INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID Case No. ARB/19/34

AMEC FOSTER WHEELER USA CORPORATION, PROCESS CONSULTANTS, INC., AND JOINT VENTURE FOSTER WHEELER USA CORPORATION AND PROCESS CONSULTANTS, INC.

Claimants

v.

REPUBLIC OF COLOMBIA

Respondent

MEMORIAL ON PRELIMINARY OBJECTIONS

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INTRODUCTION

1. The Republic of Colombia ("Colombia" or "Respondent") submits this Memorial on Preliminary Objections ("Memorial") in accordance with Procedural Order No. 1 of March 18, 2021 and the revised procedural calendar of April 1, 2021.[1]

2. This case was brought by two consulting service providers – Amec Foster Wheeler USA Corporation ("Foster Wheeler") and Process Consultants, Inc. ("Process Consultants") – and the joint venture formed by them, Joint Venture Foster Wheeler USA Corporation and Process Consultants, Inc. ("FPJVC") (together, the "Claimants"), seeking compensation from Colombia in respect of merely hypothetical damages allegedly arising from a fiscal liability proceeding in which they are involved ("Fiscal Liability Proceeding"). In their Notice of Arbitration of December 6, 2019 ("Notice of Arbitration"), Claimants recount a story in which they have been victims of alleged abuses at the hands of the Office of the Comptroller General of the Republic ("CGR") – an organ of the Colombian State that oversees the Fiscal Liability Proceeding – which, they argue, had no competence to initiate a fiscal liability proceeding against them and which reached conclusions without legal or factual basis, ignoring their arguments in defense. However, what really lacks legal and factual basis is Claimants' claim in this Arbitration. No matter how hard Claimants try, their complaints and failed arguments cannot obscure reality: namely, that there exists neither a measure that is capable of constituting a breach by Colombia of any obligations it has assumed, nor any loss or monetary damage on

[1] References in the form of "Ex. R-" and "Ex. RL-" are to the factual exhibits and legal authorities, respectively, submitted by Respondent in this Arbitration; while those in the form of "Ex. C-" and "Ex. CL-" are to the factual exhibits and legal authorities, respectively, submitted by Claimants in this Arbitration. This Memorial uses the following notation: period (".") to separate thousands, comma (",") to separate decimals, "US$" to refer to U.S. dollars and "COP$" to refer to Colombian pesos.

Claimants' part that could be compensated by this Tribunal. The absence of any actual damage in this case reveals Claimants' true intention behind initiating this Arbitration: to dissuade the Colombian authorities, in particular the CGR, from exercising their constitutional and legal powers.

3. The premature nature of Claimants' claim is only the first in a long list of legal defects that prevent this Tribunal from assuming jurisdiction over this case and granting Claimants the compensation they seek. Crucially, Claimants do not have an investment in Colombia protected under the Investment Chapter (the "Treaty")[2] of the Trade Promotion Agreement between the Republic of Colombia and the United States of America (the "Colombia-U.S. TPA"),[3] or under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"). Their activities were limited to the provision of professional services under the terms of a commercial services contract, the performance of which did not entail any risk on Claimants' part. In addition, Claimant FPJVC, being a mere contractual association lacking legal personality, does not qualify as a "national of another Contracting State" under the ICSID Convention.

4. While this would be enough to dismiss this case in its entirety, the defects in Claimants' claim do not stop there. Foster Wheeler and Process Consultants failed to file a notice of intent against Colombia, breaching one of the requirements under the

[2] **Ex. RL-1**, United States – Colombia Trade Promotion Agreement, signed on November 22, 2006 and effective from May 15, 2012, Chapter 10 (the "Treaty").

[3] **Ex. RL-2**, United States – Colombia Trade Promotion Agreement, signed on November 22, 2006 and effective from May 15, 2012 (the "Colombia-US TPA"). Due to the length of the Colombia-US TPA and considering that it must be submitted in both languages, Respondent submits as **Ex. RL-2**, only the Preamble and Chapter 1, which are the only relevant sections for this case (in addition to Chapter 10, which is submitted as **Ex. RL-1**). Should the Tribunal wish to consult any other section of the Colombia-US TPA, the full text is available at the following link: www.sice.oas.org.

Treaty for submitting a claim to arbitration. They did, however, raise allegations of purported violations of fair and equitable treatment ("FET") under the Treaty before Colombian courts, such that they are now precluded from bringing the same claim before this Tribunal. Finally, not only did Claimants file a waiver that fails to comply with the formal requirements under the Treaty, but they have initiated and continued proceedings before the Colombian judicial and administrative courts in respect of the same "measures" that are at issue in this Arbitration.

5. The facts giving rise to this claim are essentially the following: FPJVC, the contractual association formed by Foster Wheeler and Process Consultants, entered into a services contract with a State-owned oil company to provide consulting services in respect of the management of a project to expand and modernize a refining complex in Cartagena, Colombia. In accordance with the contractual provisions, FPJVC [redacted]

6. Unfortunately for Colombia, the works for the expansion and modernization of the refinery were completed after years of delays and billions of dollars in cost overruns. Suspecting that economic damage would have been caused to the State's assets as a result of such delays and excessive costs, the CGR – the Colombian State organ tasked with overseeing and controlling the expenditure of public funds – initiated a Fiscal Liability

Proceeding to determine the amount of such damage, identify those liable, and, if applicable, obtain compensation for the economic damage to the State.

7. Following an extensive investigation, the CGR issued an procedural administrative act charging Claimants Foster Wheeler and Process Consultants, as well as other juridical and natural persons, both Colombian and foreign, with fiscal liability, having found that they were allegedly joint and severally liable for the economic damage derived from the project's cost overruns.

8. That administrative act of mere procedural character, by itself, was sufficient for Claimants to initiate this Arbitration for alleged violations of the Treaty, despite the fact that such act did not constitute a final decision on fiscal liability and that Claimants had not suffered any loss or damage as a result of their involvement in the Fiscal Liability Proceeding at that time.

9. Aware that the Fiscal Liability Proceeding was far from complete and that there was no loss or economic damage, in their Notice of Arbitration Claimants essentially ask the Tribunal to: (i) order Colombia to pay compensation for moral damages for the alleged reputational harm resulting from their involvement in the proceeding; (ii) issue an order enjoining Respondent from making any attempt to seize or attach assets they own in Colombia or abroad; and (iii) issue an offsetting award equal to the amount of an eventual ruling with liability.

10. While a ruling was issued after the filing of the Notice of Arbitration by which several defendants in the Fiscal Liability Proceeding – including Claimants Foster Wheeler and Process Consultants – were found to be joint and severally liable for causing economic damage to the State, Claimants' situation for purposes of this Arbitration

remains unchanged: namely, the ruling is not final and is subject to judicial control, and Claimants have not incurred any loss or damage.

11. The premature nature of Claimants' claim precludes the Tribunal, as a matter of law, from issuing an award in their favor because, in order to submit a claim to arbitration under the Treaty, Article 10.16.1 requires, on the one hand, that there be a breach of a substantive obligation of the Treaty or an investment agreement, and, on the other, that the claimant incur loss or damage by reason of, or arising out of, that breach. Neither of these two requirements are satisfied in the present case.[4] Nor can the Tribunal, as a matter of law, make an award in Claimants' favor because their claims are outside the scope of the powers granted to the Tribunal under the Treaty. Article 10.26 of the Treaty provides that the Tribunal may award only monetary damages or restitution of property and expressly prohibits an award of punitive damages, such that the Tribunal cannot order Colombia to pay moral or hypothetical damages or grant injunctions.[5] For these reasons, and as authorized by Article 10.20.4 of the Treaty and Procedural Order No. 1,[6] the first part of Respondent's Memorial raises a preliminary objection that, as a matter of law, Claimants' claim is not one for which an award can be made in their favor.[7]

12. In the second part of this Memorial, Respondent raises five additional objections to be decided by the Tribunal as a preliminary question,[8] namely: (I) an objection that the Tribunal lacks jurisdiction *ratione materiae,* because Claimants do not have a protected investment under either the Treaty or the ICSID Convention, given that

[4] *See* ¶¶ 168-261, *infra.*

[5] *See* ¶¶ 262-278, *infra.*

[6] Procedural Order No. 1, ¶ 14.6.

[7] *See* ¶¶ 164-278, *infra.*

[8] *See* Procedural Order No. 1, ¶ 14.7.

the contract they entered into is a contract for the provision of services that does not entail any investment risk;[9] (II) an objection that the Tribunal lacks jurisdiction *ratione personae* over Claimant FPJVC, because that Claimant does not qualify as a "juridical person" under Article 25(2)(b) of the ICSID Convention;[10] (III) an objection that the Tribunal lacks jurisdiction *ratione voluntatis* with respect to Claimants Foster Wheeler and Process Consultants, because such Claimants did not file a notice of intent in accordance with Article 10.16.2 of the Treaty;[11] (IV) an objection that the Tribunal lacks jurisdiction *ratione voluntatis* with respect to the claims for breach of the Treaty's FET obligation, because Foster Wheeler and Process Consultants raised allegations to the same effect before Colombian courts and, pursuant to Annex 10-G of the Treaty, such an election is definitive;[12] and (V) an objection that the Tribunal lacks jurisdiction *ratione voluntatis*, because Claimants did not submit a valid and effective waiver pursuant to Article 10.18.2(b) of the Treaty.[13]

13. Below, Respondent will summarily present the main facts of the dispute in order to contextualize the aforementioned preliminary objections. In the event that this proceeding progresses to the merits stage, Respondent reserves its right to expand the statement of facts contained in this Memorial.

[9] *See* ¶¶ 281-298, *infra.*

[10] *See* ¶¶ 299-309, *infra.*

[11] *See* ¶¶ 310-318, *infra.*

[12] *See* ¶¶ 319-328, *infra.*

[13] *See* ¶¶ 329-343, *infra.*

BACKGROUND

A. Foster Wheeler and Process Consultants Entered into a Joint Venture Agreement to Submit a Joint Proposal to Reficar and Execute the Resulting Contract

14. In the 2000s, Ecopetrol, S.A. ("Ecopetrol") undertook an ambitious project to expand and modernize the Cartagena Refinery (the "Project"), a large refining industrial complex located on the Caribbean coast of Colombia.[14] For this purpose, a new company called Refinería de Cartagena, S.A. ("Reficar") was incorporated – a mixed capital company (*sociedad de economía mixta*) descentralized by services, organized in the form of a stock corporation.[15]

15. Currently, Reficar's capital stock is 100% owned by Ecopetrol,[16] which is a mixed capital company (*sociedad de economía mixta*) descentralized by services, organized in the form of a corporation.[17] The Republic of Colombia is the majority shareholder of Ecopetrol, with 88,49% of the capital stock.[18] Neither Ecopetrol nor Reficar belong to the central level of the Colombian government.[19]

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[14] [redacted]

[15] Initially, Reficar was formed as a corporation (*sociedad anónima*), but currently it takes the form of a simplified stock corporation (*sociedad por acciones simplificada*). **Ex. R-33**, Bylaws of Refinería de Cartagena S.A.S., Article 1.

[16] **Ex. R-34**, Refinería de Cartagena, Internet Portal, "Company Profile", p. 4. *See* Notice of Arbitration, December 6, 2019 ("Notice of Arbitration"), ¶ 3.

[17] **Ex. RL-3**, Law 1118 of 2006, which modifies the legal nature of Ecopetrol S.A. and sets forth other provisions, Article 1. **Ex. R-35**, Ecopetrol, Internet Portal, "Legal framework." *See* **Ex. RL-4**, Law 489 of 1998, which establishes rules on the organization and functioning of national entities, sets forth the provisions, principles and general rules for the exercise of the powers set forth in paragraphs 15 and 16 of Article 189 of the Political Constitution, and sets forth other provisions ("Law 489 of 1998"), Article 68.

[18] **Ex. R-36**, Ecopetrol, Internet Portal, "About Ecopetrol." *See* Notice of Arbitration, ¶ 20.

[19] *See* **Ex. RL-4**, Law 489 of 1998, Article 38 (indicating that the central level of the executive branch is comprised of: the Presidency of the Republic, the Vice-Presidency of the Republic, the High Councils of the administration (*Consejos Superiores de la administración*), the ministries and administrative departments, and the superintendencies (*superintendencias*) and the special administrative units without legal personality). The mixed capital companies (*sociedades de economía mixta),* such as Reficar and

16. The Project aimed to increase the refining capacity of the Cartagena Refinery, which would not only boost exports of high value-added and cleaner fuels, but also reduce dependence on imported fuels.

17. At the end of 2007, Reficar entrusted Chicago Bridge & Iron Company N.V., Chicago Bridge & Iron Company (CB&I) Americas Ltd., CB&I UK Ltd. and CBI Colombiana S.A. (together, "CB&I")[20] with the engineering, procurement and construction of the Project, entering into a series of agreements with those companies (collectively, "EPC Contract").[21] The EPC Contract originally provided for two stages with differentiated remuneration structures: an initial FEED (Front-End Engineering and Design) stage on a cost-reimbursable basis; and a second stage of detailed engineering, procurement and turnkey construction, with CB&I receiving a lump sum payment upon delivery of the completed Project.[22] However, during the performance of the EPC Contract, it was decided that the second stage would proceed on a cost-reimbursable basis.[23]

18. On October 9, 2009, Foster Wheeler and Process Consultants, both entities organized and existing under the laws of the State of Delaware in the U.S., entered into a joint venture agreement for the purpose of [redacted]

Ecopetrol, belong to the decentralized level by services (*nivel descentralizado por servicios*). *Id.*, Article 38 (indicating that the decentralized sector by services is comprised of public establishments, industrial and commercial companies of the State, superintendencies (*superintendencias*) and special administrative units with legal personality, social companies of the State and public utility companies, scientific and technological institutes, public companies and mixed capital companies (*sociedades de economía mixta*), and other national administrative entities with legal personality that are created, organized or authorized by law).

[20] The Services Contract refers to CB&I as "EPC Contractor" o "EPCC."

[21] *See* Notice of Arbitration, ¶ 52.

[22] **Ex. R-37**, Office of the Deputy Comptroller for the Mines and Energy Sector, Final report of the special audit, November 2016, p. 32.

[23] *Id.*

[redacted][24] (the "Joint Venture Agreement", and the union of both such companies pursuant to the terms of the Joint Venture Agreement, "FPJVC").

19. In the Joint Venture agreement, Foster Wheeler and Process Consultants expressly acknowledged and agreed that FPJVC [redacted][25] Contrary to Claimants' assertion,[26] under New York State law which governs the Joint Venture Agreement,[27] unincorporated entities are not separate juridical persons from their members.[28]

B. FPJVC Entered into a Services Contract with Reficar for Project Management Consulting Services

20. Pursuant to the terms of the Joint Venture Agreement, on November 18, 2009 FPJVC submitted a commercial offer to Reficar [redacted][29] On November 19, 2009 Reficar accepted the offer under the proposed terms and conditions,[30] thus forming a contractual

[24] [redacted]

[25] [redacted]

[26] Letter from Claimants to the Tribunal, September 8, 2020, p. 12 ("FPJVC is a joint venture governed by the laws of the State of New York, USA, under which a joint venture is a recognized form of juridical person.").

[27] [redacted]

[28] For that reason, the Tribunal lacks jurisdiction *ratione personae* over Claimant FPJVC because – since it is not a juridical person – it does not qualify as a "national of another Contracting State" pursuant to Article 25(2)(b) of the ICSID Convention. *See* ¶¶ 299-309, *infra.*

[29] [redacted]

[30] [redacted]

relationship between FPJVC, on the one hand,[31] and Reficar, on the other (the "Services Contract").[32]

21. Given its length, the following is a table of contents of the documents comprising the Services Contract,[33] indicating the exhibit number that identifies each document in the record of this Arbitration:

Services Contract	**Ref.**
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]

[31] [redacted]

[32] [redacted]

[33] [redacted]

Services Contract	Ref.
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]

Services Contract	Ref.
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]

22. Claimants argue that the Services Contract constitutes their "investment" in Colombia,[34] and therefore, that they have standing to initiate this Arbitration under both the ICSID Convention and the Treaty.[35] Similarly, they argue that the Services Contract also constitutes an "investment agreement" under the Treaty,[36] which entitles them to bring a claim under Article 10.16.1(a)(i)(C) thereunder. Claimants are wrong in both respects. The Services Contract does not constitute an "investment" under neither the ICSID Convention nor the Treaty because it lacks one of the essential characteristics of an investment: the assumption of risk. As will be evident from a review of the relevant contractual provisions,[37] the Services Contract is a mere commercial contract for the

[34] **Ex. R-39**, Notice of Intent, December 26, 2018 ("Notice of Intent"), ¶ 12 (for the Tribunal's convenience, Respondent submits the original English and Spanish versions of the Notice of Intent in the same exhibit); Letter from Claimants to the Tribunal, September 8, 2020, p. 11. *See* Notice of Arbitration, ¶ 3 ("This dispute arises from a November 2009 contract between FPJVC and Refinería de Cartagena S.A.. . . . for the provision of services in connection with the modernization and expansion of a large, state-owned oil refinery located in Cartagena, Colombia.") (emphasis added). *See* ¶¶ 289-292, *infra*.

[35] **Ex. R-39**, Notice of Intent, ¶ 12.

[36] Notice of Arbitration, ¶¶ 26-31.

[37] *See* ¶¶ 24-65, *infra.*

purchase and sale of services, the performance of which by Claimants did not, in any way, entail an investment risk (*i.e.*, uncertainty as to what their return would be and whether they would recover the resources they spent in the performance of the services).[38] The Services Contract also does not fall within the definition of an "investment agreement" contained in the Treaty.[39]

23. Below, Respondent will describe those provisions of the Services Contract that are relevant to the analysis of Claimants' claims and to substantiate its preliminary objections.

(1) Purpose of the Services Contract: The Provision of Project Management Consulting Services

24. Ostensibly, the purpose of the Services Contract is the provision of consulting "Services"[40] for the management of the Project,[41] including services of:

[redacted]

[38] *See* ¶¶ 281-298, *infra.*

[39] *See* ¶¶ 240-250, *infra.*

[40] [redacted]

[41] [redacted] *See* Notice of Arbitration, ¶ 3 ("This dispute arises from a November 2009 contract between FPJVC and Refinería de Cartagena S.A.. . . for the provision of services in connection with the modernization and expansion of a large, state-owned oil refinery located in Cartagena, Colombia.") (emphasis added), ¶ 29 ("Claimants contracted with Reficar . . . to provide project management services in connection with the construction and expansion of an oil refinery owned by Colombia to supply environmentally clean motor fuels to meet Colombian demand."), ¶ 51 ("Reficar . . . entered into the Contract with FPJVC in November 2009 for FPJVC to provide project management services.") (emphasis added), ¶ 54 ("The Contract originally called for FPJVC to perform certain project management services.").

[redacted]

[redacted][42]

25. The purpose of the Services Contract was reiterated by Reficar and FPJVC, in the same terms set forth above, [redacted][43]

26. Pursuant to [redacted] of the Services Contract, "[redacted][44]

[42] [redacted] *See* Notice of Arbitration, ¶ 54. *S*[redacted]

[43] [redacted] *See* ¶¶ 62-65, *infra.*

[44] [redacted]

27. [redacted] of the Services Contract, which contains a [redacted],[45] provides that

[redacted][46]

28. [redacted] lists in detail the specific obligations of FPJVC during the course of the Project[47] and during each of the stages thereof, including the [redacted],[48] [redacted],[49] [redacted],[50] [redacted][51] It also details other services to be provided by FPJVC.[52]

29. [redacted] further states that FPJVC would provide its services [redacted],[53] but, reiterating the provisions of [redacted] of the Services Contract,[54] clarifies that

45 [redacted]

46 [redacted]

47 [redacted]

48 [redacted]

49 [redacted]

50 [redacted]

51 [redacted]

52 [redacted]

53 [redacted]

54 [redacted]

[redacted][55]

30. One of Claimants' main arguments, both in the fiscal liability proceeding giving rise to their claim[56] and in this Arbitration, is that beginning shortly after the execution of the Services Contract and in the course of its performance, Reficar reduced the management role entrusted to FPJVC in such a way that FPJVC lost all decision-making capacity over the Project. In their Notice of Arbitration, Claimants explain this alleged change to the scope of the Services Contract in the following terms:

> Shortly after signing the Contract, however, Reficar radically changed FPJVC's scope of work so that FPJVC was not acting as project manager and owner's representative with decision-making authority. Instead, Reficar assumed management of the Project itself and acted as the sole decision-making authority. FPJVC personnel worked as consultants under the direction of Reficar's project management team, but neither they nor FPJVC had authority over management of, or the expenditures for, the Project.[57]

31. According to Claimants, given that under the new terms of the Services Contract they had no decision-making capacity, they had no control or authority over the

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[redacted]

[55] [redacted]

[56] *See* ¶¶ 122-138, 147-163, *infra.*

[57] Notice of Arbitration, ¶ 4. *See id.*, ¶ 56 ("Nearly as soon as the Contract was signed, and despite all the project management responsibilities the Contract gave to FPJVC, Reficar changed FPJVC's responsibilities such that FPJVC was not permitted to perform its contractual obligations and did not manage the Project or have control over any funds. Instead, Reficar itself took on these functions and was the only entity with decision-making authority on the Project. FPJVC's role was reduced to that of supporting Reficar's management of the Project.").

expenses incurred by CB&I, such that they cannot therefore be held liable for the Project's cost overruns that are the subject of the Fiscal Liability Proceeding.[58]

32. Respondent's position is that the alleged modifications to the Services Contract never occurred.[59] However, that discussion regarding the scope of FPJVC's decision-making power with respect to the Project is irrelevant at this preliminary stage of the arbitral proceeding, and thus, Respondent will not enter in this Memorial into any rebuttal of Claimants' misguided arguments in that respect. At this juncture, it is enough to indicate that, irrespective of the scope of FPJVC's decision-making authority and the level of supervision and control exercised by Reficar, Claimants' and Respondent's positions converge on one crucial point: the nature of the activities performed by FPJVC. Pursuant to the Services Contract, FPJVC provided Reficar with consulting services for the development of the Project.[60]

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[58] *See id.*, ¶ 66.

[59] [redacted] *See* ¶¶ 62-65, *infra.* *See* ¶ 25, *supra.* *See* ¶¶ 37, 62, *infra.* *See* ¶¶ 27, 29, *supra.*

[60] *See* Notice of Arbitration, ¶ 3 ("This dispute arises from a November 2009 contract between FPJVC and Refinería de Cartagena S.A. . . . for the provision of services in connection with the modernization and expansion of a large, state-owned oil refinery located in Cartagena, Colombia.") (emphasis added), ¶ 4 ("FPJVC personnel worked as consultants under the direction of Reficar's project management team"), ¶ 29 ("Claimants contracted with Reficar, . . . to provide project management services in connection with the construction and expansion of an oil refinery owned by Colombia to supply environmentally clean motor fuels to meet Colombian demand"), ¶ 51 ("Reficar. . . entered into the Contract with FPJVC in November

(2) Remuneration Structure: [redacted]

33. For the provision of its services, FPJVC was entitled to receive payments from Reficar corresponding to [redacted][61]

34. Pursuant to [redacted] of the Services Contract, FPJVC's [redacted] was calculated according to the following formula:[62]

[redacted]

35. Each component of this formula is explained below:

- [redacted]r

2009 for FPJVC to provide project management services.") (emphasis added), ¶ 54 ("The Contract originally called for FPJVC to perform certain project management services"), ¶ 58 ("FPJVC personnel acted as consultants to Reficar's own management to supplement and strengthen the [project management team]"). [redacted]

[61] [redacted]

[62] [redacted]

[redacted][5]

- [redacted]

- [redacted]

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63 [redacted]

64 [redacted]

65 [redacted]

66 [redacted]

67 [redacted]

68 [redacted]

[redacted][72]

[redacted]

- [redacted][75]

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69 [redacted]

70 [redacted]

71 [redacted]

72 [redacted]

73 [redacted]

74 [redacted]

75 [redacted]

- [redacted]
- [redacted][81]
- [redacted][82]
- [redacted]

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76 [redacted]

77 [redacted]

78 [redacted]

79 [redacted]

80 [redacted]

81 [redacted]

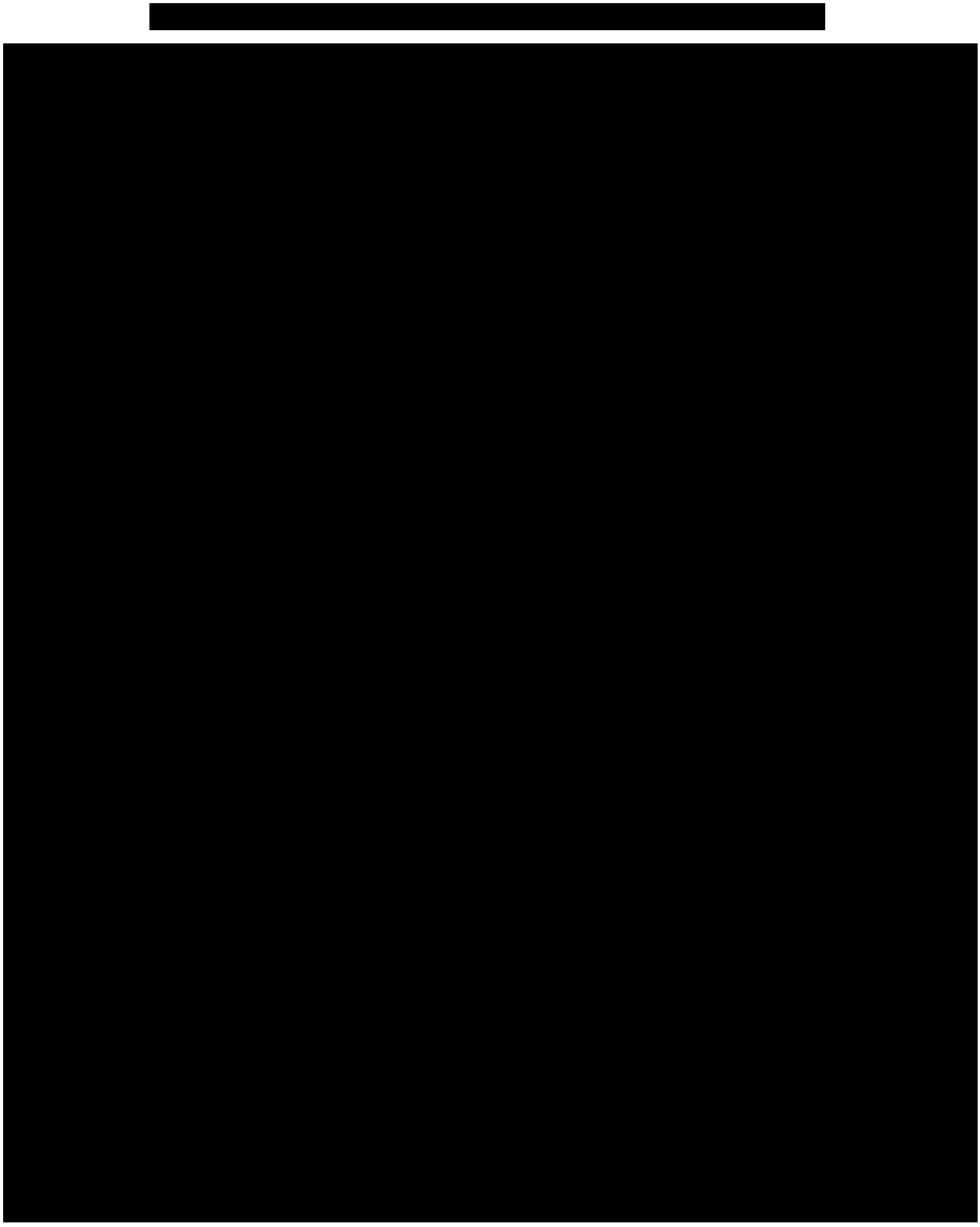
82 [redacted]

[redacted][84]

36. To facilitate the Tribunal's understanding, below is a diagram showing how FPJVC's [redacted] was calculated.

[83] [redacted]

[84] [redacted]



37. [redacted][87]

38. [redacted]

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85 [redacted]

86 [redacted]

87 [redacted]

88 [redacted]

[redacted][89]

39. In conclusion – and this is crucial – FPJVC recovered, via different components of the Remuneration, [redacted]

40. For each human resource assigned to the Services Contract, FPJVC recovered:

- [redacted]
- [redacted]
- [redacted]
- [redacted]

[89] [redacted]

- [redacted]

41. FPJVC also recuperated:

- [redacted]
- [redacted]
- [redacted][90]

42. Additionally, FPJVC charged [redacted]

43. Finally, by virtue of the [redacted], FPJVC received Reficar's payments in full [redacted]

44. Thus, the Remuneration structure provided for in the Services Contract ensured that FPJVC [redacted]

[90] [redacted]

[redacted][91]

(3) Invoicing and Payment: [redacted]

45. The absence of investment risk arising from FPJVC's Remuneration structure under the Services Contract is even more salient when considering the invoicing and payment provisions. Pursuant to [redacted], FPJVC was required to submit [redacted],[92] and Reficar was required to pay [redacted].[93] In other words, [redacted]

46. As agreed in the Joint Venture Agreement, Foster Wheeler and Process Consultants [redacted][94]

47. In general terms, every month Process Consultants – [redacted] –, sent to Reficar:

- [redacted][95]

[91] *See* ¶¶ 281-298, *infra*.

[92] [redacted]

[93] [redacted]

[94] [redacted]

[95] [redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted][99]

48. On its part, Foster Wheeler broadly sent to Reficar each month:

- [redacted]
- [redacted]
- [redacted][102]

96 [redacted]

97 [redacted]

98 [redacted]

99 [redacted]

100 [redacted]

101 [redacted]

102 [redacted]

49. [redacted]

50. [redacted]

51. On top of the fact that FPJVC received [redacted], FPJVC [redacted] of the Services Contract states:

[redacted]

[redacted]

103 [redacted]

[redacted][104]

52. In sum, it suffices to analyze the provisions of the Services Contract regarding Remuneration, invoicing and payment to realize that FPJVC did not run any investment risk. [redacted][105] Like any service provider, FPJVC did run purely commercial risks, such as the risk of non-payment of invoices,[106] a risk that was limited by [redacted]

53. As at today's date, FPJVC invoiced and Reficar paid a total of [redacted] to FPJVC in respect of [redacted], which corresponds to approximately [redacted] of [redacted], of which [redacted] represented net profits [redacted] for FPJVC. Furthermore, Reficar paid a total of [redacted] to FPJVC for [redacted].

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[104] [redacted]

[105] *See* ¶¶ 281-298, *infra.*

[106] *See* ¶¶ 286-289, *infra.* Section 18 of the Services Contract is another example of FPJVC's purely commercial risks under the [redacted]

(4) [redacted]

54. Knowing that they have been receiving their Remuneration throughout the performance of the Services Contract, Claimants do not argue that they have suffered a substantial deprivation of their rights under the Services Contract or that Colombia has expropriated their entire "investment" (*i.e.*, the Services Contract). On the contrary, they argue that through the Fiscal Liability Proceeding, Colombia has expropriated their rights under two specific contractual provisions: [redacted][107]

55. [redacted][108] It does not establish a maximum cap of non-contractual liability, much less a cap on the fiscal liability that FPJVC could incur.[109] Moreover, the text of the provision itself provides that the limitation of liability does not apply in cases of non-contractual liability. [redacted] is also express in that the limitation of liability on the part of FPJVC is only with reference to Reficar. [redacted]

[redacted]

[107] Notice of Arbitration, ¶¶ 182, 196-199.

[108] [redacted]

[109] *See* ¶¶ 81, 157, 223, n. 343, *infra*.

[redacted] 110

110 [redacted]

56. Claimants' expropriation claim with respect to the [redacted] clause in the Services Contract does not bear the slightest of scrutiny. [redacted] The claim also fails because, as Respondent will explain in more detail below, contractual rights independently considered cannot be subject to expropriation.[111]

(5) [redacted]

57. Claimants' argument that Colombia expropriated the [redacted] of the Services Contract by initiating the Fiscal Liability Proceeding also makes no sense.[112]

58. The [redacted] clause of the Services Contract has a limited personal and material scope: it binds FPJVC and Reficar as parties to the Services Contract and covers [redacted] That clause does not bind the Comptroller General of the Republic ("CGR") or any other organ of the Colombian State (and, of course, cannot prevent any of those organs from exercising their constitutional and legal powers),[113] and its material scope does not include non-contractual disputes regarding the existence or non-existence of fiscal liability.

59. [redacted]

[redacted]

[111] *See* ¶¶ 216-219, *infra.*

[112] *See* ¶¶ 221-222, *infra.*

[113] *See* ¶¶ 81, 157, 221-222, n. 343, *infra*.

[redacted]

[redacted]

[redacted][114]

(6) [redacted]

60. [redacted]

[redacted]

[114] [redacted]

[115] *Id.*, § 29.1.

[redacted]

61. [redacted].[118] The English version submitted by Claimants as Ap. C-1 is merely a translation of the Spanish original. Respondent introduces its own English translation of the Services Contract into the record.[119]

(7) Amendments to the Services Contract

62. FPJVC and Reficar amended the terms of the Services Contract on [redacted] occasions, as follows:

- [redacted][122]

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[116] [redacted]

[117] *See* ¶¶ 73-74, *infra.*

[118] [redacted]

[119] *Id.,* (including the original Spanish version of the Services Contract and Respondent's English translation in the same exhibit). To avoid unnecessary translation costs, Respondent introduces into the record, together with each of the Appendixes to the Services Contract, the English translations of those Appendixes prepared by Foster Wheeler and Process Consultants and delivered to Reficar along with the offer. However, Respondent reserves all of its rights with respect to such translations, including the right to submit corrected translations.

[120] [redacted]

[121] [redacted]

[122] [redacted]

123 [redacted]

124 [redacted]

125 [redacted].

126 [redacted]

127 [redacted]

128 [redacted]

129 [redacted]

130 [redacted]

131 [redacted]

132 [redacted]

133 [redacted]

134 [redacted]

[redacted][143]

63. Thus, FPJVC's term for performing the services, originally estimated at [redacted],[144] [redacted][145]

64. It was abundantly clear to FPJVC that it could eventually be subject to fiscal liability because a final clause was included in each of the Amendments to the Services Contract that read as follows: [redacted]

135 [redacted]
136 [redacted]
137 [redacted]
138 [redacted]
139 [redacted]
140 [redacted]
141 [redacted]
142 [redacted]
143 [redacted]
144 [redacted]
145 [redacted]

[redacted][146]

65. Save for the [redacted] amendments described above, FPJVC and Reficar have not entered into any other amendments to the Services Contract.[147]

C. The Project Culminates with Delays and Cost Overruns; CGR Conducts an Audit and Finds Irregularities

66. By Claimants' own admission, the Cartagena Refinery expansion and modernization Project culminated in "substantial cost overruns and delays."[148]

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146 [redacted] [In the English translation of its exhibits, Respondent sometimes uses the terms "fiscally responsible", "fiscal responsibility", etc. Such terms in English should be read as synonyms for "fiscally liable" and "fiscal liability", etc. as both are translations of the Spanish terms *"responsable fiscal"* and "*responsabilidad fiscal*".].

147 None of the Amendments provide for the alleged modifications to the Services Contract as referred to by Claimants. *See* n. 59, *supra.* On the contrary, each of the Amendments reiterates the purpose of the Services Contract. *See* ¶ 25, *supra.*

148 **Ex. R-39**, Notice of Intent, ¶ 21. *See* **Ex. R-49**, Office of the Comptroller General of the Republic of Colombia, GRANDES HALLAZGOS: ASÍ DESTAPÓ LA CONTRALORÍA GENERAL DE LA REPÚBLICA LOS CASOS MÁS SONOROS DE CORRUPCIÓN EN COLOMBIA. DEL CARTEL DE LA HEMOFILIA A LOS ESTRAFALARIOS SOBRECOSTOS DE REFICAR PASANDO POR EL SAQUEO AL PLAN DE ALIMENTACIÓN ESCOLAR (Imprenta Nacional 2018) (discussing how the Project developed from its inception, the problems that arose, and how those problems ultimately led to the delays and costs overruns that plagued the Project). Neither the delays nor the excessive expenses impacted the Remuneration of Foster Wheeler and Process Consultants, who, as we have already indicated, [redacted] *See* ¶¶ 33-44, *supra.*

67. The Refinery received its first load of crude oil in October 2015, more than two years later than expected, and after more than US$ 8 billion in investments by Reficar,[149] more than double the original budget.[150]

68. On December 24, 2015, the Comptroller General of the Republic (the "Comptroller General"), in the exercise of its constitutional and legal powers,[151] ordered the Deputy Comptroller for the Mining and Energy Sector to conduct a special audit on the Project.[152]

69. In its final report of November 2016, the team led by the Deputy Comptroller for the Mining and Energy Sector and composed of 28 auditors[153] reported that, after reviewing a representative sample of the contracts executed for the development of the Project,[154] it "found deficiencies in the engineering, in the procurement of materials and supplies, and in the performance of the construction contracts . . . disbursements at a

[149] *See* **Ex. R-49**, Office of the Comptroller General of the Republic of Colombia, GRANDES HALLAZGOS: ASÍ DESTAPÓ LA CONTRALORÍA GENERAL DE LA REPÚBLICA LOS CASOS MÁS SONOROS DE CORRUPCIÓN EN COLOMBIA. DEL CARTEL DE LA HEMOFILIA A LOS ESTRAFALARIOS SOBRECOSTOS DE REFICAR PASANDO POR EL SAQUEO AL PLAN DE ALIMENTACIÓN ESCOLAR (Imprenta Nacional 2018), pp. 46, 48.

[150] *See* Notice of Arbitration, ¶¶ 52-53. [redacted] *See* Notice of Arbitration, ¶ 71. [redacted]

[151] *See* ¶¶ 73-75, n. 182, *infra.*

[152] **Ex. R-37**, Office of the Deputy Comptroller for the Mines and Energy Sector, Final report of the special audit, November 2016, p. 9 (the special audit was aimed at "selectively evaluating the goods and services acquired by Reficar, either directly or through the contracts signed with CB&I and. . . FPJVC . . . by examining the efficiency, the consistency of the information, and the legality of the contracting, and also verifying the terms of quantity and quality of the works executed.") (translation from Spanish).

[153] *See* **Ex. R-49**, Office of the Comptroller General of the Republic of Colombia, GRANDES HALLAZGOS: ASÍ DESTAPÓ LA CONTRALORÍA GENERAL DE LA REPÚBLICA LOS CASOS MÁS SONOROS DE CORRUPCIÓN EN COLOMBIA. DEL CARTEL DE LA HEMOFILIA A LOS ESTRAFALARIOS SOBRECOSTOS DE REFICAR PASANDO POR EL SAQUEO AL PLAN DE ALIMENTACIÓN ESCOLAR (Imprenta Nacional 2018), p. 46.

[154] **Ex. R-37**, Office of the Deputy Comptroller for the Mines and Energy Sector, Final report of the special audit, November 2016, pp. 10-12,144-145.

higher rate than agreed",[155] among other deficiencies. It also found that the cost-reimbursable nature of the EPC Contract had led to irregularities because "with the simple request of the contractor – often without support – any expense was reimbursed, whether justified or not."[156]

70. The final report of the special audit established 36 "findings" or "*hallazgos*" (*i.e.*, relevant irregular facts that arise from comparing the reality of the situation with what should be),[157] 35 of which carried fiscal connotations, and concluded that "in the development of the expansion and modernization [Project] of [Reficar], the principles of economy, effectiveness and efficiency were not" followed.[158]

[155] *Id.*, p. 151 (translation from Spanish).

[156] *Id.*, p. 152 (translation from Spanish).

[157] *See* **Ex. R-50**, Office of the Comptroller General of the Republic, Internet Portal, Glossary (defining "audit finding") (translation from Spanish).

[158] **Ex. R-37**, Office of the Deputy Comptroller for the Mines and Energy Sector, Final report of the special audit, November 2016, p. 155 (translation from Spanish). *See* **Ex. R-49**, Office of the Comptroller General of the Republic of Colombia, GRANDES HALLAZGOS: ASÍ DESTAPÓ LA CONTRALORÍA GENERAL DE LA REPÚBLICA LOS CASOS MÁS SONOROS DE CORRUPCIÓN EN COLOMBIA. DEL CARTEL DE LA HEMOFILIA A LOS ESTRAFALARIOS SOBRECOSTOS DE REFICAR PASANDO POR EL SAQUEO AL PLAN DE ALIMENTACIÓN ESCOLAR (Imprenta Nacional 2018), pp. 50-52 (reporting some examples of the irregularities found by the CGR in the Project, including: (i) "the comptroller body detected that about 1.500 million dollars paid did not show up in the accounting, to the point that it was accepted as a loss in assets of 3,5 trillion pesos"; (ii) "Another example that shows the inadequate planning was a contract with the multinational company Mammoet Mamut for [COP$] 95.000 million pesos for the supply of 70 cranes. The problem was that only one certified operator was available for 56 of these cranes. The worst thing was that after the additions, this contract was concluded with a value of [COP$] 400.000 million pesos. At one point in time, there were more than 176 cranes at the site, which became a huge burden at the time of performing the tasks"; (iii) "Another major problem was the labor force and the miscalculation of the contractor CB&I, which Reficar authorized to contract 2.256.555 work hours and gave them a margin of excess of 10%. But they exceeded it by 2.342.763 hours, *i. e.*, they exceeded it by more than 100%, in total almost 5 million hours of the personnel. In the initial budgets, the labor force was valued at an estimated [US$] 1.500 million dollars, but ended up costing three times as much – [US$] 4.653 million dollars-"; (iv) "the Comptroller detected that some sites were being built during the day but later unbuilt in order to extend the termination of the project and continue accruing [money]"; (v) "50 ships arrived from abroad, of 50.000 tons each, with material for the refinery. There is no total clarity about the payments made because it is not known how it was paid nor where the funds went.") (translation from Spanish).

D. Brief Summary of Fiscal Liability Proceedings in Colombia

71. In order to provide context to Claimants' claims in this Arbitration, in this section we briefly discuss the Colombian regulations that underpin fiscal control and govern fiscal liability proceedings of the CGR.

72. As the Tribunal will be able to verify, due to the highly regulated nature of the fiscal liability proceeding and the existence of different stages that seek to ensure that decisions are made in accordance with the law and with respect to the due process of those under investigation, a ruling declaring that there is fiscal liability may be appealed at the administrative level, is then subject to judicial control and does not have financial impact on those fiscally liable until there is a voluntary or forced payment – as a result of a long forced collection proceeding (if it has financial impact at all, since it may not have any).

(1) The Notion of Fiscal Control and the Constitutional and Legal Regime Applicable to Fiscal Liability Proceedings

73. The fiscal liability proceeding has a constitutional basis. Articles 267 to 274 of the Colombian Constitution empower the CGR to exercise oversight and "fiscal control" over public entities and private parties that manage public funds or assets.[159] Fiscal control is an essential public function that promotes the efficient, diligent, effective and transparent use of public resources and the protection of Colombia's public assets.[160]

[159] **Ex. RL-5**, Political Constitution of the Republic of Colombia, prior to Legislative Act No. 4 of September 18, 2019 ("Prior Constitution"), Articles 267-274; **Ex. RL-6**, Political Constitution of the Republic of Colombia, after Legislative Act No. 4 of September 18, 2019 ("Current Constitution"), Articles 267-274.

[160] *See* **Ex. RL-7**, Constitutional Court of Colombia, Constitutional Judgment No. C-557, August 20, 2009, p. 30 ("the purpose of fiscal management oversight is the protection of public assets, the transparency of all operations related to the management and use of the goods and public resources, and the efficiency and effectiveness of the administration in the fulfillment of the State's purposes. These measures are in line with the concept of the social State governed by the rule of law and based on the prevalence of the

The Constitution grants the Comptroller General the power to make determinations regarding liability derived from fiscal mismanagement and collect corresponding amounts by means of forced collection. The CGR exercises such powers through the conduct of fiscal liability proceedings.[161]

74. The fiscal liability proceeding is regulated by Law 610 of 2000[162] and Law 1474 of 2011,[163] which establish a model of fiscal control that is both subsequent (*i.e.*, exercised after the execution of public resources) and selective (*i.e.*, based on a selection of a representative sample of resources, accounts, operations or activities).

75. On September 18, 2019, the Colombian Congress enacted Legislative Act 4 of 2019, reforming the constitutional regime of fiscal control ("Legislative Act No. 4").[164] Broadly, Legislative Act No. 4 introduced a new model of preventative (*i.e.*, prior to the occurrence of possible fiscal damage) and concomitant (*i.e.*, simultaneous to the execution of public resources) fiscal control, as a complement to the subsequent and selective fiscal control model that has existed since the 1991 Constitution.[165] Decree Law 403 of 2020, which implements Legislative Act No. 4, modified, *inter alia*, several

general interest, and are aimed at the fulfillment of the essential purposes of the State.") (translation from Spanish).

[161] **Ex. RL-5**, Prior Constitution, Article 268(5); **Ex. RL-6**, Current Constitution, Article 268(5). *See* Notice of Arbitration, ¶ 145.

[162] **Ex. RL-8**, Law 610 of 2000, which establishes the procedure for fiscal liability proceedings under the authority of the Comptroller's Office, prior to the amendments of Decree Law 403 of 2020 ("Prior Law 610 of 2000").

[163] **Ex. RL-9**, Law 1474 of 2011, which establishes rules aimed at strengthening the mechanisms for the prevention, investigation and sanctioning of acts of corruption and the effectiveness of public management control, prior to the amendments of Decree Law 403 of 2020 ("Prior Law 1474 of 2011").

[164] *See* **Ex. RL-6**, Current Constitution, Articles 267-274.

[165] *Id.*, Article 267.

provisions related to the fiscal liability proceeding,[166] while Law 2080 of 2021 reformed certain provisions of the administrative procedure and the procedure for administrative adjudicatory proceedings.[167]

76. The Fiscal Liability Proceeding involving Foster Wheeler and Process Consultants has been handled and conducted in accordance with the procedural and substantive provisions contained in Laws 610 of 2000 and 1474 of 2011, as *per* the versions prior to the constitutional reform contained in Legislative Act No. 4 and the regulations by which it was implemented.[168]

(2) Nature and Characteristics of the Fiscal Liability Proceeding

77. The fiscal liability proceeding constitutes the set of actions taken by the CGR to determine the liability of public servants and private parties with regard to the mismanagement of public resources under their charge.[169] Article 1 of Law 610 of 2000 provides:

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[166] *See* **Ex. RL-10**, Law 610 of 2000, which establishes the procedure for fiscal liability proceedings under the authority of the Comptroller's Office, after the amendments of Decree Law 403 of 2020 ("Law 610 of 2000 Current"); **Ex. RL-11**, Law 1474 of 2011, which establishes rules aimed at strengthening the mechanisms for the prevention, investigation and sanctioning of acts of corruption and the effectiveness of public management control, after the amendments of Decree Law 403 of 2020 ("Law 1474 of 2011 Current").

[167] **Ex. RL-12**, Law 2080 of 2021, which amends the Code of Administrative Procedure and Administrative Adjudicatory Proceedings – Law 1437 of 2011 – and establishes other provisions regarding decongestion in the proceedings that are carried out before the jurisdiction ("Law 2080 of 2021").

[168] **Ex. RL-8**, Prior Law 610 of 2000; **Ex. RL-9**, Prior Law 1474 of 2011. However, as explained in greater detail below, certain provisions of Decree 403 of 2020 and Law 2080 of 2021 will govern the Fiscal Liability Proceeding from now on (*see* **Ex. RL-10**, Law 610 of 2000 Current; **Ex. RL-11**, Law 1474 of 2011 Current; **Ex. RL-12**, Law 2080 of 2021; ¶¶ 109-121, *infra*), that is, after the issuance of the Ruling with Fiscal Liability (as said term is defined below).

[169] The possibility that individuals may be subject to fiscal liability proceedings derives from the Constitution itself. **Ex. RL-5**, Prior Constitution, Article 267. On multiple occasions, the Constitutional Court has reiterated that fiscal liability proceedings are applicable to private entities or individuals. *See for example.* **Ex. RL-13**, Constitutional Court of Colombia, *Tutela* Judgment No. T-1012, October 16, 2008, p. 16 ("In relation to the interpretation of those norms, and especially with respect to the status of the private party contractor with the State as a subject of the fiscal process, both the jurisprudence of the Constitutional

> A fiscal liability proceeding is the set of administrative actions carried out by the comptrollers' offices in order to determine and establish the liability of public servants and private parties, when in the exercise of fiscal management, or in connection with fiscal management, they cause, by their willfully negligent or negligent actions or omissions, a damage to the State's assets.[170]

78. By virtue of the aforementioned provision, in order to find a public servant or private party fiscally liable, it is necessary that his or her conduct, whether willfully or grossly negligent, was committed in the exercise of fiscal management or in connection with fiscal management.

79. Since 2001, the Constitutional Court of Colombia (the "Constitutional Court") has clarified the meaning of the expression "in connection with", indicating that those who have a "close and necessary connection with the development of the fiscal management", while not directly managing public resources, may be subject to fiscal

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Court and the *Consejo de Estado* have been emphatic in holding not only that the contractors with the State are subjects of fiscal oversight, but also that the control over the management carried out by public authorities and private parties in public procurement is justified by the very nature of the fiscal control, which was designed to defend the public treasury and ensure the efficiency and effectiveness of public resources.") (translation from Spanish; emphasis added); **Ex. RL-14**, Constitutional Court of Colombia, Constitutional Judgment No. C-167, April 20, 1995, p. 15, ("[A]rticle 267 of the Constitution delimits the range of action of the supervisory or controlling function by granting the Comptroller's Office the prerogatives of supervising the fiscal management of the administration, being understood in its broadest sense, i.e., referring both to the three branches of public power as well as to any public law entity, and to private parties who manage funds or assets of the Nation, which guarantee the State the conservation and adequate performance of the Nation's assets and incomes. Thus, wherever there are public goods or revenues, the supreme control entity must be present in [the form of] [fiscal] control.") (translation from Spanish).

[170] **Ex. RL-8**, Prior Law 610 of 2000, Article 1 (translation from Spanish). *See* **Ex. RL-15**, Constitutional Court of Colombia, Constitutional Judgment No. C-619, August 8, 2002, pp. 15-16 (defining the fiscal liability proceeding as "the set of material and legal audits that, with full observance of the guarantees of due process, the comptrollers' offices are responsible for carrying out in order to determine the liability of public servants and private parties, for misadministration or mismanagement of public money or assets in their charge. Through the aforementioned proceeding, a legal declaration is sought by which a certain public servant, former public servant or private party, must respond economically for the willfully negligent or negligent conduct in the performance of his fiscal management.") (translation from Spanish); **Ex. RL-8**, Prior Law 610 of 2000, Article 4.

liability.[171] Thus, the fiscal liability proceeding may involve not only those who exercise fiscal management directly (*i.e.*, direct fiscal management), but also those who contribute to an economic damage by means of conduct that has a close and necessary connection with the exercise of fiscal management (*i.e.*, indirect fiscal management). This is precisely the meaning of Article 6 of Law 610 of 2000 when it provides that economic damage may be caused by those who, having acted with willful or gross negligence, "directly produce a damage to public assets or contribute to such damage."[172]

80. Article 3 of Law 610 of 2000 defines "fiscal management" as the set of activities carried out by public servants or private parties who handle or administer public resources, aimed at the acquisition, administration and disposal of public assets, and at the collection, management and investment of revenues arising therefrom, for purposes

[171] **Ex. RL-16**, Constitutional Court of Colombia, Constitutional Judgment No. C-840, August 9, 2001, pp. 22-23 ("The unitary meaning of the expression or in connection with [fiscal management] is only justified to the extent that the acts that materialize it entail a close and necessary connection with the development of the fiscal management. Therefore, in every case it is [necessary] to examine if the respective conduct holds any relation with the specific notion of fiscal management, in the understanding that the latter has its own material and legal entity which is developed through action plans, programs, recollecting acts, administration, investment, disposal and cost, among others, in order to comply with the constitutional and legal functions that in their respective scopes summon the attention of public servants and private parties responsible for the management of funds or assets of the State.") (translation from Spanish; emphasis omitted). The Claimants are perfectly familiar with judgment C-840 of 2001 as they cite it in their Notice of Arbitration. Notice of Arbitration, ¶ 78.

[172] **Ex. RL-8**, Prior Law 610 of 2000, Article 6 (emphasis added) (translation from Spanish). *See* **Ex. RL-9**, Prior Law 1474 of 2011, Article 119 ("In fiscal liability proceedings . . . where the existence of an economic damage to the State arising from contract over costs or other irregular facts is demonstrated, the officer of the respective contracting body or entity who authorized the cost shall be joint and severally liable with the contractor, and with any other persons involved in the conduct, up to the recovery of the economic detriment.") (translation from Spanish; emphasis added).

of fulfilling the essential roles of the State.[173] The seriousness of improper fiscal management is due precisely to the fact that it results in the frustration of public goals.[174]

81. Accordingly, the fiscal liability proceeding seeks compensation for damage to public assets caused by inadequate fiscal management.[175] It is a proceeding that seeks compensation, not to sanction; therefore, fiscal liability is independent and autonomous from the disciplinary or criminal liability that may arise on the basis of the same events.[176] With respect to private parties, it is also independent and autonomous from any contractual liability that may arise from a breach of contractual obligations.[177]

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[173] **Ex. RL-8**, Prior Law 610 of 2000, Article 3. *See* **Ex. RL-16**, Constitutional Court of Colombia, Constitutional Judgment No. C-840, August 9, 2001, p. 18 (specifying that fiscal management is the binding and determining element of fiscal liability both in the case of public servants and private parties: "[T]he fiscal management sphere constitutes the binding and determining element of the liabilities inherent to the management of State funds and assets by public servants and private parties. Therefore, the public or private status of the respective responsible person is indifferent when it comes to establishing fiscal liabilities"), pp. 27-28 ("[T]he fiscal liability can only be asserted with respect to public servants and private parties that are legally able to perform fiscal management, i.e., that they have decision-making power over State funds or assets placed at their disposal . . . In other words, fiscal management is always linked to state assets or funds unequivocally stipulated under the administrative or dispositive ownership of a public servant or private party, precisely identified.") (translation from Spanish).

[174] *See* **Ex. RL-8**, Prior Law 610 of 2000, Article 6.

[175] *Id.*, Article 4.

[176] **Ex. RL-17**, Constitutional Court of Colombia, Unification Judgment No. SU-620, November 13, 1996, p. 12; **Ex. RL-15**, Constitutional Court of Colombia, Constitutional Judgment No. C-619, August 8, 2002, pp. 16-17; **Ex. RL-18**, Constitutional Court of Colombia, *Tutela* Judgment No. T-151, March 20, 2013, p. 14; **Ex. RL-19**, *Consejo de Estado* of Colombia, Chamber for Administrative Adjudicatory Proceedings, First Section, Judgment, February 7, 2008 (Carlos Alberto Sánchez Rincón v. Office of the Comptroller General of the Republic – Boyacá Sectional), p. 14. *See* Notice of Arbitration, ¶ 140.

[177] **Ex. RL-20**, *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia, ICSID Case No. ARB/16/6, Award, August 27, 2019* ("*Glencore I*"), ¶ 1083, (confirming what is sufficiently clear in the Colombian legal system, *i.e.*, that fiscal liability can be determined without any declaration of contractual breach: "[F]iscal liability does not require the violation of any norm, the breach of any contractual commitment, or any illegality affecting the contract. It is engaged whenever a civil servant or private party incurs in *conducta dolosa o culposa* (*e.g.*, when negotiating, executing, or performing a contract), and such behavior provokes damage to the State."); ¶ 1392 (confirming the previous point). *See also* **Ex. RL-21**, *Consejo de Estado* of Colombia, Chamber for Administrative Adjudicatory Proceedings, First Section, Judgment, June 4, 2015 (Pedro Simón Vargas Sáenz v. Office of the Comptroller General of the Republic, pp. 17-19 (highlighting that, irrespective of whether the contracting regime applicable to a state-owned entity is a private regime, if there are state resources within its capital, the CGR is responsible for exercising fiscal control over those resources and over the external contractors of that entity: "[A]lthough Empresa de Energía de Boyacá was a state-owned entity that was subject to the private regime in relation to its acts, contracts and labor relations, its capital was 99% state-owned and therefore it was up to the Office of the

From this independence and autonomy follows the unenforceability of contractual clauses, such as [redacted], in fiscal liability proceedings.[178]

82. The fiscal liability proceeding is also an administrative proceeding,[179] not a judicial proceeding. This has been repeatedly stated in the jurisprudence of the Constitutional Court[180] and the *Consejo de Estado*, the highest court of the administrative adjudicatory jurisdiction in Colombia (the "*Consejo de Estado*").[181] The administrative nature of the fiscal liability proceeding means that: (i) the CGR, an administrative

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Comptroller to exercise its fiscal control duty with respect to such public resources. . . . [The contractor] had the obligation to advance all actions to recover the sums of money owed by Empresa de Acueducto y Alcantarillado de Tunja for energy consumption, with the effective collection of the State's monies, for which it could become subject to fiscal action.") (translation from Spanish).

[178] *See* **Ex. RL-22**, *Consejo de Estado* of Colombia, Chamber for Administrative Adjudicatory Proceedings, First Section, Judgment, March 18, 2010 (Compañía de Seguros Liberty de Seguros S.A. v. Office of the Comptroller General of the Republic), p. 14 ("In this regard, it suffice to say that the clause [of exclusion of liability] becomes innocuous, since the norm in question is of public order [*orden público*], due to the fact that it regulates the exercise of a public function, such as fiscal control, as established in article 267 of the Political Constitution.") (translation from Spanish; emphasis added). *See* ¶¶ 221-223, *infra*.

[179] Administrative proceedings are "the mode of production of administrative acts." **Ex. RL-23**, Constitutional Court of Colombia, Constitutional Judgment No. C-640, August 13, 2002, p. 12 (translation from Spanish). *See* **Ex. RL-24**, Law 1437 from 2011, which establishes the Code of Administrative Procedure and Administrative Adjudicatory Proceedings ("Administrative Code"), Article 34 (establishing the common and principal administrative proceeding). The administrative proceeding must be distinguished from the administrative adjudicatory proceeding, which is a proceeding of a judicial nature carried out before a special jurisdiction – the administrative adjudicatory jurisdiction –, instituted to hear "disputes and litigation arising from acts, contracts, facts, omissions and operations, subject to administrative law, in which public entities are involved, or individuals exercising administrative functions." *Id.*, Article 104 (translation from Spanish). [In the English translation of its exhibits, Respondent sometimes refers to the "administrative adjudicatory jurisdiction" as the "administrative disputes jurisdiction", and "administrative adjudicatory proceeding" as the "administrative disputes proceeding", etc. Such terms in English should be read as synonyms as both are translations of the Spanish term "*contencioso administrativo*"].

[180] *See for example* **Ex. RL-17**, Constitutional Court of Colombia, Unification Judgment No. SU-620, November 13, 1996, p. 11; **Ex. RL-15**, Constitutional Court of Colombia, Constitutional Judgment No. C-619, August 8, 2002, p. 16; **Ex. RL-18**, Constitutional Court of Colombia, *Tutela* Judgment No. T-151, March 20, 2013, p. 14.

[181] *See for example* **Ex. RL-19**, *Consejo de Estado* of Colombia, Chamber for Administrative Adjudicatory Proceedings, First Section, Judgment, February 7, 2008 (Carlos Alberto Sánchez Rincón v. Office of the Comptroller General of the Republic – Boyacá Sectional), p. 14.

authority, is the one which conducts it,[182] (ii) the final decision or ruling of the CGR is an administrative act subject to the control of the administrative adjudicatory jurisdiction; and (iii) with respect to matters not specifically regulated by Law 610 of 2000, the general provisions of administrative procedure apply.[183]

83. While it is an administrative procedure, the fiscal liability proceeding is guided by the principle of due process enshrined in Article 29 of the Constitution.[184] According to the Constitutional Court, it follows that

> the . . . substantive and procedural guarantees [of] legality, natural or legal judge (competent administrative authority), favorability, presumption of innocence, right of defense, (right to be heard and to intervene in the process, directly or through a lawyer, to present and controvert evidence, to oppose the nullity of authorities violating due process, and to file appeals against the conviction decision), due public process without unjustified delays, and not to be judged twice for the same fact [must be observed].[185]

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[182] In accordance with Article 114 of Law 1474 of 2011, the Comptroller's Office has competence to "execute all necessary activities that determine the conducts that generate damage to public assets", including the powers to: (a) advance the investigations it deems appropriate to establish the occurrence of facts that give rise to economic damage to the State which results from an impairment, decrease, prejudice, detriment, loss or deterioration of public assets or resources, was produced by uneconomical, ineffective, inefficient and inopportune fiscal management, and, in general terms, was not undertaken in fulfilment of the duties and essentials roles of the State; (b) summon or request public servants, contractors, auditors and, in general, persons who have participated in, determined, assisted, collaborated or have knowledge of the facts under investigation; (c) require contractors, auditors and, in general, persons who have participated in, determined, assisted, collaborated or have knowledge of the facts under investigation, to submit documents which record their operations when they are required to keep such records; and (d) order contractors, auditors and suppliers to exhibit books, vouchers and accounting documents. *See* **Ex. RL-9**, Prior Law 1474 of 2011, Article 114.

[183] **Ex. RL-8**, Prior Law 610 of 2000, Article 66. *See* **Ex. RL-24**, Administrative Code.

[184] **Ex. RL-8**, Prior Law 610 of 2000, Article 2 ("Fiscal action guiding principles. Due process shall be guaranteed during the fiscal liability action, and the proceedings shall be undertaken subject to the principles established in articles 29 and 209 of the Political Constitution and in the Administrative Adjudicatory Proceedings Code.") (translation from Spanish).

[185] **Ex. RL-17**, Constitutional Court of Colombia, Unification Judgment No. SU-620, November 13, 1996, p. 12 (translation from Spanish). *See* **Ex. RL-8**, Prior Law 610 of 2000, Article 22 (indicating that the CGR must base all its rulings on legally obtained evidence presented in or contributed to the proceeding), Article 32 (providing that the persons under investigation have the right to contradict the evidence), Article 42 (noting that the persons under investigation enjoy a right of defense throughout the proceeding), Article 26

(3) Elements of Fiscal Liability and Joint and Several Liability for Those Fiscally Liable

84. In accordance with Law 610 of 2000, there are four elements of fiscal liability:[186] (1) a conduct, by action or omission, carried out in the exercise of or in connection with fiscal management;[187] (2) the willful or gross negligence on the part of the public servant *or* private party who carries out such conduct;[188] (3) an economic damage to the State;[189] and (4) a causal link between the willful or grossly negligent conduct and the economic damage.[190]

85. Pursuant to Article 118 of Law 1474 of 2011, the existence of willful negligence is presumed when the public servant or private party has been criminally convicted or disciplinarily sanctioned on the basis of the same event, while the existence of gross negligence is presumed, *inter alia*, when there is an omission in the fulfilment of obligations inherent to auditing contracts or supervision functions, such as periodic reviews of works, goods or services, such that the correct performance of the contractual purpose or compliance with the conditions offered by the contractor cannot be established.[191]

(indicating that the CGR must assess the evidence as a whole according to the rules of reasoned judgement and rational persuasion), Article 23 (providing that a ruling with fiscal liability shall only progress when there is evidence establishing the existence of economic damage and the liability of the investigated person with certainty).

[186] **Ex. RL-8**, Prior Law 610 of 2000, Articles 1, 5.

[187] *Id.*, Article 1 (emphasis added). *See* ¶¶ 78-79, *supra*; **Ex. RL-8**, Prior Law 610 of 2000, Article 6.

[188] **Ex. RL-8**, Prior Law 610 of 2000, Article 5; **Ex. RL-9**, Prior Law 1474 of 2011, Article 118.

[189] **Ex. RL-8**, Prior Law 610 of 2000, Article 6.

[190] *Id.*, Article 5. *See* **Ex. RL-25**, *Consejo de Estado*, Chamber for Administrative Adjudicatory Proceedings, Fifth Section-Decongestion, Judgment, February 22, 2018 (La Previsora S.A. Compañía de Seguros v. Office of the Departmental Comptroller of the Atlantic), pp. 13-14.

[191] **Ex. RL-9**, Prior Law 1474 of 2011, Article 118.

86. According to the *Consejo de Estado*, in matters of fiscal liability, gross negligence arises when the public servant or private party "does not handle the business of others, understood as public business, with sufficient diligence with which even negligent persons would attend to their own business."[192]

87. With respect to the economic damage, Law 610 of 2000 defines it as "an injury to public assets, represented in the impairment, decrease, harm, detriment, loss, . . . or deterioration of public assets or resources, or of the economic interest of the State."[193] According to the Constitutional Court, with this broad definition of "economic damage to the State", the Colombian legal system seeks to achieve the complete protection of public assets.[194]

88. All those involved in willful or grossly negligent conduct that causes economic damage, whether public servants or private parties, are joint and severally liable for repairing such damage.[195]

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[192] **Ex. RL-26**, *Consejo de Estado* of Colombia, Chamber for Administrative Adjudicatory Proceedings, Fifth Section-Decongestion, Judgment, March 1, 2018 (Julián Sepulveda García v, Municipality of Santiago de Cali –General Comptroller's Office of Cali), p. 20 (translation from Spanish).

[193] **Ex. RL-8**, Prior Law 610 of 2000, Article 6 (translation from Spanish). *See* **Ex. RL-27**, Constitutional Court of Colombia, Constitutional Judgment No. C-340, May 9, 2007, pp. 12-13 (explaining that the "economic interest of the State" includes all assets, resources and rights susceptible of economic valuation owned by a public entity).

[194] **Ex. RL-27**, Constitutional Court of Colombia, Constitutional Judgment No. C-340, May 9, 2007, p. 13.

[195] **Ex. RL-9**, Prior Law 1474 of 2011, Article 119 ("In fiscal liability proceedings . . . where the existence of an economic damage to the State arising from contract over costs or other irregular facts is demonstrated, the officer of the respective contracting body or entity who authorized the cost shall be joint and severally liable with the contractor, and with any other persons involved in the conduct, up to the recovery of the economic detriment.") (translation from Spanish; emphasis added). *See* **Ex. RL-28**, Constitutional Court of Colombia, Constitutional Judgment No. C-338, June 4, 2014, p. 23; **Ex. RL-29**, Law 57 of 1887, Civil Code of the Republic of Colombia, Article 2344.

(4) The Stages of the Fiscal Liability Proceeding

89. Broadly speaking, the fiscal liability proceeding consists of five stages: (a) the preliminary investigation; (b) the initiation stage; (c) the indictment stage; (d) the ruling and administrative remedies stage; and with respect to rulings with fiscal liability, (e) the judicial control stage, and (f) the forced collection stage.

a. Preliminary Investigation

90. Pursuant to Article 8 of Law 610 of 2000, the fiscal liability proceeding may be initiated *ex officio* – as a result of the exercise of fiscal control –, at the request of a supervised entity, or as a result of reports or complaints filed by citizens.[196]

91. The proceeding begins with the preliminary investigation stage, which aims

> [at verifying] the competence of the [intervening official], the occurrence of the conduct and its impact on the State's assets, [as well as] determining the affected entity and identifying the public servants and the private parties who have caused, intervened in, or contributed to the detriment.[197]

92. Although it is not a formal part of the fiscal liability proceeding, the preliminary investigation contributes to the determination of the elements necessary for formally initiating the process.[198]

[196] **Ex. RL-8**, Prior Law 610 of 2000, Article 8.

[197] *Id.*, Article 39 (translation from Spanish).

[198] **Ex. RL-16**, Constitutional Court of Colombia, Constitutional Judgment No. C-840, August 9, 2001, p. 21.

93. The preliminary investigation may be ordered for a maximum term of six (6) months. Once this term has expired, the CGR must decide whether to close the case[199] or formally initiate the fiscal liability proceeding.[200]

b. Initiation Stage

94. According to Article 40 of Law 610 of 2000, the initiation of the fiscal liability proceeding is ordered when the existence of economic damage to the State is established and there are serious indications regarding the possible perpetrators of such damage.[201]

95. The initiation order must set out:[202] (i) the competence of the investigating official; (ii) the factual and legal grounds; (iii) the identity of the affected State entity and those who potentially are fiscally liable; (iv) a determination of the economic damage to the State and an estimate of such amount; (v) the evidence being decreed; (vi) the precautionary measures being decreed, where applicable; (vii) the request for information from the relevant entities regarding the public servants involved; and (viii) an order of personal notification to the allegedly fiscally liable parties in order to guarantee their right of defense and contradiction.[203]

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[199] **Ex. RL-8**, Prior Law 610 of 2000, Article 16 (establishing that the case may be closed at any time during the preliminary investigation or during the fiscal liability proceeding, when: (i) the statute of limitations or the fiscal liability has expired; (ii) when it is established that the event did not exist, did not cause economic damage to the State or did not involve fiscal management; (iii) when there is an exclusion of fiscal liability; or (iv) when it is proven that the investigated damage has been fully compensated); *id.*, Article 17 (indicating that a reopening is appropriate when new evidence is found that proves the existence of economic damage to the State or the liability of the fiscal manager, or when it is demonstrated that the decision to close the case was based on false evidence).

[200] *Id.*, Article 39.

[201] *Id.*, Article 40.

[202] *Id.*, Article 41.

[203] **Ex. RL-9**, Prior Law 1474 of 2011, Article 106.

96. In addition to those who are allegedly fiscally liable, insurance companies may be also be involved in the proceeding as civilly liable third parties by giving them notice of the initiation order.[204]

97. Those who are allegedly fiscally liable have the right to make a free and spontaneous statement,[205] as well as to request and provide evidence to the proceedings.[206] The CGR has the power to order precautionary measures on the assets of those alleged to be fiscally liable.[207]

98. The term of the initiation stage is three (3) months, extendable by means of a reasoned order for two (2) extra months.[208] Upon expiration of this term, the CGR must decide whether to close the case[209] or issue a fiscal liability indictment order.[210]

c. Indictment Stage

99. When it emerges from the initiation stage that the economic damage to the State is objectively proven and there are testimonies, serious evidence, expert opinions or any other forms of proof that may compromise the fiscal liability of those involved, the

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[204] **Ex. RL-8**, Prior Law 610 of 2000, Article 44. [The Spanish version of this Memorial incorrectly cited to Article 44 of Law 1474 of 2011. The correct reference is to Article 44 of Prior Law 610 of 2000).

[205] *See* **Ex. RL-8**, Prior Law 610 of 2000, Article 42 (stating that an indictment of fiscal liability cannot be issued if the allegedly liable party has not been previously heard through a free and spontaneous statement or is not represented by an *ex officio* attorney in the event he/she did not appear in the proceeding or could not be located).

[206] *Id.*, Article 24.

[207] *Id.*, Article 12. This provision also states that, in the event of a ruling with fiscal liability, the precautionary measures decreed are extended and remain in force until the forced collection proceeding is complete. In the event of a closure order or a ruling without fiscal liability, the CGR must order the release of the assets.

[208] *Id.*, Article 45.

[209] *Id.*, Article 47 (indicating that the case will be closed at the initiation stage in the event there is a finding that: (i) the event did not exist, did not constitute an economic detriment or did not involve the exercise of fiscal management; (ii) the damage has been fully compensated; (iii) there is an exclusion of liability; or (iv) the statute of limitations or the fiscal liability expired).

[210] *Id.*, Article 46.

CGR proceeds to charge fiscal liability by issuing an indictment order.[211] An indictment order is an administrative act of mere procedural nature,[212] which does not define any legal situation and is therefore not subject to appeal.[213]

100. The fiscal liability indictment order must: (i) fully identify the parties who are allegedly fiscally liable and the affected entity; (ii) identify the insurer, as well as indicate the number of the policy and the insurance value (if any); (iii) indicate and assess the evidence taken as of the time when the indictment order is issued; (iv) verify the constituent elements of fiscal liability; and (v) determine of the amount of economic damage to the State.[214]

101. Pursuant to Article 50 of Law 610 of 2010, those who are allegedly fiscally liable have a term of ten (10) days from the day following the notification of the indictment order to present their arguments in defense and request or provide the evidence on which they wish to rely in the proceeding.[215] Such term to present arguments is fixed by law and is the same for all those involved in the fiscal liability proceeding, irrespective of the amount of the fiscal liability and the length of the indictment order in question.

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[211] *Id.*, Article 48.

[212] **Ex. RL-30**, Office of the Comptroller General of the Republic of Colombia, Organic Resolution No. ORG-6541-2012, April 18, 2012, Article 27.

[213] **Ex. RL-24**, Administrative Code, Article 75 (indicating that there are no administrative remedies available against procedural orders).

[214] **Ex. RL-8**, Prior Law 610 of 2000, Article 48.

[215] *Id.*, Article 50.

102. Upon expiration of the term for the presentation of arguments, the CGR has a term of thirty (30) days to decree evidence[216] and a maximum of two (2) years for the taking of evidence.[217]

d. Ruling with Fiscal Liability and Administrative Remedies

103. Having examined the evidence, the CGR must issue a decision on the merits, *i.e.*, a ruling, as to whether or not there is fiscal liability.[218]

104. A ruling with fiscal liability may be issued when, during the proceeding, the elements of fiscal liability are proven with certainty: *i.e.*, willful or grossly negligent conduct on the part of a public servant or private party that is carried out in the exercise of or in connection with fiscal management, an economic damage to the State's assets, together with the causal link between such conduct and the resulting damage.[219]

105. In fiscal liability proceedings of double instance,[220] rulings with fiscal liability are subject to the administrative remedies of reconsideration and appeal, in accordance with the law, which remedies may be filed within five (5) business days following the notification of the ruling with liability.[221]

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[216] **Ex. RL-9**, Prior Law 1474 of 2011, Article 50. The remedies of reconsideration and appeal with respect to the order decreeing or rejecting the taking of evidence may be filed within a term of five (5) days following the date of notification of the order. **Ex. RL-8**, Prior Law 610 of 2000, Articles 24 and 51.

[217] **Ex. RL-9**, Prior Law 1474 of 2011, Article 107.

[218] **Ex. RL-8**, Prior Law 610 of 2000, Articles 52.

[219] *Id.*, Article 53. On the contrary, it is appropriate to issue a ruling without liability when: (i) during the proceeding the charges outlined in the indictment order are disproved; or (ii) there is no evidence leading to certainty as to one or more of the elements constituting fiscal liability. *Id.*, Article 54.

[220] The fiscal liability proceeding is of single instance where the amount of the alleged economic damage is equal to or less than the lowest amount in respect of which the affected entity can contract, and of double instance (i.e. first instance and appeal) if the amount of the alleged economic damage exceeds the amount in respect of which the affected entity can contract. **Ex. RL-9**, Prior Law 1474 of 2011, Article 110.

[221] **Ex. RL-8**, Prior Law 610 of 2000, Article 56; **Ex. RL-24**, Administrative Code, Article 74.

106. The competent organ to resolve appeals against rulings with liability is the fiscal liability and administrative sanctions chamber of the CGR, which has a term of twenty (20) business days to rule on the appeal.[222] When no appeals are filed against the ruling with liability, or if the appeals have been waived or ruled upon, the ruling with liability will become "binding" or "final."[223]

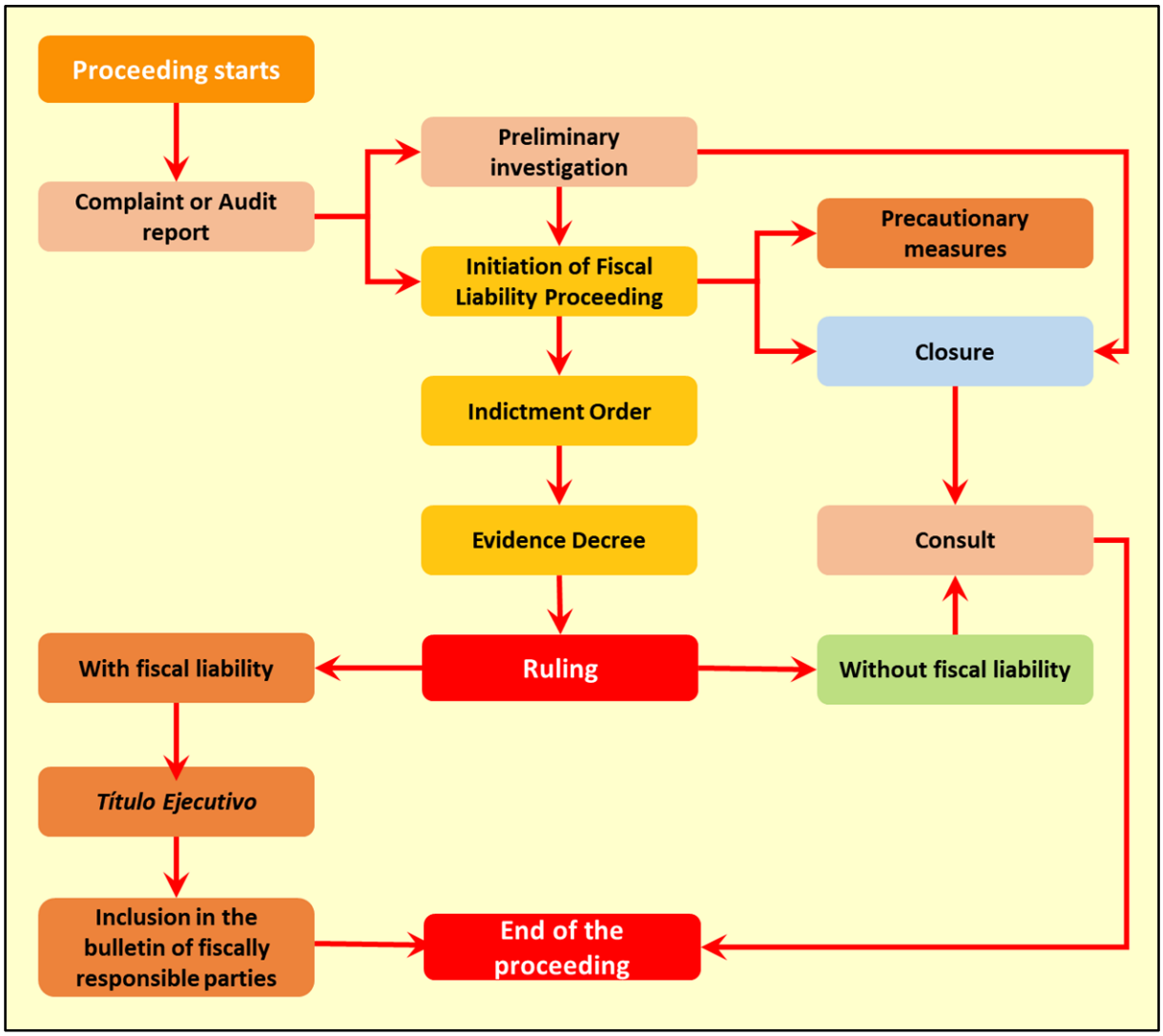
107. The following diagram, obtained from the CGR's website, shows the different stages of the fiscal liability proceeding described above:[224]

[222] **Ex. RL-8**, Prior Law 610 of 2000, Article 57 (in addition, this rule provides that the official hearing the appeal may order, *ex officio*, the taking of evidence that he/she deems necessary in order to decide upon the appeal, for a maximum term of ten (10) business days). **Ex. RL-31**, Decree Law 405 of 2020, which modifies the organic and functional structure of the Office of the Comptroller General of the Republic, Article 5.

[223] **Ex. RL-8**, Prior Law 610 of 2000, Article 56.

[224] **Ex. R-51**, Office of the Comptroller General of the Republic, Internet Portal, "Fiscal Liability", p. 2 (translation from Spanish).

Figure 2 - Flowchart of the fiscal liability proceeding



108. A final ruling with liability is nothing more than a declaration by the CGR of the existence of a joint and several payment obligation on the part of the fiscally liable parties. The completion of the declaratory phase of the proceeding at the administrative level, gives way to judicial control and, ultimately, the declared obligations are enforced by means of a forced collection proceeding.

e. Judicial Control of Rulings with Fiscal Liability

109. Law 2080 of 2021, which implements Legislative Act No. 4, creates an "automatic and comprehensive legality control" of rulings with liability by special chambers of the *Consejo de Estado,*[225] which evaluate whether the ruling with liability complies with the law.[226]

110. The comprehensive legality control begins with the CGR sending the ruling with liability and the respective file to the *Consejo de Estado* within five (5) days following the date on which the ruling becomes final.[227] Having received such documentation, the drafting judge assigned will admit it by means of an admission order.[228] The admission order shall set a term of ten (10) days for "any citizen", including those fiscally liable, to intervene in writing, either to defend or challenge the legality of the ruling with fiscal liability.[229] Within that same term, the *Ministerio Público*, composed of the Office of the Attorney General (*Procuraduría General de la Nación*) and the Office of the Ombudsman (*Defensoría del Pueblo*), must issue its opinion regarding the legality of the ruling with

[225] **Ex. RL-12**, Law 2080 of 2021, Article 23.

[226] Two days prior to the filing of this Memorial, on June 29, 2021, the *Consejo de Estado* issued a procedural decision stating that it would refrain from carrying out the automatic and comprehensive legality control of rulings with fiscal liability on the grounds that, if such control were performed, certain constitutional provisions would be breached. **Ex. RL-32**, *Consejo de Estado* of Colombia, Internet Portal, "News", "The Plenary Session of the Chamber for Administrative Adjudicatory Proceedings confirms the non-application of the provisions that rule the automatic control of legality of rulings with fiscal liability", June 29, 2021. It is important to note that the procedural decision of the *Consejo de Estado* is not *erga omnes*. Therefore, the legal provision that set forth the automatic and comprehensive legality control remains in force in the Colombian legal system until the Constitutional Court, the highest court regarding constitutional matters, declares it as unconstitutional, or until a subsequent law overturns it. Regardless of whether the automatic and comprehensive legality control remains in force or whether the regime prior to the automatic and comprehensive control is reinstated (**Ex. RL-8**, Prior Law 610 of 2000, Article 59), rulings with fiscal liability will be subject to judicial control by the tribunals of the administrative adjudicatory jurisdiction. *See* **Ex. RL-24**, Administrative Code, Article 138.

[227] **Ex. RL-12**, Law 2080 of 2021, Article 23.

[228] *Id.*, Article 45(1).

[229] *Id.*

liability.[230] Subsequently, the special chamber of the *Consejo de Estado* which exercises such judicial control may decree the taking of evidence it deems necessary.[231]

111. Once the evidence has been taken, the drafting judge must register a draft judgment and the decision chamber will have twenty (20) days from the registration of the draft judgment to issue a judgment. If the *Consejo de Estado* finds any cause to annul the administrative act, it must declare it in the judgment.[232]

112. The judgment of the special chamber tasked with automatically and comprehensively reviewing the legality of the ruling with liability is subject to appeal, which appeal must be decided by a special chamber other than the one that issued the judgement under appeal.[233]

113. The automatic and comprehensive legality control process (which cannot exceed one (1) year)[234] suspends: (i) the inclusion of those fiscally liable in the bulletin of fiscally liable parties;[235] and (ii) the auction of assets for the effective collection of the damage as established in the ruling with liability.[236] A judgement that is issued in the exercise of the automatic and comprehensive legality control has *res judicata* effect.[237]

114. If the final judgement upholds the ruling with fiscal liability, the CGR must include the names of those who have outstanding obligations under rulings with fiscal

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[230] *Id.*

[231] *Id.*, Article 45(2).

[232] *Id.*, Article 45(3) and 45(4).

[233] *Id.*, Article 45(4).

[234] **Ex. RL-6**, Current Constitution, Article 267.

[235] **Ex. RL-12**, Law 2080 of 2021, Article 45(4). *See* ¶ 114, *infra.*

[236] *See* ¶ 120, *infra.*

[237] **Ex. RL-12**, Law 2080 of 2021, Article 45(4).

liability in a bulletin of fiscally liable parties. The persons listed in the bulletin of fiscally liable parties may not hold public office or contract with the State.[238]

f. Forced Collection Proceeding

115. Once the ruling with liability becomes final,[239] it may be enforced forcibly against the fiscally liable parties and their guarantors.[240] From that moment on, the relevant regulations refer to the fiscally liable parties against whom the forced collection is directed as "debtors."

116. The forced collection proceeding is based on Article 268 of the Constitution and seeks to collect the amount outstanding under the ruling with fiscal liability.[241] The proceeding is a special administrative procedure regulated by the Administrative Code,[242] Decree Law 624 of 1989,[243] and Decree Law 403 of 2020.[244] It is overseen by the forced collection offices of the CGR[245] and consists of two stages: the voluntary collection stage; and the forced collection stage.

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[238] **Ex. RL-8**, Prior Law 610 of 2000, Article 60.

[239] Ver ¶ 106, *supra.*

[240] **Ex. RL-8**, Prior Law 610 of 2000, Article 58. *See* **Ex. RL-33**, Decree Law 403 of 2020, which establishes rules for the proper implementation of Legislative Act 04 of 2019 and the strengthening of fiscal control ("Decree Law 403 of 2020"), Article 110; **Ex. RL-24**, Administrative Code, Article 99.

[241] **Ex. RL-5**, Prior Constitution, Article 268(5).

[242] **Ex. RL-24**, Administrative Code, Articles 98-101.

[243] **Ex. RL-34**, Decree Law 624 of 1989, which establishes the Tax Code for Taxes Administered by the National Tax and Customs Office ("Tax Code"), Fifth Book, Title VIII.

[244] **Ex. RL-33**, Decree Law 403 of 2020, Title XII.

[245] **Ex. RL-35**, Organizational Resolution 0748 of 2020, which determines the authority for the handling and processing of fiscal liability and forced collection proceedings in the Office of the Comptroller General of the Republic and establishes other provisions, Article 28.

117. The voluntary collection stage seeks to obtain payment of the amount owed by debtors on a voluntary basis by means of negotiated payment agreements.[246] If there is no willingness to pay on the part of the debtors, the forced collection stage proceeds, which begins with an administrative act by which a payment order is issued in favor of the CGR for the amount established in the ruling with fiscal liability, including accrued interest.[247] Similarly, as a preventative measure, the CGR may order the attachment and seizure of the debtors' assets.[248]

118. Debtors may file objections against the administrative act by which the payment order is issued within a term of fifteen (15) days following the notification of that act.[249] The possible objections, which are exhaustively outlined by law,[250] allow the debtor to resist forced collection when, *inter alia*, the payment obligation has already been satisfied.[251]

119. The CGR shall decide on the objections proposed by the debtors within a term of thirty (30) days.[252] If the objections are upheld, the CGR will order the termination of the forced collection proceeding. Otherwise, the CGR will issue an administrative act rejecting all or part of the objections and ordering the continuation of the execution and

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[246] **Ex. RL-33**, Decree Law 403 of 2020, Article 121. The execution of a payment agreement suspends the entry in the bulletin of fiscally liable parties and the prohibition to hold public office and to contract with the State. *See* ¶ 114, *supra*.

[247] **Ex. RL-34**, Tax Code, Article 826; **Ex. RL-33**, Decree Law 403 of 2020, Article 111.

[248] **Ex. RL-33**, Decree Law 403 of 2020, Article 117.

[249] **Ex. RL-34**, Tax Code, Article 830.

[250] *See id.*, Article 831.

[251] *Id*.

[252] **Ex. RL-33**, Decree Law 403 of 2020, Article 114(1). During the processing of objections, the CGR may decree evidence *ex officio* or at the request of a party for a period of ten (10) days. *Id.*, Article 114(2).

auction of the attached and seized assets.[253] Such administrative act is subject to reconsideration.[254]

120. In addition, the administrative act that rejects, in full or in part, the objections and orders the execution and auction may be challenged before the administrative adjudicatory jurisdiction. The admission of such challenge has the effect of suspending the auction of the attached and seized assets, which may only be carried out when there is a definitive ruling of the administrative adjudicatory jurisdiction.[255]

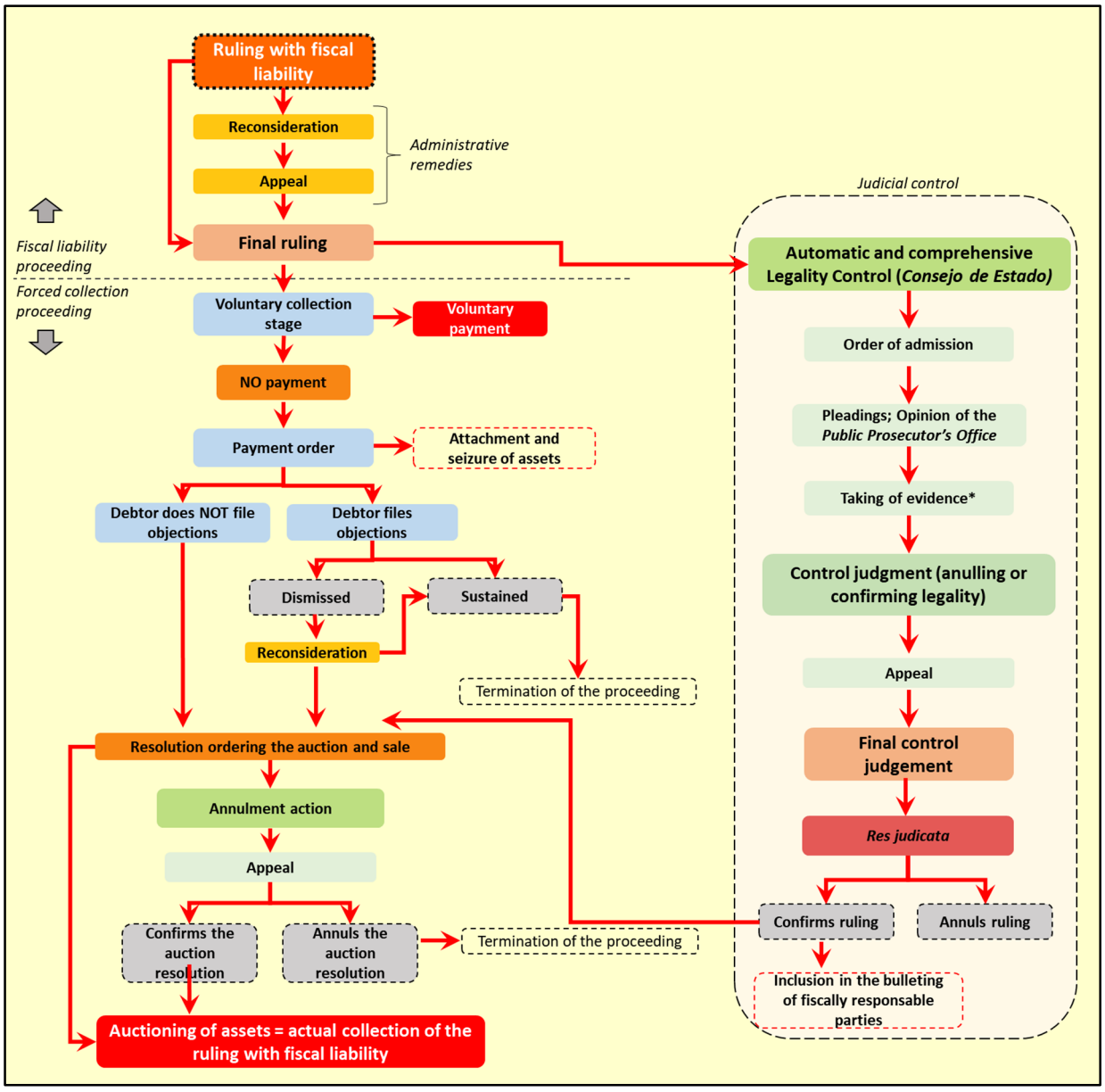
121. The following diagram shows the administrative and judicial process following the issuance of a ruling with fiscal liability, as described in the preceding sections:

[253] *See* ¶ 117, *supra*.

[254] **Ex. RL-33**, Decree Law 403 of 2020, Article 114(5).

[255] *Id.*, Article 116.

Figure 3 - Flowchart of the administrative and judicial process after a ruling with fiscal liability



E. The CGR Initiates a Fiscal Liability Proceeding Against Foster Wheeler and Process Consultants, Among Other Natural and Juridical, Foreign and Local Persons

122. As a result of the findings of the audit team led by the Deputy Comptroller for the Mining and Energy Sector in its final report of November 2016, [256] on March 10, 2017 the Intersectoral Deputy Comptroller No. 11 of the Special Investigations Unit Against Corruption (the "Deputy Comptroller") ordered the initiation of a Fiscal Liability Proceeding for US$ 6.080 million[257] in respect of possible economic damage (for both actual damage (*daño emergente*) and lost profits) arising from the five (5) change controls (or increases in the investment budget) of the Project (each one a "Change Control", and

[256] *See* ¶¶ 68-70, *supra*. *See* **Ex. R-52**, Indictment Order – Part 1: General aspects of the proceedings and factual findings, pp. 12-84.

[257] Equivalent to COP$ 17 trillion. **Ex. R-66**, Intersectoral Delegated Comptroller 11, Ordinary Fiscal Liability Procedure No. PRF-2017-00309 UCC-PRF-005-2017, Order No. 0382, March 10, 2017 ("Initiation Order"), p. 337. *See* Notice of Arbitration, ¶ 76.

together the "Change Controls"),[258] as approved by the boards of directors of Reficar and Ecopetrol.[259]

123. The Deputy Comptroller involved six juridical entities – Foster Wheeler, Process Consultants,[260] Chicago Bridge & Iron Company N.V. (a Dutch company), Chicago Bridge & Iron Company (CB&I) Americas Ltd (a US company), CB&I UK Ltd. (a British company) and CBI Colombiana S.A. (a Colombian company) –, and 35 natural

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[258] **Ex. R-49**, Office of the Comptroller General of the Republic of Colombia, GRANDES HALLAZGOS: ASÍ DESTAPÓ LA CONTRALORÍA GENERAL DE LA REPÚBLICA LOS CASOS MÁS SONOROS DE CORRUPCIÓN EN COLOMBIA. DEL CARTEL DE LA HEMOFILIA A LOS ESTRAFALARIOS SOBRECOSTOS DE REFICAR PASANDO POR EL SAQUEO AL PLAN DE ALIMENTACIÓN ESCOLAR (Imprenta Nacional 2018), pp. 58-60 ("1.- Change control of US$ 216,5 million approved on May 24, 2011, which increased the project's budget from US$ 3.777 million to US$ 3.994 million. This increase sought to maximize the activities related to petrochemicals in order to obtain refined petroleum products for combustion, such as common motor gasoline, diesel and gasoline for JET A aircraft, as well as to double the production of propylene, among others. 2.- Change control of US$ 861 million, approved on May 7, 2012, which increased the refinery's budget to US$ 4.854 million. The justifications for this change control were, among others, underestimated items, the implementation of new processing units and complementary works to guarantee the performance of the refinery units. [The change control] also included cost overruns for risk mitigation, loss of productivity, the impact of the exchange rate and the extension in the completion date of the works, among other items. 3.- Change control of US$2.048 million approved on May 15, 2013, which increased the investments in the project to US$6.901 million. Among the reasons for this increase are higher work quantities, low man-hour productivity, rework, poor work supervision, underestimated labor costs and an increased project scope. 4.- Change control of US$ 751 million approved on January 16, 2015, which increased the refinery's budget to US$ 7.653 million. One of the main causes for this increase was the workers strike between July 16 and September 23, 2013, which had a negative impact of US$ 565 million. Also, the time extension of the project's start-up had a negative impact. At that time it was said that the refinery would be ready by April 20, 2015. 5.- Change control of US$363 (sic.) [million] approved on November 4, 2015, which increased the value of investments in Reficar to US$ 8.016 million dollars. Among the reasons for this increase were the delays in the completion dates of the works, the loss of productivity due to the excess of simultaneous activities and the overcrowding of labor force, as well as additional shifts and the takeover of construction work not performed by CB&I. In summary, according to the Office of the Comptroller, the higher project costs were due to 1) a 43% increase in materials quantities, 2) a 15% price increase, 3) a 27 months delay in the start-up of operations, representing 25% of costs, and 4) a 13% lower productivity, among other factors.") (translation from Spanish; emphasis added). *See* **Ex. R-67**, Office of the Comptroller General of the Republic of Colombia, Press Release No. 35, March 13, 2017, pp. 1-5 (describing each of the five Change Controls); Notice of Arbitration, ¶¶ 5, 81-82.

[259] **Ex. R-66**, Initiation Order, pp. 139, 336-343. *See* Notice of Arbitration, ¶ 76 ("On March 10, 2017, Respondent, through the CGR, commenced a fiscal liability proceeding based on Colombian Law 610 of 2000 ("Law 610") against various entities and individuals, including CB&I and FPJVC, for alleged acts of gross negligence in the expenditure of Colombia's funds in connection with the Project.").

[260] It is important to note that the Fiscal Liability Proceeding is binding upon Foster Wheeler and Process Consultants individually, as juridical persons that may be subject to liability, and not FPJVC, which, as an unincorporated joint venture, does not have legal personality.

persons of Colombian nationality – members of the boards of directors of Reficar and Ecopetrol during the relevant years, and certain officials and former officials of Reficar,[261] as parties to the Fiscal Liability Proceeding on the basis of their alleged fiscal liability, as well as several insurance companies as civilly liable third parties.[262]

124. During the initiation stage, and in accordance with Article 24 of Law 610 of 2000, both Foster Wheeler and Process Consultants (as well as the other parties under investigation) gave free and spontaneous statements in which they presented their own version of the facts and provided and requested evidence, thus fully exercising their rights of defense.[263]

F. The CGR Issues the Indictment Order against Foster Wheeler and Process Consultants, Among Other Natural and Juridical, Foreign and Local Persons

125. Finding that economic damage to the State had been objectively demonstrated and that there was evidence that compromised the fiscal liability of certain some of those involved in the proceeding,[264] on June 5, 2018 the Deputy Comptroller issued a fiscal liability indictment order (the "Indictment Order").

126. Given its length, we have divided the Indictment Order into 14 parts, numbering each such part as a separate exhibit.

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[261] **Ex. R-66**, Initiation Order, pp. 337-340.

[262] *Id.*, p. 340. *See* ¶ 96, *supra*.

[263] **Ex. R-53**, Indictment Order – Part 2: Means of defense of those involved, pp. 192-198 (for Foster Wheeler), pp. 198-228 (for Process Consultants). Foster Wheeler and Process Consultants were represented by counsel, submitted free and spontaneous statements and expanded upon such statements, filed requests for clarification and requests to close the proceeding, and provided evidence (including testimonies and documents). **Ex. R-52**, Indictment Order – Part 1: General aspects of the proceedings and factual findings, pp. 133, 137-138.

[264] *See* ¶ 99, *supra.*

Indictment Order	Ref.
Part 1: General aspects of the proceedings and factual findings	R-52
Part 2: Means of defense of those involved	R-53
Part 3: Considerations of the office and results of the investigation	R-54
Part 4: Determination and quantification of the damage	R-55
Part 5: Charges against the members of the board of directors of Reficar I	R-56
Part 6: Charges against the members of the board of directors of Reficar II	R-57
Part 7: Charges against the members of the administration of Reficar I	R-58
Part 8: Charges against the members of the administration of Reficar II	R-59
Part 9: Charges against the members of the administration of Ecopetrol	R-60
Part 10: Charges against contractors I	R-61
Part 11: Charges against contractors II	R-62
Part 12: Closure of proceedings I	R-63
Part 13: Closure of proceedings II	R-64
Part 14: Disaggregation of facts and resolutions	R-65

127. The Indictment Order charged 14 individuals and five juridical entities (including Foster Wheeler and Process Consultants) with joint and several liability in

respect of the economic damage to the State,[265] consisting of the loss in value of the investments made by Ecopetrol and Reficar in the Project[266] as a result of Change Controls 2, 3 and 4.[267] In the investigation, there was no finding of economic damage as a result of Change Controls 1 and 5 to the extent that the respective budget increases were foreseen as contingencies in the Project's budget.[268]

128. The Deputy Comptroller charged joint and several fiscal liability in the amount of US$ 2.433 million,[269] (i) for willful negligence on the part of the former members of Reficar's board of directors, certain former Reficar officials and CB&I Americas Ltd, CB&I Colombiana S.A., and CB&I UK Limited, as EPC contractors of the Project; and (ii) for gross negligence on the part of Foster Wheeler and Process Consultants.[270] In addition, the Deputy Comptroller maintained the involvement of several insurance

[265] **Ex. R-52**, Indictment Order – Part 1: General aspects of the proceedings and factual findings, pp. 145-147, n. 11 (identifying the affected State entities: Reficar, a decentralized and indirect or second grade entity, created by Ecopetrol, a decentralized first grade entity, constituted as a mixed capital company, with the Republic as its majority shareholder).

[266] *See* ¶ 87, *supra*. The Indictment Order refers only to actual damage (*daño emergente*), since it orders the disaggregation of the proceedings and actions related to loss of profit so that they can be assessed in a separate proceeding. *See* **Ex. R-65**, Auto de Imputación – Parte 14: Desagregación de hechos y resolutorio, p. 4738.

[267] **Ex. R-55**, Indictment Order – Part 4: Determination and quantification of the damage, pp. 1410-1412. *See* n. 258, *supra.*

[268] **Ex. R-55**, Indictment Order – Part 4: Determination and quantification of the damage, p. 1410.

[269] Equivalent to COP$ 5.2 trillion. **Ex. R-65**, Auto de Imputación – Parte 14: Desagregación de hechos y resolutorio, p. 4738. *See* **Ex. R-55**, Indictment Order – Part 4: Determination and quantification of the damage, pp. 1410-1412.

[270] **Ex. R-65**, Auto de Imputación – Parte 14: Desagregación de hechos y resolutorio, pp. 4738-4741. The deputy Comptroller ordered the closure of the procedural actions regarding members of the Ecopetrol board of directors, certain members of the board of directors of Reficar, the former financial and administrative Vice-president of Reficar, and CB&I N.V., EPC contractor of the Project. *Id.*, pp. 4744-4747. *See* Notice of Arbitration, ¶ 9. With respect to members of Ecopetrol's board of directors, the Deputy Comptroller found that Change Control 2 was approved by Reficar's board absent any knowledge of the Ecopetrol board, such that there was no fiscally reproachable conduct. **Ex. R-63**, Indictment Order – Part 12: Closure of proceedings I, pp. 4422, 4427. The Deputy Comptroller did not reach a finding of either gross or willfully negligent conduct on the part of the members of the Ecopetrol board in the approval of Change Controls 3 and 4; finding, on the contrary, that the conduct of the Ecopetrol board members was in accordance with their functional, legal, statutory and regulatory duties. *Id.*, pp. 4425-4426, 4458, 4677-4678.

companies in the proceeding as civilly liable third parties and identified the relevant insurance policies.[271]

129. According to the Indictment Order, the willfully negligent conduct of Reficar's board members and Reficar's former officials occurred in the exercise of fiscal management (*i.e.*, direct fiscal management), since several of the functions of Reficar's board of directors and senior management members as provided for in the company's bylaws (in particular, "the making of investment decisions and capital expenditure budgets, as well as the monitoring of these investments" in the case of the board of directors, and "administration and expenditure of the resources of the investments" in the case of the senior management) were within the same sphere of fiscal management.[272]

130. The conduct of the Project's contractors (*i.e.*, willful negligence in the case of CB&I, and gross negligence in the case of Foster Wheeler and Process Consultants) occurred in connection with the fiscal management exercised by the members of the board of directors and officials of Reficar. The Indictment Order explains:

> [A]s will be analyzed and assessed in this order, the contractors carrying out the detailed engineering, procurement and construction activities (corresponding to the expressions Engineering, Procurement, and Construction, which gives rise to the acronym EPC) and the companies auditing the investment project that were in charge of the project management consulting (Project Management Consulting), will have contributed to the detriment of the economic interest of the State in connection with fiscal management carried out by the administrators.[273]

[271] **Ex. R-65**, Indictment Order – Part 14: Disaggregation of facts and resolutions, pp. 4742-4744.

[272] **Ex. R-54**, Indictment Order – Part 3: Considerations of the office and results of the investigation, p. 808 (translation from Spanish).

[273] **Ex. R-54**, Indictment Order – Part 3: Considerations of the office and results of the investigation, p. 809 (translation from Spanish; emphasis added).

131. According to the analysis of the Indictment Order, the relationship between the conduct of Foster Wheeler and Process Consultants and the fiscal management exercised by members of the board of directors and officials of Reficar has to do with the scope of the contractual obligations assumed by such companies. Under the Services Contract, Foster Wheeler and Process Consultants were to provide "Project management and supervision" and "shall be integrally accountable for the Project Management to accomplish the successful execution in terms of quality, time, budget and industrial safety."[274] After analyzing the contractual provisions, the Deputy Comptroller found that the activities and control mechanisms vested in Foster Wheeler and Process Consultants allowed for the "measuring [of] the degree of progress of the project" and for "decisions to be made regarding the degree of progress, productivity" in order to, *inter alia*, facilitate the implementation of measures aimed at meeting established schedules and goals, as part of the Project management.[275]

132. According to the Deputy Comptroller, the failure by Foster Wheeler and Process Consultants in supervising and technically and administratively managing the Project were necessary for the approval of Change Controls 2, 3 and 4, through which the economic damage to the State materialized.[276]

133. The Deputy Comptroller made an individual and detailed analysis of the conduct of each of the 41 natural and juridical persons involved in the proceeding,

[274] **Ex. R-61**, Indictment Order – Part 10: Charges against contractors I, p. 3450. *See also id.*, pp. 3453, 3467 (translation from Spanish).

[275] **Ex. R-61**, Indictment Order – Part 10: Charges against contractors I, p. 3466 (for Foster Wheeler), p. 3601 (for Process Consultants) (translation from Spanish). *See* Notice of Arbitration, ¶¶ 80, 83, 85.

[276] **Ex. R-61**, Indictment Order – Part 10: Charges against contractors I, pp. 3571-3577 (for Foster Wheeler), pp. 3706-3712 (for Process Consultants). *See also id.*, pp. 3577-3580 (for Foster Wheeler), pp. 3712-3715 (for Process Consultants); Notice of Arbitration, ¶¶ 80, 83, 85.

assessing the evidence in relation to each one and addressing their respective arguments in defense. This individualized analysis explains why the Indictment Order has more than 4.700 pages,[277] while the analysis specially pertaining to Foster Wheeler and Process Consultants covers approximately 300 pages.[278]

134. Furthermore, the Indictment Order complied with all requirements established by law: (i) it fully identified the allegedly fiscally liable parties (14 natural persons and five juridical entities) and the affected entities (Ecopetrol and Reficar); (ii) it identified the insurance companies, as well as the policy numbers and insurance values; (iii) it identified and assessed the evidence taken up to that moment in time; (iv) it verified the elements constituting the fiscal liability in respect of each defendant; and (v) it preliminarily determined the amount of economic damage to the State (US$ 2.433 million).[279]

135. In accordance with the provisions of Law 610 of 2000, the Deputy Comptroller originally ordered a ten (10) day term in which the allegedly fiscally liable parties could present arguments in defense of the charges raised against them and to request and provide evidence, warning that no remedy was allowed against the Indictment Order[280] since it was a preparatory or procedural administrative act that did

[277] *See* **Ex. R-68**, Superior Court of Bogotá – Criminal Chamber, *Acción de Tutela* No. 2018-00182 filed by Foster Wheeler and Process Consultants against CGR, *Tutela* Judgment of Second Instance, November 21, 2018, p. 17 (". . . beyond, [the Indictment Order's] length, it expressed in an understandable manner the factual and legal situations that led the Office of the Comptroller General of the Republic to bring charges against the claimant companies.") (translation from Spanish).

[278] *See* **Ex. R-53**, Indictment Order – Part 2: Means of defense of those involved, pp. 192-198; **Ex. R-61**, Indictment Order – Part 10: Charges against contractors I, pp. 3445-3715.

[279] **Ex. RL-8**, Prior Law 610 of 2000, Article 48.

[280] **Ex. R-65**, Indictment Order – Part 14: Disaggregation of facts and resolutions, p. 4750.

not define any legal situation.[281] In the end, Foster Wheeler and Process Consultants had four (4) months to present their arguments and evidence.[282]

136. On September 14, 2018, Foster Wheeler and Process Consultants filed an *acción de tutela*[283] against the CGR, alleging a violation of their fundamental rights of due process, defense and contradiction in the framework of the Fiscal Liability Proceeding launched against them.[284] Only Foster Wheeler and Process Consultants brought the *acción* (and not FPJVC) because only natural and juridical persons have a right to initiate legal action. In the *acción de tutela*, Foster Wheeler and Process Consultants alleged not only a violation of their constitutional right to due process, but also of due process as part of the FET obligation under the Treaty,[285] such that they cannot now bring a claim before this Tribunal based on those same allegations.[286]

137. The *acción de tutela* was denied in the first instance and on appeal because Foster Wheeler and Process Consultants did not prove the occurrence of irremediable

[281] **Ex. RL-24**, Administrative Code, Article 75.

[282] Notice of Arbitration, ¶ 157.

[283] An *acción de tutela* is a mechanism for immediate judicial protection of the fundamental rights, enshrined in Article 86 of the Constitution. The *acción* proceeds when a fundamental right has been threatened or violated by an authority and the claimant has no other means of judicial defense. In the event other judicial means of defense are available, the *acción de tutela* may only be used as a transitory mechanism to avoid irremediable damage. Thus, an *acción de tutela* is a subsidiary and residual action. *See* **Ex. RL-6**, Current Constitution, Article 86.

[284] **Ex. R-69**, *Acción de Tutela* No. 2018-00182 filed by Foster Wheeler and Process Consultants against CGR, September 14, 2018 ("*Acción de Tutela* 2018"). In the *acción de tutela*, the arguments presented by Foster Wheeler and Process Consultants against the Fiscal Liability Proceeding are essentially the same as those presented in the Fiscal Liability Proceeding, and are the same as the arguments now being presented by Claimants in this Arbitration. *See* ¶ 326, *infra*.

[285] **Ex. R-69**, *Acción de Tutela* 2018, pp. 7-8.

[286] *See* ¶¶ 319-328, *infra.*

damage or a lack of adequacy of the existing ordinary judicial mechanisms.[287] According to the judge at first instance, Foster Wheeler and Process Consultants

> have a multiplicity of actions to guarantee their fundamental rights, not only within the [Fiscal Liability Proceeding], but also after the issuance of a final decision.[288]

138. In turn, the judge on appeal stated:

> In addition, the administrative proceeding in question is a fiscal liability proceeding that is currently underway, therefore, the claimant companies must present the [requests] that they consider necessary for the exercise of their right of defense, as well as having the opportunity to . . . appeal the decisions that are adverse to them.[289]

G. FPJVC Notifies Colombia of its Intent to Submit a Claim to Arbitration Under the Treaty

139. On December 26, 2018, Claimant FPJVC filed a notice of intent pursuant to Article 10.16 of the Treaty.[290] Claimants Foster Wheeler and Process Consultants did not file a notice of intent.[291]

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[287] **Ex. R-70**, Criminal Court 26 of the Bogotá Circuit, *Acción de Tutela* No. 2018-00182 filed by Foster Wheeler and Process Consultants against CGR, *Tutela* Judgment of First Instance, October 3, 2018; **Ex. R-68**, Superior Court of Bogotá – Criminal Chamber, *Acción de Tutela* No. 2018-00182 filed by Foster Wheeler and Process Consultants against CGR, *Tutela* Judgment of Second Instance, November 21, 2018.

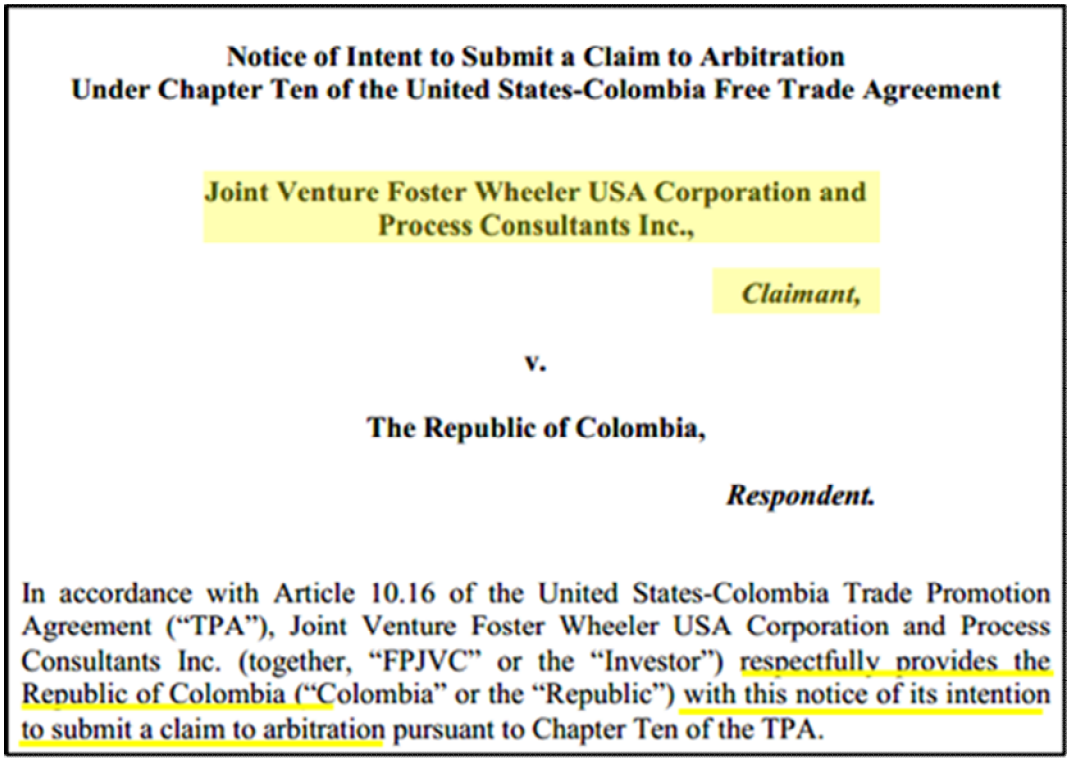
[288] **Ex. R-70**, Criminal Court 26 of the Bogotá Circuit, *Acción de Tutela* No. 2018-00182 filed by Foster Wheeler and Process Consultants against CGR, *Tutela* Judgment of First Instance, October 3, 2018, p. 20 (translation from Spanish).

[289] **Ex. R-68**, Superior Court of Bogotá – Criminal Chamber, *Acción de Tutela* No. 2018-00182 filed by Foster Wheeler and Process Consultants against CGR, *Tutela* Judgment of Second Instance, November 21, 2018, p. 14 (translation from Spanish).

[290] **Ex. R-39**, Notice of Intent.

[291] *See* ¶¶ 310-318, *infra*.

Figure 4 – FPJVC Notice of Intent (English)



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.

140. The Notice of Intent refers to the "Investor" claimant in the singular, describing it in English as a "contractual joint venture" and in Spanish as a "*contrato de consorcio*."[292]

141. In its Notice of Intent, FPJVC admits that the Services Contract is merely a contract for the provision of services.[293]

[292] **Ex. R-39**, Notice of Intent, ¶ 5.

[293] *Id.*, ¶ 12 ("As set forth in Article 10.28 of the [Treaty], 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 [Treaty]").

H. Foster Wheeler, Process Consultants and FPJVC File a Notice of Arbitration Against Colombia

142. Almost a year later, on December 6, 2019, FPJVC, and this time also Foster Wheeler and Process Consultants,[294] filed a Notice of Arbitration against Colombia, alleging that Colombia had breached its obligations under the Treaty and international law by involving them in the Fiscal Liability Proceeding and issuing the Indictment Order.[295]

143. According to Claimants, their dispute against Colombia arises out of a "November 2009 contract between FPJVC and [Reficar] for the provision of services in connection with the [Project],"[296] such that there is no doubt or contention between the Parties as to the nature of the Services Contract as a contract for the provision of services.

144. In their Notice of Arbitration, Claimants included a waiver that does not meet the requirement of Article 10.18.2(b) of the Treaty because it contains a reservation that renders it completely ineffective.[297] Failure to comply with this essential requirement deprives this Tribunal of jurisdiction over their claim.[298]

145. While it is not possible at this preliminary stage of the Arbitration to respond in depth to the merits of Claimants' claims, it is important to note that all of their arguments in the Notice of Arbitration are without merit:

- Claimants allege that Law 610 of 2000 only authorizes the CGR to initiate fiscal liability proceedings against "fiscal managers",[299] and that

[294] Notice of Arbitration, ¶ 1 ("Amec Foster Wheeler USA Corporation y Process Consultants, Inc., individually and as members of a contractual joint venture named FPJVC") (emphasis added).

[295] *Id.*, ¶¶ 2, 97.

[296] *Id.*, ¶¶ 3, 51.

[297] *Id.*, ¶ 25.

[298] *See* ¶¶ 329-343, *infra.*

[299] Notice of Arbitration, ¶ 10.

there is no basis for concluding that Foster Wheeler and Process Consultants were "fiscal managers."[300] As Respondent already explained, fiscal liability proceedings may be brought not only against those who exercise direct fiscal management, but also against those who exercise indirect fiscal management, *i.e.*, whose conduct has a close and necessary connection with the exercise of fiscal management.[301] It was precisely in that capacity that the Deputy Comptroller charged Foster Wheeler and Process Consultants with fiscal liability under the Indictment Order.[302]

- Claimants also allege that the "CGR did not include [in the Indictment] any specific allegations related to willful or grossly negligent conduct and made no effort to articulate how FPJVC's conduct caused the alleged harm."[303] However, as explained above, the Indictment Order contains an extensive and individualized analysis of the conduct of Foster Wheeler and Process Consultants and of the causal link between such conduct and the economic damage to the State.[304]

- Claimants argue that the "CGR did not identify specific economic damage to the State, maintaining instead that Project budget increases that Reficar and Ecopetrol approved constituted such damage."[305] However, as already explained by Respondent, the CGR identified and adequately quantified the alleged economic damage to the State.[306]

- Claimants further assert that the CGR seeks relief from FPJVC in respect of damages that are "arbitrary and grossly disproportionate to the alleged harm caused by FPJVC."[307] However, there is nothing arbitrary or disproportionate in the Indictment Order. As explained by Respondent, all parties whose willful or grossly negligent conduct caused economic damage are joint and severally liable for remedying such damage, regardless of the extent to which they contributed to that damage.[308]

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[300] *Id.*, ¶¶ 2, 12, 78, 97, 104, 105, 109, 111-117, 120.

[301] *See* ¶¶ 77-79, *supra.*

[302] *See* ¶¶ 130-132, *supra.*

[303] Notice of Arbitration, ¶ 12. *See id.*, ¶¶ 14, 86, 109, 122, 124, 126, 160-162.

[304] *See* ¶¶ 130-133, *supra.*

[305] Notice of Arbitration, ¶ 12. *See id.*, ¶¶ 122, 125-126.

[306] *See* ¶ 127, *supra.*

[307] Notice of Arbitration, ¶ 109. *See id.*, ¶¶ 127-129.

[308] *See* ¶ 88, *supra.*

- Claimants argue that the initiation and conduct of the Fiscal Liability Proceeding deprived [redacted][310] However, as clarified by Respondent, fiscal liability is autonomous and separate from contractual liability.[311]

- Claimants assert that the CGR did not apply the same legal standard to FPJVC as it did to Ecopetrol because it closed the case against the board members of that company on the basis that they were not considered "fiscal managers", while bringing charges against FPJVC, which, according to Claimants, "had even less authority than the Ecopetrol directors."[312] As Respondent has already indicated, the reason why the Deputy Comptroller closed the proceedings against the members of Ecopetrol's board of directors was because it did not find a willful or grossly negligent conduct,[313] and not because it did not consider that such board members had exercised fiscal management – as Claimants falsely claim.

- Claimants complain that, although the Indictment Order consists of 4.751 pages and is written in Spanish (which, as Claimants "explain", is not their working language), the "CGR initially ordered FPJVC to file its response . . ., including the submission of all evidence in support of its defenses, within a mere *ten days*."[314] As Respondent has already stated, the length of the Indictment Order is due to the number of parties under investigation and the detailed and systematic analysis of the Deputy Comptroller.[315] The Indictment Order is obviously written in Spanish, the official language of Colombia, and the term of ten days in which to present arguments and evidence is the term provided for in Law 610 of 2000 and applies to all parties who are subject to fiscal liability proceedings without distinction.[316] In any event, Claimants themselves accept that they had "approximately four months" to present their arguments.[317]

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[309] Notice of Arbitration, ¶ 14.

[310] *Id.*, ¶¶ 173, 182-186.

[311] *See* ¶ 81, *supra.*

[312] Notice of Arbitration, ¶¶ 174-178.

[313] *See* n. 270, *supra.*

[314] Notice of Arbitration, ¶ 89. *See id.*, ¶¶ 88, 156-158.

[315] *See* ¶ 133, *supra.*

[316] *See* ¶¶ 101, 135, *supra.*

[317] Notice of Arbitration, ¶¶ 91, 157.

- Finally, Claimants argue that the CGR "completely limited FPJVC's right to present its defense, submit relevant contentions of fact and law, and offer supporting evidence in support of such defense."[318] This is absolutely false. Claimants conceal from the Tribunal that, as Respondent has already stated, they were represented in the fiscal liability proceeding from the initiation stage, made free and spontaneous statements, presented their arguments in defense, requested evidence and submitted dozens of documents into the record of the proceeding.[319]

146. In their Notice of Arbitration, Claimants admit that FPJVC is a "contractual joint venture",[320] and therefore, as Respondent will explain in this Memorial, the Tribunal lacks jurisdiction over FPJVC because it is not a "juridical person" under Article 25(2)(b) of the ICSID Convention.[321]

I. The CGR Issues a Ruling with Fiscal Liability

147. After issuing the Indictment Order, an evidentiary period of approximately two years began.[322] During this period, the Deputy Comptroller decreed, obtained and introduced into the record of the Fiscal Liability Proceeding a multitude of evidence, including testimonies, free and spontaneous statements of the defendants, technical reports, documents and expert opinions; it also made several special visits to Reficar to conduct interviews and collect documentation.[323] The defendants, including Foster Wheeler and Process Consultants, were given the opportunity to provide evidence and

[318] *Id.*, ¶ 158.

[319] *See* ¶ 124, *supra.*

[320] Notice of Arbitration, ¶ 29.

[321] *See* ¶¶ 299-309, *infra.*

[322] The Fiscal Liability Proceeding was suspended and resumed on multiple occasions. *See*, **Ex. R-71**, Ruling with Fiscal Liability – Part 1: Competence, evidentiary record, procedural actions and others, pp. 242-252.

[323] *Id.*, pp. 220-225, 243, 245, 248.

contradict the evidence introduced by the Deputy Comptroller.[324] They also presented challenges, annulment requests and multiple appeals, all of which were decided upon by the Deputy Comptroller within the framework of the Fiscal Liability Proceeding, in accordance with the applicable regulations.[325]

148. Having exhausted the evidentiary period, and finding that elements of fiscal liability were established with certainty,[326] on April 26, 2021[327] the Intersectoral Deputy Comptroller No. 15 issued a ruling with liability (the "Ruling with Fiscal Liability").[328]

149. Given its length, we have divided the Ruling with Fiscal Liability into 13 parts, numbering each such part as a separate exhibit.

Ruling with Fiscal Liability	**Ref.**
Part 1: Competence, evidentiary record, procedural actions and others	R-71
Part 2: Office considerations	R-72

[324] *Id.*, pp. 242-252.

[325] *See for example id.*, pp. 159, 203.

[326] *See* ¶ 104, *supra.*

[327] Three days before the Ruling was issued, on April 23, 2021 Foster Wheeler and Process Consultants filed an *acción de tutela* against the CGR alleging a violation of their rights of due process, defense, contradiction and their right to present evidence with respect to the CGR's handling of technical reports regarding the quantification of fiscal damage which were decreed within the framework of the Fiscal Liability Proceeding. **Ex. R-84**, *Acción de Tutela* No. 2021-00138 filed by Foster Wheeler and Process Consultants against CGR, April 23, 2021 ("*Acción de Tutela* 2021-A"), p. 8. The *acción de tutela* was denied at first instance by the Civil Court 14 of the Bogotá Circuit because, *inter alia,* an *acción de tutela* cannot be brought against procedural administrative acts. **Ex. R-85**, Civil Court 14 of the Bogotá Circuit, *Acción de Tutela* No. 2021-00138 filed by Foster Wheeler and Process Consultants against CGR, *Tutela* Judgment of First Instance, May 10, 2021, p. 8. The filing of this *acción de tutela* violates the waiver referred to in Article 10.18.2(b) of the Treaty, thus depriving this Tribunal of jurisdiction over Claimants' claim. *See* ¶¶ 329-343, *infra.*

[328] *See* **Ex. R-86**, Office of the Comptroller General of the Republic of Colombia, Press Release No. 46, April 26, 2021.

Ruling with Fiscal Liability	Ref.
Part 3: Individualization, members of the board of directors of Reficar I	R-73
Part 4: Individualization, members of the board of directors of Reficar II	R-74
Part 5: Individualization, members of the board of directors of Reficar III	R-75
Part 6: Individualization, officers of Reficar I	R-76
Part 7: Individualization, officers of Reficar II	R-77
Part 8: Individualization, officials of Reficar III	R-78
Part 9: Individualization, contractors I	R-79
Part 10: Individualization, contractors II	R-80
Part 11: Individualization, Ecopetrol officials	R-81
Part 12: Joint and several liability, civilly liable third parties and others	R-82
Part 13: Resolutory	R-83

150. The Deputy Comptroller decided to issue a ruling with fiscal liability, joint and severally, for gross negligence, against 12 natural persons (two presidents and three vice presidents of Reficar, seven members of the board of directors of Reficar, including the president of Ecopetrol at the time of the relevant events) and four juridical persons (CB&I Colombiana S.A., CB&I UK Limited, Foster Wheeler and Process Consultants) in the amount of US$ 997 million,[329] in respect of economic damage resulting from the

[329] **Ex. R-83**, Ruling with Fiscal Liability – Part 13: Resolutory, pp. 6230-6234. As the CGR received and evaluated the evidence and considered the arguments in defense, the scope of the Fiscal Liability Proceeding was narrowed. The Initiation Order initially involved six juridical persons and 35 natural persons in the proceeding with respect to an economic damage of US$ 6.080 million resulting from Change Controls 1, 2, 3, 4 and 5; the Indictment Order charged five juridical persons and 14 natural persons with fiscal liability with respect to economic damage of US$ 2.433 million resulting from Change Controls 2, 3 and 4;

additional investments in the Project derived from Change Controls 2 and 3.[330] The charges against the allegedly fiscally liable parties related to Change Control 4 were disproven during the evidentiary phase.[331]

151. In addition, the Ruling with Fiscal Liability declared Compañías Aseguradoras de Fianzas S.A. Confianza, Chubb de Colombia Compañía de Seguros S.A. and AXA Colpatria Seguros S.A. (the "Insurance Companies") as civilly liable third parties.[332]

152. The Ruling with Fiscal Liability determined the existence of actual damage (*daño emergente*) consisting of the loss in value of the investment of public resources in the Project. According to the Deputy Comptroller, the additional investments derived from Change Controls 2 and 3 did not add value to the Project in the form of greater capacity or technological improvements for the Refinery, but were allocated to cover expenses associated with low labor productivity, engineering errors that required the acquisition of larger quantities of materials and labor, work delays, coordination failures among contractors, and logistical failures.[333] In sum, the economic damage was caused as a

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and finally, the Ruling found four juridical persons and 12 natural persons to be fiscally liable for US$ 997 million resulting from Change Controls 2 and 3.

[330] Equivalent to COP$ 2.945 million. **Ex. R-83**, Ruling with Fiscal Liability – Part 13: Resolutory, p. 6230.

[331] *Id.*, pp. 6234-6235. The Deputy Comptroller found that the parties involved in the Fiscal Liability Proceeding had proved from a legal, technical and financial perspective that Change Control 4 was necessary to mitigate the impact of the labor strike that occurred between July and September 2013. Thus, the Deputy Comptroller concluded that the approval of this Change Control was not caused by willful or grossly negligent conduct on the part of the defendants, but by a need to mitigate the labor strike, which constitutes a break in the causal link for Change Control 4. **Ex. R-72**, Ruling with Fiscal Liability – Part 2: Office considerations, pp. 544-551.

[332] **Ex. R-83**, Ruling with Fiscal Liability – Part 13: Resolutory, pp. 6236-6237.

[333] **Ex. R-72**, Ruling with Fiscal Liability – Part 2: Office considerations, pp. 395-396.

result of approving greater investments that were necessary due to "deficiencies in the execution of the different stages or phases of the project."[334]

153. The Deputy Comptroller determined that the conduct of Foster Wheeler and Process Consultants, as Project contractors in charge of managing the Project, had a "close and necessary relation" with the direct fiscal management exercised by Reficar's board of directors and senior management.[335] While the Ruling with Fiscal Liability acknowledges that Foster Wheeler and Process Consultants were not the ones who approved Change Controls 2 and 3, "they are held liable for their contribution in the cause of the damage from their condition as consultants" of the Project (*i.e.*, as indirect fiscal managers).[336]

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[334] **Ex. R-80**, Ruling with Fiscal Liability – Part 10: Individualization, contractors II, p. 5124 (translation from Spanish). The Ruling addressed each of the defense arguments related to the economic damage presented by the attorneys of the defendants individually. **Ex. R-72**, Ruling with Fiscal Liability – Part 2: Office considerations, pp. 624-673.

[335] *See* **Ex. R-80**, Ruling with Fiscal Liability – Part 10: Individualization, contractors II, p. 5419 ("[F]iscal liability. . . may derive. . . from the acts or omissions attributable to a public servant or a private party that, in the development of a close and necessary relation with the relevant fiscal management, contribute in a causal and, therefore, determinant manner to the fiscal damage. In other words, in order to establish fiscal liability in such cases, the investigated party must act in a functional relationship, derived, dependent and inseparable from the fiscal management in the course of which the fiscal damage occurred, and who else but the contractors, in these cases, to comply with such requirements."), p. 5420 ("[I]n the analysis of each conduct, it shall be pertinent to establish the conditions of the direct fiscal managers and of the parties that acted in concurrence and in the context of a close and necessary relation with the relevant fiscal management, in order to establish the causes, or co-occurrent causes, that produced the damage to the public assets.") (translation from Spanish; emphasis added).

[336] *Id.*, p. 5190 (translation from Spanish). *See id.*, p. 5333 ("From all of the above, it is precisely evidenced the close and necessary connection [of FPJVC] with the fiscal management . . . taking into account the scope of the obligations that the members of the FPJVC had as [*project management consultant*], [including] the submission of Notices of Change, the review of invoicing in the case of the Cost Committee, their participation in the Management Committees, [and] the direction and assumption of tasks within the Risk Committee. [The scope of the obligations of FPJVC] goes much further and their participation in the fiscal management of resources is evident, on the one hand due to the obligation to which they are committed as [*project management consultant*] and, [on the other hand due to] the work carried out within the [*integrated project management team*]."), p. 5470 ("The integration of the managing team. . . does not reduce or modify the responsibilities [of each] member of that integrated managing team, since taking part in the project management decision-making process, while performing the contract, entails responsibility as a contributor in the decision-making process that led to the approval of change controls. . . .") (translation from Spanish).

154. The Ruling with Fiscal Liability makes it clear that the evaluation of the conduct of Foster Wheeler and Process Consultants went beyond an analysis of the scope of the contractual obligations assumed by such companies under the Services Contract (a breach of which the CGR is not able to assess since it is not the judge of the contract),[337] and evaluated the role that the companies actually played in the Project.[338] In the view of the Deputy Comptroller, the evidence demonstrated that Foster Wheeler and Process Consultants did indeed have a "decisive" role in the approval of Change Controls 2 and 3.[339]

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[337] *Id.*, pp. 5333-5334 (indicating that the purpose of the Fiscal Liability Proceeding is not to assess compliance with the Services Contract: "The extensive documentation provided by the attorney [of FPJVC] asserts that [FPJVC] complied with the contract, a matter that should be discarded, precisely because of the principle of the natural judge raised by the attorney [of FPJVC]. Given that the purpose of the [fiscal liability] proceeding is not to assess the performance of the contract, the Office cannot evaluate one by one the evidence related to such compliance, otherwise it would . . . usurp the competences of the judge of the contract.") (translation from Spanish).

[338] *Id.*, p. 5191 ("the indictment against the parties of the FPJVC does not result from the analysis of . . . [the] compliance with the contract, but rather of how the actions of FPJVC had an impact on the outcome of the project in terms of budget, costs and timing, which influenced the decision-making regarding change controls."), p. 5334 ("[M]uch of the correspondence prepared by the Joint Venture, in fact shows how it performed its duties and not as a simple drafter of documents, but as a reflection of the work performed, the evidence shows the follow-up and the actions to be taken [by FPJVC], such as the requirements to the EPC contractor, as well as its participation and actions [of FPJVC] in committees, working groups and others, much of it in the development of the established coordination procedure.") (translation from Spanish; emphasis added).

[339] *Id.*, p. 5203 ("[A]s shown in the last paragraph, the projections and information of the FPJVC . . . the statements, reports and recommendations of the Joint Venture would have an impact exactly on such delays, increased costs and others. . . . Furthermore, as it has been pointed out and demonstrated in the docket, within the scope of its contractual obligations, regardless of their nature, the participation of the [FPJVC] was decisive in the investment decisions taken by the company that owned the project through change controls 2 and 3.") (translation from Spanish; emphasis added). Part of the defense pleaded by Foster Wheeler and Process Consultants in the Fiscal Liability Proceeding consisted of arguing, just as they do in this Arbitration, that the Services Contract was [implicitly] amended in such a way that they lost effective "management" of the Project. The Deputy Comptroller concluded that no such implied amendment had occurred since the evidence showed that Foster Wheeler and Process Consultants did indeed hold key positions in the management of the Project that corresponded to obligations under the Services Contract. *See for example id.*, p. 5210 (indicating that the personnel of FPJVC "was placed in key positions in several project proceedings, including managing key proceedings within the project's development.") (translation from Spanish), p. 5230 (indicating that, as project management consultant, FPJVC was part of an integrated team that provided information that fed the decision making by Reficar's board of directors), p. 5236 (indicating that participated in committees at the management, tactical and operational levels of the Project). However, the discussion of whether or not there was an implied amendment becomes moot because the findings of the Ruling with Fiscal Liability are supported by evidence with regards to the role

155. The conduct of Foster Wheeler and Process Consultants was deemed to be "grossly negligent" because, despite their prominent role in the management of the Project, including their participation in management, technical and operational committees, and the tasks they undertook under the Services Contract, they failed to take sufficient actions to "minimize the delays, reworks, reprocessing, increased costs and delays in the development of the project."[340]

156. Finally, regarding the causal link between the grossly negligent conduct of Foster Wheeler and Process Consultants and the economic damage, the Ruling with Fiscal Liability indicated:

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actually played by Foster Wheeler and Process Consultants. *Id.*, p. 5333 ("Notwithstanding the foregoing evidentiary analysis on the active and decisive intervention of [FPJVC]. . . the Office insists that the discussion on the nature of the obligations of the [FPJVC], on their primary and secondary role, and on whether its role was diminished or increased, is a discussion that becomes a secondary issue if we take into account that it has been proved that. . . in any case, [FPJVC] participated in a decisive manner in the decisions taken by Reficar's governing bodies in change controls 2 and 3, in which they approved greater investments that caused a detriment. In other words, the [Joint Venture] contributed together with the other investigated parties to cause the fiscal damage that now concerns us.") (translation from Spanish).

[340] *Id.*, p. 5475. *See also id.*, pp. 5477-5478 ("To such extent, the higher costs incurred as a result of the higher number of man-hours invoiced for design engineering due to errors attributable to the [EPC] contractor under the oversight of the Integrated Management Team. . . which refrained from recommending to the project owner . . . specific application of [objections] and the non-reimbursement of costs overruns for clearly identified and identifiable reasons. . . The [Deputy Comptroller] is forced to conclude that, . . . the Integrated Management Team and, within this team the multinationals Foster Wheeler and Process Consultants, did not deploy all the capabilities, nor [did they keep] a detailed record that could be used to determine the set of costs that could be identified and qualified as unreasonable for such additional man-hours invoiced by the CB&I companies on account of the delays and redesigns, not including, although it could also have been accurately determined, the deviation in the schedule of procurement and construction for each redesign for each unit.") (emphasis added), p. 5329 ("In these reports it is proven how the auditing proceedings include one of the FPJVC activities carried out by Process Consultans (sic.) Inc in the procurement and construction phases and there, in fact, observations and recommendations are made, which should have meant that the [*Project Management Team*] – of which the Joint Venture was a member – took actions or decisions that in the end proved to be insufficient, since in fact they generated higher costs for the project, especially if the review of invoicing, the submission of the [*Notice of Change*] and many other tasks within the scope of the Joint Venture."), p. 5332 ("With the information gathered during the special visit . . . it is proven that despite the extensive documentation and information prepared or elaborated by the FPJVC, the meetings held, the committees organized and carried out, the weekly reports and the assumption of liability related to risk management by the FPJVC, the results did not lead to budget savings, synergies or improvements in productivity, even less to better performance of the EPC contractor.") (translation from Spanish).

> [F]or the case of both companies FOSTER WHEELER USA CORPORATION AND PROCESS CONSULTANTS INC, as members of the FPJVC, it is clear that the grossly negligent conducts mentioned above were necessary for the change controls 2 and 3 to be carried out, by failing to prevent, as part of the [*integrated project management team*] and within the key areas of [the] project, such as those related to costs, risks and others, the unjustified increase of the investments in the execution of the project through repeated delays and misleading behaviors that led to the payment of goods and services not foreseen for the project, which affects the economic interests of the Nation as majority shareholder of ECOPETROL S.A., and controlling company of the subsidiary REFINERÍA DE CARTAGENA S.A.[341]

157. In its analysis, the Deputy Comptroller reiterated the autonomy of fiscal liability from "other types of liability", such as "contractual, disciplinary or criminal liability", noting that

> Such autonomy means that a fact or conduct that gives rise to a detriment to public assets may be investigated by the comptrollers' offices, which will limit themselves to establishing the existence of the fiscal damage and declaring that a subject who by action or omission led to the damage is fiscally liable. . . .
>
> The contractual judge does not have the competence to determine the existence of fiscal damage nor to order its reparation, nor is the fiscal control body in the possibility of declaring the breach of obligations, nor the alteration of the contractual equilibrium. [The CGR] can only declare the existence of fiscal liability and order the compensation of the fiscal damage . . . .[342]

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[341] *Id.*, p. 5481 (translation from Spanish).

[342] *Id.*, pp. 5164-5165, 5167-5168 (translation from Spanish). Although the Ruling is clear in upholding the autonomy of the Fiscal Liability Proceeding from arbitration proceedings based on contractual clauses, it is equally clear in indicating that in the event that the economic damage to the State is compensated in another forum, it must necessarily be taken into account in the fiscal proceeding. *Id.*, p. 5163 ("Now, in both cases of the contractor companies (the CBI group of companies and the FPJVC), it should be emphasized that paragraph 1 of Article 4 of Law 610 of 2000: . . . clearly confirms the possibility of carrying out the present fiscal liability proceeding independently of other proceedings that may be pursued, and in this case, [independently of] the arbitration tribunals to which both groups of companies refer in their arguments, without this being considered as a violation to the principle of *non bis in idem* since they are actions or

158. In response to the argument advanced by Foster Wheeler and Process Consultants in both the Fiscal Liability Proceeding and this Arbitration that the [redacted] of the Services Contract deprived the CGR of jurisdiction to initiate a fiscal liability proceeding, the Ruling with Fiscal Liability clearly stated:

> [C]ontractual clauses related to the resolution of disputes between the parties and arising from the contract itself do not overturn the authority of the Office of the Comptroller General of the Republic to carry out a fiscal liability proceeding, which in fact is not a judicial process, but a special administrative proceeding, and its nature does not substitute nor replace the judge of the contract, let alone the Court of Arbitration of the International Chamber of Commerce. Thus, an arbitration clause does not overturn the authority of the fiscal control entities. In other words, it cannot be considered, and this has been confirmed by the high courts, that a contractual clause. . . can totally annul the competence of the administrative judges, the [authority] of the fiscal control bodies or even the [competence] of criminal courts, under the assumption that any dispute must be brought [to arbitration].[343]

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proceedings of a different nature. Neither would there be a hypothetical case of unjust enrichment or double recovery derived from arbitration decisions favorable to Reficar and a ruling with fiscal liability, since the [fiscal] liability proceeding is an essentially compensatory action, and in the event of such compensation in another instance, it must necessarily be taken into account in the [fiscal liability proceeding].”), p. 5165 (“At [independent] disciplinary, criminal or administrative proceedings it could be simultaneously declared that a conduct investigated by the comptrollers’ offices also typifies a disciplinary fault, a crime or a contractual liability, as the case may be, which is not incompatible because of the autonomous and independent nature of the fiscal liability proceeding. However, it would have the consequence that if the damage is compensated first in some other instance, the comptrollers’ offices must cease the fiscal action initiated due to the facts causing the same detriment, in accordance with the provisions of Article 111 of Law 1474 of 2011. . . the Office must point out that the fact that the compensation expected from the [fiscal liability] proceeding is generated in a different proceeding cannot become a source of unjust enrichment. That is because if the compensation is obtained in another proceeding, [such compensation] must be taken into account in order to even close the [fiscal liability] proceeding, provided that one of the conditions for its closure is fulfilled: that the damage has been compensated.”) (translation from Spanish; emphasis added). Thus, the Ruling with Fiscal Liability directly responds to Claimants’ argument in their Notice of Arbitration that if Reficar were to receive compensation from CB&I [redacted], FPJVC should receive a credit or else Colombia would receive double compensation in respect of the same damage. *See* Notice of Arbitration, ¶¶ 138-142.

[343] **Ex. R-80**, Ruling with Fiscal Liability – Part 10: Individualization, contractors II, pp. 5156-5157 (translation from Spanish; emphasis added). *See Id.*, p. 5168 (“With such arguments, we would go to the extreme of excluding criminal prosecution, disciplinary or fiscal control of contracts involving public resources, only because of the autonomy of the will of the parties. How about that? The parties of the contracts financed with public resources freeing themselves from the imperative authorities in fiscal, disciplinary and criminal

159. Appeals before the Deputy Comptroller and the fiscal liability and administrative sanctions chamber of the CGR were available against the Ruling with Fiscal Liability.[344] Pursuant to Article 56 of Law 610 of 2000, those who were fiscally liable have a term of five days from the date of the notification of the Ruling with Fiscal Liability to file appeals. Although Foster Wheeler and Process Consultants filed an *acción de tutela* alleging a violation of due process in the Fiscal Liability Process seeking the non-application of that five-day term,[345] on May 7, 2021 Foster Wheeler and Process Consultants filed a timely appeal.[346] By filing the *acción de tutela* and the appeal, Claimants violated the waiver referred to in Article 10.18.2 of the Treaty, thus depriving the Tribunal of jurisdiction over this claim.[347]

160. As of the date of this Memorial, the appeal is pending resolution. Once it is decided upon and the Ruling with Fiscal Liability becomes binding, it shall be subject to judicial control by the courts of the administrative adjudicatory jurisdiction.[348]

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matters, knowing that the contractual judge – the arbitral tribunal, lacks the competence to establish other types of liability other than the contractual liability of the parties.") (translation from Spanish; emphasis added).

[344] **Ex. R-83**, Ruling with Fiscal Liability – Part 13: Resolutory, p. 6242.

[345] *See* **Ex. R-87**, *Acción de Tutela* No. 2021-00385 filed by Foster Wheeler and Process Consultants against CGR, April 28, 2021 ("*Acción de Tutela* 2021-B"). Foster Wheeler and Process Consultants alleged a violation of their rights of due process, defense and contradiction with respect to the application of the five-day term for filing appeals against the Ruling with Fiscal Liability, and requested the judge to order the non-application of the law and the substitution of the legal term for a term of ninety (90) days. At first instance, the Administrative Adjudicatory Proceedings Court of Cundinamarca declared the *acción de tutela* inadmissible, finding that the five (5) day term had been deemed to be sufficient by the legislator and that, since its enactment, it has not been challenged or declared unconstitutional, and that, in any event, the claimants have other means to allege a violation of their fundamental rights of defense and due process. **Ex. R-88**, Administrative Adjudicatory Proceedings Court of Cundinamarca – Fourth Section, Subsection B, *Acción de Tutela* No. 2021-00385 filed by Foster Wheeler and Process Consultants against CGR, *Tutela* Judgement of First Instance, May 14, 2021, pp. 28, 32.

[346] *See* **Ex. R-89**, Appeal filed by Foster Wheeler and Process Consultants against the Ruling with Fiscal Liability, May 7, 2021. The other liable parties also filed appeals against the Ruling with Fiscal Liability.

[347] *See* ¶¶ 329-343, *infra.*

[348] **Ex. R-83**, Ruling with Fiscal Liability – Part 13: Resolutory, p. 6243. *See* ¶¶ 109-114, *supra*. *See* **Ex. R-80**, Ruling with Fiscal Liability – Part 10: Individualization, contractors II, p. 5162 (citing the order of the

161. In its operative part, the Ruling with Fiscal Liability expressly indicates that the inclusion in the bulletin of fiscally liable parties will be postponed until the judgement that concludes the judicial control is final.[349]

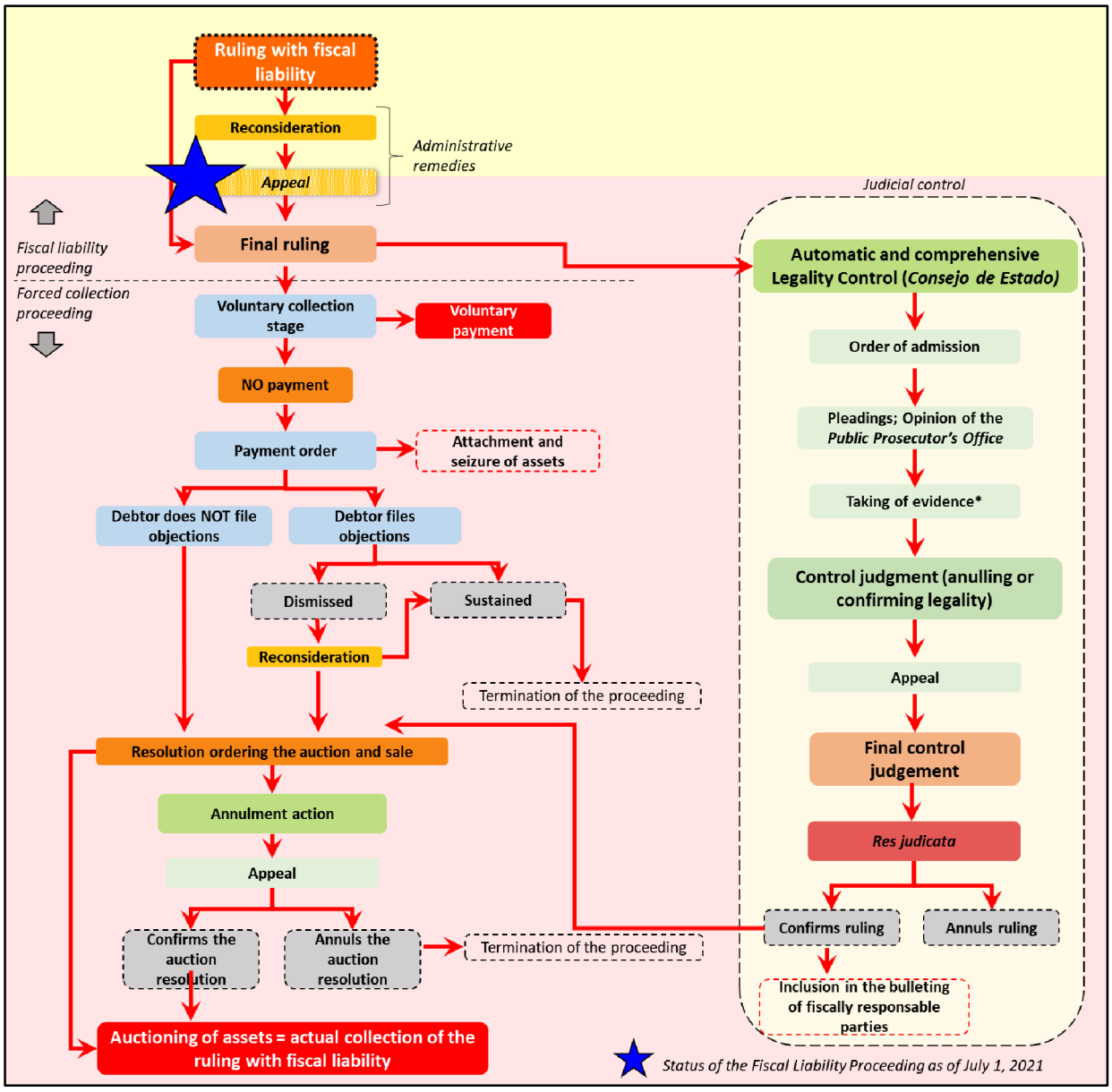
162. As of the date of this Memorial, the CGR has not decreed precautionary measures against the assets of Foster Wheeler or Process Consultants, nor has it initiated forced collection of the amount set forth in the Ruling with Fiscal Liability. Needless to say, neither Foster Wheeler nor Process Consultants have made any voluntary payment to the CGR.

163. For the Tribunal's reference, the following diagram illustrates the current status of the Fiscal Liability Proceeding (marked with a star), as well as the multiple administrative and judicial proceedings and appeals that are still pending (marked with pink background) and which would need to be completed prior to there being any measure that could give rise to a monetary harm or damage to Claimants.

Comptroller General of May 31, 2018, which confirms order 0673 of May 11, 2018: "[T]he fiscal liability proceeding, guarantees not only the exercise of the legality control [at the administrative level] by the competent fiscal official, but also the legality control in the [administrative adjudicatory] jurisdiction once an [administrative] decision on the merits has been issued. Therefore, the administrative act [on the merits] is presumed to be legal, but unlike to the judicial decision, it does not become *res judicata*.") (translation from Spanish). *See* n. 226, *supra*.

[349] **Ex. R-83**, Ruling with Fiscal Liability – Part 13: Resolutory, p. 6243.

Figure 5 - Status of the Fiscal Liability Proceeding as of 1 July 2021



PRELIMINARY OBJECTION UNDER ARTICLE 10.20.4 OF THE TREATY

164. Article 10.20.4 of the Treaty provides that the Tribunal shall address and decide "as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be

made under Article 10.26."[350] This preliminary objection is intended to dismiss, at an early stage of the arbitral proceeding, defective claims that do not meet the essential prerequisites for submitting a valid claim to arbitration under the Treaty, and in respect of which the Tribunal is not able to make an award in Claimants' favor, irrespective of whether their factual allegations were correct.[351] In short, this objection pertains to the legal basis of the claim that has been raised.

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[350] **Ex. RL-1**, Treaty, Article 10.20.4. The provision states that, when deciding upon this objection, the Tribunal "shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration." *Id.* However, the Tribunal "may also consider any relevant facts not in dispute" and should not assume to be true legal allegations (even those disguised as factual allegations) or conclusions that are not supported by the relevant factual allegations. *Id.*; **Ex. RL-36**, *Pac Rim Cayman LLC v. Republic of El Salvador,* ICSID Case No. ARB/09/12 (DR-CAFTA), Decision on the Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, August 2, 2010 ("*Pac Rim*"), ¶ 91 ("It is also only 'factual allegations' that are assumed to be true under this procedure. The phrase does not include any legal allegations. It could not therefore include a legal allegation clothed as a factual allegation. Nor could it include a mere conclusion unsupported by any relevant factual allegation without depriving the procedure of any practical application. In short, the Tribunal concludes, again, that substance must clearly prevail over form under this procedure."). Furthermore, the only factual allegations that must be taken as true by the Tribunal as regards an objection under Article 10.20.4 of the Treaty are those outlined in the Notice of Arbitration, and not those raised thereafter. **Ex. RL-36,** *Pac Rim*, ¶ 90 ("[O]nly the notice (or amended notice) of arbitration which benefits from a presumption of truthfulness: there is to be no assumption of truth as regards factual allegations made elsewhere, for example in other written or oral submissions made by a claimant to the tribunal under the procedure for addressing the respondent's preliminary objection.").

[351] *See* **Ex. RL-37**, Lee M. Caplan and Jeremy K. Sharpe, United States, in COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 755 (C. Brown (ed.) Oxford University Press 2013), p. 835 ("Article 28(4) [which is identical to Article 10.20.4 of the Treaty] borrows from Rule 12(b)(6) of the US Federal Rules of Civil Procedure, which permits dismissal for failure to state a claim upon which relief can be granted. The rule promotes judicial efficiency by disposing of legally defective cases before the disputing parties have expended time and money litigating a fatally flawed claim.") (emphasis added); **Ex. RL-38**, Audley Sheppard, *The Jurisdictional Threshold of a Prima Facie Case*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 933 (P. Muchlinski and others (eds.), Oxford University Press 2008), pp. 957-959 ("A new generation of investment treaties involving the USA includes an express provision allowing a respondent State to make an application akin to a motion to dismiss. [That is the case, for] example, [of] the Central America-Dominican Republic-US Free Trade Agreement (CAFTA-DR), signed on 5 August 2004, . . . at Article 10.20. . . . A short explanation of CAFTA-DR produced by the Office of the United States Trade Representative states: 'The CAFTA-DR includes safeguards to ensure that investors cannot abuse the arbitration process, including provisions (based on U.S. court rules) that allow tribunals to dismiss frivolous claims at an early stage of the proceedings or to award attorneys' fees and costs as a deterrent to such claims.' Article 10.20 was inspired by the 'motion to dismiss' procedure, in which the defendant asserts that the plaintiff has failed to state a claim upon which relief can be granted (Rules of Federal Procedure, Rule 12(b)(6)). . . . [A] motion to dismiss is not a challenge to the court's jurisdiction, but a challenge to the legal sustainability of the claim at a very early stage of the proceedings. . . . The wording of Article 10.20 of CAFTA quoted above is reproduced in Article 28 of the US Model BIT, which was completed in November 2004. This wording is also contained in the US-Uruguay BIT (4 November 2005), US-Peru TPA (12 April 2006), the US-Colombia [TPA] (22 November 2006), and the US-Panama TPA (28 June 2007).").

165. The Treaty contains specific provisions setting forth the requirements that a claim must meet in order to be submitted to arbitration and the forms of relief that a tribunal is empowered to award. Thus, Article 10.16.1 of the Treaty provides that a claimant may only submit to arbitration a claim that alleges (i) that the respondent has breached a substantive obligation under the Treaty, an investment authorization or an investment agreement; and (ii) that, by reason of or arising out of such breach, the claimant has incurred loss or damage.[352] Moreover, Article 10.26 provides that an arbitral tribunal constituted under the Treaty has the power to award "monetary damages" only, and is not authorized to "award punitive damages" or non-monetary damages.[353]

166. In the present case, it is clear that the claim submitted to arbitration by Claimants is not a claim in respect of which, as a matter of law, an award in their favor can be made, because (I) none of the essential requirements set forth in Article 10.16.1 of the Treaty for the submission of a valid claim to arbitration is met; and (II) Claimants' claims exceed the forms of relief that the Tribunal is empowered to grant under Article 10.26 of the Treaty. Therefore, Claimants' claim must be dismissed as a preliminary question without the need to analyze the objections to the Tribunal's jurisdiction, much less proceed to the merits of the case.

(emphasis added). In any event, while this objection is inspired by Rule 12(b)(6) of the U.S. Rules of Federal Procedure, it should be clarified that the scope of Article 10.20.4 of the Treaty is not limited to addressing merely "frivolous" or "legally impossible" claims, but is broader in scope. **Ex. RL-36**, *Pac Rim*, ¶ 108 ("The Tribunal does not consider that the standard of review under Article 10.20.4 is limited to 'frivolous' claims or 'legally impossible' claims, contrary to the submissions of the Claimant. These words could have been used by the Contracting Parties in agreeing CAFTA; but all are significantly absent. Moreover, the implied addition of these or similar words would significantly restrict the arbitral remedy under Article 10.20.4, when the structure of this provision permits a more natural and effective interpretation consistent with its object and purpose.").

[352] **Ex. RL-1**, Treaty, Article 10.16.1.

[353] *Id.*, Article 10.26.

167. Each of these issues will be discussed in detail below.

I.

An Award Cannot be Made in Claimants' Favor Because the Requirements of Article 10.16.1 of the Treaty Are Not Met

168. In order for an investor – either on its own behalf or on behalf of an enterprise that it owns or controls directly or indirectly – to submit a claim to arbitration under the Treaty, Article 10.16.1 requires that the following requirements be met: (A) that there is a breach of a substantive obligation under the Treaty or of an investment authorization or investment agreement; and (B) that the claimant or enterprise has incurred loss or damage by reason of or arising out of such breach.[354]

169. In the present case, the factual allegations raised by Claimants in their Notice of Arbitration are not capable of satisfying any of these inescapable requirements for submitting a valid Treaty claim.[355] A claim such as Claimants', which has not been

[354] *Id.,* Article 10.16.1. It should also be noted that failure to comply with these requirements affects not only the admissibility of the claim submitted to arbitration, but also the consent itself, since the Contracting Parties to the Treaty only "consent to the submission of a claim to arbitration under this Section [B] in accordance with this Agreement." *Id*., Article 10.17.1. In other words, the Contracting Parties did not consent to the submission of a claim to arbitration under the Treaty in the absence of a breach of a substantive obligation under the Treaty or an investment agreement, or in the absence of loss or damage incurred by reason of or arising out of that breach. *See* **Ex. RL-39**, *United Parcel Service of America Inc v. Government of Canada*, ICSID Case No. UNCT/02/1 (NAFTA), Award on Jurisdiction, November 22, 2002 ("*UPS*"), ¶ 60 ("Jurisdiction is conferred by article 1116(1)(b) [of NAFTA, which is similar to Article 10.16.1 of the Treaty] and is subject to its terms. Article 1116 concerning Investor-State disputes, like the similar article 1117, states the extent of what the Parties have agreed to in respect of claims being submitted to arbitration against each of them by an investor of another Party.").

[355] The requirements under Article 10.16.1 of the Treaty for the submission of a valid claim to arbitration must be analyzed at the time such claim is submitted to arbitration. In other words, the admissibility of the claim will depend on whether these requirements (*i.e.*, a breach of a substantive obligation under the Treaty or an investment agreement and the incurrence of loss or damage by reason of or as a result of such breach) are fulfilled on the date on which the claim is submitted to arbitration. *See for example* **Ex. RL-40**, *Glamis Gold, Ltd. v. United States of America,* UNCITRAL (NAFTA), Award, June 8, 2009 ("*Glamis*"), ¶¶ 328, 331, 335 ("The issue of ripeness therefore turns on the determination of whether the challenged California measures had effected harm upon Claimant's property interests by the time Claimant submitted its claim to arbitration.") (emphasis added).

validly submitted in accordance with the Treaty, is not a claim in respect of which this Tribunal can make a favorable award under Article 10.26 of the Treaty. For that reason, the claim must be dismissed in its entirety.

A. No Breach Exists That May Give Rise to a Claim Under Article 10.16.1 of the Treaty

170. The first requirement under Article 10.16.1 for an investor to submit a claim to arbitration under the Treaty is the existence of a breach of a substantive Treaty obligation or of an investment authorization or investment agreement at the time of the submission of the claim. Although in this case Claimants argue that there was a breach of certain substantive obligations under the Treaty and of an investment agreement, according to the factual allegations raised by Claimants themselves (1) there could not have been a breach of a substantive obligation of the Treaty; and (2) much less so could there have been a breach of an investment agreement.

(1) There Could Not Have Been Any Breach of a Substantive Treaty Obligation in This Case

171. In this case, the factual allegations raised by Claimants in their Notice of Arbitration are not capable of constituting, as a matter of law, a breach of the substantive obligations under the Treaty. This is principally due to the fact that (a) a measure capable of constituting a breach of a substantive obligation under the Treaty has not occurred, since a final or enforceable Ruling with Fiscal Liability has not yet been issued and the judicial control has not been carried out; and (b) Claimants have not been able to establish that their claim may constitute a *prima facie* breach of substantive obligations under the Treaty.

a. No Measure Capable of Constituting a Breach of a Treaty Obligation Has Occurred

172. All of Claimants' claims in this case, which concerns alleged breaches of the substantive obligations under the Treaty, are based on the Fiscal Liability Proceeding initiated by the CGR in Colombia against Foster Wheeler and Process Consultants and other natural and juridical persons, both Colombian and foreign. However, taking Claimants' allegations as true, they do not establish that there is currently a measure in the Fiscal Liability Proceeding that is capable of constituting a breach of a substantive Treaty obligation, since the Ruling with Fiscal Liability is not yet final.

173. Moreover, at the time the Notice of Arbitration was filed, a Ruling with Fiscal Liability had not even been issued; rather, there was simply an Indictment Order, which is a procedural or interlocutory decision that does not definitively define any legal situation.[356]

174. While the Deputy Comptroller issued the Ruling with Fiscal Liability months after this claim was submitted to arbitration, that Ruling has been appealed before the fiscal liability and administrative sanctions chamber of the CGR with suspensive effect. Only when the appeal is resolved, thus exhausting administrative remedies, would the Ruling with Fiscal Liability become final (in the event it is upheld).[357] It also remains that the tribunals of the administrative adjudicatory jurisdiction carry out a judicial control (which in any case may be subject to appeal).[358]

175. At present, it is unknown whether the Ruling with Fiscal Liability will be finally confirmed at the administrative level and, if so, whether it will remain in force after

[356] *See* ¶¶ 99, 135, *supra*.

[357] *See* ¶¶ 106, 160, 163, *supra*.

[358] *See* n. 226, ¶¶ 109-114, 160, 163, *supra*.

the judicial control is carried out before the tribunals of the administrative adjudicatory jurisdiction.

176. It is therefore clear that the arbitration proceeding initiated by Claimants is premature.[359] A mere administrative act that is not final and is subject to judicial control cannot, by itself, constitute a measure that is capable of constituting a breach of a substantive Treaty obligation: there cannot be a denial of justice, much less an expropriation or a breach of some other substantive Treaty obligation, such as the minimum standard of treatment, national treatment or most-favored-nation treatment.

177. This case is analogous in many respects to the *Corona v. Dominican Republic* case, which was dismissed under a summary preliminary objection pursuant to Article 10.20.5 of the DR-CAFTA (which is identical to Article 10.20.5 of the Treaty).[360] In that case, the Environment Ministry of the Dominican Republic denied the claimant environmental approval with regards to a concession on grounds that the project was not environmentally viable, without proceeding to reconsider its decision. In dismissing the claimant's arbitration claim for alleged breaches of the DR-CAFTA, the tribunal held the following:

> [T]he Tribunal does not believe that an administrative act, *in and of itself*, particularly as the level of a first instance decision maker, can constitute a denial of justice under customary

[359] Neither the mere initiation of the Fiscal Liability Proceeding against Foster Wheeler and Process Consultants, nor the subsequent indictment, can constitute a breach of a substantive obligation under the Treaty. The conduct of fiscal liability proceedings involving U.S. investors when there is economic damage to the State constitutes an exercise by Colombia of a constitutional power that is not prohibited by the Treaty. Moreover, a fiscal liability proceeding is perfectly compatible with the Treaty, since one of the objectives expressly stated in the Preamble of the Colombia-U.S. TPA is that the Contracting Parties may "preserve their ability to safeguard the public welfare." **Ex. RL-2**, Colombia-US TPA, Preamble.

[360] It should be recalled that Article 10.20.5 of the Treaty provides for an expedited preliminary objection, which is even more limited in scope and subject to shorter terms than an objection under Article 10.20.4 of the Treaty. **Ex. RL-1**, Treaty, Article 10.20.5.

> international law, when further remedies or avenues of appeal are potentially available under municipal law.[361]

178. Accordingly, the *Corona* tribunal held that "a finding of denial of justice under international law necessarily depends on the final product of the State's domestic legal system", and "the 'responsibility [of a State] is engaged as the result of a definitive judicial decision by a court of last resort'", "there can be no denial of justice without a final decision of a State's highest judicial authority."[362] Moreover, the tribunal emphasized that "not only is there no final decision of a State's highest judicial authority, there is no decision of an administrative adjudicatory body or judicial authority *at all*."[363] The same applies here, insofar as there is merely an administrative act that is not final and has not yet been subject to judicial control.

179. Claimants' preferred case, *Glencore v. Colombia*, also supports Colombia's position.[364] When the claimants in *Glencore* submitted their claim to arbitration, the ruling with fiscal liability was already final at the administrative level after administrative remedies had been exhausted and after that administrative act had already been subject to an appeal for annulment before the administrative adjudicatory jurisdiction.[365]

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[361] **Ex. RL-41**, *Corona Materials, LLC v. Dominican Republic,* ICSID Case No. ARB(AF)/14/3 (DR-CAFTA), Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, May 31, 2016 ("*Corona Award*"), ¶ 248 (emphasis added).

[362] *Id.*, ¶ 264 (emphasis added).

[363] *Id.* (emphasis added). *See also* **Ex. RL-42**, Campbell McLachlan, Laurence Shore and Matthew Weiniger, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (2d ed., Oxford International Arbitration Series 2017), ¶ 7.68 ("Any failures in administrative decision-making would not give rise themselves to an international claim, since they would first have had to be tested by the investor in the local courts.") (emphasis added); ¶¶ 201-210, *infra*.

[364] Notice of Arbitration, ¶¶ 130-131, 144, 165; **Ex. RL-20**, *Glencore I*.

[365] It should be clarified that at that time the regulation which created the automatic and comprehensive legality control was not in force. *See* ¶¶ 75, 109, *supra*. It is also worth pointing out that under the Colombia-Switzerland BIT, there is no waiver requirement equivalent to that contained in Article 10.18.2(b) of the Treaty. *See* ¶ 330, *infra*.

However, beyond the more advanced state of the fiscal liability proceeding in *Glencore*, there is a fundamental difference between that case and the present: the protocol to the Colombia-Switzerland Bilateral Investment Treaty ("BIT") – being the treaty under which the *Glencore* tribunal was constituted – stipulated that a claim based on an administrative act could be submitted to arbitration, provided that the claimant had exhausted administrative remedies[366] (which is not the case under the Treaty, which contains no analogous provision). This fundamental difference between the two cases further reinforces the argument that in the present case there is not yet a measure that is capable of constituting a breach of the Treaty.

180. Arbitral tribunals have consistently rejected claims of alleged breaches of substantive treaty obligations when such claims have been raised prematurely:

- *Aminoil v. Kuwait*: "[T]he possibility (prior to the issuing of Decree-Law No. 124) of seizing an arbitral tribunal with the particular question over which the Parties had failed to come to an understanding . . . . did not exist, because unless and until the Government took some concrete step – such as nationalization – in consequence of that failure, there would have been no definite complaint with which to seize any arbitral tribunal."[367]

- *Enkev v. Poland*: "Towards the beginning of this arbitration, the Respondent helpfully supplied a 'road-map' of the different and successive administrative, legal and judicial steps which could lead to the eventual expropriation of Enkev Polska's real property. . . . The road-map consists of seven steps, of which the Notification of 7 January 2014 forms only the first step. The second step has not yet been reached, still less any further administrative, legal or judicial step culminating in the actual expropriation of Enkev Polska's real property

[366] **Ex. RL-20**, *Glencore I*, ¶¶ 1114-1118; **Ex. RL-43**, Agreement Between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments, signed on May 17, 2006 and effective from October 6, 2009 ("Colombia-Switzerland BIT"), Protocol, Ad Article 11(3) ("With respect to Colombia, in order to submit a claim for settlement under the said Article, domestic administrative remedies shall be exhausted in accordance with applicable laws and regulations.").

[367] **Ex. RL-44**, *The American Independent Oil Company v. Government of the State of Kuwait*, Final Award, March 24, 1982, ¶ 112 (emphasis added).

under the Road Legislation. In these circumstances, the Tribunal finds that the Claimant has not established any want of due process under Polish or international law: that process has far to go in Poland, including the possibility for several judicial interventions by the Polish courts. In the Tribunal's view, the Claimant's complaint is premature."[368]

- *Glamis Gold v. United States*: In the determination of whether the Tribunal has subject matter jurisdiction to decide the Article 1110 claims before it, the Tribunal begins from the premise that a finding of expropriation requires that a governmental act has breached an obligation under Chapter 11 and such breach has resulted in loss or damage. NAFTA Article 1117(1) establishes standing for an investor of a State Party to bring a claim for harm done to its subsidiary in the territory of another State Party under the investment provisions of Chapter 11. Through the language of Article 1117(1), the State Parties conceived of a ripeness requirement in that a claimant needs *to have* incurred loss or damage in order to bring a claim for compensation under Article 1120. Claims only arise under NAFTA Article 1110 when actual confiscation follows, and thus mere threats of expropriation or nationalization are not sufficient to make such a claim ripe; for an Article 1110 claim to be ripe, the governmental act must have directly or indirectly taken a property interest resulting in actual present harm to an investor. . . . Without a governmental act that moves beyond a mere threat of expropriation to an actual interference with a property interest, it is impossible to assess the economic impact of the interference."[369]

- *Achmea v. Slovakia II*: "As the Slovak Republic has made abundantly clear in its submissions, the process is still in its infancy stages, since no draft bill has as of yet been submitted to the Slovak legislature. Hence, at this moment, it is still entirely speculative if, when, and under which conditions the purported expropriation of Achema's investment is to take place. . . . On the basis of the foregoing, the Tribunal is of the view that the Claimant has failed to state a prima facie case for its Article 5 claim. . . . The Tribunal is being invited to engage in a speculative exercise, looking into the future to examine a State

[368] **Ex. RL-45**, *Enkev Beheer B.V. v. Republic of Poland,* PCA Case No. 2013-01, First Partial Award, April 29, 2014, ¶¶ 350-351 (emphasis added).

[369] **Ex. RL-40**, *Glamis*, ¶¶ 328, 331 (emphasis added). *See also* **Ex. RL-46**, *Mariposa Development Company and Others (United States) v. Panama,* June 27, 1933, REPORTS OF INTERNATIONAL ARBITRAL AWARDS, Volume VI, p. 341 ("Practical common sense indicates that the mere passage of an act under which private property may later be expropriated without compensation by judicial or executive action should not at once create an international claim on behalf of every alien property holder in the country. There should be a *locus penitentiae* for diplomatic representation and executive forbearance, and claims should arise only when actual confiscation follows.").

> conduct that has not yet materialized and whose features may not be determined with certainty at this stage. The Tribunal concludes that that is impermissible under the BIT and thus falls outside the ambit of the Tribunal's jurisdiction."[370]

181. In sum, the case brought by Claimants is premature since there is no measure to date that is capable of constituting a breach of a substantive violation under the Treaty (whether a denial of justice, an expropriation or any of the other alleged breaches), given the absence of an administrative act that has become final, much less so a judicial decision. In short, Claimants are inviting the Tribunal to engage in a merely speculative exercise.

182. In sum, according to Article 10.16.1 of the Treaty, the submission of a valid claim to arbitration requires that a substantive obligation under the Treaty has been breached as of the date of the submission. However, as of the date of the submission of the present claim to arbitration,[371] there could not have been any breach of a substantive obligation under the Treaty simply because there was no measure capable of constituting such a breach,[372] and thus Claimants' claim is premature and inadmissible.

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[370] **Ex. RL-47**, *Achmea B.V. v. Slovak Republic II*, PCA Case No. 2013-12, Award on Jurisdiction and Admissibility, May 20, 2014 ("*Achmea II*"), ¶¶ 238, 251 (emphasis added).

[371] Compliance with the requirements of Article 10.16.1 of the Treaty regarding the submission of a valid claim to arbitration must be analyzed as of the date the claim is submitted. *See* n. 365, *supra*. In that regard, it should be recalled that, as of the date on which Claimants filed their Notice of Arbitration, the Fiscal Liability Proceeding was underway, and Foster Wheeler and Process Consultants had been charged. However, no Ruling with Fiscal Liability had been issued by that point. While the Ruling with Fiscal Liability was issued after Claimants had submitted their claim, the Ruling is not final (not even at the administrative level) and Foster Wheeler and Process Consultants have not incurred any loss or damage, such that the situation remains unchanged and, to date, there is still no measure capable of constituting a breach of a Treaty obligation.

[372] *See* **Ex. RL-48**, *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17 (NAFTA), Submission of the United States of America, July 25, 2014 ("*Submission of the U.S. in Mesa Power*"), ¶ 4 ("NAFTA Article 1116(1) [which is almost identical to Article 10.16.1 of the Treaty] further provides that an investor may submit a claim to arbitration that a Party 'has breached' certain obligations, and that the investor 'has incurred loss or damage by reason of, or arising out of, that breach.' Thus, there can be no claim under Article 1116(1) until an investor has suffered harm from an alleged breach. Consistent with Articles 1116(1) and 1120(1), therefore, a disputing investor may submit a claim to arbitration under Chapter Eleven only for a breach that already has occurred and for which damage or loss has already been

b. Claimants Have Failed to Establish a *Prima Facie* Breach of Any Substantive Obligations Under the Treaty

183. In any event, Claimants have not raised any allegations that can *prima facie* constitute a breach of any of the substantive Treaty obligations they invoke.

184. In investment arbitration, it is a widely recognized principle that claimants have the burden of proving at least a *prima facie* case that the facts they allege are capable of constituting, as a matter of law, a breach of a substantive treaty obligation.[373]

185. Claimants have not been able to satisfy that burden. In their Notice of Arbitration, Claimants argue that Colombia has breached the following substantive obligations under the Treaty: (i) fair and equitable treatment (included within the minimum standard of treatment); (ii) no expropriation without compensation; (iii) national treatment; and (iv) most-favored-nation treatment.[374] Claimants, however, have not presented a *prima facie* case of a possible breach of these substantive obligations under the Treaty.

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incurred. . . . No claim based solely on speculation as to future breaches or future loss may be submitted.") (emphasis added).

[373] *See* **Ex. RL-49**, *Salini Construttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan,* ICSID Case No. ARB/02/13, Award, January 31, 2006, ¶ 151 ("[T]he Tribunal will accordingly seek to determine whether the facts alleged by the Claimants in this case, if established, are capable of coming within those provisions of the BIT which have been invoked." (emphasis added); **Ex. RL-39**, *UPS*, ¶¶ 33-34 ("[C]ounsel for UPS accepted the test stated by Canada in its Reply Memorial: '[The Tribunal] must conduct a prima facie analysis of the NAFTA obligations, which UPS seeks to invoke, and determine whether the facts alleged are capable of constituting a violation of these obligations.' That formulation rightly makes plain that a claimant party's mere assertion that a dispute is within the Tribunal's jurisdiction is not conclusive. It is the Tribunal that must decide."), ¶ 37 (where the tribunal considered the following crucial question: "Do the facts alleged by [Claimant] fall within those provisions; are the facts capable, once proved, of constituting breaches of the obligations they state?") (emphasis added); **Ex. RL-50**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, February 8, 2005, ¶ 119 (noting that "the claimant must show that the alleged facts on which it relied were capable of falling within the provisions of the treaty."); **Ex. RL-51**, *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, September 13, 2006 ("*Telenor*"), ¶ 68 ("The onus is on the Claimant to show what is alleged to constitute expropriation is at least capable of so doing. There must, in other words, be a prima facie case that the BIT applies."); **Ap RL-52**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, November 14, 2005, ¶ 194 (indicating that the tribunal "should be satisfied that, if the facts or the contentions alleged by Bayindir are ultimately proven true, they would be capable of constituting a violation of the BIT.").

[374] Notice of Arbitration, ¶ 30.

(i) Claimants Have Failed to Establish a *Prima Facie* Breach of Fair and Equitable Treatment

186. Claimants have not presented a *prima facie* case of a possible breach of the FET standard because: (a) the Treaty's FET standard only protects investments and not investors, and all of Claimants' claims are based on alleged acts, omissions and conduct by Colombia that would have affected only investors; (b) in any event, Claimants plead their case on the basis of an incorrect FET standard, since, under the Treaty, the FET standard is limited to the minimum standard of treatment under customary international law, and none of Claimants' allegations are capable of violating the minimum standard of treatment; and (c) ultimately, irrespective of the limited scope of the FET standard, there could not have been a denial of justice in this case, given that there is not even a final administrative act in the Fiscal Liability Proceeding, and much less so has there been a fundamental breach of due process.

(a) The FET Standard Only Protects Investments and Not Investors

187. The minimum standard of treatment under the Treaty, which includes the FET obligation, only protects investments and not investors. Article 10.5.1 of the Treaty expressly provides:

> Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.[375]

[375] **Ex. RL-1**, Treaty, Article 10.5.1 (emphasis added). This is clearly the interpretation that emerges from the ordinary meaning of the terms of the provision in their context. *See*, in that respect, **Ex. RL-53**, Vienna Convention of the Law of Treaties, done at Vienna on May 23, 1969, U.N. Doc A/CONF.39/27 (1969), 1155 U.N.T.S. 331, Article 31.1. *See also* **Ex. RL-1**, Treaty, Article 10.5.2 ("For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments.") (emphasis added).

188. The United States – the other Contracting Party to the Treaty – has ratified, in its submissions as a non-disputing party, this limitation on the scope of the FET obligation under the Treaty:

> Some obligations in the U.S.-Colombia TPA require a Party to accord treatment to both investors and covered investments, whereas other obligations in the Agreement only require a Party to accord treatment to a covered investment. For example, the Article 10.5 requires the Parties to accord "fair and equitable treatment" and "full protection and security" only to covered investments, not to investors. In contrast, Article 10.3 requires the Parties to accord "national treatment" to both investors and covered investments. In accordance with this distinction, for the Agreements' obligations which only extend to covered investments, a claimant (*i.e.*, an investor) must establish that a Party's treatment was accorded to the covered *investment* and violated the relevant obligation.[376]

189. Arbitral jurisprudence has also pointed out that when the FET obligation protects only investments and not investors, an FET violation can only occur if the State's acts, omissions or conduct affect investments, and not if such acts, omissions or conduct affect only investors:

- *Nelson v. Mexico*: "From the text of the treaty, it is clear that the obligation of fair and equitable treatment is limited to the treatment of 'investments of investors'. Therefore, before reviewing Claimant's allegations of unfair and inequitable treatment, the Tribunal must first

[376] **Ex. RL-54**, *Angel Manuel Seda and others v. Republic of Colombia*, ICSID Case No. ARB/19/16 (Colombia-U.S. TPA), Submission of the United States of America, February 26, 2021 ("*Submission of the U.S. in Angel Seda*"), ¶ 5 (emphasis added). *See also* **Ex. RL-55**, *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2 (NAFTA), Submission of the United States of America, June 21, 2019 ("*Submission of the U.S. in Lion Mexico*"), ¶ 10 ("Article 1105(1) [of NAFTA] differs from other substantive obligations, such as those in Articles 1102, 1103 and the second paragraph of Article 1105, in that it obligates a Party to accord treatment only to an '*investment*.' In the context of a claim for denial of justice under Article 1105(1), a claimant (*i.e.*, an investor) must therefore establish that the treatment accorded to its investment rose to the level of a denial of justice under customary international law."); **Ex. RL-56**, *Omega Engineering LLC and Mr. Oscar Rivera v. Republic of Panamá*, ICSID Case No ARB/16/42 (Panama-U.S. TPA), Submission of the United States of America, February 3, 2020 ("*Submission of the U.S. in Omega*"), ¶ 46.

clarify what is the investment that, according to Claimant, suffered from unfair and inequitable treatment."[377]

- *Belokon v. Kyrgyzstan*: "The BIT however only requires FET in accordance with 'investments of investors of either contracting party'. Investments is a defined term of the BIT and does not encompass the *former* directors and management of Manas Bank. The Tribunal therefore does not consider it has authority to consider the criminal proceedings, however abusive they may be, in its analysis under the FET standard of this particular BIT, except insofar as they form a pattern which may be relevant in assessing the context as a whole. . . . The latter of these two allegations, while understandably grave, cannot be considered under this BIT as a breach of the FET standard as they do not relate to the investment in Manas Bank."[378]

190. Since all of the allegations raised here by Claimants pertain to alleged acts or conduct of Respondent that – if they were true – would, in any event, have affected investors[379] and not their investment, there is not even one allegation that could give rise to a *prima facie* breach of the Treaty's FET obligation.

191. Claimants principally allege that Colombia committed a denial of justice, deprived Claimants of due process and frustrated Claimants' legitimate expectations by "improperly" charging Foster Wheeler and Process Consultants in the Fiscal Liability

[377] **Ex. RL-57**, *Mr. Joshua Dean Nelson v. United Mexican States*, ICSID Case No. UNCT/17/1 (NAFTA), Final Award, June 5, 2020, ¶ 312 (emphasis added).

[378] **Ex. RL-58**, *Valeri Belokon v. Kyrgyz Republic*, UNCITRAL, Award, October 24, 2014, ¶¶ 245, 251 (emphasis added). *See also* **Ex. RL-59**, Jeswald Salacuse, THE LAW OF INVESTMENT TREATIES (2d. ed., Oxford 2015), p. 281 ("Like provisions on national treatment, MFN clauses are formulated in different ways in different treaties. As a result, the scope of protection that the clause provides and the stipulated exceptions to it vary from treaty to treaty. For example, some treaties grant MFN treatment only to *investments* of a treaty counterpart, while others grant it to *investors*. . . . As a result of the wide variety of MFN treatment formulations found in investment treaties, persons interpreting them need to focus carefully on the particular language of the treaty in question and should not assume that the nature and scope of protection is uniform among treaties.") (emphasis added); **Ex. RL-60**, International Law Commission, *Final Report of the Study Group on the Most-Favoured-Nation Clause*, 2(2) YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (2015), ¶ 69 ("In investment agreements, the obligation is generally specified as providing MFN treatment to the 'investor' or its 'investment'. Some agreements limit the benefit of an MFN provision to the investment.") (emphasis added).

[379] *See* ¶ 145, *supra*.

Proceeding initiated by the CGR for alleged economic damage to the State.[380] None of these allegations – regardless of their veracity – relate to an act, omission or conduct that would have affected Claimants' alleged investment in Colombia (*i.e.*, the Services Contract[381]), but instead relate to acts, omissions or conduct *vis-à-vis* the alleged investors (*i.e.*, Foster Wheeler and Process Consultants).

192. For this reason, such allegations, which purportedly entailed unfair and inequitable treatment of Claimants, cannot constitute a breach of the FET obligation under the Treaty which protects only investments, not investors.

(b) In Any Event, Claimants Plead Their Case Based on an Incorrect FET Standard

193. Claimants erroneously argue that "Chapter 10 of the TPA does not define the term 'fair and equitable'", and thus, its meaning must be interpreted according to its ordinary meaning and as an autonomous standard.[382] However, Article 10.5 of the Treaty

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[380] *See for example* Notice of Arbitration, ¶ 97 ("The CGR's unlawful exercise of jurisdiction and assertion of fiscal liability charges against FPJVC without any colorable legal or factual basis, in contravention of both Colombian law and the [Services] Contract, has (1) denied FPJVC justice, (2) deprived it of due process, and (3) frustrated its legitimate expectations, all in violation of the TPA's Minimum Standard of Treatment."), ¶ 104 ("Respondent violated the minimum standard of treatment that Colombia owed to FPJVC in accordance with the FET standard by improperly subjecting FPJVC to groundless fiscal liability proceedings under Law 610"), ¶ 154 ("Colombia, through the CGR, breached the FET standard by denying FPJVC due process by failing to: (1) provide FPJVC with a fair and equal opportunity to present its case, to marshal appropriate evidence, and to be heard; (2) provide FPJVC with proper notice regarding the reasons for the Charges; and (3) act in a reasoned, even-handed, and unbiased manner in the course of the fiscal liability proceeding."), ¶ 172 ("FPJVC expected that its due process rights would be protected, including that it would not be held liable without the proof of causation, or for grossly disproportionate damages.") (emphasis added). It is worth remembering that the subjects of the Fiscal Liability Proceeding, and thus those who were charged in the Indictment Order, were Foster Wheeler and Process Consultants. *See* ¶ 123, *supra*.

[381] It should be reminded that Foster Wheeler and Process Consultants claim that their "covered investment" under the Treaty is the Services Contract. Notice of Arbitration, ¶ 29; ¶¶ 289-292, *infra*.

[382] Notice of Arbitration, ¶¶ 101-102. There appears to be a contradiction in Claimants' argument since, on the one hand, they argue that the Colombia's conduct breached the minimum standard of treatment obligation contained in Article 10.5 of the Treaty (*Id.*, ¶¶ 96-97), while on the other, they argue that Colombia breached the fair and equitable treatment obligation contained in Article 10.5 of the Treaty which is not defined in Chapter 10 of the Treaty and must therefore be interpreted as an autonomous standard (*Id.*, ¶¶ 98, 101). However, in the *acción de tutela* filed by Foster Wheeler and Process Consultants in 2018,

expressly limits the FET obligation to the minimum standard of treatment under customary international law:

> 1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
>
> 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.[383]

194. Thus, as expressly appears from the terms of this provision, the FET obligation is not an "autonomous standard" under the Treaty[384] – as Claimants erroneously argue –, but a standard that does not require treatment in addition to or

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they clearly recognized that the FET obligation under the Treaty is "in accordance with customary international law." **Ex. R-69**, *Acción de Tutela* 2018, pp. 7-8 (translation from Spanish).

[383] **Ex. RL-1**, Treaty, Article 10.5 (emphasis added).

[384] *See* **Ex. RL-61**, *Adel A. Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33 (Oman-U.S. FTA), Submission of the United States of America, September 22, 2014 ("*Submission of the U.S. in Hamadi Al Tamimi*"), ¶ 4 ("The minimum standard of treatment referenced in Article 10.5 of the U.S.-Oman FTA is an umbrella concept incorporating a set of rules that, over time, has crystallized into customary international law in specific contexts. Article 10.5 thus reflects a standard that develops from State practice and *opinio juris*, as expressly stated in Annex 10-A, rather than an autonomous, treaty-based standard."). The cases and legal authorities cited to by Claimants in their Notice of Arbitration are irrelevant because they refer to the FET obligation as an autonomous standard, which is not the meaning and scope of the FET obligation under the Treaty. Notice of Arbitration, ¶¶ 99-103. *See also* **Ex. RL-54**, *Submission of the U.S. in Angel Seda*, ¶ 37 ("[A]rbitral decisions interpreting 'autonomous' fair and equitable treatment and full protection and security provisions in other treaties, outside the context of customary international law, cannot constitute evidence of the content of the customary international law standard required by Article 10.5."). Claimants' reference to sources of international law under Article 38 of the Statute of the International Court of Justice is confusing (Notice of Arbitration, ¶ 100), given that it is explicit from the very terms of the obligations contained in Article 10.5 of the Treaty that it is limited to the minimum standard of treatment under customary international law (which is only one such source). The Treaty itself defines the concept of "customary international law" in Annex 10-A, and confines it to "a general and consistent practice of States that they follow from a sense of legal obligation." **Ex. RL-1**, Treaty, n. 3 and Annex 10-A.

beyond that which is required by the minimum standard of treatment under customary international law.[385]

195. The meaning and scope of the standard under Article 10.5 of the Treaty has been confirmed by the United States in its submissions as a non-disputing party:

> This text [Article 10.5] demonstrates the Parties' express intent to establish the customary international law minimum standard of treatment as the applicable standard in Article 10.5. The minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law in specific contexts. The standard establishes a minimum "floor below which treatment of foreign investors must not fall."[386]

196. The minimum standard of treatment only protects investments against a measure or conduct on the part of the State that is egregious and shocking, such as a

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[385] *See* **Ex. RL-37**, L. Caplan and J. Sharpe, *United States*, p. 784 ("Article 5(2) [of the 2012 U.S. BIT Model, which is similar to Article 10.5 of the Treaty] further notes that the 'concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard and do not create additional substantive rights'. Article 5(2) thus clarifies that fair and equitable treatment and full protection and security themselves constitute the minimum standard of treatment. Article 5(2) thus forecloses the argument that the obligation to accord fair and equitable treatment and full protection and security is 'additive to the requirements of international law.'").

[386] **Ex. RL-54**, *Submission of the U.S. in Angel Seda*, ¶ 32 (emphasis added). *See also* **Ex. RL-62**, *Michael Ballantine and Lisa Ballantine v. Dominican Republic*, PCA Case No. 2016-17 (DR-CAFTA), Submission of the United States of America, July 6, 2018 ("*Submission of the U.S. in Ballantine*"), ¶ 17; **Ex. RL-63**, *Bay View Group and The Spalena Company v. Republic of Rwanda,* ICSID Case No. ARB/18/21 (Rwanda-U.S. BIT), Submission of the United States of America, February 19, 2021 ("*Submission of the U.S. in Bay View*"), ¶ 37; **Ex. RL-64**, *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3 (DR-CAFTA), Submission of the United States of America, March 11, 2016 ("*Submission of the U.S. in Corona*"), ¶ 11; **Ex. RL-65**, *Elliott Associates, L.P. v. Republic of Korea*, PCA Case No. 2018-51 (KORUS FTA), Submission of the United States of America February 7, 2020 ("*Submission of the U.S. in Elliott Associates*"), ¶ 13; **Ex. RL-66**, *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. Republic of Peru*, ICSID Case No. UNCT/18/2 (Peru-U.S. TPA), Submission of the United States of America, June 21, 2019 ("*Submission of the U.S. in Gramercy*"), ¶ 31; **Ex. RL-67**, *Italba Corporation v. Oriental Republic of Uruguay*, ICSID Case No. ARB/16/9, Submission of the United States of America, September 11, 2017 ("*Submission of the U.S. in Italba*"), ¶ 18; **Ex. RL-68**, *Mason Capital, L.P and Mason Management LLC v. Government of the Republic of Korea*, PCA Case No. 2018-55 (KORUS FTA), Submission of the United States of America, February 1, 2020 ("*Submission of the U.S. in Mason*"), ¶ 10; **Ex. RL-56**, *Submission of the U.S. in Omega*, ¶ 14.

gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons.[387]

197. None of the allegations raised by Claimants (with the exception of those relating to an alleged denial of justice and a violation of due process, which will be specifically addressed below) are even remotely linked to a possible violation of the minimum standard of treatment. For example, in their Notice of Arbitration, Claimants summarize their allegations as follows:

> The CGR's unlawful exercise of jurisdiction and assertion of fiscal liability charges against FPJVC without any colorable legal or factual basis, in contravention of both Colombian law and the [Services] Contract, has (1) denied FPJVC justice, (2) deprived it of due process, and (3) frustrated its legitimate expectations, all in violation of the TPA's Minimum Standard of Treatment.[388]

198. Setting aside the fact that the FET obligation protects only investments and not investors, and that none of these allegations relate to acts, omissions or conduct by

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[387] *See for example* **Ex. RL-69**, *L.F.H Neer and Pauline Neer v. United Mexican States*, Mexico-U.S. General Claims Commission, Docket No. 136, Opinion, October 15, 1926, in 21 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 555 (1927), p. 556 (in order to violate the standard, the treatment of an alien "should amount to an outrage, to bad faith, to willful neglect of duty, or to insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."); **Ex. RL-40**, *Glamis*, ¶ 824 ("Claimant has not established that the individual measures taken by the federal and California state governments fall below the customary international law minimum standard of treatment and constitute a breach of Article 1105 [of NAFTA] in that they are not egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons."); **Ex. RL-70**, *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2 (NAFTA), Award, September 18, 2009 ("*Cargill*"), ¶¶ 284, 286 ("Key to this adaptation is that, even as more situations are addressed, the required severity of the conduct as held in *Neer* is maintained. . . . If the conduct of the government toward the investment amounts to gross misconduct, manifest injustice or, in the classic words of the *Neer* claim, bad faith or the willful neglect of duty, whatever the particular context the actions taken in regard to the investment, then such conduct will be a violation of the customary obligation of fair and equitable treatment."). *See also* **Ex. RL-1**, Treaty, Annex 10-A ("With regard to Article 10.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens").

[388] Notice of Arbitration, ¶ 97. *See* ¶ 145, *supra*.

Colombia that would have affected their investments, Claimants have not established a *prima facie* case of breach of the minimum standard of treatment under customary international law.

199. Furthermore, as the Treaty's FET obligation is limited to the minimum standard of treatment under customary international law, none of the other elements of the FET standard argued by Claimants (with the exception of the alleged denial of justice and violation of due process, which will be addressed below), form part of the minimum standard of treatment,[389] such that they are not capable of constituting a breach of that standard:

- The protection of legitimate expectations is not a constituent element of FET under customary international law. This has not only been confirmed by the International Court of Justice in *Bolivia v. Chile*,[390] but it has also been ratified by the United States – the other Contracting Party to the Treaty – in its various submissions as a non-disputing party in numerous investment arbitrations where the scope of such a provision has been ruled upon.[391] Thus, Claimants'

[389] *See* **Ex. RL-54**, *Submission of the U.S. in Angel Seda*, ¶ 39 ("[T]he concepts of legitimate expectations, non-discrimination, and transparency are not component elements of 'fair and equitable treatment' under customary international law that give rise to independent host State obligations."). *See also* **Ex. RL-63**, *Submission of the U.S. in Bay View*, ¶¶ 46, 49-51; **Ex. RL-67**, *Submission of the U.S. in Italba*, ¶¶ 24-25; **Ex. RL-68**, *Submission of the U.S. in Mason*, ¶¶ 17-18, 21-22; **Ex. RL-56**, *Submission of the U.S. in Omega*, ¶¶ 24-26.

[390] **Ex. RL-71**, *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, International Court of Justice, Judgment of October 1, 2018, 507 I.C.J. REPORTS 2018, ¶ 162 ("The Court notes that references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment. It does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation. Bolivia's argument based on legitimate expectations thus cannot be sustained.").

[391] **Ex. RL-72**, *Lone Pine Resources Inc. v. Government of Canada*, ICSID Case No. UNCT/15/2 (NAFTA), Submission of the United States of America, August 16, 2007, ¶¶ 26-27 ("The concept of 'legitimate expectations' is not a component element of 'fair and equitable treatment' under customary international law that gives rise to an independent host State obligation. An investor may develop its own expectations about the legal regime governing its investment, but those expectations impose no obligations on the State under the minimum standard of treatment. The United States is aware of no general and consistent State practice and *opinio juris* establishing an obligation under the minimum standard of treatment not to frustrate investors' expectations; instead, something more is required than the interference with those expectations. In fact, tribunals discussing State practice confirm that expectations about a particular legal regime do not

allegations regarding the frustration of their legitimate expectations are not capable of constituting a breach of the Treaty's FET standard.[392]

- The obligation to act consistently or to provide a stable regulatory framework is also not part of the minimum standard of treatment.[393]

- Similarly, the obligation to act transparently is not part of the minimum standard of treatment.[394]

- Lastly, Claimants argue that an alleged attempt by Colombia to obtain double compensation would also breach the FET standard.[395] Setting aside that Claimants do not explain which theory or element of FET this breach of the minimum standard of treatment relates to, since – in any event – it would be a question of quantum, not liability, the Ruling

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preclude a State from taking future regulatory action. States may modify or amend their regulations to achieve legitimate public welfare objectives and will not incur liability under customary international law merely because such changes interfere with an investor's 'expectations' about the state of regulation in a particular sector.") (emphasis added). *See also* **Ex. RL-54**, *Submission of the U.S. in Angel Seda*, ¶ 40; **Ex. RL-62**, *Submission of the U.S. in Ballantine*, ¶ 23; **Ex. RL-63**, *Submission of the U.S. in Bay View*, ¶ 50; **Ex. RL-66**, *Submission of the U.S. in Gramercy*, ¶ 38; **Ex. RL-67**, *Submission of the U.S. in Italba*, ¶ 25; **Ex. RL-68**, *Submission of the U.S. in Mason*, ¶ 18; **Ex. RL-56**, *Submission of the U.S. in Omega*, ¶ 24.

[392] Notice of Arbitration, ¶¶ 168-173.

[393] Notice of Arbitration, ¶ 102. *See* **Ex. RL-73**, *Spence International Investments,LLC, Berkowitz et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2 (DR-CAFTA), Submission of the United States of America, April 17, 2015, ¶ 19 ("States may modify or amend their regulations to achieve legitimate public welfare objectives and will not incur liability under customary international law merely because such changes interfere with an investor's 'expectations' about the state of regulation in a particular sector. . . . For all these reasons, regulatory action may only violate 'fair and equitable treatment' under the minimum standard of treatment as that term is understood in customary international law."). *See also* **Ex. RL-74**, Kenneth J. Vandevelde, BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION (Oxford University Press 2010), p. 13 [of PDF] ("Tribunals have made clear that the [FET] standard does not impose on host states a general obligation always to act consistently over time. Host states generally have the discretion to change policies.").

[394] Notice of Arbitration, ¶ 103. *See* **Ex. RL-70**, *Cargill*, ¶ 294 ("The Tribunal holds that Claimant has not established that a general duty of transparency is included in the customary international law minimum standard of treatment owed to foreign investors per [NAFTA] Article 1105's requirement to afford fair and equitable treatment."); **Ex. RL-75**, *United Mexican States v. Metalclad Corporation*, Supreme Court of British Columbia, Reasons for Judgment of the Honourable Mr. Justice Tysoe, May 2, 2001, 2001 BCSC 664, ¶¶ 68, 72 (Can. B.C.S.C.) (holding that "[n]o authority was cited or evidence introduced [in the Metalclad arbitration] to establish that transparency has become part of customary international law," and that "there are no transparency obligations contained in [NAFTA] Chapter 11."); **Ex. RL-54**, *Submission of the U.S. in Angel Seda*, ¶ 42 ("The concept of 'transparency' also has not crystallized as a component of 'fair and equitable treatment' under customary international law giving rise to an independent host-State obligation. The United States is aware of no general and consistent State practice and *opinion juris* establishing an obligation of host-State transparency under the minimum standard of treatment."). *See also* **Ex. RL-62**, *Submission of the U.S. in Ballantine*, ¶ 21; **Ex. RL-63**, *Submission of the U.S. in Bay View*, ¶ 49; **Ex. RL-66**, *Submission of the U.S. in Gramercy*, ¶ 40; **Ex. RL-68**, *Submission of the U.S. in Mason*, ¶ 22; **Ex. RL-56**, *Submission of the U.S. in Omega*, ¶ 26.

[395] Notice of Arbitration, ¶¶ 138-142.

> with Fiscal Liability underscores that such an argument is incorrect and that there has been no attempt to recover double compensation and that no such risk exists.[396]

200. In conclusion, the facts outlined by Claimants in their Notice of Arbitration are not capable of constituting a breach of the FET obligation contained in the Treaty – which is equivalent to the minimum standard of treatment under customary international law –, and, therefore, Claimants have not presented a *prima facie* case of breach of the FET standard.

(c) There Could Not Have Been a Denial of Justice in This Case

201. The FET obligation under the Treaty includes the obligation under customary international law to provide protection against a denial of justice. Indeed, Article 10.5.2(a) of the Treaty expressly provides that the FET obligation "includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world."[397] It is clear from the text of the provision itself that the obligation not to deny justice is limited to judicial proceedings and does not cover administrative proceedings.[398]

202. In effect, a denial of justice under customary international law requires "misconduct or inaction of the judicial branch of the government" and involves "some violation of rights in the administration of justice, or a wrong perpetrated by the abuse of

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[396] **Ex. R-80**, Ruling with Fiscal Liability – Part 10: Individualization, contractors II, pp. 5163, 5165 (translation from Spanish). *See* ¶ 81, n. 342, *supra*.

[397] **Ex. RL-1**, Treaty, Article 10.5.2(a).

[398] Article 10.5.2(a) expressly uses the term "administrative adjudicatory proceedings" in reference to judicial proceedings before the administrative adjudicatory jurisdiction. The "administrative adjudicatory proceedings" must be distinguished from "administrative proceedings" which are not of a judicial nature. *See* n. 179, *supra.*

judicial process."[399] Therefore, for purposes of determining the existence of a denial of justice under customary international law, the standard of proof is high.[400]

203. In its submissions as a non-disputing party, the United States has affirmed that a denial of justice involves a final act of a State's judiciary that is either notoriously unjust or reflects an administration of justice that is considered egregious to the point that

[399] **Ex. RL-76**, Edwin M. Borchard, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS (The Banks Law Publishing Co. 1919), p. 330. *See also* **Ex. RL-77**, *Liman Caspian Oil BV and NCL Dutch Investment v. Republic of Kazakhastan,* ICSID Case No. ARB/07/14, Excerpts of Award, June 22, 2010, ¶ 279 ("Respondent can only be held liable for denial of justice if Claimants are able to prove that the court system fundamentally failed. Such failure is mainly to be held established in cases of major procedural errors such as lack of due process."); **Ex. RL-41**, *Corona Award*, ¶ 254 ("The international delict of denial of justice rests upon a specific predicate, namely, the *systemic failure* of the State's justice system. When a claim is successfully made out at international law, it is because the international court or tribunal accepts that the respondent's legal system as a whole has failed to accord justice to the claimant.") (emphasis added); **Ex. RL-78**, *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II, August 30, 2018, ¶ 8.36 ("To meet the applicable test, it will not be enough to claim that municipal law has been breached, that the decision of a national court is erroneous, that a judicial procedure was incompetently conducted, or that the actions of the judge in question were probably motivated by corruption. A denial of justice implies the failure of a national system as a whole to satisfy minimum standards") (emphasis added); **Ex. RL-79**, *Agility Public Warehousing Company K.S.C. v. Republic of Iraq*, ICSID Case No. ARB/17/7, Award, February 22, 2021 ("*Agility*"), ¶ 212 ("In order to succeed in a claim for denial of justice, the Claimant must go beyond a mere misapplication of domestic law and show that there was a failure of the national system as a whole.") (emphasis added).

[400] *See* **Ex. RL-80**, *Phillip Morris Brands SARL, et al. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, July 8, 2016, ¶ 499, ("An elevated standard of proof is required for finding a denial of justice due to the gravity of a charge which condemns the State's judicial system as such. A denial of justice claim may be asserted only after all available means offered by the State's judiciary to redress the denial of justice have been exhausted.") (emphasis added);.**Ex. RL-66**, *Submission of the U.S. in Gramercy*, ¶ 46. ("The high threshold required for judicial measures to rise to the level of a denial of justice in customary international law gives due regard to the principle of judicial independence, the particular nature of judicial action, and the unique status of the judiciary in both international and municipal legal systems. As a result, the actions of domestic courts are accorded a greater presumption of regularity under international law than are legislative or administrative acts. Indeed, as a matter of customary international law, international tribunals will defer to domestic courts interpreting matters of domestic law unless there is a denial of justice.") (emphasis added); **Ex. RL-81**, *RosInvestCo UK Ltd. v. Russian Federation*, SCC Arbitration V (079/2005), Final Award, September 12, 2010, ¶ 275 ("The Tribunal emphasizes again that an international arbitration tribunal . . . is not an appellate body and its function is not to correct errors of domestic procedural or substantive law which may have been committed by the national courts. The Tribunal stresses that the threshold of the international delict of denial of justice is high and goes far beyond the mere misapplication of domestic law."); **Ex. RL-79**, *Agility*, ¶ 215 ("This high standard of what constitutes a denial of justice is in line with the fact that an international arbitration tribunal is not an appellate court and does not function to correct errors of domestic law.").

it "offends a sense of judicial propriety", while emphasizing that the Treaty does not vest arbitral tribunals with the role of a supranational appellate court.

> A denial of justice may occur in instances such as when the final act of a State's judiciary constitutes a "notoriously unjust" or "egregious" administration of justice which "offends a sense of judicial propriety." In this connection, it is well-established that international tribunals, such as U.S.-Colombia TPA Chapter Ten tribunals, are not empowered to be supranational courts of appeal on a court's application of domestic law. Thus, an investor's claim challenging judicial measures under Article 10.5.1 is limited to a claim for denial of justice under the customary international law minimum standard of treatment. A fortiori, domestic courts performing their ordinary function in the application of domestic law as neutral arbiters of the legal rights of litigants before them are not subject to review by international tribunals absent a denial of justice under customary international law.[401]

204. In this case, it is conceptually impossible for there to have been a denial of justice given that, to date, a final decision at the administrative level has not even been issued in the Fiscal Liability Proceeding, and the judiciary has not yet intervened.[402] In that respect, the tribunal in *Corona v. Dominican Republic* – when interpreting an identical provision – held that an administrative decision at the first hierarchical level of decision-making cannot constitute a denial of justice under customary international law:

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[401] **Ex. RL-54**, *Submission of the U.S. in Angel Seda*, ¶ 46 (emphasis added). *See also*, in the same sense, **Ex. RL-64**, *Submission of the U.S. in Corona*, ¶ 13; **Ex. RL-66**, *Submission of the U.S. in Gramercy*, ¶¶ 44-47; **Ex. RL-67**, *Submission of the U.S. in Italba*, ¶ 20.

[402] The only exception are the *acciones de tutela* brought by Foster Wheeler and Process Consultants for alleged breaches of constitutional guarantees, which are not strictly within the framework of the Fiscal Liability Proceeding but are autonomous actions. *See* n. 283, *supra*. Of the three *acciones de tutela* brought by Foster Wheeler and Process Consultants, one has already been reviewed at first instance and on appeal, while the other two have first instance rulings. *See* ¶¶ 136-138, 159, nn. 327, 345, *supra*. The reason why the *tutela* judges dismissed the *acciones de tutela* brought by Foster Wheeler and Process Consultants is because the *tutela* is an extraordinary mechanism for protecting fundamental rights in the event there are no other means of judicial defense or, if such means do exist, in the event there is a risk that the applicant will suffer irremediable harm. None of these requirements were ascertained in the case of Foster Wheeler and Process Consultants.

> [T]he Tribunal does not believe that an administrative act, in and of itself, particularly as the level of a first instance decision-maker, can constitute a denial of justice under customary international law, when further remedies or avenues of appeal are potentially available under municipal law.[403]

205. At the time the present claim was submitted to arbitration, only the Indictment Order had been issued against Foster Wheeler and Process Consultants and other natural and juridical persons.[404] Subsequently, the Deputy Comptroller issued the Ruling with Fiscal Liability which constitutes an administrative act of the first instance, which was appealed before the fiscal liability and administrative sanctions chamber of the CGR. The judiciary has not yet had the opportunity to intervene in the Fiscal Liability Proceeding, and it is only after exhausting administrative remedies that the tribunals of the administrative adjudicatory jurisdiction may undertake a judicial control.[405]

206. The occurrence of a denial of justice necessarily requires local remedies to be exhausted, so that only those judicial decisions that definitively resolve a legal situation can constitute a breach of the minimum standard of treatment under customary international law.[406] The fact that there are still multiple administrative and judicial

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[403] **Ex. RL-41**, *Corona Award*, ¶ 248 (emphasis added).

[404] *See* ¶¶ 125-135, *supra*.

[405] *See* n. 226, ¶¶ 109-114, *supra*.

[406] **Ex. RL-54**, *Submission of the U.S. in Angel Seda*, ¶ 47 ("For the foregoing reasons, judicial measures may form the basis of a claim under the customary international law minimum standard of treatment under Article 10.5.1 only if they are final and if it is proved that a denial of justice has occurred. Were it otherwise, it would be impossible to prevent Chapter Ten tribunals from becoming supranational appellate courts on matters of the application of substantive domestic law, which customary international law does not permit.") (emphasis added). It should be noted that the fact that Article 10.18.2(b) of the Treaty requires a waiver of the right to initiate or continue proceedings with respect to the same measure before local administrative or judicial tribunals (*see* ¶¶ 330-336, *infra*), does not exclude the requirement of a final judicial decision for purposes of a denial of justice under customary international law. *See* **Ex. RL-37**, L. Caplan and J. Sharpe, *United States*, pp. 829-830 ("Article 26(2)(b) [of the 2012 U.S. Model Treaty, which is identical to Article 10.18.2(b) of the Treaty] is not meant to waive the local remedies rule under customary international law where judicial acts form the basis of a claim arising under a US BIT. The local remedies rule bars one State from presenting an international claim on behalf of one of its nationals against another State before the

proceedings and remedies available against the Ruling with Fiscal Liability – which Claimants do not dispute – is in itself sufficient to consider that there is no *prima facie* breach of denial of justice. This has been established by multiple investment tribunals:

- *Alps Finance v. Slovakia*: "[R]espondent has convincingly objected that other remedies were still available to the Claimant in internal law in order to try to obtain revision of the judgment that it considered prejudicial to its interest. The non-exhaustion of local remedies is *per se* sufficient to exclude the States' responsibility in international law for actions or omissions of its judiciary. In conclusion, the *prima facie* test of a plausible treaty-claim is far from being met."[407]

- *Flughafen v. Venezuela*: "There could be no international responsibility of a State for denial of justice if there is still an effective local remedy against the local decision that is challenged."[408]

- *Apotex v. United States*: "The Tribunal has sympathy for Apotex's position, and can readily appreciate that a judgment call was taken at the time that petitioning the U.S. Supreme Court was unlikely to secure the desired relief. However, as the Respondent has observed, under established principles, the question whether the failure to obtain judicial finality may be excused for 'obvious *futility*' turns on the unavailability of relief by a higher judicial authority, not on measuring the likelihood that the higher judicial authority would have granted the desired relief. In this case, and on balance, the Tribunal is not satisfied that finality was achieved, such as to allow for a claim under NAFTA in respect of the particular judicial decisions in question."[409]

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legal system of the other State has had the opportunity to address any alleged harm. Thus, for example, in the context of an alleged denial of justice in breach of the minimum standard of treatment, Article 26(2)(b) does not obviate the need for the claimant to pursue all available judicial remedies, including higher-level appeals, in accordance with the principle of judicial finality. As the US Government argued in Loewen, a provision of the NAFTA similar to Article 26(2)(b) was not 'intended to create . . . an international remedy that would override the international law requirement that a denial of justice claim cannot be made out where . . . justice is available but the claimant has failed to pursue it'. The Loewen tribunal agreed, finding that the NAFTA provision 'involves no waiver of the duty to pursue local remedies in its application to a breach of international law constituted by a judicial act'.").

[407] **Ex. RL-82**, *Alps Finance v. Slovak Republic*, UNCITRAL, Award, March 5, 2011, ¶¶ 251-252 (emphasis added).

[408] **Ex. RL-83**, *Flughafen Zurich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/10/19, Award, November 18, 2014, ¶ 392 (translation from Spanish).

[409] **Ex. RL-84**, *Apotex Inc. v. Government of the United States of America*, ICSID Case No. UNCT/10/2 (NAFTA), Award on Jurisdiction and Admissibility, June 14, 2013 ("*Apotex*"), ¶ 276 (emphasis added).

207. In its submissions as a non-disputing party, the United States has asserted the same position. For example, in its intervention in the *Lion Mexico v. Mexico* case, the United States stated as follows:

> "[D]ecisions of lower courts that may be corrected on appeal, for example, have not produced a denial of justice and cannot be the basis of a NAFTA Chapter Eleven claim. As such, non-final judicial acts cannot be the basis for claims under Chapter Eleven of the NAFTA, unless recourse to further domestic remedies is obviously futile or manifestly ineffective. Rather, an act of a domestic court that remains subject to appeal has not ripened into the type of final act that is sufficiently definite to implicate state responsibility, unless such recourse is obviously futile or manifestly ineffective."[410]

208. Aware of their inability to satisfy this essential requirement for alleging a denial of justice, Claimants argue that they have diligently and unsuccessfully tried "all available and practical local remedies" against the indictment in the Fiscal Liability Proceeding.[411] This is conspicuously false. Setting aside that, at the time of submitting this claim to arbitration, the Deputy Comptroller had not yet issued a Ruling with Fiscal Liability – which only happened later –, that Ruling is not yet final and has been appealed (with suspensive effect) before the fiscal liability and administrative sanctions chamber of the CGR which has not yet decided the appeal.[412] In addition, as already mentioned, once administrative remedies have been exhausted, the administrative act will be subject to judicial control before the tribunals of the administrative adjudicatory jurisdiction.[413]

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[410] **Ex. RL-55**, *Submission of the U.S. in Lion Mexico*, ¶¶ 12-13 (emphasis added). *See also* n. 406, *supra*.

[411] Notice of Arbitration, ¶ 110.

[412] *See* ¶¶ 159-160, *supra*.

[413] *See* n. 226, ¶¶ 109-114, *supra*. Furthermore, even if the Ruling with Fiscal Liability were upheld by both the lower and the appeal administrative adjudicatory tribunals, the forced collection proceeding must be initiated against those fiscally liable parties in order to obtain payment of the amount of the Ruling with Fiscal Liability, which is a procedure that, in turn, involves multiple administrative and judicial procedures and remedies. *See* ¶¶ 115-120, *supra*.

Consequently, numerous practical local (administrative and judicial) procedures and remedies remain available against the Ruling with Fiscal Liability.[414]

209. In turn, while Claimants argue that to the extent local remedies are available they would be "ineffective", "futile or improbable" or "unavailable", they have not presented the slightest evidence to support their assertions.[415] On the contrary, there are numerous examples of rulings with fiscal liability issued by the Deputy Comptroller in Colombia that have been rendered ineffective or reversed, in whole or in part, after the available administrative[416] and judicial[417] remedies have been pursued.

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[414] *See* ¶ 163, *supra*.

[415] Notice of Arbitration, ¶ 110.

[416] *See for example* **Ex. RL-85**, Office of the Comptroller General of the Republic of Colombia, Fiscal Liability and Administrative Sanctions Chamber, Order No. 111, May 11, 2021, pp. 31-32 (partially revoking a first instance ruling with fiscal liability and ruling without fiscal liability in favor of Mr. Gustavo Hernan Estupiñán, because it did not find that fiscal management had been carried out by Mr. Estupiñán); **Ex. RL-86**, Office of the Comptroller General of the Republic of Colombia, Fiscal Liability and Administrative Sanctions Chamber, Order No. 005, January 12, 2021, pp. 53-54 (partially revoking a first instance ruling with fiscal liability and ruling without fiscal liability in favor of Mr. Edwin José Besaile Fayad, since it neither ascertained the elements of willful or gross negligence, nor a causal link, between Mr. Besaile's conduct and the economic damage to the State).

[417] *See for example* **Ex. RL-87**, *Consejo de Estado* of Colombia, Chamber for Administrative Adjudicatory Proceedings, First Section, Judgment, November 20, 2014 (Condor S.A. Compañía de Seguros v. Comptroller of Bogotá D.C.), pp. 11-12, 33 (confirming the decision of the Administrative Adjudicatory Proceedings Court of Cundinamarca annulling the actions of the Comptroller's office of Bogota, D.C., which declared fiscal liability on an insurance company, Condor S.A., as a civilly liable third party); **Ex. RL-88**, *Consejo de Estado* of Colombia, Chamber for Administrative Adjudicatory Proceedings, First Section, Judgment, October 22, 2015 (Marta Inés Martínez Arias v. Municipality of Armenia-Municipal Comptroller of Armenia), pp. 9-10; 22-23 (confirming the decision of the Administrative Adjudicatory Proceedings Court of Quindío annulling the administrative acts issued by the Municipal Comptroller's Office of Armenia which declared fiscal liability on Mrs. Marta Inés Martínez Arias); **Ex. RL-89**, *Consejo de Estado* of Colombia, Chamber for Administrative Adjudicatory Proceedings, First Section, Judgment, July 5, 2018 (Ezequiel Paladines Cuellar v. Office of the Departmental Comptroller of the Atlantic), pp. 27-28 (confirming the decision rendered by the Administrative Adjudicatory Proceedings Court of Atlántico which declared that acts identifying Ezequiel Paladines Cuellar as an individual liable for tax were null and void); **Ex. RL-90**, *Consejo de Estado* of Colombia, Chamber for Administrative Adjudicatory Proceedings, First Section, Judgment, November 12, 2020 (Ana María Piñeros Ricardo v. Comptroller General of the Republic), pp. 108-109 (confirming the decision of the Administrative Adjudicatory Proceedings Court of Cundinamarca which declared that administrative acts charging Ana María Piñeros with fiscal liability to be partially null and void); **Ex. RL-91**, *Consejo de Estado* of Colombia, Chamber for Administrative Adjudicatory Proceedings, First Section, Judgment, February 18, 2021 (Aseguradora Colseguros S.A. v. Comptroller General of the Republic), pp. 36-37 (upholding the validity of arguments upon which the Administrative Adjudicatory Proceedings Court of Santander declared the decisions of the Office of the Comptroller

210. On the other hand, and irrespective of the availability of numerous administrative and judicial procedures and remedies against the Ruling with Fiscal Liability, it should be noted that erroneous administrative or judicial decisions, or the mere incorrect application or interpretation of local law, cannot constitute a denial of justice.[418] In this regard, Claimants raise a number of allegations about the application or interpretation of Colombian law – such as that "the CGR completely disregarded the standards imposed by Colombian law", that there is no precedent for an indictment of that volume of pages, that there was no basis under Colombian law for concluding that Claimants were "fiscal managers" under Article 3 of Law 610, or that there was no "articulate viable theories of liability, causation, and damages" against Claimants – or assessment of the evidence – such as that the indictment did not mention or address "substantial additional evidence provided to it during the investigative phase of the CGR

General of the Republic, by which Colseguros S.A. was attached as a civilly liable third party to a ruling with fiscal liability, to be null).

[418] *See for example* **Ex. RL-55**, *Submission of the U.S. in Lion Mexico*, ¶ 7 ("[E]rroneous domestic court decisions, or misapplications or misinterpretation of domestic law, do not in themselves constitute a denial of justice under customary international law."); **Ex. RL-92**, Robert *Azinian et al. v. United Mexican States*, ICSID Case No. ARB(AF)/97/2 (NAFTA), Award, November 1, 1999, ¶ 99 ("The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seized has plenary appellate jurisdiction. This is not true generally, and it is not true for NAFTA. *What must be shown is that the court decision itself constitutes a violation of the treaty*. Even if the Claimants were to convince this Arbitral Tribunal that the Mexican courts were wrong with respect to the invalidity of the Concession Contract, this would not per se be conclusive as to a violation of NAFTA.") (emphasis in original); **Ex. RL-84**, *Apotex*, ¶ 278 ("[I]t is not the proper role of an international tribunal established under NAFTA Chapter Eleven to substitute itself for the U.S. Supreme Court, or to act as a supranational appellate court."); **Ex. RL-93**, *Eli Lilly and Company v. Government of Canada*, ICSID Case No. UNCT/14/2 (NAFTA), Final Award, March 16, 2017, ¶ 224 ("The Tribunal emphasizes that a NAFTA Chapter Eleven tribunal is not an appellate tier in respect of the decisions of the national judiciary. It is not the task of a NAFTA Chapter Eleven tribunal to review the findings of national courts and considerable deference is to be accorded to the conduct and decisions of such courts. It will accordingly only be in very exceptional circumstances, in which there is clear evidence of egregious and shocking conduct, that it will be appropriate for a NAFTA Chapter Eleven tribunal to assess such conduct against the obligations of the respondent State under NAFTA Article 1105(1).").

proceeding" before the Deputy Comptroller –[419] which, even if true, would not be capable of constituting a denial of justice under customary international law.[420]

211. Finally, the argument that there were fundamental breaches of due process in the Fiscal Liability Proceeding that would have gone to the extreme of constituting a violation of the minimum standard of treatment under customary international law[421] does

[419] *See for example* Notice of Arbitration, ¶¶ 84, 86, 88, 109, 111-126.

[420] Claimants allege that Respondent misapplied Colombian law. Notice of Arbitration, ¶ 109. Setting aside that an incorrect application of the law, without more, does not constitute a denial of justice, it is appropriate to make the following preliminary clarifications. First, regarding the concept of fiscal management, based on the law and jurisprudence, the Deputy Comptroller found that the conduct of Foster Wheeler and Process Consultants had a close and necessary connection with the fiscal management exercised by Reficar's board members and officers (*i.e.*, it found that Foster Wheeler and Process Consultants exercised indirect fiscal management). *See* ¶¶ 131, 153, *supra*. Second, regarding the elements of fiscal liability, these were sufficiently explained by the Deputy Comptroller in both the Indictment Order and in the Ruling with Fiscal Liability. *See* ¶¶ 127-132, 152-156, *supra*. Third, in response to the allegation of disproportionality with regard to the amount of the damage in the Fiscal Liability Proceeding, it is clear that economic damage is determined by the larger investments in the Project derived from Change Controls 2 and 3, and since fiscal liability is of a joint and several nature, all those who contributed to such damage must be answerable for it irrespective of the extent of their contribution. *See* ¶¶ 150-152, *supra*. Fourth, regarding the harmonious collaboration between State entities, it is obvious that this principle does not prevent certain entities from exercising control over others. **Ex. RL-94**, Constitutional Court of Colombia, Constitutional Judgment No. C-246, March 16, 2004, p. 26 ("[I]n addition to the harmonious collaboration between the branches of [the State], which implies relations of cooperation and inter-institutional coordination, there are also relations of control between state bodies, since power must not only be divided so that it is not concentrated, but also controlled so that it doesn't exceed its limits. . . . It can then be concluded that, in general terms, the oversight and control are immanent to the constitutional recognition of the division of powers, and not an exception to it, since the control appears as the indispensable instrument so that balance, and with it freedom, can be a reality.") (translation from Spanish).

[421] Not any mere breach of due process constitutes a breach of the minimum standard of treatment. A breach of due process that rises to the level of a violation of the minimum standard of treatment under customary international law must be a fundamental and serious breach of due process, which, in effect, constitutes "willful disregard of due process of law . . . that shocks, or at least surprises, a sense of juridical propriety." **Ex. RL-95**, *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italia)*, International Court of Justice, Judgment of July 20, 1989, 15 I.C.J REPORTS 1989, ¶ 128. *See also* **Ex. RL-96**, *Waste Management Inc. v. United Mexican States II*, ICSID Case No. ARB(AF)/00/3 (NAFTA), Award, April 30, 2004, ¶ 98 (indicating that for there to be a breach of the minimum standard of treatment there must be an "lack of due process leading to an outcome which offends judicial propriety"); **Ex. RL-42**, C. McLachlan, L. Shore and M. Weiniger, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES, ¶ 7.129 (indicating that "what must be shown is: '[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety.'"). With respect to administrative proceedings, the requirement of due process is lower than with respect to judicial proceedings, such that a breach would have to be even more serious in order to constitute a breach of the minimum standard of treatment. *See* **Ex. RL-42**, C. McLachlan, L. Shore and M. Weiniger, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES, ¶ 7.193 ("The processes of administrative decision-making cannot be judged by the standards expected of judicial proceedings. The *International Thunderbird* Tribunal rejected the proposition that the standard necessarily requires a formal adversarial procedure, finding that the administrative proceedings

not square with the objective facts – which are not in dispute – of what has occurred in the administrative proceeding to date:

- Foster Wheeler and Process Consultants have been able to appear in the Fiscal Liability Proceeding and exercise their right of defense (in fact, they made free and spontaneous statements, presented their arguments and defense, requested and contradicted evidence, and submitted dozens of documents).[422] Even the deadline for the presentation of their response to the Indictment Order was extended.[423]

- Both have been duly notified and represented in all stages of the Fiscal Liability Proceeding.[424]

- Both have filed administrative remedies during the Fiscal Liability Proceeding,[425] as well as *acciones de tutela* before Colombian courts seeking protection of their right to due process.[426]

- Both the Indictment Order and the Ruling with Fiscal Liability are extensive documents precisely because of the detailed and meticulous analysis of the Deputy Comptroller in relation to each of the alleged fiscally liable parties. Both administrative acts are amply reasoned, regardless of the fact that Claimants do not agree with their motives.[427]

212. A proof that Claimants were able to exercise their right of defense properly in the Fiscal Liability Proceeding is that, while they were initially investigated for five

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at issue in that case 'should be tested against the standards of due process and procedural fairness applicable to administrative officials. The administrative due process requirement is lower than that of a judicial process.'").

[422] *See* ¶¶ 124, 147, *supra*.

[423] *See* ¶ 135, *supra*.

[424] *See* ¶¶ 124, 135, 159, *supra*.

[425] *See* ¶ 147, *supra*.

[426] *See* **Ex. R-69**, *Acción de Tutela* 2018; **Ex. R-84**, *Acción de Tutela* 2021-A; **Ex. R-87**, *Acción de Tutela* 2021-B.

[427] **Ex. R-61**, Indictment Order – Part 10: Charges against contractors I, pp. 3445-3715; **Ex. R-80**, Ruling with Fiscal Liability – Part 10: Individualization, contractors II, pp. 5037-5485; ¶¶ 150-158, *supra*.

Change Controls, they were charged with respect to only three of those Change Controls and were later only found liable for two of them.[428]

213. Lastly, setting aside Claimants' expressed disagreement with the decisions adopted or the reasons contained therein, or with the time periods they were granted (which Claimants consider insufficient), it is indisputable – from what can be deduced from the objective facts, which are not in dispute – that Claimants were duly able to exercise their right of defense in the Fiscal Liability Proceeding.[429] While it may seem obvious, it is worth noting that Colombia is a democratic country with an independent judiciary and governed by the Rule of Law,[430] such that a serious accusation like denial of justice or failure to respect due process to the point of violating the minimum standard of treatment under customary international law, is subject to a high standard of proof.[431]

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[428] **Ex. R-83**, Ruling with Fiscal Liability – Part 13: Resolutory, pp. 6230-6234; ¶¶ 122, 127, 150, *supra*. *See* Notice of Arbitration ¶ 80.

[429] *See* ¶¶ 124, 135, 159-160, *supra*. Claimants also allege that the Fiscal Liability Proceeding did not enjoy independence and impartiality because the case was closed with respect to the members of Ecopetrol's board of directors. Notice of Arbitration, ¶ 166. Setting aside that that decision was fully reasoned and justified, it is an uncontroversial fact that several members of Reficar's board of directors were also held fiscally liable, thus dismissing any allegations of possible prejudice or partiality. *See* n. 270, ¶ 150, *supra*.

[430] *See* **Ex. RL-5**, Prior Constitution, Articles 1, 228; **Ex. RL-6**, Current Constitution, Articles 1, 228. Colombia is even a member of the Organization for Economic Co-operation and Development ("OECD"), and having an independent judiciary is a prerequisite for membership in this prestigious organization. *See* **Ex. RL-97**, Trade Union Advisory Committee to the OECD, *OECD Membership and the Values of the Organisation*, May 28, 2018 (indicating that in order to become an OECD member, countries must primarily demonstrate their commitment to adhere to two fundamental conditions: (i) democratic societies committed to rule of law and protection of human rights; and (ii) open, transparent and free-market economies); **Ex. R-90**, OECD, Internet Portal, "OECD countries agree to invite Colombia as 37th member", May 25, 2018 ("Colombia has been subject to in-depth reviews by 23 OECD Committees and has introduced major reforms to align its legislation, policies and practices to OECD standards, including on labour issues, the reform of its justice system, corporate governance of state-owned enterprises, anti-bribery, [and] trade.").

[431] **Ex. RL-98**, Frederic G. Sourgens, Kabir Duggal and Ian A. Laird, EVIDENCE IN INTERNATIONAL INVESTMENT ARBITRATION (Oxford University Press 2018), ¶¶ 5.06-5.07 ("For matters that do not concern jurisdictional matters, the most common approach has been to follow the '*pro tem*' rule, ie a prima facie evidence, that has been applied by both the ICJ and investment tribunals. Under this rule, the claimants allege the facts at the jurisdictional phase and the tribunal will examine these facts to see, if proven subsequent, would fall within the scope of the applicable treaty . . . There are two exceptions to this. First, if a matter concerns a tribunal's jurisdiction (eg a question concerning nationality of the investor, or a state's consent), such a matter would have to be proved fully at the jurisdictional stage itself. Secondly, . . . if a tribunal's jurisdiction

214. In conclusion, Claimants have not presented a *prima facie* case of denial of justice or a fundamental breach of due process because (i) at the time of submitting this claim to arbitration, there was merely an indictment by the Deputy Comptroller in the Fiscal Liability Proceeding (*i.e.*, the Indictment Order); in other words, not even a final administrative act had been issued; (ii) subsequent to the commencement of this Arbitration, the Ruling with Fiscal Liability was issued against Foster Wheeler and Process Consultants and other natural and juridical persons, which was later appealed before the fiscal liability and administrative sanctions chamber of the CGR, which explains why the Ruling has not yet become final; (iii) to date there is only a mere administrative decision (which in any event is not final); the judiciary has not yet had the opportunity to undertake control over the Ruling with Fiscal Liability; (iv) Foster Wheeler and Process Consultants have had full procedural guarantees and have been able to exercise their right of defense in the Fiscal Liability Proceeding, having presented all available arguments in defense, evidence, actions and resources; (v) in the event that the Ruling with Fiscal Liability is upheld at the administrative level, a judicial control subject to appeal by the tribunals of the administrative adjudicatory jurisdiction would still take place; and (vi) finally, Claimants have not proved that there is a lack of effective or sufficient means or remedies against the Ruling with Fiscal Liability, or that such remedies are futile, ineffective or improbable.

is contingent on a matter that is of a quasi-criminal nature . . . a heightened standard of proof will apply."), ¶ 5.25 ("For matters that implicate serious issues . . . tribunals have insisted on a heightened standard of proof.").

(ii) Claimants Have Failed to Establish a *Prima Facie* Expropriation

215. Incredibly, Claimants contend that Colombia deprived them of certain fundamental protections under the Services Contract and indirectly expropriated their benefits.[432] Specifically, Claimants argue that the Services Contract afforded them two protections that they considered "critical": [redacted][433]

216. What is curious about Claimants' argument is that <u>they do not contend that the Services Contract has been expropriated</u> – which they could not seriously argue [redacted] –,[434] but simply that Colombia expropriated two of their "contractual rights" [redacted] by initiating a Fiscal Liability Proceeding against Foster Wheeler and Process Consultants.[435] However, neither of these two "contractual rights" is capable of being economically exploited independently and separately from the rest of the Services Contract (Claimants' alleged "investment"). On the contrary, they are part of the "bundle of contractual rights" that comprise the Services Contract and are interrelated with the other contractual rights, such that they cannot be considered to be "expropriated" under the Treaty independently and separately from the rest of the "investment."

[432] Notice of Arbitration, ¶ 179.

[433] *Id.*, ¶ 182.

[434] *See* ¶¶ 33-53, *supra*.

[435] Notice of Arbitration, ¶ 187.

217. Arbitral jurisprudence has consistently established that, for purposes of determining whether an expropriation has occurred, the specific rights that have allegedly been expropriated must be capable of being assessed separately and independently from the rest of the rights that make up to the "covered investment":

- *Dreyfus v. India*: "This dilemma leads LDA [Louis Dreyfus Armateurs SAS, the Claimant] to attempt to demonstrate expropriation instead by isolating a particular *revenue stream* contributing to ALBA's [ALBA Asia Private Limited] overall value, namely that attributable to HBT's [Haldia Bulk Terminals Private Limited] operations. But however creative this theory may be, it runs counter to the text of Article 6(1). Article 6(1) does not prohibit 'measures having the effect of dispossession . . . of [*a part of an*] investment,' or 'the effect of dispossession . . . of [*a distinct revenue strand of an*] investment.' It requires a showing that the *investment itself* suffered an impact equivalent in effect to complete dispossession. The prohibition on uncompensated dispossession thus serves to bar dispossession by the host State of an investment writ large, not just interference with isolated rights or benefits relating to such investment. . . . DA's next attempt to reformulate its expropriation case is to redefine the subject investment for Article 6(1) purposes not as its shareholding in ALBA as such, but rather as the 'value of Claimant's shareholding in ALBA *connected to* HBT.' Essentially, LDA argues that this particular strand of value in ALBA derives from the value of HBT's Contract, and in these circumstances qualifies as an investment in its own right, since the definition of investment in Article 1(1)(c) of the Treaty includes 'claims to money or any other claim under contract having economic value.' Thus, according to LDA, if rights stemming from a contract are protected property, then they are capable of being expropriated separately from other elements of an overall investment. The natural corollary of LDA's argument is that if the investment is defined only as the *specific right* impacted by State conduct, then the severity of harm requirement in the Treaty – that the investment be dispossessed, and not just incrementally harmed – is *ipso facto* satisfied. . . . This argument is equally unavailing. Even putting aside the implications of Article 2(1) – that LDA has no protected investment in HBT, much less a protected right stemming from HBT's Contract – the false assumption underlying LDA's argument is that every interest, asset, or right of an investor may be expropriated separately from the investment enterprise as a whole, even when the enterprise has not itself been expropriated. But the logical consequence of LDA's theory would be that almost any impact of State conduct on an investment could be deemed to be an expropriation, provided the investor simply

identified as the relevant 'investment' only the category of interests, assets or rights impacted by the government act. . . . Thus, even if proven, interference with a single component of LDA's investment in ALBA, such as the value derived from an alleged indirect right to benefit from HBT's Contract, could not constitute expropriation."[436]

- *Electrabel v. Hungary*: "If it were possible so easily to parse an investment into several constituent parts each forming a separate investment … it would render meaningless … [the] approach to indirect expropriation based on 'radical deprivation' and 'deprivation of any real substance' as being similar in effect to a direct expropriation or nationalization. It would also mean, absurdly, that an investor could always meet the [magnitude of deprivation] test for indirect expropriation by slicing its investment as finely as the particular circumstances required, without that investment as a whole ever meeting that same test."[437]

- *Grand River v. United States*: "The Claimant pointed to no cases supporting the notion that state action allegedly impairing only a limited portion of the value of an otherwise ongoing and profitable investment . . . can give rise to a 'partial' expropriation under either NAFTA Article 1110 or general international law. . . . An act of expropriation must involve 'the investment of an investor,' not part of an investment. This is particularly so in these circumstances, involving an investment that remains under the investor's ownership and control." [438]

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[436] **Ex. RL-99**, *Louis Dreyfus Armateurs SAS v. Republic of India*, PCA Case No. 2014-26, Award, September 11, 2018, ¶¶ 417-419 (emphasis added).

[437] **Ex. RL-100**, *Electrabel S.A v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, November 30, 2012 ("*Electrabel*"), ¶ 6.57 (emphasis added).

[438] **Ex. RL-101**, *Grand River Enterprises Six Nations, LTD., et al. v. United States of America*, UNCITRAL (NAFTA), Award, January 12, 2011 ("*Grand River*"), ¶¶ 154-155 (emphasis added). *See also* **Ex. RL-102**, *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1 (NAFTA), Award, December 16, 2002 ("*Feldman*"), ¶ 152 ("The Claimant is free to pursue other continuing lines of export trading, such as exporting alcoholic beverages, photographic supplies, or other products for which he can obtain from Mexico the invoices required under Article 4, although he is effectively precluded from exporting cigarettes. Thus, this Tribunal believes there has been no 'taking' under this standard. . . in the present case."). According to doctrine, only a right that is capable of independent economic exploitation is capable of being expropriated separately from the investment as a whole. *See* **Ex. RL-103**, Ursula Kriebaum, *Partial Expropriation*, 8(1) The JOURNAL OF WORLD INVESTMENT & TRADE 69 (2007), p. 83 (explaining that a right is capable of being expropriated separately from the investment as a whole if: (i) "the overall investment Project can be disassembled into a number of discrete rights"; (ii) "the State has deprived the investor of a right which is covered by one of the items in the definition of 'investment' in the applicable investment protection treaty"; (iii) "this right is capable of economic exploitation independently of the remainder of the investment."); **Ex. RL-104**, Santiago Montt, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION - GLOBAL CONSTITUTIONAL AND ADMINISTRATIVE LAW IN THE BIT GENERATION (Hart Publishing 2009), pp. 270-271 ("[Tribunals] should look for denominators which, properly grounded in the applicable law, represent generally shared business expectations concerning groups of rights that are accepted as autonomous

218. This impossibility of a "partial expropriation" is also supported by the very text of the expropriation provision of the Treaty. Article 10.7 of the Treaty states that "[n]o Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization."[439] In other words, in accordance with the ordinary meaning of its terms, protection against expropriation is granted under the Treaty to the "covered investment" (which, according to Claimants, is the Services Contract), not to certain "specific rights" or "parts" of that covered investment.

219. It is a basic principle of international investment law that for an indirect expropriation to exist, there must be a substantial deprivation of the investment as a whole.[440] And as Claimants in this case do not allege – nor could they allege – that there was a substantial or total deprivation of their covered investment (*i.e.*, the Services Contract), their expropriation claim is not capable of constituting a breach of Article 10.7 of the Treaty.

220. Furthermore, and setting aside that it is impossible – as a matter of law – for two specific contractual rights to be indirectly expropriated separately from the rest of the other contractual rights that otherwise comprise Claimants' "covered investment",

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entities. This can be supported by the fact that those rights are 'identifiable *distinct* parts' of the investors' enterprises, . . . or that they are '*capable of* economic exploitation independently of the remainder of the investment'.").

[439] **Ex. RL-1**, Treaty, Article 10.7 (emphasis added). *See also* **Ex. RL-2**, Colombia-US TPA, Article 1.3 ("Covered investment means, with respect to a Party, an investment, as defined in Article 10.28 (Definitions), in its territory of an investor of another Party in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter.").

[440] *See for example* **Ex. RL-105**, *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1 (NAFTA), Award, March 31, 2010, ¶ 144 ("In this regard, as was also concluded in *Pope & Talbot*, the business of the investor has to be considered as a whole and not necessarily with respect to an individual or separate aspect."); **Ex. RL-51**, *Telenor*, ¶ 67 ("In the present case at least, the investment must be viewed as a whole and that the test the Tribunal has to apply is whether, viewed as a whole, the investment has suffered substantial erosion of value."); **Ex. RL-106**, Andrew Newcombe and Lluís Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT (Kluwer Law International 2009), p. 350 ("The tendency has been for tribunals to consider that the investment must be viewed as a whole.").

from a mere *prima facie* analysis of their factual allegations and the text of the Services Contract itself, it is evident that the "expropriation" alleged by Claimants with regard to the [redacted] of the Services Contract has not taken place.

221. First, it is not true – as Claimants contend – that the right under the Services Contract [redacted] has been "expropriated."[441] There is a clear distinction between Claimants' contractual liability and their fiscal liability. The Fiscal Liability Proceeding concerns Claimants' fiscal liability, not their contractual liability.[442] As it appears from its own text, the [redacted] of the Services Contract has limited personal and material scope, since it only covers [redacted][443] As fiscal liability is

[441] Notice of Arbitration, ¶¶ 184-185. Contradicting themselves, Claimants state that they submitted a notice of intent to initiate ICC arbitration under the Services Contract. Id., ¶ 197. This underlines the fact that the argument that there may have been an "expropriation" of the [redacted] has no basis.

[442] *See* ¶ 81, *supra*.

[443] [redacted] **Ex. R-80**, Ruling with Fiscal Liability – Part 10: Individualization, contractors II, pp. 5162-5163 ("[I]n the aforementioned clauses, it is established that the disputes between the parties to the contract, related to the performance of the contract, are ultimately resolved through an international arbitration tribunal, with agreed forms and procedures, but this does not include any type of process or administrative proceeding of a non-contractual nature. An arbitration clause should not be considered to overturn public order rules nor to transfer powers or public functions in favor of a third party. It must be noted that the authority of the Office of the Comptroller General of the Republic to carry out the present fiscal liability proceeding is regarding the irregularities evidenced with respect to the higher investments made in the Modernization and Expansion Project of the Cartagena Refinery, which is the object of the present fiscal liability proceeding, and not an apparent breach of the contract or the claims related to the performance of the contract.") (translation from Spanish). *See also* **Ex. RL-107**, Law 1563, which issued the National and International Arbitration Statute and other provisions, Article 1 ("Arbitration is an alternative dispute resolution mechanism whereby the parties submit to arbitrators the resolution of a dispute concerning matters of free disposition or those authorized by law.") (translation from Spanish); **Ex. RL-108**, Juan Carlos Naizir Sistac, *Arbitrabilidad objetiva: ¿Qué se puede y qué no se puede someter a arbitraje nacional según las fuentes colombianas de derecho?*, 139 REVISTA VNIVERSITAS (2019), p. 8 ("The Constitutional Court was emphatic in excluding from arbitration the matters that involve public policy, national sovereignty or constitutional order, matters which by their nature are reserved for the State, through its various organs.") (translation from Spanish).

autonomous and independent from contractual liability, contractual clauses are unenforceable in a fiscal liability proceeding.[444]

222. Moreover, in Claimants' most-cited case, *Glencore v. Colombia*, faced with the claimants' allegations of purported breaches of contractual guarantees by the initiation of a fiscal liability proceeding, the tribunal precisely emphasized that "fiscal liability does not require the violation of any norm, the breach of any contractual commitment, or any illegality affecting the contract."[445] In other words, the *Glencore* tribunal confirmed that fiscal liability can be determined independently of whether or not there is any breach of contract, being autonomous and independent from contractual liability.

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[444] *See* ¶¶ 81, 157-158, *supra*; **Ex. RL-8**, Prior Law 610 of 2000, Article 4, Paragraph 1 ("1. Fiscal liability is autonomous and independent, and [shall be analyzed] without prejudice to any other type of liability") (translation from Spanish); **Ap RL-109**, Constitutional Court of Colombia, Constitutional Judgment No. C-648 October 25, 2002, pp. 14-15 ("[T]he autonomous and compensatory nature of the fiscal liability action in charge of the comptrollers' offices is compatible with the liability deduced by other judicial or administrative authorities in relation to irregular compliance or breach of obligations that arise from state contracts, without this exercise involving the determination of a type of liability other than fiscal liability, or implying the violation of the right to due process or disregard for the principle of separation of powers, as alleged by the claimants, since they deal with different conducts or legal assets subject to protection.") (translation from Spanish); **Ex. RL-110**, Constitutional Court of Colombia, Constitutional Judgment No. C-1436, October 25, 2000, pp. 13-14 ("[T]he competence of the arbitrators is limited not only by the temporary nature of their action but also by the nature of the matter submitted to them, since only matters susceptible to transaction can be decided by arbitrators. . . . In this context, it is not difficult to reach the conclusion that private parties vested with the power to administer justice cannot pronounce on matters involving public policy, national sovereignty or constitutional order, matters which, by their nature, are reserved to the State, through its various organs.") (translation from Spanish); **Ex. R-68**, Superior Court of Bogotá – Criminal Chamber, *Acción de Tutela* No. 2018-00182 filed by Foster Wheeler and Process Consultants against CGR, *Tutela* Judgment of Second Instance, November 21, 2018, pp. 15-16 ("In this regard, the Chamber does not overlook the fact that [the Services Contract] indicated that any dispute arising out of the legal business concluded must be resolved initially through direct settlement, amicable composition and lastly under the rules of arbitration of the International Chamber of Commerce, however, these dispute resolution mechanisms refer to disputes in the execution of the signed contract, which in no way release the claimant companies from compliance with the legal obligations relating to public morality, nor do they derogate the national legislation that is inherent to it and that was referenced above.") (translation from Spanish). This same argument was raised by Claimants in the Fiscal Liability Proceeding, and was rejected in the Ruling with Fiscal Liability. *See* **Ex. R-80**, Ruling with Fiscal Liability – Part 10: Individualization, contractors II, pp. 5151-5163.

[445] **Ex. RL-20**, *Glencore I*, ¶ 1083.

223. Secondly, neither is it true that the [redacted] established in the Services Contract have been "expropriated."[446] [redacted] Therefore, the [redacted] of the Services Contract could not protect FPJVC from potential fiscal liability for economic damage to the State.[448]

224. For the foregoing reasons, Claimants' allegations regarding a purported expropriation of their rights under [redacted] of the Services Contract are not capable of establishing a *prima facie* case of expropriation.

(iii) Claimants Have Failed to Establish a *Prima Facie* Breach of National Treatment

225. Claimants also argue that there has been a breach of the national treatment obligation under Article 10.3 of the Treaty because they have been given less favorable treatment than that accorded to the members of Ecopetrol's board of directors.[449] According to Claimants, the CGR did not charge the members of Ecopetrol's board of directors with fiscal liability because it did not consider them to be "fiscal managers", while

[446] Notice of Arbitration, ¶ 186.

[447] [redacted]

[448] *See* **Ex. R-80**, Ruling with Fiscal Liability – Part 10: Individualization, contractors II, p. 5168; ¶ 157, n. 343, *supra*.

[449] Notice of Arbitration, ¶¶ 174-178.

it did charge Foster Wheeler and Process Consultants even though – Claimants argue – they had less power and management control than the members of Ecopetrol's board of directors.[450]

226. Without entering into an analysis of the powers and management roles of Claimants and the members of the Ecopetrol board, as regards the meaning and scope of the role of a "fiscal manager" under Colombian law,[451] and as to what objective conditions justified a differential treatment in their case, it appears from the Indictment Order itself (and the subsequent Ruling with Fiscal Liability) that both natural persons (including members of the board and certain administrators of Reficar) and juridical persons (including CB&I), of Colombian and foreign nationality, were charged (and later found liable) in the Fiscal Liability Proceeding.[452] That fact alone negates any allegation that there may have been any discrimination in this case on the basis of Claimants' U.S. citizenship.

227. For purposes of establishing whether there has been a breach of the national treatment obligation under Article 10.3 of the Treaty, Claimants have the burden of proving that (i) they or their investments were accorded "treatment", (ii) they were "in

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[450] *Id.*, ¶¶ 176-177.

[451] Preliminarily, it should be noted that Foster Wheeler and Process Consultants were charged (and later found fiscally liable) with "contributing in the cause of the damage from their condition as consultants of the Project", and not as "fiscal managers" (*i.e.*, for their conduct "in connection" with fiscal management – as per the terms of Article 1 of Law 610 of 2000 –, or, to put it another way, as indirect fiscal managers). *See* **Ex. R-54**, Indictment Order – Part 3: Considerations of the office and results of the investigation, p. 809 (translation from Spanish); **Ex. R-80**, Ruling with Fiscal Liability – Part 10: Individualization, contractors II, p. 5190 (translation from Spanish); ¶¶ 130-132, 153-154, *supra*. In contrast, the proceedings against the members of the Ecopetrol board of directors were closed because no willful or grossly negligent conduct was found, and not because such members were not considered to have exercised fiscal management. *See* n. 270, ¶ 145, *supra*. Therefore, Claimants and the members of Ecopetrol's board of directors were not "in like circumstances."

[452] **Ex. R-65**, Indictment Order – Part 14: Disaggregation of facts and resolutions, pp. 4738-4747. *See also* **Ex. R-83**, Ruling with Fiscal Liability – Part 13: Resolutory, pp. 6230-6236 (determining that the defendants are fiscally liable, with the exception of four of those under investigation).

like circumstances" with respect to local investors and investments, and (iii) the treatment they or their investments received was "less favorable" than that accorded to the local investors and investments.[453] Similarly, the national treatment obligation is limited to "the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments" of the investor.[454] In short, the national treatment obligation under the Treaty protects investors and their investments from discrimination based on their nationality, such that there could not have been a *prima facie* violation of Article 10.3 of the Treaty when CGR's actions affected both foreigners and nationals.[455]

[453] **Ex. RL-1**, Treaty, Article 10.3 ("1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors 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 its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."). *See also* **Ex. RL-54**, *Submission of the U.S. in Angel Seda*, ¶ 49; **Ex. RL-62**, *Submission of the U.S. in Ballantine*, ¶ 13; **Ex. RL-63**, *Submission of the U.S. in Bay View*, ¶ 31; **Ex. RL-65**, *Submission of the U.S. in Elliott Associates*, ¶ 22; **Ex. RL-66**, *Submission of the U.S. in Gramercy*, ¶ 49; **Ex. RL-67**, *Submission of the U.S. in Italba*, ¶ 14; **Ex. RL-68**, *Submission of the U.S. in Mason*, ¶ 26.

[454] **Ex. RL-1**, Treaty, Article 10.3. It is important to note that none of Claimants' allegations concerning a purported breach of the national treatment obligation relate to the "acquisition, expansion, management, conduct, operation, and sale or other disposition" of the Services Contract, being the "investment" claimed by Claimants. Similarly, it should also be noted that the national treatment obligation does not oblige more favorable treatment to be granted to U.S. investors than that granted, in like circumstances, to Colombian investors, as Claimants appear to suggest with their allegations.

[455] *See* **Ex. RL-102**, *Feldman* ¶ 181 ("It is clear that the concept of national treatment as embodied in NAFTA and similar agreements are designed to prevent discrimination on the basis of nationality, or 'by reason of nationality'."). **Ex. RL-111**, *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine* Republic, ICSID Case No. ARB/14/32, Decision on Jurisdiction, June 29, 2018, ¶ 249 ("The Tribunal, however, is unable to see how either one of these aspects, or both aspects together, could plausibly result in a breach of Article 3(1) of the BIT. Article 3(1) prohibits nationality-based discriminations between foreign investors and their investments, on the one hand, and national investors and their investments, on the other. Such discrimination, however, presupposes that foreign and national investors and their investments are affected differently*, de iure* or *de facto*, either by the same government measure or by measures that are sufficiently closely connected so as to result in a discriminatory treatment."); **Ex. RL-54**, *Submission of the U.S. in Angel Seda*, ¶ 50 ("Article 10.3 is intended to prevent discrimination on the basis of nationality between domestic investors (or investments) and investors (or investments) of the other Party, that are in 'like circumstances'.").

228. As noted by the tribunal in *S.D. Myers v. Canada* when analyzing an identical national treatment provision:

> [I]n assessing whether a measure is contrary to a national treatment norm, the following factors should be taken into account:
>
> - whether the practical effect of the measure is to create a disproportionate benefit for nationals over non-nationals;
>
> - whether the measure, on its face, appears to favour its nationals over non-nationals who are protected by the relevant treaty.[456]

229. From a simple analysis of Claimants' factual allegations and the undisputed facts of the case, it is possible to observe that Claimants have failed to prove *prima facie* that the conditions necessary for a breach of the national treatment obligation are met due to the fact that: (i) the Indictment Order (as well as the Ruling with Liability that was issued after this Arbitration was initiated) involves both nationals and foreigners, and therefore does not have the "practical effect" of "creat[ing] a disproportionate benefit for nationals over non-nationals"; and (ii) "whether the measure, on its face" does not "appears to favour its nationals over non-nationals."

230. For the foregoing reasons, a *prima facie* case of a breach of the national treatment obligation has not been established.

(iv) Claimants Have Failed to Establish a *Prima Facie* Breach of Most-Favored-Nation Treatment

231. Claimants also contend that Colombia breached Article 10.4 of the Treaty – the most-favored-nation ("MFN") treatment obligation – by allegedly granting Swiss investors and Swiss covered investments more favorable treatment than that granted to

[456] **Ex. RL-112**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL (NAFTA), Partial Award, November 13, 2000, ¶ 252.

U.S. investors, on grounds that Swiss investors can purportedly invoke the umbrella clause contained in the Colombia-Switzerland BIT while Claimants cannot, given that the Treaty does not contain such a clause.[457] Based on the application of the MFN clause, Claimants request the importation of the umbrella clause of the Colombia-Switzerland BIT and argue that Colombia breached that umbrella clause.[458] However, none of Claimants' arguments are capable of establishing a *prima facie* breach of the MFN obligation.

232. First, according to the ordinary meaning of the terms of Article 10.4.1 of the Treaty, in its context the MFN obligation only requires that Colombia accord to U.S. investors a treatment no less favorable than that which it accords, in like circumstances, to investors of any other Party or non-Party with respect to the establishment, acquisition, management, conduct, operation, and sale or other disposition of investments in Colombia.[459] This requires a comparison of the factual situations of treatment actually accorded, in like circumstances, to U.S. investors and investors from third countries; the MFN obligation is not a mechanism for importing standards of protection from other investment treaties concluded with third countries.[460] In the present case, Claimants do

[457] Notice of Arbitration, ¶¶ 188-192.

[458] *Id.*, ¶¶ 193-200.

[459] **Ex. RL-1**, Treaty, Article 10.4.1 ("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.").

[460] *See* **Ex. RL-113**, *Içkale Insaat Limited Sirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award, March 8, 2016, ¶ 329 ("The terms 'treatment accorded in similar situations' therefore suggest that the MFN treatment obligation requires a comparison of the factual situation of the investments of the investors of the home State and that of the investments of the investors of third States, for the purpose of determining whether the treatment accorded to investors of the home State can be said to be less favorable than that accorded to investments of the investors of any third State. It follows that, given the limitation of the scope of application of the MFN clause to 'similar situations,' it cannot be read, in good faith, to refer to standards of investment protection included in other investment treaties between a State party and a third State. The standards of protection included in other investment treaties create legal rights for the investors concerned, which may be more favorable in the sense of being additional to the standards included in the basic treaty, but such differences between applicable legal standards cannot be said to amount to 'treatment accorded in similar situations,' without effectively denying any meaning to the terms 'similar situations.' Investors

not argue that there is a factual scenario in which any third country investor was actually accorded more favorable treatment with respect to the establishment, acquisition, management, conduct, operation, and sale or other disposition of investments in Colombia, such that there could not have been a breach of this obligation.

233. Second, even if the MFN clause could have be used as an importation mechanism as Claimants argue (*quod non*), it would not be possible to use the MFN clause of the Treaty to import a new right from an investment treaty concluded with a third country (as would be the case of the umbrella clause) that is not found in the base treaty (*i.e.*, the Treaty).[461] In other words, even if the importation of standards of protection from

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cannot be said to be in a 'similar situation' merely because they have invested in a particular State; indeed, if the terms 'in similar situations' were to be read to coincide with the territorial scope of application of the treaty, they would not be given any meaning and would effectively become redundant as there would be no difference between the clause 'treatment no less favourable than that accorded in similar situations . . . to investments of investors of any third country' and 'treatment no less favourable than that accorded . . . to investments of investors of any third country.' Such a reading would not be consistent with the generally accepted rules of treaty interpretation, including the principle of effectiveness, or *effet utile*, which requires that each term of a treaty provision should be given a meaning and effect.") (emphasis added); **Ex. RL-114**, *Muhammet Cap & Sehil Insaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Award, May 4, 2021, ¶¶ 784, 793 ("Accordingly, the Tribunal considers that the words '*similar situations*' indicate the State parties' intention to restrict the scope of the MFN clause to apply only to discriminatory treatment between investments of investors of one of the State parties and investors of third States, insofar as such investments may be said to be in a factually similar situation. This required that the actual measures taken by the host State is directed towards investments of actual investors that are in a similar situation, and to prove that such measure had the effect of treating one less favourably than the other. . . . The Tribunal has concluded that the MFN provision in Article II(2) BIT applies to *de facto* discrimination where two actual investors in a similar situation are treated differently. That is not the case here. Further, the wording of Article II(2), requiring such factually similar situation, does not entitle Claimants to rely on the MFN provision to import substantive standards of protection from a third-party treaty which are not included in the BIT, and to rely on such standards in the present Arbitration.") (emphasis added).

[461] *See*, in that respect, **Ex. RL-115**, *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, October 24, 2011 ("*Hochtief AG*"), ¶ 81 ("In the view of the Tribunal, it cannot be assumed that Argentina and Germany intended that the MFN clause should create wholly new rights where none otherwise existed under the Argentina-Germany BIT. The MFN clause stipulates a standard of treatment and defines it according to the treatment of third parties. The reference is to a standard of treatment accorded to third parties, not to the extent of the legal rights of third parties."); **Ex. RL-116**, *Accession Mezzanine Capital L.P. and Danubius Kereskedöház Vagyonkezelö Zrt. v.* Hungary, ICSID Case No. ARB/12/3, Decision on Respondent's Objections under Arbitration Rule 41(5), January 16, 2013, ¶¶ 73-74 ("Care has to be taken in this context. MFN clauses are not and should not be interpreted or applied to create new causes of action beyond those to which consent to arbitrate has been given by the Parties. . . . The Tribunal is of the view that an investor may properly rely only on rights set forth in the basic treaty,

other treaties concluded with third parties were allowed, only the importation of more favorable standards of protection already contained in the Treaty could take place.[462] As there is no umbrella clause in the Treaty, it would not be possible to insert this new right into the Treaty by importing it via the MFN clause.

234. Third, even if Claimants were allowed – by means of applying the MFN clause – to import new rights not found in the Treaty, it would not be possible to import an umbrella clause from some other investment treaty concluded by Colombia since this would contravene the public policy considerations that the Contracting Parties took into account when specifically excluding an umbrella clause from the Treaty.[463] Colombia has

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meaning the BIT to which the investor's home state and the host state of the investment are directly parties, but not more than that.").

[462] *See for example* **Ex. RL-117**, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/01, Award, July 21, 2017, ¶ 884 ("The Tribunal accepts that the parties to the Treaty were in all likelihood aware of the existence of umbrella clauses and if they had intended to include such a clause in the Treaty, they would have done so. According to Respondent, use of the MFN Clause to incorporate an umbrella clause into the Treaty would result in the incorporation of a new right or standard of treatment not provided for in the Treaty. On the basis of the specific language used by the Parties in the Treaty, the Tribunal finds this argument persuasive."); **Ex. RL-115**, *Hochtief AG*, ¶ 81 ("The MFN clause is not a *renvoi* to a range of totally distinct sources and systems of rights and duties: it is a principle applicable to the exercise of rights and duties that are actually secured by the BIT in which the MFN clause is found.").

[463] The *Maffezini v. Spain* tribunal itself emphasized that the importation of obligations or standards from other treaties by means of an MFN clause cannot be effected if it would breach the policy considerations taken into account by the contracting parties when incorporating, eliminating or establishing exceptions to a certain treaty provision. **Ex. RL-118**, *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the tribunal on Objections to Jurisdiction, January 25, 2000, ¶ 56 ("This operation of the most favored nation clause does, however, have some important limits arising from public policy considerations."), ¶ 62 ("As a matter of principle, the beneficiary of the clause should not be able to override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question."), ¶ 63 ("[T]his stipulation cannot be bypassed by invoking the clause. This conclusion is compelled by the consideration that it would upset the finality of arrangements that many countries deem important as a matter of public policy."). Therefore, provisions specifically negotiated by the Contracting Parties cannot be set aside through the application of an MFN clause. *See* **Ex. RL-119**, UNCTAD, *Most-Favoured-Nation Treatment*, UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II (United Nations 2010), p. XV ("[A]rbitral tribunals have generally been cautious in importing substantive provisions from other treaties, particularly when absent from the basic treaty or when altering the specifically negotiated scope of application of the treaty.").

a consistent policy of rejecting umbrella clauses.[464] As for the United States, while its early model treaties contained an umbrella clause, the 1994 U.S. model treaty – as well as the 2004 U.S. model treaty (on which this Treaty is based) and all of its subsequent model treaties – removed the umbrella clause from the text and included instead a definition of the term "investment agreement", establishing the possibility that certain contractual claims could be submitted to arbitration by an investor when in breach of an "investment agreement" – which is a concept specifically defined in investment treaties concluded by the United States since 1994.[465] Thus, the Treaty specifically provides for

[464] **Ex. RL-120**, José Antonio Rivas, *Colombia*, in COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 183 (C. Brown (ed.), Oxford Scholarly Authorities on International Law 2013), p. 242 ("The practice of Colombia in rejecting the inclusion of an umbrella clause has been highly consistent, with the exception of the Colombia-U.S. [Treaty] (2006). This [Treaty] has a type of umbrella clause included under the investor-State dispute settlement section of the treaty as commitments made under 'investment agreements', and is limited to three sectors – investments in natural resources, supply of services to the public on behalf of the State, and infrastructure. The Switzerland-Colombia BIT (2007) and Japan-Colombia BIT (2011) have typical umbrella clauses, but the parties to these treaties have not given their consent to investor-State arbitration when an investor alleges a breach of the respective umbrella clause."). *See also id.,* p. 241 ("As a strict policy matter, the Model [Treaty of Colombia] does not include an 'umbrella clause'.").

[465] *See* **Ex. RL-121**, Kenneth J. Vandevelde, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (Oxford University Press 2009), pp. 103-104 ("The changes in the 1994 model are too numerous. . . . [T]he general absolute treatment provision was modified by the deletion of the clause requiring the parties to observe obligations relating to investments. . . . [T]he investor-state disputes provision was modified to include definitions of 'investment agreement' and 'investment authorization'."), p. 261 ("[T]he provision requiring the parties to observe obligations with regard to investments was deleted. This provision had been omitted from NAFTA and, particularly as a result of the negotiations of the Energy Charter Treaty, U.S. BIT negotiators had become concerned about its potential breadth. The term 'obligation' potentially could be given a scope that the drafters never intended, such as to refer to a treaty obligation, thereby suggesting that any treaty obligation with respect to investment was enforceable under the investor-state disputes provision."), p. 360 ("[T]he term 'investment agreement' in the BITs is narrower than the term 'any obligation'. The *El Paso* and *Pan American Energy* tribunals treated the 2004 model as an interpretive guide to the Argentina BIT, but in fact the Argentina BIT was based on the 1991 model and thus reflected the policy in place prior to 1994, when the obligations provision was deleted, and certainly long before the evolutions in policy that produced the 2004 model.") (emphasis added); **Ex. RL-122**, Katia Yannaca-Small, *Interpretation of the Umbrella Clause in Investment Agreements*, OECD WORKING PAPERS ON INTERNATIONAL INVESTMENT 2006/03 (OECD Publishing 2006), p. 14 ("This [umbrella] clause is not present in the most recent 2004 US Model BIT. Article 24 (1) of the model BIT limits the application of this clause to cover only claims stemming from an investment agreement and not other contractual obligations.") (emphasis added); **Ex. RL-42**, C. McLachlan, L. Shore and M. Weiniger, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES, ¶ 4.65 ("The US model brings contractual claims under investment agreements with national authorities of the State within the jurisdiction of an investment treaty tribunal. It does not treat such claims as constituting substantive breaches of the treaty. Rather, and in contrast to such breaches, it provides that investment agreement claims are subject to the rules of law specified in the agreement (or, in default of agreement, the law of the host State and such rules of international law as may

the possibility of submitting breaches of an "investment agreement" to arbitration, and only where a particular written agreement qualifies as an "investment agreement" under the Treaty (*i.e.*, a written agreement between "a national authority of a Party" and an investor of another Party) may breaches of contractual obligations arising under such an investment agreement be submitted to arbitration under the Treaty.[466] To permit the importation of an umbrella clause, and thus expand the universe of contractual claims that could be submitted to arbitration under the Treaty, would undermine the public policy considerations taken into account by the Contracting Parties when incorporating the special term "investment agreement", eliminating the umbrella clause, and limiting the type of contractual claims that can be submitted to arbitration under the Treaty only to breaches of an investment agreement.[467]

235. Fourth, even if the importation of an umbrella clause from another investment treaty were permitted through the MFN clause of the Treaty, importing the

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be applicable)."). *Compare* **Ex. RL-123**, Treaty between the Argentine Republic and the United States of America concerning the Reciprocal Encouragement and Protection of Investment, signed November 14, 1991 and effective from October 20, 1994, Article 2.2(c) (which contains an umbrella clause, and where the term "investment agreement" is not defined) *with* **Ex. RL-124**, 1994 United States Bilateral Investment Treaty Model, Article 1 (which defines the term "investment agreement", and does not contain an umbrella clause) *and* **Ex. RL-125**, 2004 United States Bilateral Investment Treaty Model, Article 1 (which also defines the term "investment agreement" and does not contain an umbrella clause).

[466] **Ex. RL-1**, Treaty, Article 10.16.1; ¶¶ 240-246, *infra*. While the umbrella clause is a substantive obligation, the effect of importing an umbrella clause into the Treaty *via* its MFN clause would be tantamount to expanding the type of contractual claims that could be submitted to arbitration beyond those concerning breaches of an investment agreement. However, footnote 2 of the Treaty itself clarifies that MFN treatment "does not encompass dispute resolution mechanisms, such as those in Section B, that are provided for in international investment treaties or trade agreements." **Ex. RL-1,** Treaty, n. 2. Claimants are ultimately pursuing that objective in their attempt to import an umbrella clause: to extend the Tribunal's jurisdiction so that it can hear any contractual claim, which is expressly forbidden by the Treaty.

[467] It should be noted that Colombia did not include an umbrella clause in its 2008 Model Treaty either, nor in its subsequent model treaties. *See* **Ex. RL-126**, Colombia Bilateral Agreement for the Promotion and Protection of Investments Model of 2008 ("2008 Colombia Model Treaty"); n. 464, *supra*. Additionally, the importation of an umbrella clause from another investment treaty would not be permitted due to the limited scope of the MFN obligation under the Treaty. Article 10.4.1 of the Treaty provides that MFN treatment is granted to U.S. investors only with respect to the "establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." **Ex. RL-1**, Treaty, Article 10.4.1.

right to submit a claim to arbitration for breach of the umbrella clause of the Colombia-Switzerland BIT (being the treaty from which Claimants seek to import such a right) would not be possible because such a right does not exist in the Colombia-Switzerland BIT. Notably, while the Colombia-Switzerland BIT contains an umbrella clause, it does not contain a consent to submit to arbitration any claims that may arise from a breach of that umbrella clause.[468]

236. This was expressly confirmed by the tribunal in *Glencore v. Colombia* where, precisely, the tribunal had to interpret the scope of the umbrella clause of the Colombia-Switzerland BIT and the consent given by the contracting parties to submit disputes arising out of alleged breaches of the umbrella clause to arbitration.[469] While Article 10(2) of the Colombia-Switzerland BIT contains an umbrella clause (which is the one cited to by Claimants in their Notice of Arbitration),[470] Article 11(3) of the treaty expressly provides that the contracting parties consent to the submission of investment disputes to international arbitration, "except for disputes with regard to Article 10 paragraph 2 of [the treaty]."[471] In the Protocol to the Colombia-Switzerland BIT, it was

[468] **Ex. RL-43**, Colombia-Switzerland BIT, Article 10(2) ("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."), and 11(3) ("Each Party hereby gives its unconditional and irrevocable consent to the submission of an investment dispute to international arbitration in accordance with paragraph 2 above, except for disputes with regard to Article 10 paragraph 2 of this Agreement."). It should be noted that no investment treaty, or investment chapter in a free trade agreement, entered into by Colombia and currently in force contains a consent to submit to arbitration claims that may arise from a breach of an umbrella clause. The only investment treaties entered into by Colombia that contain an umbrella clause are the Colombia-Switzerland BIT and the Colombia-Japan BIT, but neither of these treaties contain consent to submit to arbitration claims that may arise from breaches of those umbrella clauses. *See* n. 454, *supra*.

[469] **Ex. RL-20**, *Glencore I*, ¶ 1025 ("[T]he Tribunal concludes that it lacks competence to adjudicate claims brought under the Umbrella Clause contained in Art. 10(2) of the Treaty.") (emphasis omitted).

[470] Notice of Arbitration, ¶ 192 (quoting Article 10(2) of the Colombia-Switzerland BIT – although the Claimants erroneously quote it as Article 10(3)); **Ex. RL-43,** Colombia-Switzerland BIT, Article 10(2).

[471] **Ex. RL-20**, *Glencore I*, ¶ 1001; **Ex. RL-43**, Colombia-Switzerland BIT, Article 11(3).

established that after a period of five (5) years from its entry into force, the contracting parties had to consult to determine whether the limitation of consent with respect to the umbrella clause continues to be appropriate.[472] However, that provision was never reviewed or modified, such that disputes regarding alleged breaches of the umbrella clause in the Colombia-Switzerland BIT are excluded from the consent to arbitration in that treaty, as confirmed by the *Glencore* tribunal:

> The wording of Art. 11(2) of the Protocol, combined with the ordinary meaning of Art. 11(3) of the Treaty, supports only one conclusion: in Art. 11(3) of the Treaty the State parties excluded Umbrella Clause disputes from their consent to arbitrate, but, conscious that such exclusion in practical terms deprived the Umbrella Clause of effectiveness, in Art. 11(2) of the Protocol they agreed to review their decision, after a five-year period of experience, in light of the performance of the Treaty and upon request of one of the State parties.[473]

237. Thus, if the Tribunal were to allow the importation of the umbrella clause of the Colombia-Switzerland BIT and allow Claimants to submit their claims for breaches of the umbrella clause to arbitration, U.S. investors would be in more favorable circumstances than Swiss investors.[474]

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[472] **Ex. RL-20**, *Glencore I*, ¶ 1006 (citing to the Addendum Article 11(2) of the Protocol to the Colombia-Switzerland BIT, which states: "With regard to paragraph 3 of the said Article, on request of a Party five years after the entry into force of this Agreement or at any time thereafter, the Parties shall consult with a view to assessing whether the provision on consent with respect to Article 10 paragraph 2 is appropriate considering the performance of this Agreement."); **Ex. RL-43**, Colombia-Switzerland BIT, Protocol, Ad Article 11(2).

[473] **Ex. RL-20**, *Glencore I*, ¶ 1009 (emphasis added). In addition, the *Glencore* tribunal noted that Colombia's policy of not including an umbrella clause in its model investment treaty and the opinions of several doctrinaires to the same effect confirmed its interpretation that there was no consent to arbitrate an alleged breach of the umbrella clause. *Id.*, ¶¶ 1014, 1022-1023.

[474] This would be the case because, under the Colombia-Switzerland BIT, Swiss investors cannot submit to arbitration their claims for breaches of the umbrella clause of that treaty, and the importation of the umbrella clause could not result in granting U.S. investors more favorable treatment than that enjoyed by Swiss investors under the treaty from which the umbrella clause would be imported. Furthermore, U.S. investors would be treated more favorably than any other foreign investor protected by an investment treaty concluded by Colombia, since Colombia has not consented to submit to arbitration claims for breaches of an umbrella clause in any of its investment treaties. *See* n. 464, *supra*. The very text of the MFN obligation

238. Fifth, even if Claimants could hypothetically import the umbrella clause of the Colombia-Switzerland BIT – by way of the Treaty's MFN clause – and the Tribunal deems that there is consent under the Treaty to submit disputes regarding alleged breaches of that umbrella clause to arbitration (*quod non*), the umbrella clause of the Colombia-Switzerland BIT (which protects obligations arising from a written agreement between the central government or an agency thereof and an investor of the other Party in relation to a specific investment which the investor could rely on in good faith when establishing, acquiring or expanding the investment)[475] would also not apply in this case because the requirements for its application are not met:

- Reficar is not an "agency" of the Colombian central government, as Claimants incorrectly point out.[476] Although the Colombia-Switzerland BIT does not contain a definition of "central government agency" (nor does the Treaty), under Colombian law it is inadmissible to classify a

of the Treaty prevents this type of importation and/or the application of this obligation, since it is limited to granting "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." **Ex. RL-1**, Treaty, Article 10.4.1. In other words, the MFN obligation is limited to granting U.S. investors treatment "no less favorable" and "in like circumstances" than that accorded to Swiss investors, but cannot be applied in a manner that would result in granting U.S. investors more favorable treatment as this would exceed the scope of the obligation. Furthermore, there are several legal grounds that would preclude the importation in the manner requested by Claimants. First, if the importation of the umbrella clause of the Colombia-Switzerland BIT were allowed, that importation could not be "partial." In other words, the importation of the umbrella clause should be effected together with all rights and limitations pertaining thereto, including the existing limitation contained in that treaty regarding the lack of consent to submit disputes over alleged breaches of the umbrella clause to arbitration. For practical purposes, this would mean that this Tribunal lacks the power to settle any dispute resulting from an alleged breach of the umbrella clause, such that the discussion on whether or not the umbrella clause applies in this case is merely academic. Secondly, if the importation of the umbrella clause of the Colombia-Switzerland BIT were allowed and, at the same time, U.S. investors were allowed to submit their disputes regarding potential breaches of the umbrella clause to arbitration under the Treaty, that "importation" would be contrary to the recognized international principle of "*nemo plus iuris*", since it would give U.S. investors a better right than the one held by the Swiss investors, from whom the obligation derives. *See*, in that respect, **Ex. RL-127**, *Banro American Resources, Inc. and Société Aurifere du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No. ARB/98/7, Award of the Tribunal (Excerpts), September 1, 2000, 17 ICSID Review – FILJ 380 (2002), ¶ [5].

[475] **Ex. RL-43**, Colombia-Switzerland BIT, Article 10(2).

[476] Notice of Arbitration, ¶ 194.

decentralized commercial company, such as Reficar, as a central government agency.[477]

[477] There are several reasons for this. First, because Colombian law establishes which entities belong to central government and does not include commercial companies. **Ex. RL-4**, Law 489 of 1998, Article 38 ("The Executive Branch of the Government at the national level is made up of the following bodies and entities: 1. From the Central Level: a) The Presidency of the Republic; b) The Vice-Presidency of the Republic; c) The High Councils of the administration; d) The ministries and administrative departments; e) The superintendencies and the special administrative units without legal personality.") (translation from Spanish; emphasis added). Secondly, because the Colombian government has 16 agencies, and Reficar is not one of them. *See* **Ex. R-91**, Single Portal of the Colombian State, "Entities", "Executive Branch", "National Order." Third, as Claimants themselves highlight (Notice of Arbitration, ¶ 50), Reficar is simply a commercial company with its own legal personality, and cannot be considered as an "agency of the central government" of Colombia. *See* ¶¶ 14-15, n. 19, *supra*; **Ex. RL-128**, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, June 18, 2010 ("*Gustav F W*"), ¶¶ 346, 348 ("The Tribunal further notes the position taken by the ad hoc Committee in the *CMS v. Argentina* case, which also made it clear that, in its understanding, a contractual obligation between a public entity distinct from the State and a foreign investor cannot be transformed by the magic of the so-called 'umbrella clause' into a treaty obligation of the State towards a protected investor. . . . in these circumstances, the contractual commitments of Cocobod, being a separate entity from the State, cannot be considered as elevated – and transformed in nature – by Article 9(2) of the BIT, into treaty commitments of the State itself. It follows that a violation by Cocobod – if such a violation had been found – could not have constituted a violation of the BIT."); **Ex. RL-129**, *Impregilo S.p.A v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, April 22, 2005 ("*Impregilo*"), ¶¶ 216, 223 ("Given that the Contracts at issue were concluded between the Claimant and WAPDA [Pakistan Water and Power Development Authority], and not between the Claimant and Pakistan; that under the law of Pakistan, which governs both the Contracts and the status and capacity of WAPDA for the purposes of the Contracts, WAPDA is a legal entity distinct from the State of Pakistan; and given that Article 9 of the BIT does not cover breaches of contracts concluded by such an entity, it must follow that this Tribunal has no jurisdiction under the BIT to entertain Impregilo's claims based on alleged breaches of the Contracts. . . . In the Tribunal's view, given that the Contracts were concluded by Impregilo with WAPDA, and not with Pakistan[,] Impregilo's reliance upon Article 3 of the BIT takes the matter no further. Even assuming that Pakistan, through the MFN clause and the Swiss-Pakistan BIT, has guaranteed the observance of the contractual commitments into which it has entered together with Italian investors, such a guarantee would not cover the present Contracts – since these are agreements into which it has not entered. On the contrary, the Contracts were concluded by a separate and distinct entity."). Claimants also appear to argue that, under international law, Reficar entered into the Services Contract on behalf of Colombia. Notice of Arbitration, ¶ 195. Setting aside that there is no factual and/or legal basis for such an assertion, international law respects the separate legal personality of state-owned companies and, absent an international wrongful act, does not permit the general attribution of contracts of State-owned companies to the State. *See* **Ex. RL-130**, Richard Happ, *The Nykomb Case in the Light of Recent ICSID Jurisprudence*, in INVESTMENT ARBITRATION AND THE ENERGY CHARTER TREATY 315 (C. Ribeiro (ed.), JurisNet, LLC 2006), p. 324 ("[I]t is not possible to attribute a contract concluded by a sub-division or State entity to the state by using the rules on state responsibility. The rules of attribution have been developed in the context of attributing acts to the State in order to determine whether those acts are in breach of international law. They cannot be applied *mutatis mutandis*."); **Ex. RL-131**, *Consutel Group S.p.A. in liquidazione v. People's Democratic Republic of Algeria*, PCA Case No. 2017-33 (UNCITRAL), Final Award, February 3, 2020, ¶ 364 ("The Tribunal admitted, for the purposes of the discussion on jurisdiction, the attribution to the State of contractual breaches alleged against Algeria Telecom. However, this does not mean that the State is considered to be the debtor of these contractual obligations. The rules of attribution do not have the effect of modifying the holders of the contract and transferring to the State the rights or obligations entered into by a public entity. The liability of a public entity for the breach of its contractual obligations can certainly be attributed to the State on the basis of the attribution rules, but the contractual obligations thus breached remain those of the public entity that has entered into them. The State does not

- By the very terms of the umbrella clause of the Colombia-Switzerland BIT, the Services Contract cannot simultaneously constitute the "investment" and the "written agreement" from which an obligation derives with respect to the investment.[478] In other words, it is a matter of logic that "the written agreement" cannot constitute the investment itself.

- In any event, Claimants' factual allegations – even if true – could not constitute a breach of the Colombia-Switzerland BIT[479] because: (i) there was evidently no breach of the [redacted] of the Services Contract since fiscal liability is autonomous and independent from contractual liability and is not (and nor could it be) within the personal and material scope of the [redacted];[480] and (ii) any [redacted] in the Services Contract would ultimately apply only with regard to Claimants' [redacted] vis-à-vis Reficar, and would not (and nor could it) apply to their fiscal or other liabilities.[481]

239. In sum, Claimants' claims are not capable of constituting a *prima facie* breach of the Treaty's MFN obligation for an abundance of reasons: (i) the MFN obligation is a standard of "treatment" and Claimants have failed to make a *prima facie* showing of a factual scenario in which third-country investors were accorded more favorable treatment, in like circumstances, than U.S. investors; (ii) the MFN clause of the Treaty cannot be used to import substantive obligations from other investment treaties (new rights) that are not found in the base treaty (*i.e.*, the Treaty), nor – if the importation of new rights were permitted – can such an importation be contrary to the public policy considerations taken into account by the Contracting Parties to the Treaty; (iii) even if the importation of an umbrella clause from another treaty were permitted, unusually the umbrella clause of the Colombia-Switzerland BIT that Claimants seek to import does not

become, by virtue of the rules of attribution, the debtor of the obligations incurred by the public entity.") (translation from French).

[478] **Ex. RL-43**, Colombia-Switzerland BIT, Article 10(2).

[479] Notice of Arbitration, ¶¶ 196-199.

[480] *See* ¶¶ 81, 157-158, *supra*.

[481] *See* ¶ 157, n. 343, *supra*.

grant consent to arbitrate claims for breaches of that umbrella clause; and (iv) in any event, even if the umbrella clause of the Colombia-Switzerland BIT could be imported in the manner requested by Claimants, it would be impossible to apply that clause in this case because the requirements for its application are not met (*inter alia*, because Reficar is not an agency of the Colombian central government).

(2) There Could Not Have Been a Breach of an Investment Agreement

240. Claimants also confusingly argue that, in addition to having breached substantive Treaty obligations, Colombia's actions constitute contractual breaches,[482] and that the Treaty specifically permits investors such as Claimants to seek some form of relief against the State in an ICC arbitration in respect to breaches of a contract that qualifies as an "investment agreement."[483] However, the Treaty does not grant jurisdiction to the Tribunal to hear alleged contractual breaches. Furthermore, no investment agreement *prima facie* exists in this case, such that no investment agreement could have been breached.

241. Strangely, Claimants contend that "all of Colombia's actions that constitute contract violations . . . also constitute violations of the [Treaty]", and therefore, that the Tribunal would have jurisdiction over Claimants' claims arising out of a breach of their contractual rights.[484] However, as explicitly appears from the terms of the Treaty,

[482] Notice of Arbitration, ¶ 202 ("[A]ll of Colombia's actions that constitute contract violations . . . also constitute violations of the [Treaty]. Consequently, the Tribunal has jurisdiction over FPJVC's claims arising from a violation of its contractual rights.").

[483] *Id.*, ¶ 203 ("[T]he [Treaty] specifically allows for investors, like FPJVC, to seek relief against the State in ICC arbitration for violations of a contract if it qualifies as an 'investment agreement'.").

[484] *Id.*, ¶ 202.

contractual claims are outside the scope of Colombia's consent under the Treaty,[485] such that this Tribunal lacks jurisdiction to hear purely contractual claims.[486]

242. On the other hand, with respect to the arguments raised by Claimants regarding the existence of an alleged "investment agreement", it should be noted that Article 10.16.1 of the Treaty allows a claimant to submit a claim to arbitration only if the respondent has breached an investment agreement – as defined under the Treaty itself

[485] Article 10.16.1 of the Treaty only allows a claimant to submit a claim to arbitration for alleged breaches of substantive obligations under the Treaty, an investment authorization or an investment agreement. **Ex. RL-1**, Treaty, Article 10.16.1. In turn, Article 10.17.1 of the Treaty provides that "[e]ach Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement." *Id.*, Article 10.17.1. Therefore, the consent of the Contracting Parties to the Treaty as regards the submission of claims to arbitration does not include claims for alleged purely contractual breaches. *See also* **Ex. RL-61**, *Submission of the U.S. in Hamadi Al Tamimi*, ¶ 12 ("Article 10.21 [which is practically identical to Article 10.22 of the Treaty] does not give the Tribunal jurisdiction to hear claims of breach of any obligations other than the obligations listed in Chapter Ten, Section A.").

[486] In other words, the Tribunal only has jurisdiction to assess contractual rights or claims to the extent that these also constitute breaches of substantive obligations under the Treaty or an investment agreement, but the Tribunal lacks jurisdiction to hear purely contractual claims that are not related to breaches of substantive obligations under the Treaty or an investment agreement. *See for example* **Ex. RL-132**, *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, August 4, 2011, ¶ 316 ("It is in principle admitted that with respect to a BIT claim an arbitral tribunal has no jurisdiction where the claim at stake is a pure contract claim. This is because a BIT is not meant to correct or replace contractual remedies, and in particular it is not meant to serve as a substitute to judicial or arbitral proceedings arising from contract claims. Within the context of claims arising from a contractual relationship, the tribunal's jurisdiction in relation to BIT claims is in principle only given where, in addition to the alleged breach of contract, the Host State further breaches obligations it undertook under a relevant treaty. Pure contract claims must be brought before the competent organ, which derives its jurisdiction from the contract, and such organ – be it a court or an arbitral tribunal – can and must hear the claim in its entirety and decide thereon based on the contract only."); **Ex. RL-133**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic I,* ICSID Case No. ARB/97/3, Decision on Annulment, July 3, 2002, ¶ 96 ("In accordance with this general principle (which is undoubtedly declaratory of general international law), whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law—in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract, in other words, the law of Tucumán. For example, in the case of a claim based on a treaty, international law rules of attribution apply, with the result that the state of Argentina is internationally responsible for the acts of its provincial authorities. By contrast, the state of Argentina is not liable for the performance of contracts entered into by Tucumán, which possesses separate legal personality under its own law and is responsible for the performance of its own contracts."). The decision cited to by Claimants in support of their position (Notice of Arbitration, ¶ 201, citing *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, April 27, 2006, ¶ 84) is irrelevant, since that decision was made by the tribunal in the context of an alleged breach of an umbrella clause of an investment treaty (which this Treaty does not contain), and did not concern the manner and scope that Claimants would like to see applied thereto.

– and if the claimant has incurred loss or damage by reason of or arising out of that breach.[487] In turn, Article 10.28 of the Treaty specifically defines the term "investment agreement" as follows:

> investment agreement means a written agreement between a national authority of a Party and a covered investment or an investor of another Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor: (a) with respect to natural resources that a national authority controls, such as for their exploration, extraction, refining, transportation, distribution, or sale; (b) to supply services to the public on behalf of the Party, such as power generation or distribution, water treatment or distribution, or telecommunications; or (c) to undertake infrastructure projects, such as the construction of roads, bridges, canals, dams, or pipelines, that are not for the exclusive or predominant use and benefit of the government.[488]

243. Claimants contend that the Services Contract is an "investment agreement" because it was entered into between Reficar, a "State entity" and a "national authority of a Party", and FPJVC, an "investor of another Party."[489] However, a cursory analysis suffices to demonstrate that Claimants are wrong.

244. First, the Services Contract cannot be considered an "investment agreement" under the terms of the Treaty because, as per the Treaty, an "investment

[487] **Ex. RL-1**, Treaty, Article 10.16.1.

[488] *Id.*, Article 10.28 (emphasis omitted).

[489] Notice of Arbitration, ¶ 204. *See also* Letter from Claimants to the Tribunal, September 8, 2020, p. 9 ("Reficar is a 'national authority' of Colombia—under both the definition of 'national authority' in the TPA ('an authority at the central level of government') and in accordance with ICSID jurisprudence."). It should be noted that for purposes of determining whether Reficar qualifies as "national authority" or an "authority at the central level of government" in accordance with the Treaty – which are terms specifically defined by the Treaty –, the decisions of other ICSID tribunals based on treaties that do not contain specific definitions of these terms or which merely discuss the attribution of state responsibility under the criteria of customary international law are irrelevant. *See* n. 493, *infra*.

agreement" cannot simultaneously constitute a "covered investment", as Claimants argue here. Article 10.28 states that an investment agreement is a written agreement by virtue of which the investor "relies in establishing or acquiring a covered investment other than the written agreement itself."[490] Accordingly, Article 10.16.1 of the Treaty expressly states that the submission of a claim for breach of an investment agreement is valid only if "the subject matter of the claim and the claimed damages directly relate to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement."[491] It is clear from the text of these provisions that the Services Contract cannot constitute an "investment agreement" and, at the same time, a "covered investment other than the written agreement itself."[492] There is an obvious logical and conceptual contradiction in Claimants' argument.

245. Second, the Services Contract was not entered into by a "national authority of a Party", as Claimants incorrectly allege. The Treaty defines "national authority" as "an

[490] **Ex. RL-1**, Treaty, Article 10.28 (emphasis added). *See*, in that respect, **Ex. RL-121**, K. Vandevelde, U.S. INTERNATIONAL INVESTMENT AGREEMENTS, p. 174 (clarifying that "the investment established in reliance on the written agreement cannot be the written agreement itself").

[491] **Ex. RL-1**, Treaty, Article 10.16.1 (emphasis added).

[492] Claimants also argue that other agreements similar to the Services Contract have frequently been recognized as "investment agreements" by international arbitral tribunals, and cite to a number of decisions involving other investment treaties. Notice of Arbitration, ¶ 204 and n. 95. However, none of those cases referred to the term "investment agreement" as defined in the Treaty, or involved types of contracts (*e.g.*, a power plant development contract, an oil exploitation and production contract, or a contract for the exploration of minerals) even remotely similarly to the Services Contract, which merely aims to provide consulting services. *See* ¶¶ 24-32, *supra*. *See also* **Ex. RL-134**, *F-W Oil Interests, Inc. v. Republic of Trinidad and Tobago*, ICSID Case No. ARB/01/14, Award, March 3, 2006, ¶ 131 ("[A]lthough the concept of an 'investment agreement' appears regularly in BITs concluded by the USA at around this time, the concept is unique to those concluded by the USA."); **Ex. RL-74**, K. Vandevelde, BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION, n. 181 ("The term 'investment agreement' is a term of art in the U.S. BIT practice."); **Ex. RL-121**, K. Vandevelde, U.S. INTERNATIONAL INVESTMENT AGREEMENTS, p. 577 ("The term 'investment agreement' is intended to include agreements relating to the establishment or operation of an investment. It was intended, at the same time, to exclude ordinary commercial contracts.") (emphasis added).

authority at the central level of government."[493] The Services Contract was entered into by Reficar, a mixed capital company (*sociedad de economía mixta*) that carries out commercial activities and forms part of the decentralized level of government (*i.e.*, executive branch) of Colombia.[494] In other words, under the definition of the Treaty itself, Reficar cannot be considered as a "national authority" of Colombia.[495]

246. In turn, while Claimants argue that Reficar is a "State entity" and the Services Contract is a "State Contract" under Colombian law, this is irrelevant because the Treaty itself contains specific provisions as to what is to be considered a "national authority" for purposes of the Treaty.[496] In conclusion, the Services Contract also cannot

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[493] **Ex. RL-1**, Treaty, n. 13.

[494] *See* nn. 17, 19 *supra.* Not only is Reficar not at central governmental level, but it is also not an "authority" because it does not govern any sphere or exercise sovereign powers. **Ex. R-33**, Bylaws of Refinería de Cartagena S.A.S., Article 3. When discussing the definition of a "national authority" and how Reficar would allegedly fall within this definition, Claimants describe the composition of Reficar's board of directors, emphasizing the participation of several ministers and vice ministers as directors, as well as the fact that Reficar is 100% owned by Ecopetrol, on whose board – according to Claimants – members of the Colombian government participate. Notice of Arbitration, n. 92. However, the manner in which the boards of Reficar or Ecopetrol are composed has nothing to do with whether Reficar is part of the central level of government, and therefore, whether it is considered a "national authority" under the Treaty. As already indicated, Reficar forms part of the decentralized level of government and, in that respect, is not an "national authority" under the Treaty. It should be noted that the Claimants are perfectly aware of the decentralized nature of Reficar and Ecopetrol. **Ex. R-69**, *Acción de Tutela* 2018, p. 74 ("In particular, Reficar and Ecopetrol, [are] decentralized entities of the Executive Branch.") (translation from Spanish).

[495] This conclusion is reinforced by the fact that the Treaty itself contains a specific definition of the term "state enterprise", which is distinct from the concept of a "national authority." **Ex. RL-2,** Colombia-US TPA, Article 1.3 (defining a "state enterprise" as "an enterprise that is owned, or controlled through ownership interests, by a Party"). Reficar would qualify as a "state enterprise."

[496] Notice of Arbitration, ¶ 204. Claimants argue that the allegation that Reficar is not a "national authority" of Colombia is an attempt to "contradict the factual allegations in support Claimants' claim", which is not permitted under Article 10.20.4 of the Treaty. Letter from Claimants to the Tribunal, September 8, 2020, n. 19. *See also* Letter from Claimants to the Tribunal, September 8, 2020, p. 5 ("Respondent asserts that the [Services] Contract does not constitute an 'investment agreement' under the [Treaty] because, *inter alia*, Reficar is not a 'national authority' of Colombia as defined by the [Treaty]. Not only does this assertion rebut Claimants' detailed allegations concerning the Colombian government's control and authority over Reficar, but it also calls for a legal analysis of what constitutes an 'investment agreement' and 'national authority,' which requires a factual analysis of Colombia's control of Reficar, and an application of those facts to the law. It is neither a proper objection under Article 10.20.4 nor a proper question to be decided at the preliminary stages of the proceedings."). However, the question of whether or not Reficar qualifies as a "national authority" or whether or not the Services Contract constitutes an "investment agreement" under the Treaty is not a factual allegation, but a legal allegation that should not be assumed to be true.

constitute an "investment agreement" because it is not an agreement entered into by the national government, but by a state-owned company.[497]

247. In addition, Claimants incredulously argue that the Treaty specifically permits investors, such as Claimants, to seek forms of relief against the State in an ICC arbitration for breaches of the Services Contract on grounds that, according to Claimants, the Contract qualifies as an "investment agreement."[498] This argument is absurd and frankly incomprehensible.

248. As a starting point, it is not in doubt in this Arbitration that Claimants have a contractual right under the Services Contract [redacted].[499] However, the existence of an [redacted] in

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See n. 350, *supra*. In this regard, it is useful to recall that, in accordance with the principles of interpretation enshrined in the Vienna Convention on the Law of Treaties (which forms part of customary international law), "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" and that "[a] special meaning shall be given to a term if it is established that the parties so intended." **Ex. RL-53**, Vienna Convention of the Law of Treaties, Articles 31.1 and 31.4. There is no doubt that the definitions contained in the Treaty itself as to what constitutes a "national authority" or an "investment agreement" are clear. Furthermore, it should be noted that Claimants also do not qualify as "investors of a Party" under the terms of the Treaty, since they have not made an "investment" in the territory of Colombia. **Ex. RL-1**, Treaty, Article 10.28; ¶¶ 22, 44, 45, 52, *supra*.

[497] It should also be noted that even if the Services Contract were to be considered as a "a written agreement between a national authority of a Party and . . . an investor of another Party", it would still not qualify as an "investment agreement" under the terms of the Treaty because it would not fall within the three categories of agreements or sectors covered by the definition (*i.e.*, natural resources, utilities and infrastructure). **Ex. RL-1**, Treaty, Article 10.28. Indeed, although the Services Contract is an agreement for the provision of consulting services related to an infrastructure project (the expansion and modernization of the Cartagena refinery), it is not the agreement that was entered into to "to undertake" the infrastructure project, since Claimants were not a party to the EPC Contract entered into with CB&I for the engineering and construction of the Project. In sum, the Services Contract does not satisfy any of the requirements necessary to qualify as an "investment agreement" under the Treaty.

[498] Notice of Arbitration, ¶ 203. *See also* Letter from Claimants to the Tribunal, September 8, 2020, p. 9 ("[C]onstruction contracts, like the Contract, qualify as 'investment agreements'.").

[499] [redacted] ¶¶ 57-59, *supra*. It should be noted that the Fiscal Liability Proceeding was not initiated with respect to contractual breaches by Foster Wheeler and Process Consultants, but with respect to their alleged fiscal liability, which constitutes an autonomous liability that exceeds the contractual scope (and falls outside the personal and material scope of the [redacted] of the Services Contract). *See* ¶¶ 157-158, *supra*.

the Services Contract has no bearing on the concept of "investment agreement" under the Treaty, and much less does it give the Tribunal jurisdiction to hear purely contractual claims. Claimants' argument that Article 10.16.1 of the Treaty "grants FPJVC the right to submit any claims for violation of the [Services] Contract to ICC Arbitration"[500] makes no sense either, since that provision only grants jurisdiction to a tribunal constituted under the Treaty itself to hear claims of alleged breaches of substantive obligations under the Treaty or an investment agreement provided certain requirements set forth therein are satisfied.[501]

249. In any event, Claimants do not appear to argue that this Tribunal would have jurisdiction to hear claims relating to possible breaches of the Services Contract – which Claimants incorrectly consider to constitute an "investment agreement" under the Treaty –, but that a tribunal in an ICC arbitration would have jurisdiction to hear such claims.[502]

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[500] Notice of Arbitration, ¶ 205.

[501] **Ex. RL-1**, Treaty, Article 10.16.1. In turn, it should be reminded that the Treaty only provides for the possibility of submitting to arbitration claims for breaches of its substantive obligations or of an investment agreement under the ICSID arbitration rules, the ICSID Additional Facility rules, UNCITRAL rules or the rules agreed between the claimant and the respondent. *Id.*, Article 10.16.3. On the other hand, [redacted] In short, the ICC arbitration referred to by Claimants has nothing to do with the Treaty (which does not contain a consent to ICC arbitration), but with contractual breaches of the Services Contract. The present Tribunal was constituted solely pursuant to the ICSID Convention, and there is no agreement between the parties to submit a claim for an alleged breach of an investment agreement (if one existed) under the Treaty to ICC arbitration.

[502] In the opening part of their Notice of Arbitration, Claimants argue that they are entitled to initiate this Arbitration against Colombia under Article 10.16.1(a) of the Treaty because Respondent allegedly breached multiple substantive obligations under the Treaty and an investment agreement, coupled with their contention that the Services Contract is an "investment agreement" and breaches thereof would entitle Claimants to submit a claim to arbitration under Article 10.16.1(a)(i)(C) of the Treaty. Notice of Arbitration, ¶¶ 26, 31. However, in the specific section of the Notice of Arbitration entitled "Colombia's Violations of the Contract Are Violations of the TPA" where they raise this argument, Claimants contend that the Treaty "allows for investors, like FPJVC, to seek relief against the State in ICC arbitration for violations of a contract if it qualifies as an "investment agreement'", and that, "[b]ecause the [Services] Contract is an 'investment agreement' as contemplated by the [Treaty], Article 10.16.1(a)(i)(C) of the [Treaty] grants FPJVC the right to submit any claims for violation of the [Services] Contract to ICC Arbitration." *Id.*, ¶¶ 203, 205. In other

Claimants' argument is confusing because it is unclear how the Treaty would have the effect of conferring jurisdiction on another arbitral tribunal – one that is not constituted under the Treaty – to determine alleged breaches of an "investment agreement", or how the fact that another arbitral tribunal would potentially have jurisdiction to hear claims for alleged breaches of an "investment agreement" under Article 10.16.1 of the Treaty in any way affects Claimants' claims in this Arbitration. Setting aside Respondent's rejection that the Services Contract qualifies as an "investment agreement" under the terms of the Treaty, the fact remains that Claimants are not asking this Tribunal to adjudicate their claims regarding possible breaches of an "investment agreement."[503] Notably, albeit for other reasons, Respondent agrees with Claimants that this Tribunal lacks jurisdiction to find a breach of an investment agreement in this case.

250. In sum, the Tribunal has no jurisdiction to hear purely contractual claims. Moreover, in the absence of an investment agreement under the terms of the Treaty and in the absence of a claim by Claimants that an investment agreement has been breached, there can be no *prima facie* case of breach of an investment agreement in this case.

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words, setting aside the question of whether or not the Services Contract constitutes an "investment agreement" and whether or not the Treaty allows an investor to submit to arbitration a claim under the Treaty for breaches of an investment agreement, Claimants' argument does not pertain to whether this Tribunal has jurisdiction over this claim; rather, it pertains to whether an ICC tribunal would have jurisdiction.

[503] It is not clear what precisely Claimants are asking this Tribunal to do with respect to the alleged breach of an investment agreement. In their request, Claimants seek only a declaration from the Tribunal that Colombia has breached its obligations under the Treaty, and seek an award of damages that would result from that alleged breach. They do not, however, seek a declaration that Colombia breached an investment agreement. Notice of Arbitration, ¶ 216. If Claimants are, in fact, seeking a declaration that an ICC arbitral tribunal has jurisdiction to determine any claim for breaches of an investment agreement under Article 10.16.1 of the Treaty (as paragraphs 203 and 205 of their Notice of Arbitration seem to suggest), this Tribunal is not empowered to issue any such declaratory orders under the Treaty. *See* n. 539, *infra*. Indeed, it would be the arbitral tribunal itself that is eventually constituted under the ICC Arbitration Rules that would be competent to rule on its own jurisdiction with respect to a claim for breach of an investment agreement under Article 10.16.1 of the Treaty, by application of the recognized *Kompetenz-Kompetenz* principle. *See* **Ex. RL-135**, Arbitration Rules of the International Chamber of Commerce (2021), Article 6(5).

B. There Could Not Have Been Any Loss or Damage by Reason of Any Breach of the Substantive Obligations of the Treaty or of an Investment Agreement

251. Pursuant to Article 10.16.1 of the Treaty, in order to submit a claim to arbitration, Claimants must not only prove the existence of a breach of a substantive obligation under the Treaty or of an investment agreement, but also they must prove that they have incurred loss or damage by reason of or arising out of that breach.[504] In short, in addition to the existence of a breach of a substantive obligation or an investment agreement (which has not been established in this case),[505] two other requirements must be met for a claim to be admissible under the Treaty: (i) there must be a certain loss or damage, as opposed to merely hypothetical or speculative damage,[506] at the time of

[504] **Ex. RL-1**, Treaty, Article 10.16.1; **Ex. RL-121**, K. Vandevelde, U.S. INTERNATIONAL INVESTMENT AGREEMENTS, p. 598 ("The 2004 model differs from prior models in that it explicitly requires, at Article 24(1), that either the claimant or the Enterprise upon behalf of which the claim is submitted have 'incurred loss or damage by reason of, or arising out of, [the] breach'. This language imposes three conditions on the claimant's right to submit a claim to arbitration: loss, a breach, and a causal link between the breach and the loss. These are, of course, traditional elements of standing. The language had appeared, however, in NAFTA as well as the Chile and Singapore FTAs, and BIT negotiators saw some virtue in explicitly requiring that these elements be met. They are useful, for example, in preventing the submission of claims that are not yet ripe, because no loss has occurred.") (emphasis added); **Ex. RL-101**, *Grand River*, ¶ 237 ("Under NAFTA Article 1116 [which is almost identical to Article 10.16 of the Treaty], an investor of a Party may submit to arbitration a claim that another NAFTA Party has breached specified NAFTA obligations 'and that the investor has incurred loss or damage by reason of, or arising out of, that breach.' Under UNCITRAL Rule 24(1) . . . a claimant has the burden of proving both the breach and the claimed loss or damage.") (emphasis added); **Ex. RL-136**, Andrea K. Bjorklund, *NAFTA Chapter 11*, in COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 465 (C. Brown (ed.), Oxford University Press 2013), p. 501 ("Article 1116 requires that the investor have standing – that it must have suffered loss or damage.") (emphasis added).

[505] *See* ¶¶ 170-250, *supra*.

[506] *See* **Ex. RL-137**, *Amoco International Finance Corporation v. Government of the Islamic Republic of Iran et al.*, IUSCT Case No. 56, Partial Award (Award No. 310-56-3), July 14, 1987, ¶ 238 ("One of the best settled rules of the law of international responsibility of States is that no reparation for speculative or uncertain damage can be awarded."); **Ex. RL-138**, International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2(2) YEARBOOK OF THE INTERNATIONAL LAW COMISSION 31 (2001), Article 36(2) (indicating that a State which is responsible for an internationally wrongful act must compensate for the resulting damage "insofar as [that damage] is established."), Commentary to Article 36, ¶ 27 ("Tribunals have been reluctant to provide compensation for claims with inherently speculative elements."); **Ex. RL-139**, *S.D. Myers, Inc. v. Government of Canada,* UNCITRAL (NAFTA), Second Partial Award, October 21, 2002, ¶ 173 ("[T]o be awarded, the sums in question must be neither speculative nor too remote."); **Ex. RL-68**, *Submission of the U.S. in Mason*, ¶ 35 ("[A]n investor may recover such damages only to the extent that they are established on the basis of satisfactory evidence that is not inherently speculative."). The absence of any actual damage in this case also precludes the Tribunal from issuing the offsetting award claimed by Claimants. *See* ¶¶ 272-278, *infra*.

submitting the claim to arbitration; and (ii) such loss or damage must be incurred by reason of or as a result of the breach.[507]

252. This limitation imposed by the Treaty with respect to the possibility of initiating a claim to arbitration is a significant one.[508] Under the express terms of the Treaty, it is only where loss or damage exists by reason of or as a result of a breach of the substantive Treaty obligations or an investment agreement at the time of submitting a claim to arbitration that an investor is entitled to make a claim for arbitration under the Treaty.[509]

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[507] This implies that there must be "proximate causation" or a "sufficient causal link" between the alleged breach and the damage incurred. *See for example* **Ex. RL-54**, *Submission of the U.S. in Angel Seda*, ¶¶ 58-59 ("As the United States has previously explained with respect to substantively identical language in NAFTA Articles 1116(1) and 1117(1), the ordinary meaning of 'by reason or arising out of' requires an investor to demonstrate proximate causation. In this connection, NAFTA tribunals have consistently applied a requirement of proximate causation under NAFTA Articles 1116(1) and 1117(1). For example, the *S.D. Myers* tribunal held that damages may only be awarded to the extent that there is a 'sufficient causal link' between the breach of a specific NAFTA provision and the loss sustained by the investor, and then subsequently clarified that '[o]ther ways of expressing the same concept might be that the harm must not be too remote, or that the breach of the specific NAFTA provision must be the proximate cause of the harm.' . . . Accordingly, any loss or damage cannot be based on an assessment of acts, events, or circumstances not attributable to the alleged breach. Injuries that are not sufficiently 'direct,' 'foreseeable,' or 'proximate' may not, consistent with applicable rules of international law, be considered when calculating a damage award.") (emphasis added). Accordingly, under customary international law, the obligation to make reparation only exists where there is "injury caused by the internationally wrongful act." **Ex. RL-138**, ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, Article 31(1) (emphasis added). According to the commentary to the Articles of State Responsibility, "[t]his phrase is used to make clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act." *Id*., Commentary to Article 31, ¶ 9. *See also* **Ex. RL-140**, Borzu Sabahi, Noah Rubins, and Don Wallace, Jr., INVESTOR-STATE ARBITRATION (2nd ed., Oxford University Press 2019), ¶ 21.31 ("Damages are compensable to the extent that the injured party can prove that its injuries resulted from the illegal acts.").

[508] **Ex. RL-37**, L. Caplan and J. Sharpe, *United States*, p. 824 ("Important limitations restrict a claimant's ability to bring a claim under Article 24(1) [of the 2012 U.S. BIT Model, which is identical to Article 10.16 of the Treaty]. First, not only must a claimant allege a breach of the kind discussed above, but it also must demonstrate that it 'has incurred loss or damage by reason of, or arising out of, that breach'.") (emphasis added).

[509] **Ex. RL-1**, Treaty, Article 10.16.1. *See* **Ex. RL-40**, *Glamis*, ¶¶ 328, 331, 335 ("Through the language of Article 1117(1) [of NAFTA], the State Parties conceived of a ripeness requirement in that a claimant needs to have incurred loss or damage in order to bring a claim for compensation under Article 1120. Claims only arise under NAFTA Article 1110 when actual confiscation follows, and thus mere threats of expropriation or nationalization are not sufficient to make such a claim ripe; for an Article 1110 claim to be ripe, the governmental act must have directly or indirectly taken a property interest resulting in actual present harm

253. In its submission as a non-disputing party in *Mesa Power v. Canada*, interpreting a provision almost identical to Article 10.16.1 of the Treaty, the United States has affirmed that for a claim to be submitted to arbitration the investor must have already incurred loss or damage and cannot base its claim on speculation about future loss or damage:

> NAFTA Article 1116(1) further provides that an investor may submit a claim to arbitration that a Party "has breached" certain obligations, and that the investor "has incurred loss or damage by reason of, or arising out of, that breach." Thus, there can be no claim under Article 1116(1) until an investor has suffered harm from an alleged breach. Consistent with Articles 1116(1) and 1120(1), therefore, a disputing investor may submit a claim to arbitration under Chapter Eleven only for a breach that already has occurred and for which damage or loss has already been incurred. . . . No claim based solely on speculation as to future breaches or future loss may be submitted.[510]

254. Beyond the fact that Claimants have failed to establish in this case that any of the substantive Treaty obligations or an investment agreement may have been breached,[511] to date no loss or damage has been incurred by reason of or arising out of the alleged breach of a substantive Treaty obligation or an investment agreement.[512]

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to an investor. . . . Without a governmental act that moves beyond a mere threat of expropriation to an actual interference with a property interest, it is impossible to assess the economic impact of the interference. . . . The issue of ripeness therefore turns on the determination of whether the challenged California measures had effected harm upon Claimant's property interests by the time Claimant submitted its claim to arbitration.") (emphasis added).

[510] **Ex. RL-48**, *Submission of the U.S. in Mesa Power*, ¶ 4 (emphasis added).

[511] *See* ¶¶ 170-250, *supra*.

[512] Claimants argue that actual concrete or monetary damage is not a requirement for initiating ICSID arbitration. However, what Claimants fail to note is that while the requirement does not arise from the ICSID Convention, the Treaty under which the present claim was initiated does contain a requirement that there must be loss or damage by reason of or arising out of a breach of a substantive obligation under the Treaty or an investment agreement. For this reason, the legal authorities cited to by Claimants are irrelevant, since they do not refer to situations or cases in which the investment treaty in question contains such an express requirement. Letter from Claimants to the Tribunal, September 8, 2020, n. 17. *See also* **Ex. RL-1**, Treaty, Article 10.16.1. In any event, setting aside the fact that the Treaty requires the existence of loss

255. Claimants themselves admit that they have not incurred actual losses or damages by reason of or arising out of the Fiscal Liability Proceeding initiated by the CGR.[513] At the time the Notice of Arbitration was filed, only the Indictment Order had been issued, which, as already indicated, is merely an administrative procedural act that did not define the legal situation of Foster Wheeler and Process Consultants and therefore could not have caused them any damage.[514] The Ruling with Fiscal Liability, which was issued after the Notice of Arbitration was filed, has not caused any actual damage to Claimants either. The Ruling is not yet final (administrative remedies have not been exhausted), and, given that the fiscal liability is joint and several, it is not yet possible to know with certainty whether – in the event the Ruling with Fiscal Liability is upheld – any

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or damage, in the present case there is no measure that could constitute a breach of a substantive obligation under the Treaty. *See* **Ex. RL-47**, *Achmea II*, ¶ 236 ("This line of cases is unanimous in holding that an expropriation claim is too hypothetical, and thus premature as long as no taking has occurred. The fact that the *Glamis* case was arbitrated under NAFTA rules, which specifically require an allegation of a breach of a NAFTA rule and also to have suffered a loss or damage in order to bring a claim for compensation, does not change the fundamental principle.") (emphasis added); ¶ 163, *supra*.

[513] The only alleged monetary damage that Claimants allege to have suffered to date are the professional costs and expenses that they have incurred in respect of their defense in the Fiscal Liability Proceeding. Notice of Arbitration, ¶¶ 206, 216. However, the costs and expenses incurred in the Fiscal Liability Proceeding are a legal burden of the parties to that proceeding and are therefore not indemnifiable. *See*, *for example*, **Ex. RL-141**, *Consejo de Estado* of Colombia, Chamber for Administrative Adjudicatory Proceedings, Third Section, Judgment, June 14, 2019 (Orienny Mosquera López *et al.* v. Nation-General Comptroller of the Republic), pp. 20, 24 (analyzing a claim for reparation of costs and expenses (including professional, travel and copies) incurred by a citizen that was subject to a fiscal liability proceeding: "Indeed, the simple commencement of a fiscal proceeding does not imply an affection to the rights of the party subject to investigation, since the investigation is carried out in use of the legal obligation to exercise a control before acts that can possibly constitute a fiscal detriment. . . . In accordance with the foregoing, the Chamber must conclude that: (i) faced with facts that merited investigation, the Office of the Comptroller General of the Republic initiated the fiscal proceeding, in the legitimate exercise of its functions; (ii) no irregularity was noticed by the entity to cause them an autonomous damage in the fiscal proceeding conducted against Mr. Jesús Lacides Mosquera Andrade and iii) the damage is not unlawful, since the fiscal proceeding was a burden to be borne by the accused. . . . [I]t is found that the fiscal proceeding that was conducted against the claimant, under this conditions, constituted a legal burden that the party subject to investigation was legitimately obliged to bear.") (translation from Spanish; emphasis added). In turn, regardless of how they are characterized and of the fact that they are not indemnifiable, professional costs and expenses have not yet been determined because the Fiscal Liability Proceeding is still ongoing. *See* ¶¶ 160, 163, *supra*.

[514] *See* ¶¶ 99, 135, *supra*.

amount will be claimed from Foster Wheeler and Process Consultants, or if they will eventually have to make any payment, either voluntarily or compulsorily.[515]

256. It is an incontrovertible fact that, to date, Claimants have not made any payment, either voluntary or forced, with respect to the fiscal liability established in the Ruling with Fiscal Liability, such that the damages alleged by Claimants are therefore purely hypothetical.[516]

257. This is precisely one of the fundamental differences with the *Glencore v. Colombia* case, which Claimants are so fond of citing. In *Glencore*, setting aside the fact that the administrative remedy had already been exhausted (unlike in the present case),

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[515] *See* ¶¶ 88, 108, 127, 128, 150, *supra*. It is necessary to point out that, as regards potential joint and several liability (in the event the Ruling with Fiscal Liability in the Fiscal Liability Proceeding is ultimately upheld), each of the fiscally liable thereto may be required to pay the total amount of the economic damage "regardless of the share or part that corresponds to each [debtor] due to their participation in causing the damage." **Ex. R-82**, Ruling with Fiscal Liability – Part 12: Joint and several liability, civilly liable third parties and others, pp. 5703-5704 (translation from Spanish) [The Spanish version of this Memorial inadvertently omitted this cite to Ex. R-82]. *See* **Ex. RL-9**, Prior Law 1474 of 2011, Article 119 ("In fiscal liability proceedings, collective actions and repetition actions where the existence of an economic damage to the State arising from contract over costs or other irregular facts is demonstrated, the officer of the respective contracting body or entity who authorized the cost shall be joint and severally liable with the contractor, and with any other persons involved in the conduct, up to the recovery of the economic detriment.") (translation from Spanish); **Ex. R-82**, Ruling with Fiscal Liability – Part 12: Joint and several liability, civilly liable third parties and others, p. 5702 ("[E]ach of the parties charged shall be jointly and severally liable for the economic detriment in which they participated, giving rise to each of the costs overruns determined and quantified in the relevant sections of this decision."), pp. 5703-5704 ("[T]he joint and several liability to those who have been declared fiscally liable allows the [CGR] to claim the whole amount determined as economic damage within the fiscal liability proceeding, regardless of the share or part that corresponds to each [debtor] due to their participation in causing the damage.") (translation from Spanish); **Ex. RL-29**, Law 57 of 1887, Civil Code of the Republic of Colombia, Article 1571 (indicating that the creditor may demand the totality of the damage from any of the liable parties at its discretion), Article 1579 (noting that the joint and several debtor who has paid the debt is subrogated to the creditor's action, and may then claim the amount or part thereof from each of the co-debtors), Article 2344 (indicating that if a crime or negligent act is committed by two or more persons, each of them shall be joint and severally liable for the totality of the damage arising out of the crime or negligent act). Thus, it is possible that the full amount of the economic damage (if any) may be claimed from and/or paid by the other co-debtors. Likewise, if Foster Wheeler or Process Consultants were to pay all or part of the economic damage, they could ultimately claim the amount or part thereof that corresponds to the other co-debtors. In short, this underscores that the loss or damage claimed by Claimants is purely hypothetical and speculative.

[516] *See* ¶ 162, *supra;* ¶¶ 272-278, *infra*.

the claimants had paid the amount that had been fixed in the ruling with fiscal liability; meaning, they had incurred an actual damage at the time of initiating their claim.[517]

258. In addition, in order to a submit a claim to arbitration under Article 10.16 of the Treaty, when an investor claims a breach of a substantive Treaty obligation and that substantive obligation protects only the covered investment, not the investor, the loss or damage must have been incurred by the covered investment. This has been explicitly stated by the United States in its submission as a non-disputing party in *Angel Seda v. Colombia* when interpreting this same Treaty:

> The U.S.-Colombia [Treaty] authorizes claimants to seek damages for alleged breaches of specified obligations in the [Treaty]. However, in accordance with the discussion above in paragraph 5, for [Treaty] obligations that only extend to covered investments, a tribunal may only award damages for violations where the covered investment incurred damages. A tribunal has no authority to award damages that a claimant allegedly incurred in their capacity as an investor for violations of obligations that only extend to covered investments.[518]

259. In this case, Claimants argue that Colombia has breached the following substantive Treaty obligations: (i) fair and equitable treatment; (ii) protection against expropriation; (iii) national treatment; and (iv) most-favored-nation treatment. Except for the national treatment and most-favored-nation treatment obligations (which are not relevant to the damages claimed here[519]), the other substantive Treaty obligations (non-

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[517] **Ex. RL-20**, *Glencore*, ¶ 1135; ¶¶ 162, 179, *supra*.

[518] **Ex. RL-54**, *Submission of the U.S. in Angel Seda*, ¶ 62 (emphasis added). *See also* **Ex. RL-56**, *Submission of the U.S. in Omega*, ¶ 47.

[519] In this case, Claimants do not claim that there has been a breach, *per se*, of the Treaty's MFN obligation. Rather, they request that this Tribunal import the umbrella clause of the Colombia-Switzerland BIT through the MFN clause of the Treaty. Notice of Arbitration, ¶¶ 188-200. However, for the reasons explained above, even if that importation were possible in the manner requested by Claimants (*quod non*), the conditions for the application of such an umbrella clause are not met here. *See* ¶¶ 235-238, *supra*. Moreover, even if the umbrella clause of the Colombia-Switzerland BIT were to apply, Claimants do not specify what loss or damage would occur as a result of breaching that umbrella clause, since Claimants' potential fiscal liability

expropriation and FET) only protect covered investments and not investors, such that only the losses or damages incurred by the covered investments (*i.e.*, the Services Contract) could give rise to an arbitration claim under the Treaty. In the present case, all damages that Claimants allege to have incurred (such as moral damages to Claimants' reputation and credit) are damages that would, hypothetically, affect an alleged investor and not an alleged "covered investment"; *i.e.*, the Services Contract.

260. Least of all can Claimants seriously argue that they have suffered loss or damage by reason of an investment agreement. While the Services Contract does not constitute an investment agreement, even for argument's sake if it did, Claimants are not asking the Tribunal to determine whether or not there was a breach of an investment agreement, and much less are they claiming alleged losses or damages that would arise from breaching such an agreement.[520]

261. In conclusion, in the absence of any certain loss or damage by reason of or arising out of a breach of a substantive obligation under the Treaty or an investment agreement, the second inescapable requirement for ensuring the admissibility of Claimants' arbitration under Article 10.16.1 of the Treaty is not satisfied. For this reason, as a matter of law, an award cannot be made in Claimants' favor.

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bears no relation to their potential contractual liability. Therefore, they could not have suffered any loss or damage resulting from a breach of the MFN obligation. *See* ¶¶ 81, 221-223, *supra*. With respect to the national treatment obligation, on the premise that both nationals and foreigners have been charged (and found fiscally liable) in the Fiscal Liability Proceeding, it is impossible to see how this substantive obligation could have been breached. *See* ¶¶ 128, 150, 229, *supra*. But even if it could be considered that the national treatment obligation had been breached, Claimants also fail to specify what loss or damage it would have caused.

[520] Indeed, none of the purported losses or damages alleged by Claimants would be the result of a breach of the obligations under the "investment agreement." *See* Notice of Arbitration, ¶ 216.

II.

Claimants' Claims Fall Outside the Tribunal's Powers Under Article 10.26 of the Treaty

262. In addition to the fact that the requirements of Article 10.16.1 of the Treaty for the submission of a valid claim to arbitration are not met, the Tribunal cannot make an award in Claimants' favor because it is not empowered under Article 10.26 of the Treaty to grant the relief sought in this Arbitration. In particular, Article 10.26 of the Treaty does not empower the Tribunal to: (A) award moral damages; (B) award non-monetary damages or injunctions; nor (C) issue an offsetting award.

A. The Tribunal Is Not Empowered to Award Moral Damages

263. Claimants argue that they have suffered "substantial harm" to their "reputation and credit" as a result of the Fiscal Liability Proceeding initiated by the CGR, and request compensation in the form of "moral damages" for the "reputational harm" that they allege to have suffered.[521] However, the Tribunal is not empowered to award moral damages as requested by Claimants because the Treaty limits the Tribunals' power exclusively to awarding monetary damages, and further prohibits an award of punitive damages. Moral damages are non-monetary damages and can be punitive in nature, such that the Tribunal, as a matter of law, cannot make an award in favor of Claimants by granting them such relief.

264. These limitations on the Tribunal's powers stem from the express provisions of the Treaty. Article 10.26.1 of the Treaty provides that a tribunal is only

[521] Notice of Arbitration, ¶¶ 206, 216.

empowered to award "monetary damages" ("*daños pecuniarios").*[522] Accordingly, Article 10.26.3 provides that "[a] tribunal may not award punitive damages."[523] Unlike other investment treaties that do not contain express limitations or exclusions regarding the powers of an arbitral tribunal and the forms of relief it may award, the Treaty does contain such limitations and exclusions,[524] and thus the Tribunal can only make an award subject to the limitations and exclusions provided for in Article 10.26.[525]

265. In international law, moral damages are considered non-monetary damages. In *Daillo*, the International Court of Justice described moral damages as compensation for "non-material injury", noting that "[q]uantification of compensation for

[522] **Ex. RL-1**, Treaty, Article 10.26.1 (the English version uses the expression "monetary damages" and the Spanish version uses the expression "*daños pecuniarios*"). Although it is irrelevant to the case at hand, this provision also allows the Tribunal to award, separately to or in combination with monetary damages and accrued interest, the restitution of property, in which case an award may state that the respondent pay monetary damages together with accrued interest *in lieu* of restitution. *Id.* These are the only forms of relief that an arbitral tribunal constituted under the Treaty is empowered to award.

[523] *Id.*, Article 10.26.3.

[524] *See* **Ex. RL-142**, Borzu Sabahi, COMPENSATION AND RESTITUTION IN INVESTOR-STATE ARBITRATION: PRINCIPLES AND PRACTICE (Oxford University Press 2011), p. 138 ("Investment treaties generally do not seem to limit a tribunal's powers to award compensation for moral damages. Investment treaty tribunals, as long as they have jurisdiction over a dispute, may award compensation for moral harm caused to the investor or the investment, unless there is a limitation on awarding compensation in such cases in the applicable treaty."), n. 31 ("Some treaties, such as NAFTA, however, expressly prohibit awarding of punitive damages.") (emphasis added). The very text cited by the Claimants by the same author confirms this proposition. Letter from Claimants to the Tribunal, September 8, 2020, n. 23; **Ex. RL-143**, Borzu Sabahi, *Moral Damages in International Investment Law: Some Preliminary Thoughts in the Aftermath of Desert Line v Yemen*, in A LIBER AMICORUM: THOMAS WÄLDE – LAW BEYOND CONVENTIONAL THOUGHT 257 (J. Werner & A. Ali (eds.), CMP Publishing 2009), p. 257 ("Investment treaty tribunals, as long as they have jurisdiction over a dispute, may award compensation for moral harm caused to the investor or investment, unless there is a limitation on awarding compensation in such cases in the applicable treaty.") (emphasis added).

[525] In this regard, it should be noted that the consent of each of the Contracting Parties to the Treaty to submit a claim to arbitration was given only with respect to Section B of the Treaty and in accordance with the Treaty. **Ex. RL-1**, Treaty, Article 10.17.1. Similarly, Claimants' consent to submit to arbitration under Section B of the Treaty is conditional upon their compliance with the procedures provided for in the Treaty, and they have indeed done so in their Notice of Arbitration. **Ex. RL-1**, Treaty, Article 10.18.2; Notice of Arbitration, ¶ 24. Thus, if the Tribunal were to grant Claimants any form of relief in excess of the powers expressly conferred on it, this would constitute an excess of its powers and a clear breach of the arbitration agreement.

non-material injury necessarily rests on equitable considerations",[526] because the damage is not financially assessable.[527] In its judgment, the International Court of Justice cited the decision of the Inter-American Court of Human Rights in *Cantoral Benavides v. Peru*, in which that court addressed moral damages or "non-pecuniary damages" (or immaterial damages) separately from monetary damages, and noted that "[i]t frequently happens that the various types of non-pecuniary damages have no specific monetary equivalent", tribunals must be guided by principles of equity in awarding them.[528] The decision in the *Daillo* judgment accords with the provisions of the Articles on

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[526] **Ex. RL-144**, *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo*), Judgment – Compensation owed by the Republic of the Congo to the Republic of Guinea, I.C.J. REPORTS 324, June 19, 2012, ¶¶ 24-25. *See* **Ex. RL-142**, B. Sabahi, COMPENSATION AND RESTITUTION IN INVESTOR-STATE ARBITRATION: PRINCIPLES AND PRACTICE, p. 136 ("The term 'moral' damage, in public international law, is used to refer to those categories of harms that are non-material or non-financial.").

[527] It should be recalled that, according to Article 10.22 of the Treaty, the Tribunal must decide the dispute according to law (*i.e.*, the provisions of the Treaty and the applicable rules of international law, in the case of breaches of substantive obligations of the Treaty, or the legal rules specified in the investment agreement – in this case, Colombian law – in the case of a breach of an investment agreement) and not according to equitable principles. This point confirms that the Treaty does not empower the Tribunal to award moral damages, which are based in equity and not law. **Ap. RL-1**, Treaty, Article 10.22. As in international law, under Colombian law moral damages are seen as non-monetary damages and may be considered to constitute a sanction or have a punitive character. *See for example*, **Ap. RL-145**, Obdulio Velásquez Posada, RESPONSABILIDAD CIVIL EXTRACONTRACTUAL (Ed. Temis 2009), p. 255 ("The impossibility of an exact economic valuation of the moral damage implies that in a strict sense the corresponding sentence is not a compensation, since the money does not leave the victim unharmed and at most it is a simple satisfaction or compensation for the damage caused that compensates or suppresses the affliction produced by the harmful event.") (translation from Spanish); **Ap. RL-146**, Supreme Court of Justice of Colombia, Judgment, May 20, 1952 (Balvino Chaverra Lopez *et al.* against the Nation), p. 326 ("[Moral] damages do not have in this case a compensatory character, but rather an exemplary nature."); **Ap. RL-147**, *Consejo de Estado* of Colombia, Chamber for Administrative Adjudicatory Proceedings, Third Section, Judgment, June 7, 1973 (Bar Association Specialized in Military Legislation v. Colombian Nation), p. 12 ("The Court has said that the indemnification for this type of [moral] damages have an exemplary nature, but not a compensatory one, as it is basically nothing more than a private penalty that sanctions a moral duty.").

[528] **Ex. RL-148**, *Case of Cantoral-Benavides v. Peru*, Inter-American Court of Human Rights, Judgment of December 3, 2001 (Reparation and Costs), ¶ 53. *See also* **Ex. RL-149**, Leiry Cornejo Chavez, *New Remedial Responses in the Practice of Regional Human Rights Courts: Purposes Beyond Compensation*, 15(2) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 372 (2017), p. 378 ("[T]he IACtHR clearly differentiates between awards for pecuniary damages and moral damages."); **Ex. RL-150**, Dinah Shelton, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW (3d ed., Oxford University Press 2015), pp. 402-403 ("Moral damages can also sanction and deter if they are based on an assumption that the egregiousness of the wrongdoing can be used to measure the moral injury. Even some damages traditionally thought of as compensatory in nature are increasingly recognized as having a large punitive element.").

Responsibility of States for Internationally Wrongful Acts prepared by the International Law Commission, which Claimants cite, where it states that the obligation to compensate covers any damage that is "financially assessable", thus excluding moral damages.[529]

266. Commentators have also repeatedly underscored that moral damages are non-monetary damages that can have a punitive component:

- Mohtashami, Holland and El-Hosseny: "Notwithstanding that moral damages are considered as compensatory in both the civil and common-law systems (as well as in international law), they stand distinct to monetary damages. Moreover, certain recent investment treaty awards demonstrate that moral damages are beginning to be understood as having a punitive (and therefore non-compensatory) function. . . . It should be noted that moral damage may also be referred to as 'non-pecuniary', 'non-economic', 'non-material' or 'intangible' damages."[530]

- Jargush and Sebastian: "There appear to be two conceptions of moral damages. The first is as a compensatory remedy for a particular category of harms: those involving mental distress. The second is as a form of punitive damages. . . . In summary: a. Moral damages can be thought of as fines for egregious behaviour or as compensation for non-pecuniary injury. b. If they are fines then it is a radical step for tribunals to award them because punitive damages are not well-recognized in public international law. Tribunals seeking to award punitive damages would be introducing a novel remedy on grounds which have not been agreed in the treaties which they are charged

[529] **Ex. RL-138**, ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, Article 36 ("1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution. 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.") (emphasis added); Commentary to Article 36, ¶ 1 ("The qualification 'financially assessable' is intended to exclude compensation for what is sometimes referred to as 'moral damage' to a State, *i.e.* the affront or injury caused by a violation of rights not associated with actual damage to property or persons.").

[530] **Ex. RL-151**, Reza Mohtashami, Romilly Holland and Farouk El-Hosseny, *Non-Compensatory Damages in Civil- and Common-Law Jurisdictions - Requirements and Underlying Principles*, in THE GUIDE TO DAMAGES IN INTERNATIONAL ARBITRATION 22 (2d ed. GAR 2018), p. 29, n. 107 (emphasis added).

with applying. c. The better view, therefore, is that moral damages are compensation for non-pecuniary injury."[531]

- Weber: "The simplest definition of a moral damage is 'a damage that is not material'. A material damage is a financial or economic loss and can therefore be expressed in monetary terms. On the contrary, a moral damage cannot be expressed in monetary terms and hence cannot be objectively quantified. . . . [A] moral damage cannot be objectively quantified, which excludes an award of compensation."[532]

267. This understanding is even confirmed by the very author cited to by Claimants, who maintains that "[t]he real difference" between moral damages and material damages "lies in the pecuniary or non-pecuniary nature of the wrongs to be repaired."[533]

268. In sum, Article 10.26 of the Treaty expressly limits the Tribunal's powers to award monetary damages and prohibits punitive damages, which, as logic dictates,

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[531] **Ex. RL-152**, Stephen Jagusch and Thomas Sebastian, *Moral Damages in Investment Arbitration: Punitive Damages in Compensatory Clothing?*, 29:1 ARBITRATION INTERNATIONAL 45 (2013), pp. 45-46, 62 (emphasis added).

[532] **Ex. RL-153**, Simon Weber, *Demistifying Moral Damages in International Investment Arbitration*, 19 LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 417 (2020), pp. 419, 432 (emphasis added).

[533] **Ex. RL-154**, Juan Pablo Moyano Garcia, *Moral Damages in Investment Arbitration: Diverging Trends*, 6(1) JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 485 (Oxford University Press 2015), p. 488. *See* Letter from Claimants to the Tribunal, September 8, 2020, n. 23. *See also* **Ex. RL-155**, Irmgard Marboe, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW (2d ed., Oxford University Press 2017), ¶ 5.343 (observing that the "moral damages" is equivalent to "non-material damage"). In support of their position, Claimants cite to a number of international cases and opinions that recognize the theoretical possibility of an international tribunal awarding moral damages in extreme cases. Notice of Arbitration, ¶¶ 207-214. However, what Claimants conveniently omit to discuss is the possibility of moral damages being awarded under the Treaty. In any event, the fact that moral damages may potentially be awarded under international law does not imply that they are available in investment arbitration, and in particular, when the claimants are juridical persons and not natural persons. *See* **Ex. RL-42**, C. McLachlan, L. Shore and M. Weiniger, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES, ¶ 9.149 ("Even though moral damages can be granted under principles of international law, it does not automatically follow that they should be available in investment arbitrations. It is generally accepted that damages should be compensatory and not punitive, and a distinction could be drawn between moral damages awarded to natural persons and those awarded to corporate individuals.").

makes it impossible to award the moral damages claimed by Claimants (irrespective of their inappropriateness in this case).[534]

B. The Tribunal Is Also Not Empowered to Award Non-Monetary Orders or Injunctions

269. Claimants also request the Tribunal to enjoin any attempt by the CGR or any other Colombian organ to seize any of Claimants' assets in Colombia or elsewhere.[535] However, Article 10.26 of the Treaty provides that the Tribunal may award "only" monetary damages or order restitution of property,[536] such that the Tribunal is not

[534] Due to the narrow scope of assessing this issue as part of the preliminary objection, Respondent does not undertake a detailed analysis of the inappropriateness of moral damages in the present case. However, setting aside the limitations prescribed by the Treaty itself with regard to the Tribunal's power to award moral damages, there are other independent reasons why Claimants' claim for moral damages is improper. First, the Treaty largely grants substantive protection to investments, not investors, such that Article 10.26 only permits compensation for monetary damages affecting property rights and not the personal rights of investors. **Ex. RL-156**, Zachary Douglas, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS (Cambridge University Press, 2009), ¶ 276 ("The vast majority of BITs confer substantive protection to investments rather than to investors. An investor usually does not enjoy autonomous rights under BITs as an 'investor': investment treaty protection is predicated upon having a recognized 'investment' in the host state. The object of the substantive protection is the property rights comprising the investment rather than any personal rights of the investor. In general, this means that an investment treaty tribunal has no jurisdiction to entertain claims for a personal injury to the investor unless the property rights comprising the investment were also affected by the tortious acts."). Second, if moral damages were to be awarded in investment arbitration, this could only be done when there is a physical threat, which is not even alleged in this case. **Ex. RL-157**, *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, March 10, 2015, ¶ 910 ("As a general rule, a party injured by the wrongful acts of a State cannot be awarded additional compensation for moral damages, unless it can prove the following: - that the State's actions implied physical threat, illegal detention, or other ill-treatments in contravention of the norms according to which civilized nations are expected to act; - and that such situation has caused serious damage to its physical health, grave mental suffering or a substantial loss of reputation.").

[535] Notice of Arbitration, ¶ 216(c).

[536] **Ex. RL-1**, Treaty, Article 10.26.1 (emphasis added). *See*, in that respect, **Ex. RL-158**, Christoph Schreuer, *Non-Pecuniary Remedies in ICSID Arbitration*, 20 ARBITRATION INTERNATIONAL 4 (2004), pp. 331-332 ("[I]t is clear that the parties [of an investment treaty] may restrict the tribunal's power to ordering certain forms of relief. States may prefer having to pay damages rather than being enjoined to withdraw measures that have been found illegal.").

empowered under the Treaty to award the non-monetary orders or injunctions that Claimants seek.[537]

[537] Generally, arbitral tribunals are empowered to award monetary and non-monetary damages. *See for example* **Ex. RL-159**, Gary Born, INTERNATIONAL COMMERCIAL ARBITRATION (3rd ed., Kluwer Law International 2021), p. 3177 ("[I]t is well-settled that an award, within the meaning of the New York Convention, includes instruments ordering non-monetary relief (e.g., declaratory or injunctive relief) and monetary relief."); **Ex. RL-160**, Nigel Blackaby, Constantine Partasides *et al.*, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION (6th ed., Oxford University Press 2015), p. 522 ("There is no objection in principle to an arbitral tribunal granting relief by way of injunction, if requested to do so, either on an interim basis or as final relief."). However, this is not the case when there is an express limitation on the powers of the arbitral tribunal under the instrument from which its jurisdiction derives, as is the case in the Treaty. *See for example* **Ex. RL-161**, *European Media Ventures S.A. v. Czech Republic*, UNCITRAL, Award on Jurisdiction, May 15, 2007, ¶ 82 ("[T]he Tribunal does not have the power to issue declaratory relief of the sort claimed by the Claimant or at all. This is clear from the language in Article 8(1) [of the BIT] which states that arbitral jurisdiction is limited to disputes 'concerning compensation due'. To the extent that any other relief may be appropriate, even for breach of Article 3(1), it would seem no arbitral tribunal has jurisdiction to grant such relief."); **Ex. RL-162**, Gisele Stephens-Chu, *Is it Always All About the Money? The Appropriateness of Non-Pecuniary Remedies in Investment Treaty Arbitration*, 30 ARBITRATION INTERNATIONAL 4 (2014), pp. 662-663 ("Some investment treaties do restrict the remedies which may be awarded against States. For example, Article 1135(1) of the North American Free Trade Agreement (NAFTA) limits the range of remedies that may be awarded to compensation and material restitution, and allows the respondent state to pay damages in lieu of such restitution. . . . The wording of Article 1135(1) [which is identical to Article 10.26 of the Treaty] has been adopted by the United States and Canada in their model bilateral treaty texts, and recent treaties concluded by these states incorporate similar restrictions on awards of remedies.") (emphasis added); **Ex. RL-163**, Tomoko Ishikawa, *Restitution as a Second Chance for Investor-State Relations*, 3 MCGILL JOURNAL OF DISPUTE RESOLUTION 154 (2016-2017), p. 164 ("Article 1135 of NAFTA and similar provisions that are often found in recent IIAs [International Investment Agreements] . . . that limit the types of remedies available in investor-state arbitration to pecuniary compensation and restitution in property.") (emphasis added); **Ex. RL-164**, Farshad Rahimi Dizgovin, *Foundations of Specific Performance in Investor-State Dispute Settlements: Is It Possible and Desirable?*, 28 FLORIDA JOURNAL OF INTERNATIONAL LAW 1 (2016), p. 12 ("The North American Free Trade Agreement (NAFTA) and the recent model Bilateral Investment Treaties (BITs) of the United States and Canada are some notorious examples that limit the types of available remedies to damages and restitution of property."); **Ex. RL-165**, Martin Endicott, *Remedies in Investor-State Arbitration: Restitution, Specific Performance and Declaratory Awards*, en NEW ASPECTS OF INTERNATIONAL INVESTMENT LAW 517 (P. Kahn & T. Waelde (eds.), Martinus Nijhoff Publishers 2007), pp. 520-521 ("It is rare for bilateral investment treaties (BITs) or investor-State concession contracts to specify the types of remedies that may be ordered by an arbitral tribunal. . . . Some existing multilateral investment agreements specifically narrow the range of remedies available. Article 1135 of the NAFTA confines tribunals to the award of monetary damages or the restitution of property, with an option to pay damages in lieu of restitution. The recent United States-Chile and United States-Singapore Free Trade Agreements impose the same restrictions on the power of tribunals."). In the present case, there is an express limitation on the award of non-monetary damages under the Treaty that cannot be ignored by the Tribunal.

270. It is clear that Claimants' request for an order enjoining any attempt by the CGR or any other Colombian organ to seize any of Claimants' assets in Colombia or elsewhere is a non-monetary order which the Tribunal is not empowered to grant.[538]

271. Therefore, regardless of the determination of the merits of the case, the Tribunal also lacks the power to grant the non-monetary orders sought by Claimants in this case, which means that, as a matter of law, the Tribunal cannot make an award in favor of Claimants granting them such relief.

C. The Tribunal Cannot Grant an Offsetting Award Because It Is Not Empowered to Award Hypothetical Damages

272. Lastly, Claimants also request the Tribunal to order the payment of an offsetting award for an amount equivalent to the damages that may be established in the Fiscal Liability Proceeding initiated by the CGR against Foster Wheeler and Process Consultants and other natural and juridical persons.[539] However, the Ruling with Fiscal

[538] While Claimants argue that the Tribunal could order an interim protection measure to preserve the rights of a disputing party (Letter from Claimants to the Tribunal, September 8, 2020, p. 10), the Tribunal is not empowered to grant an interim injunctive relief to prevent the implementation of a measure that is considered to be an alleged breach of a substantive obligation under the Treaty or an investment agreement. **Ex. RL-1**, Treaty, Article 10.20.8. In other words, the Tribunal is not empowered to issue an injunction order as requested by Claimants, whether provisional or definitive. In any event, it is worth clarifying that Colombia has not seized any of Claimants' assets, either in its territory or abroad. *See* ¶ 162, *supra.*

[539] Notice of Arbitration, ¶¶ 215-216. It is not entirely clear if what Claimants are really seeking by requesting a compensatory award is a declaratory award by which Respondent is ordered to compensate any future damages that Claimants may hypothetically suffer as a result of the Fiscal Liability Proceeding initiated by the CGR – whose Ruling with Fiscal Liability is not yet final –, thus establishing an obligation on the part of Respondent to compensate Claimants in advance for any damages they may hypothetically suffer in the event of a final ruling under which Foster Wheeler and Process Consultants are required to pay a certain amount of money (either voluntarily or by way of a forced collection proceeding). If that were the form of relief claimed by Claimants, it is clear that the Tribunal would not have the power to make a declaratory award, since the Treaty requires the existence of damage arising out of a breach of a substantive obligation under the Treaty or an investment agreement, and limits the Tribunal's powers to make only an award of monetary damages. *See* **Ex. RL-1**, Treaty, Articles 10.16.1 and 10.26.1; **Ex. RL-136**, A. Bjorklund, *NAFTA Chapter 11*, p. 523 ("Article 1135 restricts the kind of relief that a NAFTA tribunal can award. . . . This limitation means that other types of relief, such as specific performance, declaratory judgments, rectification, or contractual gap-filling are not allowed.") (emphasis added); **Ex. RL-166**, Stefan Leimgruber,

Liability is not yet final and Claimants have not made a voluntary or forced payment of the amount of fiscal liability determined there, such that there is no actual monetary damage that could be offset by the Tribunal in an award made under Article 10.26 of the Treaty.

273. The requirement that damage must be certain, and not merely hypothetical, in order to be compensable is widely recognized in international investment law.[540] In the *SPP v. Egypt* case, the tribunal recognized that it is a basic principle that "possible but contingent and undeterminate" damages cannot be compensated by an arbitral tribunal.[541] Similarly, in the *Occidental v. Ecuador I* case, the tribunal ruled not to order the payment of compensation or the reimbursement of amounts that "not yet [were] due or [had been] paid", since "contingent and undeterminate" damages could not be compensated.[542] In the same vein, the tribunal in *Al-Bahloul v. Tajikistan* held that "[t]o the extent that Claimant is now suggesting that Respondent should be held liable . . . for damages which have not yet occurred, or may not yet be calculated, but which may occur in the future as a result of future circumstances", such matters could not be resolved by

Declaratory Relief in International Commercial Arbitration, 32(3) ASA BULLETIN 467 (Kluwer International Law 2014), p. 467 ("A declaratory award is a statement by an arbitral tribunal on the existence or non-existence of a state of affairs."); **Ex. RL-167**, Patrick Dunand, Maria Kostyska, *Declaratory Relief in International Arbitration*, 29 JOURNAL OF INTERNATIONAL ARBITRATION 1 (Kluwer International Law 2012), p. 2 ("The parties seek declaratory relief to ascertain their legal positions, clarify their rights and obligations, and determine whether they are bound by contracts or other legal instruments. Declaratory awards are intended to allow the parties to adjudicate their disputes early, quickly and cost-effectively, before they suffer damage.") (emphasis added).

[540] *See* n. 506, *supra*. In their Notice of Arbitration, Claimants also state that they agree with this basic principle. Notice of Arbitration, ¶ 214 (citing an article by Marc Allepuz, entitled "Moral Damages in International Investment Arbitration" (*Revista del Club Español del Arbitraje*), which advocates that an arbitral tribunal should award damages "where the existence of damage is certain.").

[541] **Ex. RL-168**, *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, May 20, 1992, ¶ 189.

[542] **Ex. RL-169**, *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No. UN3467, Final Award, July 1, 2004, ¶ 210.

that Tribunal.[543] Numerous tribunals have rejected awarding hypothetical or speculative damages.[544] This is only underscored by the fact that under the Treaty, the occurrence of damage, *i.e.*, the existence of actual and not merely hypothetical damage, is an essential requirement for validly submitting a claim to arbitration.[545]

274. In this Arbitration, the damages that Claimants seek to recover by way of an offsetting award are entirely hypothetical, since, at this point in time, it is not possible to know with certainty whether Claimants will incur any damage as a result of the Fiscal Liability Proceeding or even the amount of such damage. To put it another way, although the Ruling with Fiscal Liability is for an amount of US$ 997 million, that is not the amount of the alleged damage incurred by Claimants. Moreover, in the event Claimants do not make a voluntary or compulsory payment of the potential amount provided for in the Ruling with Fiscal Liability, they would suffer no damages at all.

275. The contingent or hypothetical nature of Claimants' alleged "damages" derives from the following:

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[543] **Ex. RL-170**, *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V(064/2008), Final Award, June 8, 2010, ¶ 103. *See also* **Ex. RL-171**, *Mobil Investments Canada Inc. & Murphy Oil Corporation c. Canada (I),* ICSID Case No. ARB(AF)/07/4 (NAFTA), Decision on Liability and on Principles of Quantum, May 22, 2012, ¶ 478 ("[T]here is no basis to grant at present compensation for uncertain future damages.").

[544] *See for example* **Ex. RL-172**, *Société Ouest Africaine des Bétons Industriels (SOABI) v. Republic of Senegal,* ICSID Case No. ARB/82/1, Award, February 25, 1988, ¶ 10.02 (refusing to award compensation for damage that was "entirely hypothetical") (translation from French); **Ex. RL-173**, Borzu Sabahi, Kabir Duggal and Nicholas Birch, *Principles Limiting the Amount of Compensation*, in CONTEMPORARY AND EMERGING ISSUES ON THE LAW OF DAMAGES AND VALUATION IN INTERNATIONAL ARBITRATION 325 (C. Beharry, (ed.), Brill 2018), p. 337 ("Tribunals have recognized that computation of damages is not an exact science and is therefore subject to a tribunal's overall discretion. This discretion, however, does not extend to speculative, uncertain, or hypothetical damages."), p. 339 (describing situations "where the damage is yet to materialize" as examples of situations where damages claims are speculative or uncertain).

[545] **Ex. RL-1**, Treaty, Article 10.16.1; ¶¶ 251-261, *supra*. Similarly, in the absence of a causal link between the State's alleged wrongful conduct and the investor's damage, a tribunal cannot award monetary damages. *See* n. 507, *supra*. It is thus far unclear whether Claimants will suffer any damage caused by the conduct which they allege to be in breach of the Treaty.

- The Ruling with Fiscal Liability is not final because administrative remedies have not been exhausted. The instances of appeal and review of the Ruling with Fiscal Liability (both through administrative remedies and judicial remedies) have suspensive effect, such that nothing can be claimed from Foster Wheeler and Process Consultants (in the event the Ruling with Fiscal Liability is upheld) until it is final.[546] Furthermore, there is the possibility that the Ruling with Liability may be overturned in whole or in part on appeal.[547]

- Once the Ruling with Fiscal Liability is final, the potential fiscal liability of Foster Wheeler and Process Consultants, and of the other fiscally liable parties, will be joint and several, such that it is impossible to know how much will be claimed from Foster Wheeler and Process Consultants at any time for the partial or total payment of the amount established in the Ruling with Fiscal Liability (in the event the Ruling is upheld).[548] In order to collect the amount of the Ruling with Fiscal Liability, the CGR may initiate a forced collection proceeding against Foster Wheeler and Process Consultants, or it may choose to seize and/or execute assets of other natural or juridical persons or individuals who are found to be fiscally liable.[549] The CGR could also seek to recover the payment from the Insurance Companies, as civilly liable third parties.

- The Fiscal Liability Proceeding is subject to judicial control before the tribunals of the administrative adjudicatory jurisdiction, as a result of which the Ruling with Fiscal Liability may ultimately be declared null.[550]

- Even if the CGR were to decide to initiate a forced collection proceeding against Foster Wheeler and Process Consultants, it would have to locate their assets in Colombia (or potentially through cooperation mechanisms that may or may not bear fruit abroad) that could be seized and eventually auctioned in order to satisfy the amount of the Ruling with Fiscal Liability.[551] Additionally, the forced collection proceeding would ultimately allow Foster Wheeler and Process Consultants to file an appeal for annulment before the administrative

[546] *See* ¶¶ 160-161, 163, *supra*.

[547] This is demonstrated by the examples of rulings with fiscal liability that were reversed at administrative level or later in court. *See* nn. 416-417, *supra*.

[548] *See* ¶¶ 88, 127, 128, 150, 151, 255, *supra*.

[549] *See* ¶¶ 115-120, *supra*. [redacted] (Notice of Arbitration, ¶ 136), the Ruling with Fiscal Liability itself clarifies that there is no risk of double compensation. *See* n. 342, *supra*.

[550] *See* ¶¶ 109-114, 160, *supra*.

[551] *See* ¶ 117, *supra*.

> adjudicatory jurisdiction against the execution and auction order, thus rendering any eventual damage even more hypothetical.[552]

276. In sum, when the Ruling with Fiscal Liability becomes final and Foster Wheeler and Process Consultants are required to pay all or part of the amount of the Ruling, it is only after Foster Wheeler and Process Consultants make any payment (either voluntarily or compulsorily, by means of a forced collection proceeding or an auction of any of their assets) that certain monetary damage that is capable of being compensated under Article 10.26 of the Treaty would be incurred.[553]

277. The *Glencore v. Colombia* case does not support Claimants' s position, but – on the contrary – Respondent's.[554] While in that case the tribunal granted the claimants an award of compensation that was equivalent to the amount of the ruling with fiscal liability issued against them by the CGR, as stated above,[555] Glencore's Colombian subsidiary had voluntarily paid that amount (once the ruling became final after exhausting administrative remedies), such that the damage was certain.[556] In the present case, not

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[552] *See* ¶ 120, *supra*.

[553] Claimants also refer to the professional fees and expenses that they have had to – and will have to – bear in order to defend themselves in the Fiscal Liability Proceeding in Colombia, and request the reimbursement of such fees and expenses. Notice of Arbitration, ¶ 206. Setting aside the fact that these costs have not yet been determined, given that the Fiscal Liability Proceeding is still ongoing, they are not costs that can be considered as "damages"; rather, they are a "legal burden" to be borne by Claimants. *See* n. 513, *supra*. In any event, those potential costs could not constitute losses or damages arising out of a breach of a substantive obligation of the Treaty or an investment agreement because, for that to be the case, there would first have to be a breach of a substantive obligation or an investment agreement in this case – which there is not –, and second, it would have to be established that those costs are a result of that breach.

[554] Notice of Arbitration, ¶ 130; **Ex. RL-20**, *Glencore I*. *See also* ¶ 257, *supra*.

[555] *See* ¶ 257, *supra*.

[556] **Ex. RL-20**, *Glencore I*, ¶ 525. Following the ruling with fiscal liability, Prodeco S.A. ("Prodeco", being the Colombian subsidiary of Glencore International A.G., "Glencore") filed for a remedy of reconsideration before the deputy comptroller and an appeal before the CGR. After exhausting administrative remedies, Prodeco filed an annulment action before the administrative adjudicatory jurisdiction. However, before the annulment action was resolved, Prodeco paid the State the amount of the tax liability in order to avoid the contract for the exploration, construction and exploitation of a coal project which it had signed with the Colombian mining agency from expiring. *Id.*, ¶¶ 507-525. It should be noted that under the Colombia-Switzerland BIT (which is the treaty under which Glencore's claim was brought), there is a protocol that

only is there no final Ruling with Fiscal Liability (in fact, not even the administrative process has been exhausted), but also Foster Wheeler and Process Consultants have not had to pay any amount to the State for their potential fiscal liability (either voluntarily or compulsorily) within the framework of the Fiscal Liability Proceeding initiated by the CGR. Thus, to date there is no actual damage but only hypothetical damage.[557]

278. In conclusion, the Tribunal also lacks the power under Article 10.26 of the Treaty to grant the offsetting award that Claimants request because the damages they seek to be compensated are merely hypothetical damages and are not certain monetary damages.

OBJECTIONS TO JURISDICTION

279. Pursuant to paragraph 14.7 of Procedural Order No. 1 and Article 10.20.4 of the Treaty, Respondent submits the following five objections to the Tribunal's jurisdiction that are to be addressed as preliminary questions.

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establishes that the admissibility of claims regarding administrative acts in Colombia are subject to the exhaustion of administrative remedies, and in that case such administrative remedies had been exhausted. *Id.*, ¶¶ 1114-1118; ¶ 179, *supra*. In the Treaty under analysis in this case there is no equivalent protocol, and in any event, administrative remedies have not been exhausted. Consequently, Glencore's situation was very different from Claimants', since in *Glencore* not only had the administrative remedies in respect of the ruling with fiscal liability been exhausted (which made the claim admissible under the relevant treaty in that case), but also because Prodeco (Glencore's subsidiary) had already paid the State the amount of the penalty established in the ruling with fiscal liability, such that the damage was certain – unlike in the present case, where Foster Wheeler and Process Consultants have not paid anything to date.

[557] Claimants cite to the *Pan American v. Argentina* case in support of their argument that a tribunal can hear a claim for additional hypothetical damage. Letter from Claimants to the Tribunal, September 8, 2020, pp. 8-9 and n. 18. That case does not help Claimants. Setting aside the fact that no damage has yet been incurred in this case (such that any damage would not be treated as additional damage) and that the U.S.-Argentina BIT does not contain provisions analogous to Articles 10.16.1 and 10.26.1 of the Treaty (which require the existence of damage in order for a claim to arbitration to be admissible), the *Pan American* tribunal determined that it had jurisdiction because "some of the damage [were] concrete and specific in that it [had] occurred already", and further held that "damage that remains contingent or hypothetical at [the merits phase]" should be disregarded. **Ex. RL-174**, *Pan American Energy LLC, and BP Argentina Exploration Company v. Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, July 27, 2006, ¶¶ 177-178 (emphasis added).

280. In this regard, it is necessary to note that the Tribunal's analysis of these three objections is not subject to the limitations imposed by Article 10.20.4 of the Treaty with respect to the manner in which an objection is to be addressed, and in particular, the requirement to assume "to be true claimant's factual allegations in support of any claim."[558] Therefore, Claimants have the burden of proving all facts on which the Tribunal's jurisdiction is based.[559]

[558] **Ex. RL-1**, Treaty, Article 10.20.4; **Ex. RL-175**, *Seo Jin Hae v. Republic of Korea,* HKIAC Case No. 18117 (KORUS FTA), Submission of the United States of America, June 19, 2019 ("*Submission of the U.S. in Seo Jin Hae*"), ¶¶ 12-13 ("[W]hen a respondent invokes paragraph 7 to address objections to competence, there is no requirement that a tribunal 'assume to be true claimant's factual allegations.' To the contrary, there is nothing in paragraph 7 that removes a tribunal's authority to hear evidence and resolve disputed facts. . . . [N]othing in the text of paragraph 7 alters the normal rules of burden of proof. In the context of an objection to competence, the burden is on a claimant to prove the necessary and relevant facts to establish that a tribunal is competent to hear a claim. It is well-established that where 'jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage.' A tribunal may not assume facts in order to establish its jurisdiction when those facts are in dispute.") (emphasis added); **Ex. RL-176**, *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43 (DR-CAFTA), Decision on Respondent's Preliminary Objections, March 13, 2020, ¶ 220 ("Unlike objections under Article 10.20.4, jurisdictional objections do not require a tribunal to assume as true all facts alleged in the notice of arbitration.").

[559] *See for example* **Ex. RL-177**, *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Award, April 26, 2017, ¶ 73 (determining that "the burden of proof that all the jurisdictional requirements of the case are met, insofar as they are contested by the Respondent, lies with the Claimant."); **Ex. RL-178**, *Tulip Real Estate y Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue, March 5, 2013, ¶ 48 ("As a party bears the burden of proving the facts it asserts, it is for Claimant to satisfy the burden of proof required at the jurisdictional phase."); **Ex. RL-179**, *Caratube International Oil Company LLP and Mr. Devincci Salah Hourani v. Republic of Kazakhastan*, ICSID Case No. ARB/13/13, Award, September 27, 2017, ¶ 310 ("[A] claimant has the burden of proving that all the requirements for the tribunal's jurisdiction are met."); **Ex. RL-128**, *Gustav F W*, ¶ 143 ("If jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage."); **Ex. RL-180**, *Pac Rim Cayman LLC. v. Republic of El Salvador,* ICSID Case No. ARB/09/12 (DR-CAFTA), Decision on the Respondent's Jurisdictional Objections, June 1, 2012, ¶ 2.9 ("[A]ll relevant facts supporting such jurisdiction must be established by the Claimant at this jurisdictional stage and not merely assumed in the Claimant's favour.").

I.

Claimants Do Not Have a Protected Investment Under the Treaty and the ICSID Convention

281. Even if the Tribunal were to consider that Claimants have submitted a claim in respect of which an award can be made in their favor (*quod non*), the Tribunal nevertheless lacks jurisdiction *ration materiae* over this case because Claimants do not have an "investment" within the meaning of Article 10.28 of the Treaty and Article 25 of the ICSID Convention.

282. Article 10.28 of the Treaty defines an "investment" as "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk."[560] Although Article 10.28 then lists certain examples of the forms that an investment may take, including different types of contracts, it is only in cases where such assets (whether those listed as examples in Article 10.28 or elsewhere) have the characteristics of an investment that they may be considered to be protected by the Treaty.[561]

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[560] **Ex. RL-1**, Treaty, Article 10.28 (emphasis added).

[561] *See for example* **Ex. RL-37**, L. Caplan and J. Sharpe, *United States*, pp. 767-768, n. 53 ("The enumeration of a type of an asset in Article 1 [of the 2012 U.S. BIT Model, which is almost identical to Article 10.28 of the Treaty], however, is not dispositive as to whether a particular asset, owned or controlled by an investor, meets the definition of investment; it must still always possess the characteristics of an investment. . . . Footnotes to certain enumerated possible forms of investment reinforce this basic requirement, such as footnote 1 to subparagraph (c)."). Although in this case there is an express provision in the Treaty, the requirement is considered to be implicit even if there is no express provision to that effect. *See for example* **Ex. RL-181**, *Romak S.A. (Switzerland) v. Republic of Uzbekistan*, PCA Case No. AA280, Award, November 26, 2009 ("*Romak*"), ¶ 207 ("[I]f an asset does not correspond to the inherent definition of 'investment,' the fact that it falls within one of the categories listed in Article 1 does not transform it into an 'investment'."); **Ex. RL-182**, *Nova Scotia Incorporated (Canada) v. Bolivarian Republic of Venezuela (II),* ICSID Case No. ARB(AF)/11/1, Excerpts of the Award, April 30, 2014 ("*Nova Scotia*"), ¶ 80 ("No matter what the forum, the ordinary meaning of investment in the relevant bilateral investment treaty derives from something more than a list of examples and calls for an examination of the inherent features of an investment."); **Ex. RL-183**, *Orascom TMT Investments S.a.r.l. v. People's Democratic Republic of Algeria,* ICSID Case No. ARB/12/35, Award, May 31, 2017, ¶ 372 *("*The listed items normally exhibit the hallmarks

283. Among the examples listed in the definition of "investment" in Article 10.28 of the Treaty, Claimants highlight paragraph (e),[562] which establishes "turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts" as one of the forms that an investment may take.[563] Commentators agree that paragraph (e) of the definition of "investment" excludes ordinary commercial contracts that do not have the characteristics of an investment.[564]

284. The United States, in its submissions as a non-disputing party interpreting provisions that are equivalent to Article 10.28 of the Treaty included in several of its investment treaties, has underscored the following relevant aspects of the definition of "investment":

- "Article 1 [which is identical to Article 10.28 of the Treaty] defines 'investment' . . . The '[f]orms that an investment may take include' the categories listed in the subparagraphs, which are illustrative and non-exhaustive. The enumeration of a type of an asset in Article 1,

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of an 'investment' in the objective sense seen above. But, if any of these items does not correspond to the inherent definition of 'investment', the fact that it falls within one of the categories listed in Article 1(2) does not transform it into an 'investment'."); **Ex. RL-184**, *Masdar Solar & Wind Cooperatif U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, May 16, 2018, ¶ 199 ("In sum, the existence of an 'investment' requires a commitment or allocation of resources for a duration and involving risk. For example, a one-time sale resulting in receivables would not qualify as an 'investment,' even if the receivables may be listed as 'assets.'").

[562] Letter from Claimants to the Tribunal, September 8, 2020, p. 11, n. 27.

[563] **Ex. RL-1**, Treaty, Article 10.28, Definition of "investment", (e).

[564] *See for example* **Ex. RL-37**, L. Caplan and J. Sharpe, *United States*, n. 53 ("[A]s Vandevelde notes, modifying language in the phrase 'turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts' in subparagraph (e), was meant to 'exclude contracts that are ordinary commercial contracts and that do not have the character of an investment'.") (emphasis added); **Ex. RL-121**, K. Vandevelde, U.S. INTERNATIONAL INVESTMENT AGREEMENTS, p. 123 ("The 2004 model modifies the category of contractual rights, to make sure that the *ejusdem generis* principle is applied to the illustrative listing of contracts. Specifically, the 2004 model actually omits the reference to contracts generally. The entire category is no 'turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts'. The listing thus is the same in substance as that which had first appeared in the 1994 model, but the modification makes clear that only contracts of that type are included. Again, however, the listing is itself only illustrative, and the definition of investment includes every kind of assets having the character of investment, whether or not it falls within one of the enumerated categories. The goals of the modification here was to exclude contracts that are ordinary commercial contracts and do not have the character of an investment.") (emphasis added).

however, is not dispositive as to whether a particular asset, owned or controlled by an investor, meets the definition of investment; it must still always possess the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk."[565]

- "Subparagraph (e) of the definition lists, among forms that an investment may take, 'turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts.' Ordinary commercial contracts for the sale of goods or services typically do not fall within the list in subparagraph (e). The definition of 'investment' explicitly excludes claims to payment that arise from commercial contracts for the sale of goods or services and that are not immediately due."[566]

- "The determination as to whether a particular instrument has the characteristics of an investment is a case-by-case inquiry, involving examination of the nature and extent of any rights conferred under the State's domestic law."[567]

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[565] **Ex. RL-63**, *Submission of the U.S. in Bay View*, ¶ 2 (emphasis added). *See also* **Ex. RL-185**, *Bridgestone Licensing Services Inc., and Bridgestone Americas Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34 (Panama-U.S. TPA), Submission of the United States of America, August 28, 2017 ("*Submission of the U.S. in Bridgestone*"), ¶ 14; **Ex. RL-65**, *Submission of the U.S. in Elliott Associates*, ¶ 7; **Ex. RL-66**, *Submission of the U.S. in Gramercy*, ¶ 18; **Ex. RL-67**, *Submission of the U.S. in Italba*, ¶ 2; **Ex. RL-175**, *Submission of the U.S. in Seo Jin Hae*, ¶ 15. Colombia has confirmed the same understanding in its 2008 Model Treaty. **Ex. RL-126**, 2008 Colombia Model Treaty, Article 2.4 ("In accordance with paragraph 1 of this Article, the minimum characteristics of an investment shall be: a. The commitment of capital or other resources; b. The expectation of gain or profit; and c. The assumption of risk for the investor."). *See* **Ex. RL-120**, J. Rivas, *Colombia*, p. 206 ("[T]he Investment Negotiating Team [of Colombia] considered whether all characteristics were necessary for there to be an investment. To the extent that the characteristics are interdependent, as recognized in *Salini*, it made little sense not to make them all mandatory in the Model. Since risk is a core characteristic, and since risk logically involves an expectation of gains together with the possibility of not yielding returns from whatever resources were committed, *ie* the remaining two characteristics, all three elements were deemed necessary for the finding of an investment.").

[566] **Ex. RL-185**, *Submission of the U.S. in Bridgestone*, ¶¶ 15-16 (emphasis added). Accordingly, in its 2008 Model Treaty, Colombia expressly excluded commercial services contracts from the definition of "investment." **Ex. RL-126**, 2008 Colombia Model Treaty, Article 2.2 ("Investment does not include: . . . i. Commercial contracts for the sale of goods and services by a national or legal entity in the territory of a Contracting Party to a national or a legal entity in the territory of the other Contracting Party"). *See* **Ex. RL-120**, J. Rivas, *Colombia*, p. 204 ("As a matter of public policy the Model also does not consider as investments any claims to money arising exclusively from commercial contracts for the sale of goods and services. The purpose of IIAs, as understood by the Investment Negotiating Team, is reflected in this exclusion.").

[567] **Ex. RL-63**, *Submission of the U.S. in Bay View*, ¶ 4 (emphasis added).

285. In turn, in order for a tribunal constituted under the Treaty and the ICSID Convention to have jurisdiction *ratione materiae* over a claim, the asset possessed by the claimants must not only qualify as an "investment" under the Treaty, but it must also be objectively considered an "investment" under the terms of the ICSID Convention.[568] In that respect, Article 25 of the ICSID Convention provides that the jurisdiction of the International Centre for Settlement of Investment Disputes ("ICSID") only extends to disputes of a legal nature "arising directly out of an investment."[569] Commentators have been emphatic that ICSID's subject matter jurisdiction excludes disputes related to ordinary commercial contracts, such as contracts for the sale of goods and services.[570] While the ICSID Convention does not contain a definition of the term "investment", according to the so-called *Salini* test developed by ICSID jurisprudence there is an

[568] This is what is known as the "double-keyhole approach" or the "double-barrelled test." It implies that even if an asset qualifies as an "investment" under the relevant Treaty, it must also qualify as an "investment" under the objective definition of the ICSID Convention. In short, this Tribunal – which has been constituted under the Treaty and the ICSID Convention – will only have jurisdiction *ratione materiae* over this case if Claimants' asset qualifies as an "investment" under both the Treaty and the ICSID Convention. *See* **Ex. RL-186**, *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, February 7, 2011, ¶ 107 ("[I]n order for a proceeding based on breach of a treaty to be admissible, the investment to which the dispute relates must pass a double test (also known as the 'double keyhole approach' or 'double-barrelled test.' . . .) It must in practice correspond: - on the one hand, to the meaning given to the term by the treaty, which defines the framework of the consent given by the State, and also - on the other, to the meaning given in the ICSID Convention, which determines the jurisdiction of the Centre and the arbitral tribunals acting under its auspices.").

[569] ICSID Convention, Article 25(1).

[570] *See* **Ex. RL-187**, Christoph Schreuer *et al.*, THE ICSID CONVENTION: A COMMENTARY (2d ed., Cambridge University Press 2009), Article 25, ¶ 122 ("The drafting history [of the ICSID Convention] leaves no doubt that the Centre's services would not be available for just any dispute that the parties may wish to submit. In particular, it was always clear that ordinary commercial transactions would not be covered by the Centre's jurisdiction no matter how far-reaching the parties' consent might be.") (emphasis added); **Ex. RL-188**, *Standard Chartered Bank (Hong Kong) v. United Republic of Tanzania*, ICSID Case No. ARB/15/41, Award, October 11, 2019 ("*SCB*"), ¶ 194 ("The subject matter of the dispute must nevertheless still be an investment as contemplated by the ICSID Convention and consent by the Parties alone could not subject an ordinary commercial transaction or political dispute or non-legal dispute to ICSID for resolution. This is expressed in the Report by the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.").

objective notion of what constitutes an "investment" under the ICSID Convention, and one of the essential elements of that notion is the existence of investment risk.[571]

286. Investment or operational risk – as a fundamental element of the concept of an "investment" under both the Treaty and the ICSID Convention – represents the uncertainty faced by an investor regarding the return it will receive on its investment, including whether or not it will recover, in whole or in part, the capital invested. This type of risk must be distinguished from both generic risks inherent to any economic activity and simple commercial risks – inherent to any contract – linked to the non-performance of contractual obligations, including the risk of non-payment.

287. This distinction between investment risk and commercial risk was clearly stated by the tribunal in *Romak v. Uzbekistan*:

> All economic activity entails a certain degree of risk. As such, all contract – including contracts that do not constitute an investment – carry the risk of non-performance. However, this kind of risk is pure commercial, counterparty risk, or, otherwise stated, the risk of doing business generally. It is therefore not an element that is useful for the purpose of distinguishing between an investment and a commercial

[571] *See for example* **Ex. RL-189**, *Salini Construttori S.P.A and Italstrade S.P.A v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, July 16, 2001, ¶ 52 ("The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction. . . . In reading the [ICSID] Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.") (emphasis added); **Ex. RL-190**, *Ulysseas, Inc. v. Republic of Ecuador*, UNCITRAL, Final Award, June 12, 2012, ¶ 251 ("As held by many ICSID tribunals, the ordinary conception of an investment includes several basic characteristics, essentially: (a) it must consist of a contribution having an economic value; (b) it must be made for a certain duration; (c) there must be the expectation of a return on the investment, subject to an element of risk; (d) it should contribute to the development of the economy of the host State.") (emphasis added); **Ex. RL-100**, *Electrabel*, ¶ 5.43 ("Article 25 of the ICSID Convention requires that the dispute arises directly from an investment, but provides no definition of investment. While there is incomplete unanimity between tribunals regarding the elements of an investment, there is a general consensus that the three objective criteria of (i) a contribution, (ii) a certain duration, and (iii) an element of risk are necessary elements of an investment."); **Ex. RL-191**, *Quiborax S.A., Non Metallic Minerals S.A and Allan Fost Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, September 27, 2012, ¶ 227 ("[T]he Tribunal concludes that the objective definition of investment under Article 25(1) of the ICSID Convention comprises the elements of contribution of money or assets, risk and duration.").

> transaction. An 'investment risk' entails a different kind of *alea*, a situation in which the investor cannot be sure of a return on his investment, and may not know the amount he will end up spending, even if all relevant counterparties discharge their contractual obligations. Where there is 'risk' of this sort, the investor simply cannot predict the outcome of the transaction.[572]

288. Similarly, the tribunal in *Postova banks v. Greece* highlighted the differences between commercial risk – which is found in every economic transaction – and investment or operational risk – typical of an investment:

> Under an "objective" test, the element of risk is essential and cannot be analysed in isolation. Indeed any economic transaction – it could even be said any human activity – entails some element of risk. Risk is inherent in life and cannot per se qualify what is an investment. The investment risk, for purposes of the application of an "objective" test, was defined by the *Romak* tribunal. . . . In other words, under an "objective" approach, an investment risk would be an operational risk and not a commercial risk or a sovereign risk. A commercial risk covers, inter alia, the risk that one of the parties might default on its obligation, which risk exists in any economic relationship. . . . Under the objective approach, commercial and sovereign risks are distinct from operational risk. The distinction here would be between a risk inherent in the investment operation in its surrounding – meaning that the profits are not ascertained but depend on the success or failure of the economic venture concerned – and all the other commercial and sovereign risks.[573]

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[572] **Ex. RL-181**, *Romak*, ¶¶ 229-230 (emphasis added).

[573] **Ex. RL-192**, *Posštová banka, a.s, and Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, April 9, 2015, ¶¶ 367-370 (emphasis added). *See also* **Ex. RL-182**, *Nova Scotia*, ¶¶ 105, 107-108, 111 ("It may be that any transaction involves a risk, but what is required for an investment is a risk that is distinguishable from the type of risk that arises in an ordinary commercial transaction. . . . The risk the Claimant refers to is, however, the far more simple risk of exposure to a higher price for a product - for the Tribunal, this is not a risk that is inherent to an investment. . . . Thus, the type of risk involved here appears to be, for the coal industry, 'normal commercial terms.' Additionally, here, the risk is not one that affects the contribution and the alleged investment. . . . The Tribunal has not found that the risks alleged are of the sort that is inherent in the notion of investment."); **Ex. RL-193**, Professor Christian *Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius*, PCA Case No. 2018-37, Award on Jurisdiction, August 23, 2019, ¶ 145; **Ex. RL-194**, *Raymond Charles Eyre and Montrose Developments (Private) Limited v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/16/25, Award, March 5, 2020, ¶¶ 293-294; **Ex. RL-188**, *SCB*, ¶¶ 218-220; **Ex. RL-195** *Seo Jin Hae v. Government of the Republic of Korea*,

289. In the present case, Claimants allege that their "investment" is the Services Contract that FPJVC entered into with Reficar for the provision of project management services in connection with the modernization and expansion of an oil refinery in Cartagena, Colombia:

- "This dispute arises from a November 2009 contract between FPJVC and Refinería de Cartagena S.A. . . . for the provision of services in connection with the modernization and expansion of a large, state-owned oil refinery located in Cartagena, Colombia."[574]

- "Claimants contracted with Reficar, a Colombian-owned enterprise, to provide project management services in connection with the construction and expansion of an oil refinery owned by Colombia to supply environmentally clean motor fuels to meet Colombian demand."[575]

290. Aware that they do not have a protected investment under the Treaty and/or the ICSID Convention, Claimants are sometimes intentionally misleading as to what exactly constitutes their alleged investment. They consistently refer to paragraph (e) of the list of examples included in the definition of "investment" under Article 10.28 of the Treaty as to the form that an "investment" may take – which refers to "turnkey, construction, management, production, concession, revenue-sharing, and other similar

HKIAC Case No. 18117 (KORUS FTA), Final Award, September 27, 2019, ¶ 130 ("Article 11.28 of the KORUS FTA [Free Trade Agreement between the Republic of Korea and the United States] is clear in that an asset only qualifies as an investment if it has certain characteristics, such as the assumption of risk. Those characteristics, including the assumption of risk, must go beyond the features that any asset automatically has. Therefore, the risk of an asset declining in value cannot be the type of risk that the drafter of the KORUS FTA had in mind); **Ex. RL-120**, J. Rivas, *Colombia*, pp. 205-206 ("[A]n essential characteristic of an investment which creates the potential for returns and profits.").

[574] Notice of Arbitration, ¶ 3 (emphasis added).

[575] *Id.*, ¶ 29 (emphasis added).

contracts"[576] – to indicate that the Services Contract constitutes a protected investment.[577]

291. At times, Claimants also refer to their alleged "investment" more broadly, indicating that their "commercial activities" in Colombia (which they described as "contracting to provide project management services in connection with the construction and expansion of an oil refinery and committing significant capital, labor, and time in connection with those services") fall within the definition of an "investment" under the Treaty.[578]

292. Regardless of how Claimants characterize it, it is clear from their arguments that the "investment" which Claimants claim is the Services Contract, since all other "activities" and resources described by Claimants simply correspond to the performance of their contractual obligations under the Services Contract.

293. The Services Contract is a typical ordinary commercial contract for the provision of consulting services which does not present any type of investment risk,[579] such that it does not, therefore, qualify as an "investment" under either the Treaty or the

[576] **Ex. RL-1**, Treaty, Article 10.28(e).

[577] **Ex. R-39**, Notice of Intent, ¶ 12 (stating that "a contract for the provision of services" is considered an "investment"); Letter from Claimants to the Tribunal, September 8, 2020, p. 11, n. 30 (arguing that the Treaty includes "construction contracts" in its definition of "investment", and that "similar construction contracts and/or contracts for services" have been considered an "investment" by various tribunals – citing, in support of this proposition, only to two arbitral decisions involving construction contracts).

[578] Letter from Claimants to the Tribunal, September 8, 2020, pp. 11-12. *See also* Notice of Arbitration, ¶ 29.

[579] This is corroborated by Claimants themselves when describing the functions they performed under the Services Contract. Notice of Arbitration, ¶ 4 ("FPJVC personnel worked as consultants under the direction of Reficar's [*project management team*], but neither they nor FPJVC had authority over management of, or the expenditures for, the Project."), ¶13 ("FPJVC did not approve expenditures or have any decision-making authority."). *See also* Letter from Claimants to the Tribunal, September 8, 2020, p. 1 ("Claimants are all engaged in the business of providing various engineering and consulting services.").

ICSID Convention. The main characteristics of the Services Contract entered into between Reficar and FPJVC are as follows:

- [redacted]

[redacted]

[580] [redacted] ¶ 24, *supra*.

[581] *See* n. 60, *supra*.

[582] *See* [redacted] ¶¶ 35, 40-41, *supra*.

[583] *See* [redacted] ¶¶ 35, 42, *supra*.

[redacted]585

294. In sum, the Services Contract is a commercial contract for the provision of services that did not present any investment risk for Claimants.[586] While there are certain types of contracts (including some management contracts) that may have the characteristics of an investment, this is clearly not the case with Claimants' Services Contract which, by its nature, is simply an ordinary commercial contract for the provision of services that is not subject to any typical investment risk.[587] The Remuneration

[584] *See* [redacted] ¶¶ 35-43, *supra*.

[585] *See* ¶¶ 45-51, *supra*.

[586] Presumably, for this reason, Claimants conveniently argue that they "invested significant amounts of time, capital, personnel, and labor in Colombian territory" and that "[a]ll of these acts were done with the expectation that Claimants would return a profit", but say nothing about the alleged risk of their investment, since they were clearly exposed to no risk. Notice of Arbitration, ¶ 29. *See also* **Ex. R-39**, Notice of Intent, n. 4.

[587] *See* **Ex. RL-196**, Ibrahim Shihata and Antonio Parra, *The Experience of the International Centre for Settlement of Investment Disputes*, 14 ICSID REVIEW – F.I.L.J. 299 (1999), pp. 317-318 ("[T]he Convention restricts the jurisdiction of ICSID to disputes arising out of investments but does not define the term 'investment.' The constituent convention of another of the organizations belonging to the World Bank Group, the Multilateral Investment Guarantee Agency (the Agency or MIGA), does however provide some specific classifications of investment. They are mentioned here not because there is any necessary link between MIGA's activities and those of ICSID but because the MIGA classifications may conveniently be used to describe the transactions involved in the cases submitted to arbitration under the ICSID Convention. According to the Convention Establishing MIGA, investments initially eligible for insurance from the Agency will include equity interests and such forms of non-equity direct investment as may be determined by the Board of Directors of MIGA. In the 2002 Operational Regulations adopted by MIGA's Board, those forms of nonequity direct investment are determined to comprise various forms of contractual arrangements."). In its 2002 Operational Regulations, the MIGA stated the following: "Non-Equity Direct Investment. 1.07. Subject to the criteria stated in Paragraphs 1.06 and 1.07 below, the Agency's guarantees may be issued for the following forms of non-equity direct investment: . . . (iii) management contracts where the contractor assumes responsibility for the management of the Investment Project or a significant part of its operations and where his remuneration substantially depends on the production, revenues or profits of the Investment Project." **Ex. RL-197**, Multilateral Investment Guarantee Agency, *Operational Regulations* (World Bank Group 2002), p. 3. *See*, in the same respect, **Ex. RL-198**, Multilateral Investment Guarantee Agency, *Operational Policies* (World Bank Group 2015), pp. 4-5, 12 (where it also refers to non-equity direct investments, including management contracts, such as those that "depend substantially on the production, revenues or profits of the Investment Project" or – in the case of construction contracts – like those in which "the contractor assumes responsibility for the performance or the operation of the Investment Project"). It

structure of the Services Contract, and [redacted] (together with the possibility of [redacted]), ensured that FPJVC [redacted][588]

295. Fully aware that the Services Contract is merely an ordinary commercial contract for the provision of consulting services that does not qualify as an "investment" under any possible standard, Claimants argue that the Services Contract is a contract "to provide project management services in connection with the construction and expansion of an oil refinery" and that they have committed "significant amounts of time, capital, personnel, and labor in Colombian territory."[589] Furthermore, Claimants argue that the Treaty includes construction contracts within the forms that an investment may take, and that they have assumed "inherent risk associated with construction or infrastructure projects of this magnitude."[590]

is clear that, although it is a contract for the provision of services for the management of a project, the Services Contact does not satisfy any of these characteristics since remuneration thereunder [redacted] *See* ¶¶ 33-53, *supra*.

[588] *See* ¶¶ 33-44, 52, *supra*.

[589] Notice of Arbitration, ¶ 29. *See also* Letter from Claimants to the Tribunal, September 8, 2020, p. 11 [The Spanish version of this Memorial incorrectly cited to an August 24, 2020 letter from Claimants to the Tribunal. The correct reference is to the September 8, 2020 letter].

[590] Letter from Claimants to the Tribunal, September 8, 2020, p. 11. [The Spanish version of this Memorial incorrectly cited to an August 24, 2020 letter from Claimants to the Tribunal. The correct reference is to the September 8, 2020 letter].

296. However, it is clear that in this case Claimants did not have a construction contract,[591] but merely a contract for the provision of consultancy services, such that they did not experience any risk associated with the construction and expansion of the refinery – as appears from the very terms of the Services Contract they entered into.[592] In fact, FPJVC only entered into a contract for the provision of consulting services with respect to the Project management and [redacted][593]

297. The fact that Claimants' consulting services were related to the construction and expansion of a refinery is irrelevant to the analysis of the existence of an "investment" under the Treaty and/or the ICSID Convention, since it does not change the nature or the rights and obligations of the Services Contract – which is nothing more than an ordinary commercial contract for the provision of services.[594] Neither FPJVC nor any of the other

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[591] [redacted] *See* ¶¶ 33-53, *supra*.

[592] *See* ¶¶ 24-32, *supra*. In any event, it is necessary to clarify that, even if Claimants were considered to have a "construction contract", the contract would still have to display the characteristics of an "investment" in order to be protected under the Treaty and the ICSID Convention. Among those characteristics is investment risk, which clearly does not exist in this case.

[593] *See* ¶¶ 39-44, *supra*.

[594] *See* **Ex. RL-199**, *Patrick H. Mitchell v. Democratic Republic of the Congo,* ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, November 1, 2006, ¶ 38 ("In the opinion of the ad hoc Committee, one should avoid confusing the economic operation or project – which, if it fulfills certain characteristics, becomes the investment within the meaning of the Convention and the Treaty, even if it is 'smaller' and 'of shorter duration and with more limited benefit to the host State's economy' . . . – with all the rights and assets protected by the Treaty because they are part of the operation or project, or concern the same in one way or another. In this case, by the nature of things, it is the services of the 'Mitchell & Associates' firm that would or would not constitute the investment within the meaning of the Convention and the Treaty, and certainly not the minimal 'investment' in the strictly economic sense of the term that Mr. Patrick Mitchell made with a view to establishing and exercising his profession in the DRC. It is true that the latter would be protected by the Treaty, but because it related to the operation or project constituting the investment. However, nothing is said in the Award about the content of the services of the 'Mitchell & Associates' firm that would justify the decision to qualify them as an investment.") (emphasis added).

Claimants was a party to the EPC Contract, and any risk associated with that construction contract is not "transferable" to the Services Contract simply because both contracts were entered into in the context of the same Project.[595]

298. In conclusion, because Claimants' alleged investment – *i.e.*, the Services Contract – does not qualify as an "investment" under the Treaty and/or the ICSID Convention, and since the Services Contract is an ordinary commercial contract for the provision of services under which Claimants did not assume any investment risk, the Tribunal lacks jurisdiction *ratione materiae* over the claim presented in this case.

II.

Claimant FPJVC Does Not Qualify as a "Juridical Person" Under Article 25(2)(b) of the ICSID Convention

299. In addition to the fact that Claimants fail to have an "investment" protected under the Treaty and the ICSID Convention, Claimant FPJVC does not qualify as a "national of another Contracting State" under Article 25(2)(b) of the ICSID Contention because it is a contractual joint venture and not a "juridical person", and thus this Tribunal lacks jurisdiction *ratione personae* over FPJVC's claim.

300. Article 25(1) of the ICSID Convention provides that the jurisdiction of the Centre shall extend to disputes of a legal nature arising directly out of an investment between a Contracting State and a national of another Contracting State.[596] In addition to natural persons having the nationality of a Contracting State other than the State party to a dispute, Article 25(2)(b) of the ICSID Convention also considers as a "national of

[595] *See* ¶ 17, *supra*.

[596] ICSID Convention, Article 25(1).

another Contracting State" "any juridical person which had the nationality of a Contracting State other than the State party to the dispute."[597] In short, for an ICSID tribunal to have jurisdiction *ratione personae* over a dispute, the ICSID Convention necessarily requires that the dispute submitted to the Centre's jurisdiction involve a natural or juridical person of a Contracting State other than the State party to the dispute.

301. Claimant FPJVC does not qualify as a "juridical person" of another Contracting State under the terms of Article 25(2)(b) of the ICSID Convention. As Claimants themselves indicate in their Notice of Arbitration, FPJVC is a "contractual joint venture."[598] While Claimants have subsequently tried to slightly modify their argument and now contend that FPJVC is incorporated under New York law "under which a joint venture is a recognized form of juridical person",[599] the fact remains that – by its own terms – FPJVC is merely a contractual joint venture and, under New York State law, has no separate legal personality from that of its members Foster Wheeler and Process Consultants.[600]

[597] ICSID Convention, Article 25(2)(b) (emphasis added).

[598] Notice of Arbitration, ¶¶ 1, 15. *See* **Ex. R-39**, Notice of Intent, ¶ 5 (describing FPJVC as a "contractual joint venture" in English, and as a "*contrato de consorcio*" in Spanish).

[599] Letter from Claimants to the Tribunal, September 8, 2020, p. 12. Claimants obviously do not even attempt to cite to any legal support for their incorrect assertion.

[600] The law of the State of New York, which is the law under which FPJVC was constituted, is the only [redacted] In that respect, *see* **Ex. RL-200**, *Consorzio Groupement L.E.S.I.-DIPENTA v. People's Democratic Republic of Argelia*, ICSID Case No. ARB/03/08, Award, January 10, 2005 ("*LESI-DIPENTA*"), ¶ 39 ("In legal terms, there is no doubt that the juridical nature of the Consortium is determined by the law governing it.").

302. In the Joint Venture Agreement, Foster Wheeler and Process Consultants expressly agreed that FPJVC would be an "unincorporated entity."[601] Under New York law, as applicable to the Joint Venture Agreement,[602] unincorporated entities such as FPJVC are not juridical persons independent of their members,[603] and since a contractual joint venture does not have separate legal personality, all its members are joint and severally liable for the obligations assumed by that contractual joint venture.[604] Precisely for that reason, because FPJVC does not have separate legal personality, is that the

[601] [redacted] The original version of the Joint version Agreement states "shall be an unincorporated entity". Incredibly, Claimants contend that "Colombia, through Reficar, has already recognized FPJVC as a juridical person", and state that the Services Contract describes FPJVC as a "legal entity." Letter from Claimants to the Tribunal, September 8, 2020, p. 13. This is not true: Reficar has not recognized FPJVC as a juridical person; and nor does the Services Contract describe FPJVC as a legal entity. In support of their assertion, Claimants cite to what appears to be the letter in which FPJVC presented the offer Reficar (no precise reference is provided). This is a document that was drafted by Claimants themselves, not by Reficar. In any event, curiously, the Spanish version of that letter (which was the language governing the offer) does not contain the term "legal entity" ("*entidad jurídica*") to which Claimants allude (such a reference is only contained in the English version). **Ex. R-92**, Letter from FPJVC to Reficar, November 18, 2009, ¶¶ 1, 8.

[602] [redacted]

[603] **Ex. RL-201**, *Deutsche Bank Natl. Trust Co. v. Bills*, Supreme Court of New York, 37 Misc. 3d 1209(A), October 15, 2012 ("*Deutsche Bank*"), p. 4 ("'It is well settled that a joint venture . . . is in a sense a partnership for a limited purpose, and it has long been recognized that the legal consequences of a joint venture are equivalent to those of a partnership,' and, as a result, it is proper to look to the Partnership Law to resolve disputes involving joint ventures."); **Ex. RL-202**, *Tehran-Berkeley Civil & Enviromental Engineers v. Tippetts-Abbett-McCarthy-Stratton*, United States Court of Appeals for the Second Circuit, 888 F.2d 239 (1989) ("*Tehran-Berkeley")*, p. 5 ("Under New York law, the legal consequences of a joint venture are equivalent to those of a partnership."); **Ex. RL-203**, New York Consolidated Laws Service, Partnership Law, § 10, p. 3 ("The legal consequences of a joint venture are almost identical with those of a partnership."); **Ex. RL-204**, *Caplan v. Caplan*, 268 N.Y. 445, 447, Court of Appeals of New York (1935), p. 3 ("[A] partnership is not, like a corporation, an artificial person created by law and existing independent of the persons who create or control it.") (emphasis added).

[604] *See for example*, **Ex. RL-201**, *Deutsche Bank,* p. 4 ("As to all other partnership debts and obligations, all partners are jointly liable."); **Ex. RL-202**, *Tehran-Berkeley*, p. 5 ("New York law further provides that partners are liable: 1. Jointly and severally for everything chargeable to the partnership under sections twenty-four [tort law] and twenty-five [breach of trust]. 2. Jointly for all other debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract.").

Fiscal Liability Proceeding only involves Foster Wheeler and Process Consultants (which are juridical persons) but not FPJVC.[605]

303. A scenario analogous to that raised by FPJVC was analyzed by an ICSID tribunal in *Impregilo v. Pakistan*, which concluded that a contractual joint venture did not constitute a juridical person for purposes of Article 25(2)(b) of the ICSID Convention:

> The Tribunal agrees with part of Pakistan's analysis, and considers that Impregilo may not pursue claims in these proceedings on behalf of GBC [joint venture]. . . . It follows that the consent to arbitration contained in the BIT here does not cover claims by GBC, since GBC is not a 'juridical person' for the purposes of the ICSID Convention. . . . In so far as this is a claim in respect of GBC's alleged losses, it remains a claim by an unincorporated grouping that fails to meet the requirements of the BIT and the ICSID Convention, and lies beyond the scope of Pakistan's consent to arbitration. . . . The fact that GBC has no separate legal personality may lead to the conclusion that this cannot be 'GBC's claim' in any event, since GBC is nothing more than a contractual relationship between different entities. This, however, does not convert the claim into Impregilo's own claim.[606]

304. In his renowned treatise on ICSID arbitration, Professor Schreuer discusses the concept of "juridical person" under Article 25(2)(b) of the ICSID Convention and confirms that a contractual joint venture does not constitute a "juridical person" for such purposes:

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[605] *See* **Ex. R-66**, Initiation Order, p. 1; **Ex. R-52**, Indictment Order – Part 1: General aspects of the proceedings and factual findings, p. 1; **Ex. R-71**, Ruling with Fiscal Liability – Part 1: Competence, evidentiary record, procedural actions and others, p. 1. Claimants note that the joint venture was described as a "*de facto* corporations" in the Fiscal Liability Proceeding. Letter from Claimants to the Tribunal, September 8, 2020, p. 13 (Claimants do not indicate where this quotation comes from). In any event, under Colombian law a *de facto* corporations is not a juridical person. **Ex. RL-205**, Decree 410 of 1971, which issued the Commercial Code, Article 499 ("The *de facto* corporation not a legal person.") (translation from Spanish).

[606] **Ex. RL-129**, *Impregilo*, ¶¶ 131, 134, 137, 139 (emphasis added). *See also* **Ex. RL-200**, *LESI-DIPENTA*, ¶¶ 37-41.

> [T]here was also some opposition to extending the definition of the term 'company' to a mere association of natural persons or to an unincorporated partnership. . . . The subsequent drafts and the [ICSID] Convention refer to 'juridical person' without a definition. This indicates that legal personality is a requirement for the application of Art. 25(2)(b) and that a mere association of individuals or of juridical persons would not qualify. In such a situation, the individuals' case might be brought under Art. 25(2)(a) or the juridical persons' case forming the association would have to be brought separately under Art. 25(2)(b). . . . This has been confirmed by ICSID tribunals. In *LESI-DIPENTA v. Algeria*, the Tribunal declined jurisdiction to hear a claim brought by a consortium of companies. . . . The Tribunal in *Impregilo v. Pakistan* also held that the Claimant was not permitted to submit a BIT claim to ICSID on behalf of all of its partners in an unincorporated joint venture. The unincorporated consortium did not qualify as a legal person for ICSID purposes."[607]

305. Accordingly, there is no doubt that a contractual joint venture – such as FPJVC – cannot be considered a "juridical person" for purposes of Article 25(2)(b) of the ICSID Convention, and thus, does not constitute a "national of another Contracting State" as required by the ICSID Convention for the Centre to exercise its jurisdiction.

306. Separately, Article 10.28 of the Treaty defines an "investor of a Party" as "a national or an enterprise of a Party" that makes an investment in the territory of the other Party.[608] In turn, an "enterprise of a Party" is defined in Article 1.3 of the Colombia-U.S. TPA as "an enterprise constituted or organized under the law of a Party", and the term "enterprise" is defined as "any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture, or other

[607] **Ex. RL-187**, C. Schreuer *et al.*, THE ICSID CONVENTION: A COMMENTARY, Article 25, ¶¶ 689-692 (emphasis added).

[608] **Ex. RL-1**, Treaty, Article 10.28.

association."[609] The Treaty does not specify whether the term "joint venture" – or "*empress conjunta*" in the Spanish version – includes unincorporated joint ventures or only incorporated joint ventures.

307. When citing to Article 10.28 of the Treaty, Claimants spotlight the term "joint venture" and state that the Treaty "specifically identifies a joint venture as an 'enterprise of a Party.'"[610] However, the fact that FPJVC possibly qualifies as an "investor" under the Treaty because it is considered an "enterprise" of the United States – according to the definition of "enterprise" in the Treaty itself – is not sufficient for enabling this Tribunal to exercise jurisdiction *ratione personae* over Claimant FPJVC. This is because the Tribunal is constituted under the ICSID Convention, and thus it is necessary that an investor also qualifies as a "national of another Contracting State" under the ICSID Convention in order for an ICSID tribunal to have jurisdiction *ratione personae* over Claimant FPJVC.

308. This is a corollary of the "double-keyhole" or "double-barreled" test that applies in all ICSID arbitrations.[611] In this regard, it should be noted that Professor Schreuer remarked that while some investment treaties contain broad definitions of the term "investor" which may include associations without legal personality (such as unincorporated joint venture vehicles), the "juridical person" qualification is an objective requirement under Article 25(2)(b) of the ICSID Convention:

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[609] **Ex. RL-2**, Colombia-US TPA, Article 1.3. The English version of Article 1.3 of the Colombia-U.S. TPA expressly uses the term "joint venture." *See also* **Ex. RL-1**, Treaty, Article 10.28.

[610] Letter from Claimants to the Tribunal, September 8, 2020, pp. 12-13. For purposes of this jurisdictional objection, whether or not FPJVC qualifies as an "enterprise of a Party" is irrelevant to the analysis as to whether FPJVC qualifies as a "juridical person" under Article 25(2)(b) of the ICSID Convention. Notably, nothing has been said by Claimants as to whether FPJVC qualifies as a "juridical person" under the terms of Article 25(2)(b) of the ICSID Convention.

[611] *See* n. 568, *supra*.

> Some bilateral investment treaties include associations without legal personality in their definition of 'investor'. But for purposes of the [ICSID] Convention the quality of legal personality is inherent in the concept of 'juridical person' and is part of the objective requirements for jurisdiction.[612]

309. In sum, regardless of whether or not it can be considered an "enterprise" and/or an "investor" under the Treaty, Claimant FPJVC does not qualify as a "national of another Contracting State" under Article 25(2)(b) of the ICSID Convention because it is not a "juridical person" under the law of its place of constitution (New York law), and thus this Tribunal lacks jurisdiction *ratione personae* over Claimant FPJVC.

III.

The Notice of Intent Was Only Sent by FPJVC and Not by the Other Claimants

310. Although the present case was initiated by three Claimants (*i.e.*, Foster Wheeler, Process Consultants and FPJVC), the Notice of Intent to submit the present dispute to arbitration – as expressly required by Article 10.16.2 of the Treaty – was only sent by Claimant FPJVC and not by Foster Wheeler and Process Consultants. For this reason, the Tribunal lacks jurisdiction *ratione voluntatis* over the claims of Foster Wheeler and Process Consultants.

311. Article 10.16.2 of the Treaty requires the delivery of a written notice of intent to submit a claim to arbitration at least ninety (90) days before the claim is submitted to arbitration.[613] In the present case, the Notice of Intent was sent on December 26, 2018 only by Claimant FPJVC and not by the other Claimants in this Arbitration (Foster Wheeler

[612] **Ex. RL-187**, C. Schreuer *et al.*, THE ICSID CONVENTION: A COMMENTARY, Article 25, ¶ 693 (emphasis added).

[613] **Ex. RL-1**, Treaty, Article 10.16.2.

and Process Consultants), which is evident from the very terms of the document itself which mentions FPJVC as the "investor" delivering the notice of its intent to submit a claim to arbitration under the Treaty.[614] Claimants do not attempt to refute this undisputed fact; rather, they simply allege that FPJVC has two members who are bringing the same claims based on the same facts, such that the requirement can be deemed to be satisfied.[615]

312. However, Claimants' argument is contradicted by their own statements and position in this Arbitration. There are three Claimants who initiated this case – FPJVC, Foster Wheeler and Process Consultants – and, according to what they stated in their Notice of Arbitration, all three Claimants would independently qualify as "enterprises" and as "investors" under the Treaty.[616] Claimant FPJVC delivered its Notice of Intent on its own behalf – not on behalf of Foster Wheeler and Process Consultants –, and thus the other two Claimants clearly cannot benefit from the Notice of Intent delivered by FPJVC.[617]

313. The text and object of Article 10.16.2 of the Treaty are unambiguous: each claimant submitting a claim to arbitration must deliver a notice of intent at least ninety (90)

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[614] **Ex. R-39**, Notice of Intent, p. 1 (indicating that FPJVC is the "investor" for purposes of the Treaty).

[615] Letter from Claimants to the Tribunal, September 8, 2020, p. 13.

[616] Notice of Arbitration, ¶ 29. Similarly, although the Notice of Intent was only sent by FPJVC as a purported "investor", a couple months before, in the *acción de tutela* it had filed before a Colombian judge, Foster Wheeler and Process Consultants stated that they were "investors" under the terms of the Treaty. **Ex. R-69**, *Acción de Tutela* 2018, p. 7. This demonstrates that, contrary to what they now argue, Claimants were of the view that they each qualified as an "investor" under the Treaty, and thus, had the obligation to comply with the requirement to deliver a notice of intent.

[617] This is confirmed by the terms of the Notice of Arbitration itself, in which the three Claimants initiate the claim on their own behalf. *See for example* Notice of Arbitration, ¶¶ 26, 42 ("Claimants are submitting claims under both Article 10.16.1(a)(i)(A) and Article 10.16.1(a)(i)(C) of the [Treaty]."). It should be clarified that this objection is perfectly compatible with the objection to the Tribunal's jurisdiction *ratione personae* in relation to Claimant FPJVC. The objection to jurisdiction *ratione personae* does not pertain to whether or not FPJVC is an "enterprise" and/or an "investor" under the terms of the Treaty, but to the fact that FPJVC does not qualify as a "juridical person" for purposes of Article 25(2)(b) of the ICSID Convention, and thus this ICSID Tribunal lacks jurisdiction *ratione personae* over Claimant FPJVC. *See* ¶¶ 299-309, *supra*.

days before the claim is submitted to arbitration.[618] The fact that only one of several claimants delivers a notice of intent does not imply that the requirement is satisfied with respect to the other claimants who do not deliver their notice of intent: it is clearly an individual requirement that each claimant must meet.

314. Failure to comply with the requirement of Article 10.16.2 of the Treaty affects the consent to arbitration itself. Under Article 10.17 of the Treaty, the Contracting Parties only consented to the submission of claims to arbitration "in accordance with" the Treaty.[619] This implies that the Contracting Parties "did not provide unconditional consent to arbitration under any and all circumstances", but only consented to arbitration "in accordance with" the terms of the Treaty itself.[620] If any claimant fails to comply with the requirement to deliver a notice of intent at least ninety (90) days before submitting a claim to arbitration – as explicitly required by Article 10.16.2 of the Treaty – consent is not perfected at the time the arbitration commences, and it cannot then be created retroactively. A respondent's consent must be accompanied by a notice of arbitration that satisfies the requirements of Article 10.18.2 of the Treaty and has complied with the perquisite of having delivered a valid notice of intent at least ninety (90) days prior to its filing. Failure to comply with this essential requirement of Article 10.16.2 of the Treaty means that the alleged consent of the claimant does not constitute an acceptance of the offer to arbitrate by the Contracting Party to the Treaty, which is conditional upon

[618] **Ex. RL-1**, Treaty, Article 10.16.2. The notice of intent must specify information concerning each claimant, such as "name and address of the claimant", thus demonstrating that the requirement is individual.

[619] *Id.*, Article 10.17.

[620] **Ex. RL-206**, *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/05 (Colombia-U.S. TPA), Submission of the United States of America, May 1, 2020 ("*Submission of the U.S. in Astrida Carrizosa*"), ¶¶ 23, 26. *See also* **Ex. RL-207**, *Alberto Carrizosa Gelzis et al. v. Republic of Colombia,* PCA Case No. 2018-56 (Colombia-U.S. TPA), Submission of the United States of America, May 1, 2020 ("*Submission of the U.S. in Alberto Gelzis*"), ¶¶ 23, 26; **Ex. RL-63**, *Submission of the U.S. in Bay View*, ¶ 10.

compliance with the Treaty's terms.[621] Accordingly, due to the failure on the part of Foster Wheeler and Process Consultants to deliver notices of intent, the Tribunal lacks jurisdiction *ratione voluntatis* to hear the claims brought by the Claimants Foster Wheeler and Process Consultants in this Arbitration.

315. Similarly, the failure to comply with the requirement of Article 10.16.2 of the Treaty inevitably leads to the dismissal of the claims of Foster Wheeler and Process Consultants. The delivery of a notice of intent is not a mere "formality", or an act of courtesy, but an explicit requirement under the Treaty. This has been the position of the United States, as expressed in its submissions as a non-disputing party when analyzing the importance of complying with this requirement:

> The procedural requirements in Article 10.16 are not merely technical "niceties" but are explicit treaty requirements (*i.e.*, "shall deliver;" "shall specify") that serve important functions. These functions include providing a Party time to identify and assess potential disputes, coordinate among relevant national and subnational officials, and to consider, if they so choose, amicable settlement or other courses of action prior to arbitration. Such courses of action may include preservation of evidence or the preparation of a defense. As recognized by the tribunal in *Merrill & Ring v. Canada*, rejecting a belated attempt to add a claimant in that case, the safeguards found in Article 1119 of the NAFTA (the NAFTA's equivalent to Article 10.16's Notice of Intent requirement) "cannot be regarded as merely procedural niceties. They perform a substantial function which, if not complied with, would deprive the Respondent of the right to be informed beforehand of the grievances

[621] *See* **Ex. RL-206**, *Submission of the U.S. in Astrida Carrizosa*, ¶ 27 ("A disputing investor who does not deliver a Notice of Intent ninety (90) days before it submits a Notice of Arbitration or Request for Arbitration fails to satisfy the procedural requirement under Article 10.16.2 and so fails to engage the respondent's consent to arbitrate. Under such circumstances, a tribunal will lack jurisdiction *ab initio*. As discussed below with respect to Article 10.18, a respondent's consent cannot be created retroactively; consent must exist at the time a claim is submitted to arbitration. Unlike the claimant's consent required by Article 10.18.2, however, which must accompany and be in conjunction with a Notice of Arbitration, satisfaction of the requirements of Article 10.16 through submission of a valid Notice of Intent must precede submission of a Notice of Arbitration by 90 days.") (emphasis added). *See also* **Ex. RL-207**, *Submission of the U.S. in Alberto Gelzis*, ¶ 27; **Ex. RL-63**, *Submission of the U.S. in Bay View*, ¶ 12.

against its measures and from pursuing any attempt to defuse the claim[.]."

> For all the foregoing reasons, a tribunal cannot simply overlook an investor's failure to comply with the requirements of Article 10.16, including in the context of determining whether the receipt of a Notice of Arbitration constitutes the valid and timely submission of a claim. Article 10.18.1 provides that a claimant may not make a claim if more than three years have elapsed from the date on which the investor or enterprise first acquired, or should have first acquired, knowledge of the alleged breach and loss. Because a Notice of Intent under Article 10.16.2 must precede a Notice of Arbitration by 90 days, an investor has two years and 275 days to take steps that can lead to the submission of a valid and timely claim to arbitration under Chapter Ten or Chapter Twelve. Thus, for example, claimants or claims included in a Notice of Arbitration that were not included in a Notice of Intent delivered at least 90 days earlier have not been validly submitted to arbitration, and that Notice of Arbitration cannot toll the period of limitations for those claims or claimants. As the *Grand River* and *Feldman* NAFTA tribunals observed when interpreting similar provisions in the NAFTA (Articles 1116(2) and 1117(2)), the time-limitations provisions contained in the NAFTA are "clear and rigid" and not subject to any "suspension," "prolongation," or "other qualification."[622]

316. Several arbitral tribunals that have had to interpret similar provisions have emphasized the importance of delivering the notice of intent (or compliance with other

[622] **Ex. RL-206**, *Submission of the U.S. in Astrida Carrizosa*, ¶¶ 28-29 (emphasis added). *See also* **Ex. RL-207**, *Submission of the U.S. in Alberto Gelzis*, ¶¶ 28-29; **Ex. RL-63**, *Submission of the U.S. in Bay View*, ¶¶ 13-14. USCMA, which has replaced NAFTA, expressly provides that failure to comply with the notice of intent requirement deprives a tribunal of jurisdiction (in respect of investment disputes involving Mexico and the United States, since they are the only contracting parties for which international investment arbitration applies). **Ex. RL-208**, Agreement between United States-Mexico-Canada, signed on December 10, 2019 and effective from July 1, 2020, Annex 14(D)(3). This has always been Colombia's understanding too, as reflected in its 2008 Model Treaty. **Ex. RL-126**, 2008 Colombia Model Treaty, Article IX(5) ("The disputing investor may only submit the Request for Arbitration if the term established in paragraph 4 of the present Article has elapsed, and the disputing investor has notified, in writing a hundred and eighty (180) days in advance, the Contracting Party of his intention to submit a request for arbitration ('Notice of Intent'). Such a notice shall indicate the name and address of the disputing investor, the provisions of the Agreement which he deems to be breached, the facts which the dispute is based on, the estimated value of the damages and the compensation sought."). *See also* **Ex. RL-120**, J. Rivas, *Colombia*, p. 233 ("The notice of intent and the requirement of a six-month waiting period prior to the submission of the request for arbitration is of high relevance because it contains key elements enabling the disputing parties to engage in substantive settlement discussions or to appropriately prepare for impending arbitration.").

similar requirements) and the consequences of failing to comply with such an essential requirement:

- *Methanex v. U.S.*: "In order to establish the necessary consent to arbitration, it is sufficient to show (i) that Chapter 11 applies in the first place, *i.e.* that the requirements of Article 1101 are met, and (ii) that a claim has been brought by a claimant investor in accordance with Articles 1116 or 1117 (and that all pre-conditions and formalities required under Articles 1118-1121 are satisfied). Where these requirements are met by a claimant, Article 1122 is satisfied; and the NAFTA Party's consent to arbitration is established."[623]

- *Merril & Ring v. Canada*: "The Tribunal has no doubt about the importance of the safeguards noted and finds that they cannot be regarded as merely procedural niceties. They perform a substantial function which, if not complied with, would deprive the Respondent of the right to be informed beforehand of the grievances against its measures and from pursuing any attempt to defuse the claim announced. This would be hardly compatible with the requirements of good faith under international law and might even have an adverse effect on the right of the Respondent to a proper defense. Thus, even if it were to be concluded that Merrill & Ring's and Georgia Basin's claims are similar, the compliance with the above mentioned safeguards would still need to be satisfied."[624]

- *Murphy v. Ecuador*: "This Tribunal finds the requirement that the parties should seek to resolve their dispute through consultation and negotiation for a six-month period does not constitute, as Claimant and some arbitral tribunals have stated, 'a procedural rule' or a

[623] **Ex. RL-209**, *Methanex Corp. v. United States of America*, UNCITRAL (NAFTA), Partial Award, August 7, 2002, ¶ 120 (emphasis added).

[624] **Ex. RL-210**, *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1 (NAFTA), Decision on a Motion to Add a New Party, January 31, 2008, ¶¶ 29-30 (emphasis added). *See also* **Ex. RL-70**, *Cargill*, ¶ 160 ("A claimant must also provide preliminary notice pursuant to Article 1119 and satisfy the conditions precedent via consent and, where appropriate, waiver, under Article 1121. Consent of the respondent must be established pursuant to Article 1122."); **Ex. RL-211**, *Canfor Corporation v. United States of America (Consolidated)*, UNCITRAL (NAFTA), Decision on Preliminary Question, June 6, 2006, ¶ 171 ("First, a mere assertion by a claimant that a tribunal has jurisdiction does not in and of itself establish jurisdiction. It is the tribunal that must decide whether the requirements for jurisdiction are met. Second, in making that determination, the tribunal is required to interpret and apply the jurisdictional provisions, including procedural provisions of the NAFTA relating thereto, *i.e.*, whether the requirements of Article 1101 are met; whether a claim has been brought by a claimant investor in accordance with Article 1116 or 1117; and whether all pre-conditions and formalities under Articles 1118-1121 are satisfied."); **Ex. RL-212**, *William R. Clayton et al. v. Government of Canada*, PCA Case No. 2009-04 (NAFTA), Award on Jurisdiction and Liability, March 17, 2015, ¶¶ 228-229.

> 'directory and procedural' rule which can or cannot be satisfied by the concerned party. To the contrary, it constitutes a fundamental requirement that Claimant must comply with, compulsorily, before submitting a request for arbitration under the ICSID rules. . . . Based on the statements above, the Tribunal concludes that Murphy International did not comply with the requirements of Article VI of the Bilateral Investment Treaties entered into by the Republic of Ecuador and the United States of America; that such omission constitutes a grave noncompliance, and that because of such noncompliance, this Tribunal lacks competence to hear this case."[625]

317. Interestingly, this has also been the position defended by Claimants' law firm in the *B-Mex v. Mexico* case in which it represented Mexico.[626] That case was initiated by 39 claimants, yet the notice of intent under NAFTA was only delivered by 8 of those claimants in May 2014. In September 2016, after the notice of arbitration was filed and registered, 31 additional claimants were joined in an amended notice of intent. Claimants' law firm – representing Mexico – argued that the failure to deliver a notice of intent prior to submitting the claim to arbitration implied that the submission was "null *ab initio*", and that it also implied that there was no consent under the terms of NAFTA.[627] The arbitrator appointed by Mexico – Professor Vinuesa – concurred with this position, stating that the requirement of prior delivery of a notice of intent was a jurisdictional requirement, and that the failure of 31 of the claimants to serve a notice of intent deprived

[625] **Ex. RL-213**, *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, December 15, 2010, ¶¶ 149, 157 (emphasis added). *See also* **Ex. RL-214**, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, January 14, 2004, ¶ 88 ("Such requirement is in the view of the Tribunal very much a jurisdictional one. A failure to comply with that requirement would result in a determination of lack of jurisdiction."); **Ex. RL-215**, *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, September 16, 2003, ¶ 14.3.

[626] **Ex. RL-216**, *B-Mex, LLC et al. v. United Mexican States,* ICSID Case No. ARB(AF)/16/3 (NAFTA), Partial Award, July 19, 2019 ("*B-Mex Partial Award*"), ¶ 3.

[627] *Id.*, ¶¶ 41, 63, 70, 118, 134.

the tribunal of jurisdiction over those claimants.[628] In his opinion, Professor Vinuesa conclusively stated:

> In conclusion, there must be a notice of intent evidencing the very existence of a claimant investor. This is an essential requirement so as to identify not only the claimant, but also the alleged dispute itself. . . . The existence of a notice of intent by the investor is vital for the Tribunal to have jurisdiction. . . . [N]o case in which access to arbitration was given to an investor who had not been identified in a notice of intent has been cited. . . . For jurisdiction to exist, every claimant must be identified by means of a notice of intent.[629]

318. In light of the foregoing, failure to deliver the notices of intent means that the Tribunal lacks jurisdiction *ratione voluntatis* over the claims of Claimants Foster Wheeler and Process Consultants given their lack of compliance with the explicit requirement of Article 10.16.2 of the Treaty.

IV.

Claimants Have Definitively Elected to Submit their Claim for Breach of Fair and Equitable Treatment Before Colombian Courts

319. Claimants cannot submit their claim for an alleged breach of the Treaty's FET obligation to arbitration under the Treaty because they definitively elected to submit such a claim before Colombian courts.

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[628] **Ex. RL-217**, *B-Mex, LLC et al. v. United Mexican States*, ICSID Case No. ARB(AF)/16/3 (NAFTA), Partial Dissenting Opinion Arbitrator Raúl E. Vinuesa, July 6, 2019 ("*B-Mex Opinion Vinuesa*"), ¶¶ 14, 84-88, 92-93.

[629] *Id.*, ¶¶ 92-93 (emphasis added). In the present case, Claimants Foster Wheeler and Process Consultants have not even attempted to serve a notice of intent after filing their Notice of Arbitration or to amend the Notice of Intent that was originally filed only by FPJVC, thus making the failure to comply with this jurisdictional requirement all the more evident. To date, this failure has not been cured.

320. Annex 10-G of the Treaty expressly provides that a claim that Colombia has breached a substantive obligation under the Treaty may not be submitted to arbitration under the Treaty if the U.S. investor has already claimed the breach in a judicial or administrative proceeding in Colombia, since that election is deemed to be definitive as of that time:

> 1. An investor of the United States may not submit to arbitration under Section B a claim that a Party has breached an obligation under Section A either:
>
> (a) on its own behalf under Article 10.16.1(a), or
>
> (b) on behalf of an enterprise of a Party other than the United States that is a juridical person that the investor owns or controls directly or indirectly under Article 10.16.1(b),
>
> if the investor or the enterprise, respectively, has alleged that breach of an obligation under Section A in proceedings before a court or administrative tribunal of that Party.
>
> 2. For greater certainty, if an investor of the United States elects to submit a claim of the type described in paragraph 1 to a court or administrative tribunal of a Party other than the United States, that election shall be definitive, and the investor may not thereafter submit the claim to arbitration under Section B.[630]

321. This condition constitutes a clear limitation on Colombia's consent to arbitration of claims for breaches of substantive obligations under the Treaty. Pursuant to Article 10.17.1 of the Treaty, Colombia only consented "to the submission of a claim to arbitration under this Section [B] in accordance with this [Treaty]."[631] In Article 10.18 and Annex 10-G, the Contracting Parties expressly set forth certain conditions and limitations to the Contracting Parties' consent.[632] This implies that Colombia has not consented to

[630] **Ex. RL-1**, Treaty, Annex 10-G (emphasis added).

[631] *Id.*, Article 10.17.1.

[632] *Id.*, Article 10.18 and Annex 10-G.

submit to arbitration a claim in which a U.S. investor has alleged a breach of a substantive Treaty obligation before a Colombian court, which has occurred in this case.

322. Unlike other *electa una via* provisions (including the one contained in Article 10.18.4 of the Treaty for breaches of an investment authorization or an investment agreement), Annex 10-G of the Treaty does not require that the purported breach itself be brought before the judicial or administrative court,[633] but simply that the breach of a substantive Treaty obligation be alleged in a local judicial or administrative proceeding.[634]

323. That is precisely what has occurred in this case. In the first of the *acciones de tutela* before Colombian courts,[635] Foster Wheeler and Process Consultants alleged that their due process rights were being violated in the Fiscal Liability Proceeding, and

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[633] *See*, in contrast, *id.*, Article 10.18.4 (which, in the event of a claim for a breach of an investment agreement or investment authorization, requires that the claimant has not "previously submitted the same alleged breach to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedures.").

[634] *See* **Ex. RL-121**, K. Vandevelde, U.S. INVESTMENT AGREEMENTS, p. 666 ("The Chile FTA substantively differs from the 2004 [United States] model in the relationship between local remedies and investor-state arbitration. The Chile FTA includes Annex 10-E, which has no counterpart in the 2004 model. Paragraph 1 of Annex 10-E provides that a claim for breach of an obligation may not be submitted to arbitration by a U.S. investor under the investor-state disputes provision if the investor or enterprise has 'alleged that breach' in a proceeding before a court or administrative tribunal of Chile. To further emphasize this point, paragraph 2 states that 'for greater certainty,' if a U.S. investor submits a claim 'of the type described in this Annex' to a court or administrative tribunal of Chile, 'that election shall be definitive and the investor may not thereafter submit the claim to arbitration' under the investor-state disputes provision. The phrase 'for greater certainty' indicates that paragraph 2 was not intended to add a further restriction on the right of the investor to submit a claim to arbitration, but merely to clarify the scope of the restriction set forth in paragraph 1. Thus, Chile wished to ensure that a claim against it would not be submitted to investor-state arbitration if it had already been submitted to local remedies, while the United States wished to adhere to the approach that would be incorporated in the 2004 model under which a claim submitted to local remedies could be submitted to arbitration against the United States as long as local remedies were discontinued. The Uruguay BIT, the Colombia and Peru FTAs, and the CAFTA-DR are similar to the Chile FTA in this regard."), p. 676 ("One important difference between the Colombia FTA and the 2004 model is that, under paragraph 1 of Annex 10-G of the Colombia FTA, an investor of the United States may not submit a claim to investor-state arbitration alleging a breach of Section A of the investment chapter if the investor, or the enterprise upon the behalf of which the investor submits the claim, has alleged that breach in the courts or administrative tribunals of Colombia. Paragraph 2 of the annex affirms, 'for greater certainty,' that submission of a claim to the local remedies of the host state shall be definitive and that the claim may not thereafter be submitted to investor-state arbitration. The Uruguay BIT, the CAFTA-DR, and the Chile FTA are similar.").

[635] *See* ¶ 136, n. 284, *supra.*

specifically, they alleged that due process was an element of the FET obligation under the Treaty. Pursuant to Annex G-10 of the Treaty, raising that allegation of a breach of due process – which Foster Wheeler and Process Consultants themselves claim is an obligation on Colombia's part under the Treaty's FET standard – in a local proceeding now precludes Claimants from bringing that same claim before this Tribunal.

324. In the *acción de tutela* before Colombian courts, Claimants argued the following:

> The FPJVC members are investors under the terms of the Trade Promotion Agreement between the Republic of Colombia and the United States of America (the "Treaty") and their work on the Project corresponds to a covered/protected investment under the scope of the Treaty. Accordingly, the Republic of Colombia is obligated under the Treaty to provide "fair and equitable treatment" to FPJVC in accordance with customary international law.
>
> One of the founding principles of such international standard is that the defendant or accused must be guaranteed due process in all administrative or judicial proceedings. This principle is entirely consistent with the constitutional principles invoked in this *acción de tutela*, which strengthens the present [*acción de tutela*].[636]

325. As can be seen from the previous paragraph, in the *acción de tutela* Foster Wheeler and Process Consultants alleged that due process had been violated in the framework of the Fiscal Liability Proceeding, which is not only a constitutional principle under Colombian law, but also part of the FET obligation under the Treaty.

[636] **Ex. R-69**, *Acción de Tutela* 2018, pp. 7-8 (translation from Spanish; emphasis added). Foster Wheeler and Process Consultants also argued that they "expressly reserve[d] all their rights under the Treaty.." *Id.*, p. 8. However, such a "reservation" is ineffective because, under the very terms of Annex 10-G of the Treaty, the fact that a breach of a substantive Treaty obligation is alleged is a definitive choice, regardless of whether or not there is a reservation.

326. The allegations raised by Foster Wheeler and Process Consultants in the *acción de tutela* for alleged violations of due process as an element of FET are perfectly aligned with the allegations for breach of FET in this Arbitration:[637]

2018 *Acción de Tutela*	**Notice of Arbitration[638]**
The CGR is not competent to bring a fiscal liability proceeding against Foster Wheeler and Process Consultants, since they do not have the status of fiscal managers.[639]	Colombia – through the CGR – misapplied Colombian law by initiating the fiscal liability proceeding against Foster Wheeler and Process Consultants, concluding that they were fiscal managers.[640]
The CGR lacks jurisdiction to bring a fiscal liability proceeding against Foster Wheeler and Process Consultants since the charges consist of contractual breaches, [redacted][641]	Colombia frustrated FPJVC's legitimate expectations because, by initiating the fiscal liability proceeding, it did not respect FPJVC's contractual right to [redacted][642]

[637] Claimants' allegations in the 2018 *Acción de Tutela* also overlap with alleged breaches of other Treaty obligations that Claimants have raised in this Arbitration relating to Colombia's purported breach of its non-expropriation and MFN obligations. *See* Notice of Arbitration, ¶¶ 179, 184, 197, 203; **Ex. R-69**, *Acción de Tutela* 2018, pp. 9, 58-88.

[638] *See* ¶ 145, *supra.*

[639] **Ex. R-69**, *Acción de Tutela* 2018, pp. 9, 58-66.

[640] Notice of Arbitration, ¶¶ 111-121.

[641] **Ex. R-69**, *Acción de Tutela* 2018, pp. 9, 66-69.

[642] Notice of Arbitration, ¶ 173.

2018 *Acción de Tutela*	Notice of Arbitration[638]
The CGR violates the constitutional principle of harmonious collaboration between the different State bodies by carrying out the fiscal liability proceeding without considering the actions of other State bodies in relation to the project.[643]	Colombia – through the CGR – misapplied Colombian law since it initiated the fiscal liability proceeding when [redacted], violating the constitutional principle of harmonious collaboration.[644]
The CGR failed in its duty to give reasons for the initiation order and the indictment order, which prevents Foster Wheeler and Process Consultants from exercising a technical defense.[645] The lack of reasons is based on the fact that the indictment order does not contain, in a clear and concrete manner, the elements of fiscal liability.	Colombia – through the CGR – misapplied Colombian law by failing to identify the elements of fiscal liability in the fiscal liability proceeding against Foster Wheeler and Process Consultants.[646]
The indictment order has a length of 4.751 pages and extensive technical considerations. Consequently, the 10-day term granted to request and provide evidence is insufficient and unreasonable to guarantee Foster Wheeler and Process Consultants the opportunity to exercise their rights of defense and contradiction fully.[647]	Colombia – through the CGR – violated the due process rights of Foster Wheeler and Process Consultants by granting them an initial term of 10 days – finally extended to four months – in which to present their arguments and provide evidence.[648]

[643] **Ex. R-69**, *Acción de Tutela* 2018, pp. 9, 69-76.

[644] Notice of Arbitration, ¶¶ 132-137.

[645] **Ex. R-69**, *Acción de Tutela* 2018, pp. 9, 82-83.

[646] Notice of Arbitration, ¶¶ 122-126.

[647] **Ex. R-69**, *Acción de Tutela* 2018, pp. 9, 83-88.

[648] Notice of Arbitration, ¶¶ 156-158.

327. Claimants freely elected to initiate an *acción de tutela* before Colombian courts, alleging not only a violation of due process as a fundamental right of Colombian law, but also a violation of due process as part of the FET obligation under the Treaty. Under the terms of Annex 10-G of the Treaty, such an election by Claimants is definitive, and means that they cannot, thereafter, submit a claim of an alleged breach of FET to arbitration under the Treaty.

328. For the foregoing reasons, the Tribunal lacks jurisdiction *ratione voluntatis* to hear Claimants' claim of breach of the FET obligation under the Treaty which has been submitted before it in this Arbitration.

V.

Claimants' Waiver is Invalid, and Thus There Is No Consent to Submit Their Claim to Arbitration Under the Treaty

329. In their Notice of Arbitration, Claimants did not effectively waive their right to initiate or continue proceedings with respect to the measure that they allege to be a breach of the substantive obligations under the Treaty, and thus they cannot submit their claim to arbitration before this Tribunal.

330. Article 10.18 of the Treaty – entitled "Conditions and Limitations on Consent of Each Party" – establishes, *inter alia*, that a claim may not be submitted to arbitration unless the notice of arbitration is accompanied by a written waiver by the claimant of the claims submitted to arbitration:

> No claim may be submitted to arbitration under this Section unless: . . . .
>
> The notice of arbitration is accompanied,

> (i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver, and
>
> (ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant's and the enterprise's written waivers.
>
> of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.[649]

331. Thus, the very consent of the Contracting Parties to arbitration under the Treaty is conditioned upon the fulfillment of certain prerequisites, including the claimant providing a waiver to initiate or continue any action before any judicial or administrative tribunal under the law of any Party with respect to any measure alleged to have constituted a breach of the Treaty. Only a waiver in the terms of Article 10.18.2(b) is an effective waiver for purposes of the Treaty, capable of perfecting the Contracting Parties' offer of consent. The clear purpose of this condition is to prevent the same claim from being heard simultaneously by several local and international tribunals.

332. The tribunal in *Renco v. Peru*, in analyzing an identical provision, confirmed that an effective waiver is a fundamental prerequisite for the existence of an arbitration agreement and, consequently, for the very jurisdiction of an arbitral tribunal established under the Treaty:

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[649] **Ex. RL-1**, Treaty, Article 10.18.2(b) (emphasis added). The only exception provided for in the Treaty is that "the claimant or the enterprise (for claims brought under Article 10.16.1(a)) and the claimant or the enterprise (for claims brought under Article 10.16.1(b)) may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration." *Id.*, Article 10.18.3. As explained below, neither the actions of Foster Wheeler and Process Consultants in the Fiscal Liability Proceeding, nor the *acciones de tutela* filed before the Colombian courts, qualify as "interim injunctive relief", such that they do not fall within the exception provided in Article 10.18.3 of the Treaty. *See* n. 666, *infra*.

> Compliance with Article 10.18(2) is a condition and limitation upon Peru's consent to arbitrate. Article 10.18(2) contains the terms upon which Peru's non-negotiable offer to arbitrate is capable of being accepted by an investor. Compliance with Article 10.18(2) is therefore an essential prerequisite to the existence of an arbitration agreement and hence the Tribunal's jurisdiction. . .
>
> [T]he defective waiver goes to the heart of the Tribunal's jurisdiction.[650]

333. In *Renco*, the investor filed its notice of arbitration including a waiver with reservations, which was replicated in its second notice of arbitration.[651] In response to Peru's objections, the investor argued that "the reservation of rights is merely a 'belt and

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[650] **Ex. RL-218**, *The Renco Group Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1 (Peru-U.S. TPA), Partial Award on Jurisdiction, July 15, 2016 ("*Renco*"), ¶¶ 73, 138 (emphasis added). *See also id.*, ¶ 158 ("Under Article 10.18, the submission of a valid waiver is a condition and limitation on Peru's consent to arbitrate. This is a precondition to the initial existence of a valid arbitration agreement, and as such leads to a clear timing issue: if no compliant waiver is served with the notice of arbitration, Peru's offer to arbitrate has not been accepted; there is no arbitration agreement; and the Tribunal is without any authority whatsoever."); **Ex. RL-219**, *The Renco Group Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1 (Peru-U.S. TPA), Second Submission of the United States of America, September 1, 2015 ("*Second Submission of the U.S. in Renco")*, ¶ 9; **Ex. RL-220**, *The Renco Group Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1 (Peru-U.S. TPA), Third Submission of the United States of America, October 11, 2015 ("*Third Submission of the U.S. in Renco*"), ¶ 6 ("A State's consent to arbitration is paramount. Here, Article 10.18 is titled 'Conditions and Limitations on Consent of Each Party' to reinforce the point that the requirements that follow, including the waiver requirement, must be met by the claimant in order to engage the respondent State's consent to arbitrate."); **Ex. RL-221**, *Waste Management v. United Mexican States (I)*, ICSID Case No. ARB(AF)/98/2 (NAFTA), Arbitral Award, June 2, 2000 ("*Waste Management I"*), §18; **Ex. RL-222**, *Detroit International Bridge Co. v. Government of Canada*, PCA Case No. 2012-25 (NAFTA), Award on Jurisdiction, April 2, 2015, ¶¶ 291, 336-337; **Ex. RL-223** *Commerce Group Corp and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17 (DR-CAFTA), Award, March 14, 2011 ("*Commerce Group*"), ¶¶ 79-80; **Ex. RL-224**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23 (DR-CAFTA), Decision on Objection to Jurisdiction CAFTA Article 10.20.5, November 17, 2008 ("*Railroad Development*"), ¶ 56.

[651] In *Renco*, the investor first filed claims on its own behalf and on behalf of its local company by means of a notice of arbitration dated April 4, 2011. The investor then withdrew the claim which it had filed on behalf of the local company by means of a second notice of arbitration dated August 9, 2011. The waiver contained in the second notice of arbitration dated August 9, 2011, removed references to the local company and was worded as follows: "Finally, as required by Article 10.18(2) of the Treaty, Renco waives its right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16, except for proceedings for interim injunctive relief, not involving payment of monetary damages, before a judicial or administrative tribunal of Peru. To the extent that the Tribunal may decline to hear any claims asserted herein on jurisdictional or admissibility grounds, Claimant reserves the right to bring such claims in another forum for resolution on the merits." (emphasis omitted). **Ex. RL-218**, *Renco*, ¶ 58.

braces' provision of the kind that is regularly included in legal documents" and that "should have no effect on the validity of its waiver."[652] However, the tribunal rejected Renco's position and warned that the waivers made by the investor were not permitted by the very terms of Article 10.18.2(b) of the Peru-U.S. TPA (which is identical to Article 10.18.2(b) of the Treaty).[653] In that regard, the Tribunal concluded:

> [T]he repeated references to the word "any" in Article 10.18 demonstrate that an investor's waiver must be comprehensive: waivers qualified in any way are impermissible. . . .
>
> [T]his language must be interpreted to require an investor definitively and irrevocably to waive all rights to pursue claims before a domestic court or tribunal. . . .
>
> For the reasons set out above . . . Renco has failed to comply with the formal requirements of Article 10.18(2)(b) by including the reservation of rights in the waiver . . . because:
>
> (a) The reservation of rights is not permitted by the express terms of Article 10.18(2)(b);
>
> (b) The reservation of rights undermines the object and purpose of Article 10.18(2)(b);
>
> (c) The reservation of rights is incompatible with the "no U-turn" structure of Article 10.18(2)(b); and
>
> (d) The reservation of rights is not superfluous.[654]

334. In addition to providing a formal waiver in the exact terms of Article 10.18.2(b) of the Treaty, the claimant must act in a manner consistent with such a waiver

[652] **Ex. RL-218**, *Renco*, ¶ 108.

[653] *Id.*, ¶ 81. *See id.*, ¶ 78 (citing to Article 10.18.2(b) of the Peru-U.S. TPA, which is identical to Article 10.18.2(b) of the Treaty, and which requires a written waiver "of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16" to be filed in order to pursue an arbitration under that treaty.) (emphasis omitted).

[654] *Id.*, ¶¶ 79, 95, 119 (emphasis added). *See also id.*, ¶ 99 ("The waiver required by Article 10.18(2)(b) is intended to operate as a 'once and for all' renunciation of all rights to initiate claims.").

in order for it to be truly effective. In other words, the waiver must also be material. As the *Renco* tribunal held:

> It is common ground that the provisions of Article 10.18(2)(b) dealing with waiver encompass two distinct requirements: a formal requirement (the submission of a written waiver which complies with the terms of Article 10.18(2)(b)) and a material requirement (the investor abstaining from initiating or continuing local proceedings in violation of its written waiver).
> . . .
>
> Compliance with both elements is a precondition to Peru's consent to arbitrate and to the existence of a valid arbitration agreement.[655]

335. In *Commerce Group v. El Salvador*, the claimants filed a formal waiver but did not discontinue local proceedings in El Salvador, which led the tribunal in that case to find that their waiver was invalid[656] – since it was ineffective –, and therefore, that there

[655] *Id.*, ¶¶ 60, 135 (emphasis omitted). *See also* **Ex. RL-221**, *Waste Management I*, ¶ 24 ("[T]he act of waiver involves a declaration of intent by the issuing party, which logically entails a certain conduct in line with the statement issued. Indeed, such a declaration of intent must assume concrete form in the intention or resolve whereby something is said or done (conduct of the deponent). Hence, in order for said intent to assume legal significance, it is not suffice for it to exist internally. Instead, it must be voiced or made manifest, in the case in point by means of a written text and specific conduct on the part of the waiving party in line with the declaration made."); **Ex. RL-121**, K. Vandevelde, U.S. INTERNATIONAL INVESTMENT AGREEMENTS, p. 604 ("Once a claim is submitted to arbitration under the treaty, however, the investor (and the enterprise if the investor has submitted a claim on behalf of the enterprise) must abandon any other proceedings with respect to the challenged measure and waive its right to pursue other remedies with respect to that measure in the future. Where the claimant submits the waiver, but then fails to abide by the waiver, the effect is to invalidate the waiver resulting in the claimant's failure to satisfy one of the conditions upon which the tribunal's jurisdiction is based."). In the same vein, the *Renco* tribunal held that "the submission of a formally compliant waiver (and the material obligation to abstain from initiating or continuing proceedings in a domestic court) is a precondition to the State's 'consent' to arbitrate and to the Tribunal's jurisdiction." **Ex. RL-218**, *Renco*, ¶ 142. *See also* **Ex. RL-221**, *Waste Management I*, § 20.

[656] The claimants' waiver in *Commerce Group* was worded as follows: "[T]he claimants hereby waive their rights to initiate or continue any domestic proceeding with respect to any measure alleged to constitute a breach for purposes of the present Notice of Arbitration. Notwithstanding the foregoing, pursuant to Article 10.18.3 of CAFTA, the claimants reserve the right to initiate or continue any proceedings for injunctive relief not involving the payment of damages before any administrative or judicial tribunal of the Republic of El Salvador, for the purposes of preserving their rights and interests during the pendency of this arbitration. Copies of the waivers are attached as Exhibit 'A' and Exhibit 'B'." *See* **Ex. RL-223**, *Commerce Group*, ¶ 16.

was no consent to arbitrate the dispute.[657] The tribunal held in conclusive terms that "a waiver must be more than just words; it must accomplish its intended effect."[658] In short, it must ensure "materially . . . that no other legal proceedings are 'initiated' or 'continued'."[659]

336. In its submission as a non-disputing party in *Angel Seda v. Colombia*, interpreting Article 10.18.2(b) of the Treaty, the United States emphasized the importance of a waiver as a condition of consent to arbitration, as well as the need to comply with the formal and material requirements in order for such a waiver to be valid and effective:

> Compliance with Article 10.18.2(b) [of the Treaty] entails both formal and material requirements. As to the formal requirements, the waiver must be in writing and "clear, explicit and categorical." The waiver must relinquish any right to initiate or continue any action with respect to measures challenged in the arbitration, excluding an action that seeks "interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration." As the written waiver is to "accompany" the Notice of Arbitration, it must be submitted at the same time as the Notice of Arbitration.
>
> As to the material requirements, a claimant must act consistently and concurrently with the written waiver by abstaining from initiating or continuing proceedings in another forum with respect to the measures alleged to constitute a

[657] **Ex. RL-223**, *Commerce Group*, ¶ 115. It should be noted that Article 10.18 of DR-CAFTA is identical to Article 10.18 of the Treaty. *Id.*, ¶ 114 (citing to Article 10.18 of DR-CAFTA).

[658] *Id.*, ¶ 80.

[659] *Id.*, ¶ 84. *See also* **Ex. RL-218**, *Renco*, ¶¶ 84-85; **Ex. RL-221**, *Waste Management I*, § 27; **Ex. RL-225**, *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL (NAFTA), Arbitral Award, January 26, 2006, ¶ 118; **Ex. RL-207**, *Submission of the U.S. in Alberto Gelzis*, ¶ 36; **Ex. RL-206**, *Submission of the U.S. in Astrida Carrizosa*, ¶ 36; **Ex. RL-219**, *Second Submission of the U.S. in Renco*, ¶ 9 ("As the tribunal in *Commerce Group* explained . . . '[a] waiver must be more than just words; it must accomplish its intended effect.' Thus, if a claimant initiates or continues proceedings with respect to the measure(s) in another forum despite meeting the formal requirements of filing a waiver, the claimant has not complied with the waiver requirement, and the tribunal lacks jurisdiction over the dispute.").

> breach of the obligations of Chapter Ten as of the date of the waiver and thereafter. . . .
>
> [I]f a claimant initiates or continues proceedings with respect to the measure in another forum despite meeting the formal requirements of filing a waiver, the claimant has not complied with the waiver requirement, and the tribunal lacks jurisdiction over the dispute.
>
> Article 10.18.2(b) requires a claimant's waiver to encompass "any proceedings with respect to any measure alleged to constitute a breach referred to in Article 10.16." The phrase "with respect to" should be interpreted broadly. This construction of the phrase is consistent with the purpose of this waiver provision: to avoid the need for a respondent State to litigate concurrent and overlapping proceedings in multiple forums, and to minimize not only the risk of double recovery, but also the risk of "conflicting outcomes (and thus legal uncertainty)."
>
> If all formal and material requirements under Article 10.18.2(b) are not met, the waiver is ineffective and will not engage the respondent State's consent to arbitration or the Tribunal's jurisdiction *ab initio* under the [Treaty].[660]

337. In the case at hand, Claimants' waiver satisfies neither the formal nor the material requirements, and thus the Tribunal lacks jurisdiction over their claim. When submitting their Notice of Arbitration, Claimants made their "waiver" in the following terms:

> Claimants waive their rights "to initiate or continue before any administrative tribunal or court under the law of any Party, or

[660] **Ex. RL-54**, *Submission of the U.S. in Angel Seda*, ¶¶ 9-13. This same position has been maintained by the United States in its submissions as a non-disputing party in several investment cases involving waiver provisions identical or similar to that contained in the Treaty. *See* **Ex. RL-207**, *Submission of the U.S. in Alberto* Gelzis, ¶¶ 32-38; **Ex. RL-206**, *Submission of the U.S. in Astrida Carrizosa*, ¶¶ 32-38; **Ex. RL-219**, *Second Submission of the U.S. in Renco*, ¶¶ 5-10; **Ex. RL-220**, *Third Submission of the U.S. in Renco*, ¶¶ 6, 8; **Ex. RL-66**, *Submission of the U.S. in Gramercy*, ¶¶ 10-17; **Ex. RL-64**, *Submission of the U.S. in Corona*, ¶ 9; **Ex. RL-226**, *KBR, Inc. v. United Mexican States,* ICSID Case No. UNCT/14/1 (NAFTA), Submission of the United States of America, February 14, 2014, ¶¶ 2-3; **Ex. RL-227**, *Detroit International Bridge Company v. Government of Canada*, PCA Case No. 2012-25 (NAFTA), Submission of the United States of America, July 14, 2008, ¶¶ 4-7. *See also* **Ex. RL-219**, *Second Submission of the U.S. in Renco*, ¶ 16 ("[A] tribunal itself cannot remedy an ineffective waiver. Accordingly, a claim can be submitted, and the arbitration can properly commence, only if a claimant submits an effective waiver.") (emphasis added); **Ex. RL-220**, *Third Submission of the U.S. in Renco*, ¶¶ 4-5; **Ex. RL-63**, *Submission of the U.S. in Bay View*, ¶ 15, n. 23; **Ex. RL-66**, *Submission of the U.S. in Gramercy*, ¶ 17.

> other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16" of the [Treaty]. For the avoidance of doubt, this waiver is without prejudice of Claimants' right to defend themselves in the fiscal proceeding and any related proceedings, including any appeals, and to initiate or continue any action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of Colombia, provided that the action is brought for the sole purpose of preserving Claimants' rights and interests during the pendency of this arbitration.[661]

338. Claimants' waiver is not a valid and effective waiver under the terms of Article 10.18.2(b) of the Treaty because it contains a reservation of rights, which is not only impermissible, but empties the waiver of content.

339. As appears from the text of their waiver, Claimants have reserved their right to continue to defend themselves in the Fiscal Liability Proceeding and in any "related proceedings", including the filing of any appeals. Accordingly, Claimants seek to continue to pursue all local administrative and judicial proceedings where the measures alleged to constitute breaches of the substantive obligations under the Treaty are at issue (*i.e.*, the initiation and conduct of the Fiscal Liability Proceeding and the issuance of the Indictment Order), while pursuing the present Arbitration. In other words, Claimants' "waiver" is not a true waiver to "initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to

[661] Notice of Arbitration, ¶ 25 (emphasis added). *See also* **Ex. C-3**, *Power of Attorney, Waiver, and Authorization to Commence Arbitration*, Waiver ("Pursuant to Article 10.18 of the [Treaty], Foster Wheeler, Process Consultants and FPJVC each waive their respective and collective rights 'to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16' of the [Treaty]. They each respectively and collective reserve the right to concurrently continue to defend themselves in the fiscal liability proceeding and any related proceedings, including any appeals, and to initiate or continue any action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of Colombia, provided that the action is brought for the sole purpose of preserving their rights and interests during the pendency of this arbitration.") (emphasis added).

any measure alleged to constitute a breach" of the substantive obligations under the Treaty, as required by Article 10.18.12(b).[662]

340. Furthermore, beyond the formal terms of their waiver, Foster Wheeler and Process Consultants have not effectively and materially complied with the waiver they provided. Not only have they continued to participate actively in the Fiscal Liability Proceeding to which they are parties, and have even appealed the Ruling with Fiscal Liability before the fiscal liability and administrative sanctions chamber of the CGR, but they have also – subsequent to filing their Notice of Arbitration – initiated two additional *acciones de tutela* before Colombian courts for alleged violations of due process with regard to the conduct of the Fiscal Liability Proceeding.[663]

341. It is important to stress that the Treaty does not require Claimants to abandon all of their proceedings before Colombian administrative and judicial courts; but it does require them to do so if Claimants wish to submit a claim to arbitration under the Treaty for breaches of its substantive obligations – that is precisely the rationale for the Treaty's "no U-turn" structure.[664] Claimants could (and should) have waited to obtain a

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[662] **Ex. RL-1**, Treaty, Article 10.18.2(b).

[663] **Ex. R-84**, *Acción de Tutela* 2021-A; **Ex. R-87**, *Acción de Tutela* 2021-B. *See* ¶ 159, nn. 327, 345, *supra.*

[664] *See for example* **Ex. RL-54**, *Submission of the U.S. in Angel Seda*, ¶ 8 ("Similar to provisions found in many of the United States' international investment agreements, Article 10.18.2(b) [of the Treaty] is a 'no U-turn' waiver provision, which permits claimants to elect to pursue any proceeding (including in domestic court) without relinquishing their right to assert a subsequent claim through arbitration under the Agreement, subject to compliance with the three-year limitations period for claims under Article 10.18.1. However, Article 10.18.2(b) makes clear that as a condition precedent to the submission of a claim to arbitration under the Agreement, a claimant must submit an effective waiver together with its Notice of Arbitration. The date on which the claim has been submitted to arbitration for purposes of Article 10.18.1 is therefore the date of the submission of an effective waiver, assuming all other relevant procedural requirements have been satisfied."); **Ex. RL-140**, B. Sabahi *et al.*, INVESTOR-STATE ARBITRATION, ¶ 14.11 ("Both waiver provisions and true *fork in the road* clauses are primarily designed to prevent duplicative dispute resolution proceedings, which are viewed as potentially abusive and unfair to the host state."), ¶ 14.27 ("A tribunal interpreting such a [waiver] provision does not need to apply the so-called triple identity test; it need only inquire whether the same measure underlies both international and domestic law claims. Once that is established, arbitral jurisdiction exists only if the investor has waived its right to local remedies. The investor must waive its right to commence or continue local proceedings even if its claims concerning the measure

final decision in Colombian courts before then submitting their claim to arbitration under the Treaty.[665] What the Treaty does not permit, however, is for Claimants to continue their proceedings before Colombian administrative and judicial courts and, at the same time, submit a claim to arbitration before this Tribunal with respect to the same measures that they allege to have constituted a breach of the substantive Treaty obligations.

342. Claimants' waiver with reservations and their actions at domestic level completely frustrate the objective of Article 10.18.2(b) of the Treaty: to prevent the same claim from being heard simultaneously by several local and international tribunals. Foster Wheeler and Process Consultants intend to continue their claims before Colombian administrative and judicial courts while, at the same time, pursuing this Arbitration in which they essentially raise the same claims.[666] In short, what Claimants seek to achieve by initiating this Arbitration is to obtain the best of both worlds, or, in other words, take two bites at the apple. But this is precisely what the Treaty tries to avoid by conditioning consent to arbitration on a waiver of the initiation or continuation of proceedings before the administrative and judicial courts of Colombia. Claimants cannot continue to file appeals in the Fiscal Liability Proceeding, nor may they file *acciones de tutela* before

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are based on breaches of different laws (i.e. breaches of local law as opposed to breaches of international law).").

[665] This only serves to confirm that the present claim is premature. *See* ¶¶ 172-182, *supra*.

[666] In addition, it should be clarified that neither the appeal in the Fiscal Liability Proceeding nor the *acciones de tutela* filed by Foster Wheeler and Process Consultants before the Colombian courts can be qualified as "interim injunctive relief" lodged for preserving Claimants' rights and interests while this arbitral proceeding is ongoing. The appeal seeks to annul the Ruling with Fiscal Liability, while the *acciones de tutela* seek, on the one hand, to extend the right of contradiction *vis-à-vis* certain technical reports within the framework of the Fiscal Liability Proceeding, and, on the other hand, to extend the term for filing an appeal against the Ruling with Fiscal Liability. None of these three actions, if successful, would have the effect of preserving Claimants' rights while this Arbitration is ongoing.

Colombian courts related to that proceeding, and pursue this Arbitration at the same time.[667]

343. In light of the above reasons, since Claimants have not submitted an effective waiver – both formal and material – to initiate or continue their claims before Colombian administrative and judicial courts with respect to the same measure that they allege to have constituted a breach of the Treaty, the Tribunal lacks jurisdiction *ratione voluntatis* to hear their claim.

CONCLUSION

344. In view of the foregoing, Respondent respectfully requests this Tribunal to: (1) uphold the preliminary objection under Article 10.20.4 of the Treaty and dismiss the claim submitted to arbitration by Claimants; (2) declare that it lacks jurisdiction to hear the present claim; and (3) order Claimants to pay all costs and expenses of this Arbitration, including Respondent's attorneys' fees, together with interest thereon.

[667] The fact that Claimants do not request monetary damages in their proceedings before the administrative and judicial courts in Colombia does not preclude Claimants from not being entitled to make reservations with respect to those proceedings. *See* **Ex. RL-224**, *Railroad Development*, ¶ 53 ("The argument that the Claimant is only seeking performance [of the obligations] under the local arbitrations is immaterial for purposes of Article 10.18 [of DR-CAFTA]. The waivers under Article 18.10.2 are not restricted to damages claims. They should also cover claims seeking performance. A reading of Article 10.18.3 confirms this understanding. This paragraph excepts from the waivers actions seeking interim injunctive relief which do not involve the payment of monetary damages and brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration. This exception would have been unnecessary if Article 10.18.2 waivers were limited to damage claims.").

RESERVATION OF RIGHTS

345. Respondent reserves the right to submit such additional evidence and arguments as it deems appropriate to supplement this Memorial, and to raise additional jurisdictional objections, as well as to respond to any evidence or arguments submitted by Claimants.

Respectfully,

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