister of Commerce, whose address specified in Annex 10-C of the TPA is Dirección de Inversión Extranjera y Servicios, Ministerio de Comercio, Industria y Turismo, Calle 28 # 13 A – 15, Bogotá D.C. – Colombia.

8. By law Colombia owns all hydrocarbons found within its national territory and manages the extraction of those resources and the supply of energy for the benefit of the Republic through various state-owned and controlled entities, including Ecopetrol, S.A. (“Ecopetrol”) and Reficar. The Republic owns approximately 88% of Ecopetrol’s voting capital stock and appoints the majority of Ecopetrol’s board of directors, and through the board, Ecopetrol’s chief executive officer. Reficar is 100% directly and indirectly owned by Ecopetrol.

### **III. The TPA**

9. As the preamble to the TPA states, one of its purposes is to “[e]nsure a predictable legal and commercial framework for business and investment[.]”

10. To that end, Chapter 10 of the TPA requires that Colombia must (a) treat U.S. investors and investments no less favorably than its own investors and

investments;<sup>1</sup> (b) accord covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security<sup>2</sup>; and (c) not expropriate a covered investment either directly or indirectly, except for a public purpose, in a non-discriminatory manner, on conditions of prompt payment of compensation and in accordance with due process of law.<sup>3</sup>

11. Section B of Chapter 10 of the TPA grants a U.S. investor the right to submit to arbitration any investment dispute between the investor and Colombia for breach of the TPA obligations contained in Section A or of any “investment agreement” between the U.S. investor and a Colombian national authority.

12. As set forth in Article 10.28 of the TPA, a contract for the provision of services in either Colombia or the United States by an investor of the other is an “investment” within the meaning of the treaty. Accordingly, as set forth below, FPJVC is an investor that has made an investment in Colombia within the meaning of the TPA.<sup>4</sup>

#### **IV. Brief Summary of the Factual Basis for the Claim**

##### **A. The Contract**

13. In November of 2009, Reficar entered into the Contract with FPJVC for the provision of certain services with respect to the modernization and expansion of an oil refinery in Colombia known as the Cartagena Refinery (the “Project”).

14. The Contract, as originally drafted, called for FPJVC to perform certain project management consultancy services, as more fully set forth in Appendix 8 of the Contract.

15. The Contract provides that Reficar had “the right to request, and subsequently to order, [FPJVC] during the execution of the Services to make any change, modification, addition or elimination to, in or of the Services . . . .”<sup>5</sup>

16. In the Contract, FPJVC and Reficar agreed, *inter alia*, that: (a) any disputes “related to” the Contract would be resolved by a tribunal of three neutral arbitrators in an arbitration seated in Paris; conducted under the arbitration rules of the

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<sup>1</sup> TPA Art. 10.3.

<sup>2</sup> *Id.* at 10.5

<sup>3</sup> *Id.* at 10.7.

<sup>4</sup> Consistent with Article 10.28 of the TPA, an “investment” is customarily defined as an asset for which an investor of one contracting party caused money or effort to be expended and from which a return or profit is expected in the territory of another Party. *See Alpha v. Ukraine*, ICSID Case No. ARB/07/16 Award, §§ 304, 308. Here, FPJVC expended both money and effort in connection with the Project, and expected to earn a profit from the Contract.

<sup>5</sup> Contract § 23.

International Chamber of Commerce (an “ICC Arbitration”)<sup>6</sup> (b) FPJVC’s liability under the Contract “shall be limited to ten percent (10%) of the estimated value of [the] Contract” (except in cases of gross negligence);<sup>7</sup> and (c) FPJVC would not be liable for “any indirect or consequential, incidental and special damages, including but not limited to, loss of earnings, loss of production, loss of goodwill, business interruption, loss of use or claims of impossibility to operate the Plant.”<sup>8</sup>

17. FPJVC decided to invest in Colombia and to execute the Contract in reliance, *inter alia*, on those contractual safeguards, and upon the protections provided by the TPA.

### **B. The Change in FPJVC’s Scope of Work**

18. Shortly after execution of the Contract, Reficar indicated that it wished to materially narrow FPJVC’s responsibilities for the Project. For example, at a “kick-off” meeting held in Houston, Texas in December 2009, Reficar advised FPJVC that it intended to manage the Project itself with the support of FPJVC, which Reficar referred to as an “Integrated Project Management Team” (“iPMT”). Similar discussions regarding a material change to FPJVC’s role were held thereafter, including at a meeting held in April 2010 in Sugarland, Texas. Reficar ultimately made a final determination that it would directly manage the project itself without the use of FPJVC as a Project Manager and to limit FPJVC’s participation to assisting Reficar’s management team by providing personnel in the areas, and for the positions, that Reficar determined were necessary. Under that changed scope of work, FPJVC would not have decision-making authority on the Project; instead, FPJVC personnel would act as consultants to Reficar’s own management, with all direction and decision-making power vested in Reficar. FPJVC acted in accordance with the changes in its role dictated by Reficar.

19. In the early stages of the Project, Reficar and FPJVC discussed formally modifying the Contract in order to reflect the agreed changes to FPJVC’s duties and responsibilities, but no such changes were made. Nonetheless, Reficar repeatedly expressly acknowledged the changed scope of work. For example, meeting minutes dated, December 11, 2013, and formally acknowledged by Reficar, state that while the original intention of the Contract was to have FPJVC manage the project, that arrangement “was not accepted by CB&I for it was not contemplated by the EPC Contract.”<sup>9</sup>

20. In accordance with Reficar’s change in FPJVC’s scope of work, throughout the Project, FPJVC personnel only provided support to Reficar, as outlined

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<sup>6</sup> *Id.* at § 27.

<sup>7</sup> *Id.* at § 10.

<sup>8</sup> *Id.*

<sup>9</sup> Junta Directiva Reunión Ordinaria Acta No. 131 at 9. While summarizing numerous Reficar board meeting minutes in its 4,751-page Charge, the CGR neglected to address these minutes.



above, and Reficar actually managed the project. FPJVC did not have any decision-making authority to direct the manner in which CBI and other contractors performed their contractual duties, to agree to or reject change orders, or to control what each contractor spent. Rather, FPJVC personnel provided advice to Reficar on various issues, and Reficar decided whether to follow such advice in its discretion.

21. The Project did experience substantial cost overruns and delays as compared to Reficar's project budget which relied upon CB&I's original estimate for the engineering, procurement and construction phases of the project, but none are attributable to FPJVC. In that regard, Ecopetrol (the parent company of Reficar), and itself an agency or instrumentality of the Colombian state, retained a construction consultant, Jacobs Consultancy ("Jacobs"), to investigate and issue a report identifying the reasons for those delays and cost overruns. In October 2015, Jacobs issued its report explaining, among other things, that a portion of the Project delays and cost overruns resulted from Reficar's decision to reduce FPJVC's responsibility for the Project:

Managing a reimbursable contract requires an extensive project management team with more experience [than Reficar had]. Reficar acknowledged this limitation and engaged a project consultant (Foster Wheeler) to provide additional resources. However, instead of letting the management consultant take all the responsibility of the project, the consultant's staff was placed only in positions of support, with inexperienced personnel of Reficar in positions of direct control.<sup>10</sup>

22. The Jacobs Consultancy Report further found, among other things:

- "FPJVC's team had no authority and became only additional personal in Reficar's team"<sup>11</sup>
- "[A]ll the decision had to be made only by Reficar managers."<sup>12</sup>
- "Without having any authority, FPJVC's personnel could only make suggestions and provide tools for project management"<sup>13</sup>

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<sup>10</sup> Jacobs Consultancy Report at 8. The CGR referred to various reports provided by Jacobs throughout the Charge, but this one is conspicuously absent.

<sup>11</sup> *Id.* at 19.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

- “All the decision had to be made by Reficar’s managers, who had little experience in a project this size and were outrun trying to handle the changes and deviations.”<sup>14</sup>

23. Reficar has sought recovery of the cost overruns and damage for the delays in an arbitration against CB&I pursuant to the ICC Arbitration Rules. That proceeding is ongoing, and Reficar has never asserted any claims against FPJVC. Indeed, FPJVC has been providing substantial assistance to Reficar in connection with Reficar’s ongoing ICC arbitration against CB&I.

**C. The CGR Unlawfully Proceeds Against FPJVC for Following Reficar’s Directives**

24. On March 10, 2017, despite the absence of any allegations against FPJVC by Reficar or anyone else, or any evidence that FPJVC was in breach of the Contract or otherwise responsible for delay or excess costs in the Project, Colombia’s CGR, a part of the central government of Colombia, commenced a Fiscal Liability proceeding against FPJVC and others involved in the Project, based on Colombian Law 610 of 2000 (“Law 610”).

25. In accordance with the Constitution of Colombia and Law 610, the CGR has jurisdiction to hold “fiscal managers” liable when, through gross negligence or intentional misconduct, they cause public waste. As stated by the Constitutional Court of Colombia, “[f]iscal liability . . . can only be imposed with respect to public officials and private parties who are legally entitled to exercise fiscal management, that is, *those who have decision-making power over State resources or public funds under their control.*”<sup>15</sup> The CGR “must state with rigorous specificity the extent of competence or capacity of the public official or the private party with respect to a specific instance of fiscal management,” and “fiscal management is always linked to State assets or funds that are *unequivocally under the administrative or dispositive control of specifically identified public officials or private parties.*”<sup>16</sup> Conversely, if the investigated party is not a “fiscal manager,” the CGR does not have jurisdiction to initiate a fiscal liability proceeding.<sup>17</sup> As outlined below, the CGR’s proceeding against FPJVC does not begin to approach that standard, and the claims brought by the CGR against FPJVC as the basis for the CGR’s jurisdiction are not colorable.

26. On June 5, 2018, the CGR issued charges (referred to as “Auto 773”) (hereinafter referred to as the “Charges”) alleging that specific large increases in the Project’s capital expenditures, represented by “change controls” to which Reficar

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<sup>14</sup> *Id.*

<sup>15</sup> Constitutional Court, Judgment C-832 of 2002 (emphasis added).

<sup>16</sup> Constitutional Court Judgment C-840 of 2001 (emphasis added).

<sup>17</sup> Constitutional Court, Judgment C-131 of 2003.

agreed, caused “loss of public funds that produced fiscal damage.”<sup>18</sup> The Charges allege that FPJVC contributed in “great measure” to the alleged waste by not preventing the decisions that led to the change controls approved by the Board of Directors of Ecopetrol and Reficar, and that “its omissions identified in a deficient management and support of technical auditing, supervision, and control of the activities of execution in the project, in accordance with its commitment to fulfill the management, technical and administrative supervision both for the EPC and the PCS stages; actions and omissions that contributed to the generation of damage as a result of anti-economic, inefficient, and ineffectual fiscal management.”<sup>19</sup>

27. The CGR charges against FPJVC are all based on the notion that FPJVC was grossly negligent in meeting its obligations under and related to the Contract in managing the Project and that those alleged failures resulted in the waste of public funds.<sup>20</sup> In reaching that conclusion, the CGR asserted that FPJVC’s scope of work had not been altered in any way from the original contract:

... Contrary to the argument that [FPJVC] lacked decision-making authority with respect to the change controls, the NOCs and other change orders for purposes of the current investigation, it is clear that by not interfering with the decisions that led to the change controls approved by the Boards of ECOPETROL S.A. (“Ecopetrol”) and Reficar, [FPJVC] could not put aside its responsibilities and commitments given its contract and business with Reficar, which not having been actually modified, it cannot be maintained that [FPJVC] had no faculty with respect to its work as PMC, and these could not be limited to technical analysis or mere support work, given that if that were so, the purpose of the PMC contract would have been completely “denatured” . . . .<sup>21</sup>

28. Indeed, the CGR went so far as to assert that “FPJVC’s obligations were not modified,”<sup>22</sup> suggesting that even if it was instead a part of Reficar’s PM team it was

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<sup>18</sup> See generally Auto No. 773 (June 5, 2018).

<sup>19</sup> See *id.* at 3580 and 3715

<sup>20</sup> See *id.* at 3467-68 (describing contractual duties), 3707 (quoting FPJVC’s responsibilities under the Contract to submit reports to the vice-president of the Project), 3708-10 (quoting FPJVC’s responsibilities under the Contract relating to the engineering, procurement, and construction phases of the Project).

<sup>21</sup> *Id.* at 3710-11; see also *id.* at 3571 (“it is evident that the PMC contract . . . was not modified in real terms”), 3708 (describing modifications to the Contract contemplated and allegedly rejected by Reficar under Act 131).

<sup>22</sup> *Id.* At 3483. It cannot be that FPJVC was obligated to “cover” Reficar for damages caused by Reficar itself when FPJVC had been deprived by Reficar of any decision-making power.

required to cover for Reficar’s deficiencies,” in complete disregard of the standards imposed by Colombian law.

29. Based on its flawed analysis, the CGR charged FPJVC with materially contributing to the approval of Change Controls Nos. 2, 3 and 4 by not “preventing the unjustified increase of the project costs”<sup>23</sup>. The CGR concluded, moreover, that FPJVC had not merely breached the contract or negligently carried out its supposed duties, but had been grossly negligent in performing its contractual duties and, as such, should be jointly and severally liable for more than USD 2.43 billion. The Charges do not specify what acts or omissions by FPJVC are said to constitute gross negligence, nor do they even purport to explain how FPJVC could have exercised control over Reficar’s decision-making. Rather, they simply make a conclusory assertion of gross negligence, apparently based on the original project management responsibilities assigned to FPJVC under the Contract and the fact of the overrun, and fail to acknowledge what Ecopetrol’s own consultants found that- that Reficar directed a change in FPJVC’s scope of work that left FPJVC with “no authority” and only the ability to “make suggestions,” which cannot possibly form the basis for a charge of gross negligence. Furthermore, during the investigative phase of the CGR proceeding, the CGR was provided with substantial evidence showing FPJVC’s actual role but does not even address that evidence in Auto 773.

30. The Charges consist of 4,751 pages. Initially, the CGR ordered FPJVC to file its response to the Charges, including the submission of all evidence in support of its defenses, within a mere ten days. As a result of the filing of various recusal motions, each of which led to a brief suspension of that deadline, FPJVC ultimately had only approximately four months to file an objection and response, which it did on October 4, 2018.

**V. Breach of Colombia’s Obligations Under the TPA and the Investment Contract**

31. FPJVC intends to submit a claim to arbitration under Article 10.16 of the TPA because Colombia has violated the TPA and breached the Contract, as briefly set out below.

**A. The CGR’s Exercise of Jurisdiction and Assertion of Charges Against FPJVC Is a Gross Departure from Local Law, a Denial of Fair and Equitable Treatment in Violation of Articles 10.3 and 10.5 of the TPA, and a Denial of FPJVC’s Legitimate Expectations**

32. The CGR’s determination that FPJVC was a fiscal manager is a gross departure from Colombian law without any colorable basis and constitutes a denial of justice under the TPA.

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<sup>23</sup> Id at 3711

33. There is no colorable basis upon which to conclude that FPJVC managed public assets and funds, or that it supervised, recommended, executed, or made any decision regarding the funds expended on the Project. Rather, as directed by Reficar and implemented by the parties, FPJVC had no power, right or authority to manage, control or direct CB&I's activities or expenditures.<sup>24</sup>

34. Because FPJVC was not a fiscal manager pursuant to Article 3 of Law 610, the CGR lacked any colorable basis to bring fiscal liability charges against FPJVC. The CGR's proceeding against FPJVC therefore constitutes a denial of fair and equitable treatment, and a violation of FPJVC's legitimate expectations that Colombian law would be interpreted and applied to it in a fair and predictable manner.<sup>25</sup>

**B. Colombian Instrumentalities Have Subjected FPJVC to Conflicting Directives in Violation of Articles 10.3 and 10.5 of the TPA**

35. FPJVC has been deprived of fair and equitable treatment as a result of being subjected to conflicting dictates by different arms of the Colombian state.

36. Reficar, a state-owned entity, actually managed the Project. As the Jacobs Consultancy Report found, "all the decisions had to be made only by Reficar managers"<sup>26</sup> and "FPJVC's team had no authority and became only additional personal in Reficar's team."<sup>27</sup>

37. Despite that, the CGR, an arm of the Colombian state, seeks to hold FPJVC responsible for billions of dollars of alleged fiscal damages for following the specific directives of an instrumentality of the Colombian state, Reficar. At the same time, neither the CGR nor any other arm of the Republic has sought relief against Reficar.

38. Moreover, Article 113 of the Colombia Constitution provides that "[t]he different State organs have separate duties, but they should collaborate harmoniously in furtherance of the State's objectives." The "harmonious collaboration" principle applies to "not only the organs that comprise the executive, legislative and judicial branches of

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<sup>24</sup> For the evidence of doubt, FPJVC does not agree that the original terms of the Contract, as executed, rendered it a fiscal manager within the meaning of Law 610.

<sup>25</sup> Moreover, even if Reficar had not directed, and the parties had not agreed on, a fundamental change to the scope of the Contract, and there were some basis to assert that FPJVC was a fiscal manager, the most that could be alleged under such hypothetical circumstances, based on the allegations of Auto 773 regarding FPJVC's conduct, would be that FPJVC had breached the Contract or failed to execute its supposed oversight responsibilities with reasonable care. It should also be noted that during the investigation phase of the CGR proceeding, FPJVC previously submitted to the CGR an abundance of evidence that demonstrated its actual role and responsibility on the Project, which the CGR wholly failed to even mention, let alone address, in its charge.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 19.

the government, but also all other authorities whose duties are necessary for the achievement of the State's objectives."<sup>28</sup> In violation of that principle, Colombia limited FPJVC's scope of work, and now seeks to hold FPJVC liable for following that directive.<sup>29</sup>

### **C. Colombia has Denied FPJVC National Treatment**

39. Pursuant to Article 10.3 of the TPA, Colombia is obligated to provide FPJVC with treatment "no less favorable than it accords, in like circumstances, to investments in its territory of its own investors...." By subjecting FPJVC, a national of the United States, to substantially less favorable treatment than Reficar, the party actually responsible for the conduct complained of by the CGR, Colombia has violated Article 10.3 of the TPA.

### **D. Colombia Has Deprived FPJVC of Fundamental Protections in the Contract and Indirectly Expropriated its Benefits in Violation of Article 10.7 of the TPA**

40. Under Colombian and international law, a State may indirectly expropriate property rights, even when legal title formally remains with the original owner, when the State takes measures that render such property rights worthless. It is well settled that contractual rights may be indirectly expropriated. Here, Colombia has both breached the Contract and acted in a manner that effects an indirect expropriation of FPJVC's rights thereunder, in violation of Article 10.7 of the TPA.

41. The Contract contains important protections for FPJVC that were fundamental to its decision to invest in Colombia. Among other things, the Contract excludes indirect damages, caps FPJVC's potential liability at ten percent of the Contract amount and provides that all disputes "related to" the Contract must be addressed in an ICC arbitration proceeding in Paris.

42. Notwithstanding those protections, Colombia, through the CGR proceeding, and not the contractually agreed mechanism of ICC arbitration, has asserted that FPJVC failed to perform under the Contract. Colombia's claims regarding those issues, including any dispute regarding the scope of FPJVC's duties under the Contract can be heard only by an independent arbitral panel, but are the basis on which Colombia seeks to impose more than \$2.4 billion of liability on FPJVC in the CGR proceeding.

43. FPJVC has repeatedly objected to the CGR making determinations that are required to be addressed in arbitration, both in submissions to the CGR itself and in court filings in Colombia. Even though Colombia is obligated to, and does, recognize

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<sup>28</sup> Constitutional Court, Judgment C-247 of 2013.

<sup>29</sup> Moreover, state-owned Reficar has made a determination to seek recovery of the alleged cost overrun from CB&I through ICC arbitration. The CGR's charge, which is highly critical of Reficar's management of CB&I, runs at cross purposes to that effort.

and enforce arbitration clauses in accordance with its own laws and its international obligations under the New York and Panama Conventions, it has refused to submit questions about the scope of the Contract, whether the Contract was amended, and FPJVC's performance thereunder to arbitration.

44. Likewise, Colombia has refused to abide by the limitations of liability in the Contract. The Contract caps FPJVC's liability at ten percent of the Contract amount (approximately \$30 million), absent an arbitral determination that FPJVC acted in a grossly negligent manner. The Contract further bars all consequential damages.

45. The CGR has not set out any acts or omissions by FPJVC that constituted "gross negligence" in the performance of its work; rather, it has simply asserted that FPJVC engaged in acts of "gross negligence". As set out above, that assertion cannot be reconciled with the fact that FPJVC did not have authority to control the Project's costs, nor with the highly critical description of Reficar's management of the Project in Auto 773. Similarly, it cannot be reconciled with the decision of Reficar- like the CGR, an arm of the Colombian state- to commence an arbitration proceeding only against CB&I, not FPJVC, for the Project's cost overruns and delays.

46. The State has used the fiscal liability proceedings before the CGR to deprive FPJVC of its arbitration rights and to strip FPJVC of the critical liability protections set forth in the Contract.

**E. Colombia is Bound by, and Has Violated, the Terms of the Contracts in Violation of the TPA**

47. Pursuant to Article 10.28 of the TPA, the Contract is an investment agreement. As set out above, Colombia has violated the Contract by commencing and prosecuting the CGR proceeding. In accordance with Article 10.16(a)(1)(b) of the TPA, FPJVC intends to seek relief in arbitration for breach of the Contract by Colombia. In that regard, as Colombia is surely aware, FPJVC has given formal notice of its intention to commence an ICC Arbitration to Reficar, Ecopetrol and the Republic.

48. Further, Article 10.4 of the TPA (the "MFN Clause") provides as follows:

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors

of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

49. Accordingly, to the extent any other investment agreement or treaty to which Colombia is a party sets out substantive rights greater than those provided in the TPA, those greater rights are incorporated by reference in the TPA.

50. Article 10(2) (the “Umbrella Clause”) of the Agreement Between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments, executed on 17 May 2006 and presently in force, provides as follows:

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.

51. The Contract is a written agreement within the scope of the Umbrella Clause, whose substantive protections are incorporated into the TPA through the MFN Clause. As set out in this notice, Colombia, acting through the CGR and through the CGR proceeding, has breached the Contract and the Umbrella Clause. FPJVC intends to seek relief for such breach in arbitration.

**F. The Republic has Deprived FPJVC of Procedural Due Process in Violation of Articles 10.3 and 10.5 of the TPA**

52. Colombia has also deprived FPJVC of basic procedural rights afforded by both Colombian and international law.

53. It is settled under Colombian law that a person or entity subjected to administrative charges must be informed in reasonable detail of the bases of such charges. As the Constitutional Court in Colombia has explained:

An administrative act which decides the merits of the case . . . that is not well reasoned, will violate that fundamental right of due process that governs the administrative proceeding. Such acts must express the factual and legal circumstances upon which is based. The obligation that the administrative authorities have to explain the reasons upon which the act is based has three objectives: (1) Puts the parties on notice regarding the reasons of the decision and that such decision is not based on an arbitrary act



committed by the authority, which will enable the interested party to challenge such decision or exercise the legal remedies that it deems convenient; (2) it will subject the authority to the applicable laws and regulations, since by issuing reasoned acts it must legally justify its acts; and (3) the administrative function is meant to serve the general interest.<sup>30</sup>

54. Likewise, one of the fundamental principles of international law is that a party being charged with wrongdoing must be given fair notice and an adequate time and means to be able to present its defense in all administrative and judicial proceedings.

55. The CGR proceeding is the largest, by amount, in the history of Colombia. The Charges are set forth in 4,751 pages, all of which had to be translated to English, the working language of FPJVC, so that FPJVC could review and analyze the charges. Notwithstanding their length, the Charges do not detail the acts and omissions of FPJVC that purportedly constitute gross negligence in the performance of the Contract. Rather, gross negligence is simply asserted based on the CGR's determination that FPJVC was the project manager; that its duties were not narrowed, and that the Project incurred significant delay and cost overruns.

56. By failing to detail the acts or omissions alleged to constitute gross negligence and specifying how such acts or omissions caused loss, the Republic has violated FPJVC's fundamental right to present a defense.<sup>31</sup>

57. Reviewing and responding to the Charges is a herculean effort that requires thorough analysis, interviews, gathering evidence, securing expert opinions, and actually preparing a written response. Despite that, the CGR initially ordered FPJVC to file its response to the Charges, including the submission of all evidence in support of its defenses, within a mere *ten days*. In order to simply review the charges

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<sup>30</sup> Corte Constitucional, Sentencia T-108 of 2012, M.P.: Maria Victoria Calle Correa [Constitutional Court Judgment T-108 of 2012, Judge Maria Victoria Calle Correa].

<sup>31</sup> As noted above, the CGR has also ignored the requirements of Law 610 for establishing fiscal liability. Under Article 5 of Law 610, the CGR must establish gross negligence or willful misconduct by a person engaged in fiscal management, damage to the public and a causal link between these two elements. Sentence C-338-2014 states that "the [Colombian-Court has stated, in regard to fiscal liability, that any form of strict liability is prohibited and therefore, such liability must be individualized and be analyzed considering the subject's conduct" CGR Auto 773 does not "individualize" or contains any type of analysis based on the subject's conduct." On the contrary, it seeks to impose strict liability on FPJVC for Change Controls 2-4, violating FPJVC's due process rights. Moreover, each budget increase was comprised of multiple, diverse cost items, each with its own basis, but the CGR simply treats each Change Control as if it were a single increase in costs and nowhere even identifies the specific cost increases that comprised each Change Control budget increase request.

(let alone processing and responding to the charges and collecting witnesses and evidence) in ten days would require reading a page per minute for eight hours a day<sup>32</sup>

58. Although the ten-day period was, in effect, extended in fits and starts to approximately four months due to the filing of various recusal motions, even that time was grossly insufficient to investigate and respond to the voluminous Charges, which are the product of the CGR employing a large team over a period of approximately fifteen months to compile the 4,751-page document.

59. Moreover, far from acting impartially, the CGR repeatedly has made inflammatory statements in the media, in press releases and on its social networking pages that exhibit bias and predetermination by asserting that there was fraudulent conduct and corruption on the Project, for which FPJVC is responsible. These acts constitute further denial of fair and equitable treatment in violation of Article 10.5 of the TPA, as well as Article 29 of the Colombian Constitution and international law. FPJVC is entitled to a fair hearing by an independent and impartial tribunal, and has been deprived of that right.

### **G. Damage to FPJVC**

60. Colombia's violations of the TPA, the Contract, the minimum standard of international law, and improper treatment of FPJVC's investment have severely damaged FPJVC and constitute a denial of FPJVC's substantive and procedural rights and have caused substantial economic and reputational harm to FPJVC.

61. FPJVC is prepared to pursue its rights in arbitration, in accordance with the TPA, but would far prefer a consensual commercial resolution of this situation. To that end, in accordance with Article 10.15 of the TPA, FPJVC invites Colombia, by its duly authorized representatives, to meet and attempt to resolve this dispute through consultation and negotiation. The undersigned attorneys for FPJVC are available at Colombia's early convenience to discuss and agree on the time, place, terms and conditions of such meetings, and look forward to Colombia's favorable response. FPJVC assures Colombia that it will participate in such negotiations in complete good faith and with the goal of reaching an amicable resolution.

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<sup>32</sup> While the ten-day period to respond to the charges is specified in Colombian law, the CGR should have granted a reasonable extension. Such a change to the schedule is expressly authorized by Colombian law, and no reasonable person could have believed that an appropriate response to these charges could be investigated, formulated and submitted within 10 days. Article 4 of the Political Constitution of Colombia states, "[I]n case of conflict between the Constitution and any other law or rule, the constitutional provisions will prevail." In addition, "Article 4 of the Constitution not only allows but mandates that in case of any conflict between the Constitution and any other law or rule, the constitutional provisions must be applied. Therefore, any judicial officer that applies the unconstitutionality exception in a specific case will have all of his/her acts ratified pursuant to the Constitution." (Constitutional Court, Auto A-105 of 2003, M.P. Marco Gerardo Monroy Cabra).

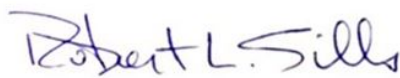
**VI. Relief Requested**

Without prejudice to its right to amend, supplement or restate its claims or the relief to be requested in arbitration, FPJVC presently intends to request the tribunal to:

- (1) Declare that the Republic of Colombia and CGR have breached the terms of the TPA and the Contract;
- (2) Award FPJVC damages for the economic and reputational harm it has suffered;
- (3) Enjoin the CGR proceeding, and any action by the CGR or any other arm of the Colombian state to seize, attach, or enjoin any assets of FPJVC;
- (4) Award FPJVC its costs and attorneys' fees incurred in connection with responding to the CGR's charges;
- (5) Award compensation associated with any arbitration or other proceedings undertaken in connection with this Notice of Intent, including all professional and attorneys' fees and costs;
- (6) Award pre- and post- award interest at a rate to be fixed by the tribunal; and
- (7) Grant such other and further relief as the tribunal may deem just and appropriate.

Dated: December 26, 2018

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