INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

GRAN COLOMBIA GOLD CORP.

Claimant

and

REPUBLIC OF COLOMBIA

Respondent

ICSID Case No. ARB/18/23

DECISION ON THE BIFURCATED JURISDICTIONAL ISSUE

Members of the Tribunal

Ms. Jean E. Kalicki, President of the Tribunal
Professor Bernard Hanotiau, Arbitrator
Professor Brigitte Stern, Arbitrator

Secretary of the Tribunal

Ms. Ana Constanza Conover Blancas

Assistant to the President of the Tribunal

Dr. Joel Dahlquist

Date of dispatch to the Parties: 23 November 2020

REPRESENTATION OF THE PARTIES

Representing Gran Colombia Gold Corp.:

Mr. John J. Hay
Ms. Diora M. Ziyaeva
Dentons US LLP
1221 Avenue of the Americas
New York, N.Y. 10020
United States of America

Mr. Barton Legum
Dentons Europe LLP
5 boulevard Malesherbes
75008 Paris
France

Representing the Republic of Colombia:

Mr. Camilo Gómez Alzate
Ms. Ana María Ordóñez Puentes
Ms. Elizabeth Prado López
Agencia Nacional de Defensa Jurídica del Estado
Carrera 7 No. 75-66
2nd and 3rd floors
Bogota, D.C.
Colombia

Mr. Fernando Mantilla-Serrano
Mr. John Adam
Mr. Diego Romero
Ms. Paloma García Guerra
Latham & Watkins LLP
45, rue Saint-Dominique
75007 Paris
France

TABLE OF CONTENTS

I. INTRODUCTION AND PARTIES 1
II. PROCEDURAL BACKGROUND 2
III. PARTIES' REQUESTS FOR RELIEF 9
IV. SUMMARY OF THE PARTIES' POSITIONS 9
A. The Respondent's Position 10
(1) Timing of Colombia's denial of benefits and burden of proof 10
a. Timing of Colombia's denial of benefits 10
b. Burden of proof 13
(2) Grounds for Denial of Benefits 13
a. Ownership and control of the Claimant 14
b. Claimant's business activities in Canada 17
(3) Claimant's Ancillary Claim under Article 1101 of the FTA 19
B. The Claimant's Position 20
(1) Timing of Colombia's denial of benefits and burden of proof 20
a. Timing of Colombia's denial of benefits 20
b. Burden of proof 22
(2) Grounds for Denial of Benefits 23
a. Ownership and control of the Claimant 24
b. Claimant's business activities in Canada 27
(3) Claimant's Ancillary Claim under Article 1101 of the FTA 30
V. CANADA'S NON-DISPUTING PARTY SUBMISSION 31
VI. TRIBUNAL'S ANALYSIS 33
A. Timing of Colombia's denial of benefits 33
B. Grounds for Denial of Benefits 36
C. Admissibility of the Claimant's Ancillary Claim 41
VII. DECISION 47

TABLE OF SELECTED DEFINED TERMS

C-[#]	Claimant's exhibit
Canada's NDP Submission	Non-Disputing Party Submission of Canada dated 14 August 2020
CDS	Clearing and Depository Services Inc.
CL-[#]	Claimant's legal authority
Cl. Mem. or Claimant's Memorial	Claimant's Memorial on Merits and Damages dated 6 October 2019
Cl. C-Mem. or Claimant's Counter-Memorial	Claimant's Counter-Memorial on Jurisdiction dated 13 April 2020
Cl. Rej. or Claimant's Rejoinder	Claimant's Rejoinder on Jurisdiction dated 31 July 2020
Claimant or GCG	Gran Colombia Gold Corp.
DoB Objection	Respondent's Denial of Benefits Objection
El Cogote's NDP Application	Request for authorization to intervene as a non-disputing party pursuant to ICSID Arbitration Rule 37(2) filed by Asociación Mutual de Mineros "EL COGOTE", dated 5 October 2020
GCG Panama	Gran Colombia Gold S.A.
Hearing on Jurisdiction	Hearing on jurisdiction held remotely by videoconference from 28 to 29 September 2020

ICSID Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings in force as of 10 April 2006
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
R-[#]	Respondent's exhibit
Resp. Mem. or Respondent's Memorial	Respondent's Memorial on Jurisdiction dated 2 March 2020
Resp. Reply or Respondent's Reply	Respondent's Reply on Jurisdiction dated 1 July 2020
Respondent or Colombia	Republic of Colombia
Rev. Tr. Day [#] (ENG), [page:line] ([Speaker(s)])	Transcript of the Hearing on Jurisdiction (as revised by the Parties on 29 October 2020
Request for Arbitration	Request for Arbitration dated 25 May 2018
Request for Bifurcation	Respondent's Request for Bifurcation of 15 November 2019
RL-[#]	Respondent's legal authority
Tapestry	Tapestry Resources Corp.
Treaty or FTA	Free Trade Agreement between Canada and the Republic of Colombia signed on 21 November 2008 and which entered into force on 15 August 2011
VCLT	Vienna Convention on the Law of Treaties

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the Free Trade Agreement between Canada and the Republic of Colombia signed on 21 November 2008 and which entered into force on 15 August 2011 (the "**FTA**" or the "**Treaty**"), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the "**ICSID Convention**").

2. The claimant is Gran Colombia Gold Corp. ("**GCG**" or "**Claimant**"), a company incorporated under the laws of British Columbia, Canada.

3. The respondent is the Republic of Colombia ("**Colombia**" or "**Respondent**").

4. The Claimant and the Respondent are collectively referred to as the "**Parties**." The Parties' representatives and their addresses are listed above on page (i).

5. This dispute relates to Colombia's measures and omissions which have allegedly negatively impacted the Claimant's investments in the Colombian gold and silver mining sectors.

6. The Claimant alleges that Colombia has breached its obligations under *(i)* Article 811 of the Treaty by means of the indirect expropriation of its investments; *(ii)* Article 805 of the Treaty and customary international law concerning the standard of full protection and security; and *(iii)* Article 805 of the Treaty concerning the fair and equitable treatment standard. The Claimant submits that it is entitled to receive compensation for damage caused as a result of the Respondent's violations of the Treaty.

7. The Respondent alleges that the Tribunal does not have jurisdiction over the Claimant's claims. Among other jurisdictional objections, the Respondent claims that Colombia has effectively denied the benefits of the FTA to the Claimant pursuant to Article 814(2) of the Treaty (the "**DoB Objection**"). The Claimant acknowledges that Colombia purported to deny such benefits, by letter of 31 May 2018, but contends that this was improper and without effect. Additionally, the Claimant submits an ancillary claim under ICSID

Arbitration Rule 40, alleging that Colombia has breached Article 814(2) of the FTA by means of its unfounded denial of benefits to GCG. The Respondent argues that the Tribunal should reject the Claimant's claim, on the basis that the requirements of Rule 40 are not met.

8. This Decision sets out the Tribunal's ruling on the Respondent's DoB Objection and upon the admissibility of the Claimant's ancillary claim.

II. PROCEDURAL BACKGROUND

9. On 29 May 2018, ICSID received a request for arbitration from GCG against Colombia ("**Request for Arbitration**").

10. On 2 July 2018, the Secretary-General of ICSID registered the Request for Arbitration in accordance with Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("**ICSID Convention**"). In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

11. The Parties agreed to constitute the Tribunal in accordance with Article 37(2)(a) of the ICSID Convention as follows: the Tribunal would consist of three arbitrators, one to be appointed by each Party, and the third, presiding arbitrator, to be appointed by agreement of the Parties.

12. The Tribunal was composed (until 5 February 2019) of Ms. Loretta Malintoppi, a national of Italy, President, appointed by agreement of the Parties; Prof. Bernard Hanotiau, a national of Belgium, appointed by the Claimant; and Prof. Brigitte Stern, a national of France, appointed by the Respondent.

13. On 31 October 2018, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings ("**ICSID Arbitration Rules**"), the Secretary-General notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was

therefore deemed to have been constituted on that date. Mrs. Ana Constanza Conover Blancas, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

14. On 26 November 2018, the Claimant filed a proposal for disqualification of Ms. Loretta Malintoppi and the proceeding was suspended in accordance with ICSID Arbitration Rule 9(6). On 12 December 2018, the Respondent filed observations on the proposal for disqualification. On 21 December 2018, Ms. Malintoppi furnished explanations in accordance with ICSID Arbitration Rule 9(3). On 4 January 2019, the Claimant filed additional observations on the proposal for disqualification. On 5 February 2019, following the resignation of arbitrator Ms. Loretta Malintoppi, the Secretary-General notified the Parties of the vacancy on the Tribunal.

15. On 25 April 2019, Ms. Jean E. Kalicki, a national of the United States, accepted her appointment as presiding arbitrator, appointed by the Parties in accordance with ICSID Arbitration Rule 11(1). On the same date, the Tribunal was reconstituted. Its members are: Ms. Jean E. Kalicki, President, appointed by agreement of the Parties; Prof. Bernard Hanotiau, appointed by the Claimant; and Prof. Brigitte Stern, appointed by the Respondent.

16. On 6 June 2019, in accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties by telephone conference.

17. Following the first session, on 24 June 2019, the Tribunal issued Procedural Order No. 1 recording the Parties' agreements on procedural matters and the decisions of the Tribunal on disputed issues. Procedural Order No. 1 established, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural languages would be English and Spanish, and that the place of proceeding would be Washington D.C. Procedural Order No. 1 also set out a provisional timetable for the arbitration.

18. On 11 July 2019, the Tribunal issued Procedural Order No. 2 concerning revisions to the procedural calendar applicable to the arbitration.

19. On 7 October 2019, the Claimant filed a Memorial on Merits and Damages dated 6 October 2019 ("**Claimant's Memorial**"), with a consolidated index of factual exhibits and legal authorities (C-0001 to C-0274 and CL-0001 to CL-0160, respectively). The pleading was also accompanied by five witness statements and two expert reports, as follows: *(i)* Witness Statement of Alejandro Ramirez Echeverry, dated 4 October 2019; *(ii)* Witness Statement of Alessandro Cecchi, dated 4 October 2019, with Annexes A-D; *(iii)* Witness Statement of Gabriel Gaviria, dated 3 October 2019; *(iv)* Witness Statement of Lombardo Paredes Arenas, dated 3 October 2019; *(v)* Witness Statement of Michael M. Davies, dated 3 October 2019; *(vi)* Expert Quantum Report of José Alberro, Ph.D., dated 6 October 2019, with Annexes 1-18; and *(vii)* Expert Report of R. Bruce Kennedy, dated 5 October 2019, with Annexes 1-5 and supporting documents BK-0001 to BK-0042.

20. On 15 November 2019, the Respondent filed a request to address its objections to jurisdiction as a preliminary question ("**Request for Bifurcation**") accompanied by exhibit R-0001 and legal authorities RL-0001 to RL-0028. On 23 December 2019, the Claimant filed observations on the Respondent's Request for Bifurcation accompanied by factual exhibits C-0275 to C-0276 and legal authorities CL-0161 to CL-0183.

21. On 17 January 2020, the Tribunal issued Procedural Order No. 3. In its order, the Tribunal decided to hear the Respondent's DoB Objection in a preliminary phase on the basis of an accelerated timetable, and invited the Parties to confer with respect to a proposed schedule for accelerated determination of the bifurcated jurisdictional issue.

22. By emails of 25 January 2020, the Parties informed the Tribunal of their agreement to the Tribunal's proposed schedule.

23. On 6 February 2020, the Tribunal confirmed that the DoB Objection would be decided pursuant to the schedule agreed by the Parties, including 28-30 September 2020 as the applicable dates for a hearing on the bifurcated jurisdictional issue.

24. By letter of 13 February 2020, the Claimant requested the Tribunal to adopt certain procedural measures aimed at promoting the efficiency of the proceeding. On 21 February 2020, the Respondent filed observations on the Claimant's proposals, together with

supporting documentation. On 23 February 2020, the Claimant submitted further observations related to its request of 13 February 2020.

25. On 2 March 2020, the Respondent filed a Memorial on Jurisdiction ("**Memorial on Jurisdiction**"), with factual exhibits R-0002 to R-0043 and legal authorities RL-0029 to RL-0046.

26. On 11 March 2020, the Tribunal issued Procedural Order No. 4 concerning the Claimant's request of 13 February 2020.

27. On 31 March 2020, the Claimant submitted an application for the Tribunal to put into place a confidentiality order. On 6 April 2020, the Respondent submitted observations on the Claimant's application. On 8 April 2020, the Claimant submitted a reply to the Respondent's observations of 6 April 2020. On 8 April 2020, the Tribunal issued Procedural Order No. 5 concerning the Claimant's application of 31 March 2020.

28. On 13 April 2020, the Claimant filed a Counter-Memorial on Jurisdiction ("**Counter-Memorial on Jurisdiction**"), with factual exhibits C-0277 to C-0348 and legal authorities CL-0184 to CL-0202. The pleading was also accompanied by one witness statement and one expert report, as follows: *(i)* Second Witness Statement of Michael M. Davies, dated 10 April 2020; and *(ii)* Expert Report by Neill May of Goodmans LLP, dated 11 April 2020, with supporting documents NM-0001 to NM-0013.

29. On 4 May 2020, following exchanges between the Parties, the Parties filed a request for the Tribunal to decide on production of documents. On 11 May 2020, the Tribunal issued Procedural Order No. 6 concerning production of documents.

30. On 1 July 2020, the Respondent filed a Reply on Jurisdiction, with factual exhibits R-0044 to R-0058 and legal authorities RL-0047 to RL-0052 ("**Reply on Jurisdiction**").

31. On 31 July 2020, the Claimant filed a Rejoinder on Jurisdiction, with legal authorities CL-0203 to CL-0212 ("**Rejoinder on Jurisdiction**").

32. On 4 August 2020, Canada provided written notice of its intention to file a written submission as a non-disputing State Party by 14 August 2020 on questions of interpretation of the Treaty.

33. On 7 August 2020, the Parties informed the Tribunal of their agreement to hold the hearing on the bifurcated jurisdictional issue remotely by videoconference. On the same date, the Tribunal took note of the Parties' agreement and released 30 September 2020 from the list of hearing dates.

34. On 11 August 2020, Canada notified the Parties and the Tribunal that it would exercise its right to attend the hearing on the bifurcated jurisdictional issue, as provided for under Article 827(7) of the Treaty.

35. On 14 August 2020, Canada filed a written submission as a non-disputing State Party pursuant to Article 827(2) of the Treaty ("**Canada's NDP Submission**").

36. On 11 September 2020, the Tribunal held a pre-hearing organizational meeting with the Parties by telephone conference.

37. On 18 September 2020, the Claimant introduced a new legal authority to the record as CL-0213.

38. On 21 September 2020, the Tribunal issued Procedural Order No. 7 concerning the organization of the hearing on the bifurcated jurisdictional issue.

39. A hearing on the bifurcated jurisdictional issue was held remotely through the videoconference platform called Zoom, hosted by FTI Consulting, Inc., on 28 and 29 September 2020 (the "**Hearing on Jurisdiction**"). The following persons were present at the Hearing on Jurisdiction:

Tribunal:

Ms. Jean Kalicki	President
Prof. Bernard Hanotiau	Co-Arbitrator
Prof. Brigitte Stern	Co-Arbitrator

Assistant to the President of the Tribunal:

Dr. Joel Dahlquist

ICSID Secretariat:

Ms. Ana Constanza Conover Blancas	Secretary of the Tribunal
Ms. Marisela Vázquez Marrero	Paralegal
Mr. Dante Herrera	Legal Assistant

For Claimant:

Counsel

Mr. John J. Hay	Dentons
Ms. Diora M. Ziyaeva	Dentons
Mr. Barton Legum	Dentons

Party representatives

Ms. Amanda Fullerton	Gran Colombia Gold Corp.
Mr. Alejandro Ramirez Echeverry	Gran Colombia Gold Corp.
Mr. Jorge Neher	Dentons Cardenas and Cardenas

Administrative and technical support

Ms. Karen Ogle	Dentons

For Respondent:

Counsel

Mr. Camilo Gómez Alzate	Agencia Nacional de Defensa Jurídica del Estado
Ms. Ana María Ordoñez	Agencia Nacional de Defensa Jurídica del Estado
Ms. Elizabeth Prado	Agencia Nacional de Defensa Jurídica del Estado
Mr. Fernando Mantilla-Serrano	Latham & Watkins
Mr. John Adam	Latham & Watkins
Mr. Diego Romero	Latham & Watkins
Ms. Paloma García Guerra	Latham & Watkins

Party representatives

Mr. Andrés Esteban Tovar	Agencia Nacional de Defensa Jurídica del Estado
Mr. Giovanny Andrés Vega	Agencia Nacional de Defensa Jurídica del Estado

Administrative and technical support

Mr. Ignacio Stratta	Latham & Watkins

Mr. Christophe Tanguy	Latham & Watkins

Non-Disputing Treaty Party:

Ms. Sylvie Tabet	Trade Law Bureau, Government of Canada
Ms. Maria Cristina Harris	Trade Law Bureau, Government of Canada

Court Reporters:

Ms. Dawn Larson	Worldwide Reporting, LLP
Mr. Dante Rinaldi	D-R Esteno

Interpreters:

Ms. Silvia Colla
Mr. Daniel Giglio
Mr. Charles Roberts

Zoom Operator:

Mr. Jamey Johnson	FTI Consulting, Inc.

40. On 5 October 2020, the Asociación Mutual de Mineros "EL COGOTE" filed an application to intervene as a non-disputing party pursuant to ICSID Arbitration Rule 37(2), Article 831 and Annex 831 of the Treaty (the "**El Cogote's NDP Application**"). On 13 October 2020, the Parties jointly requested the Tribunal to defer its consideration of El Cogote's NDP Application until after the submission of the Respondent's Counter-Memorial on all issues, should the proceedings continue after the present jurisdictional phase. On 30 October 2020, the Tribunal granted the Parties' joint request to defer the decision on El Cogote's NDP Application, on the basis that several of the factors to be considered under ICSID Arbitration Rule 37(2) would be better understood against the backdrop of both Parties' first-round substantive pleadings.

41. On 29 October 2020, the Parties submitted agreed corrections to the Hearing transcripts.

42. On 23 and 24 October 2020 respectively, the Claimant and the Respondent filed statements of costs. On 30 October 2020, each Party filed observations on the other Party's statements of costs.

III. PARTIES' REQUESTS FOR RELIEF

43. In its Rejoinder on Jurisdiction, the Claimant requests that the Tribunal:

> (a) dismiss Respondent's objection to jurisdiction on the basis of Article 814(2) of the FTA, (b) declare that Respondent breached Article 814(2) through its purporting to deny benefits in circumstances where the requirements of that Article were not met, (c) proceed to hear the merits of the dispute and (d) reserve its decision on costs for determination in the eventual award.[1]

44. In its Reply on Jurisdiction, the Respondent requests the Tribunal to:

> … declare that the Respondent validly denied the benefits of Chapter Eight of the FTA to the Claimant, and, accordingly, to dismiss GCG's claims for lack of jurisdiction.
>
> … dismiss GCG's claim pursuant to Article 1101 of the FTA, including for lack of jurisdiction.
>
> … order GCG to pay the Republic of Colombia all costs associated with these proceedings, including arbitration costs and all professional fees and disbursement, as well as the fees of the arbitral tribunal, plus interest thereon.[2]

IV. SUMMARY OF THE PARTIES' POSITIONS

45. In this section, the Parties' main arguments with respect to the DoB Objection are presented succinctly. The Tribunal emphasizes that it does not purport to set out all arguments presented, much less all authorities and evidence cited in support of those arguments, and the absence of reference to particular assertions or particular supporting material should not be taken as an indication that the Tribunal did not consider those matters. The Tribunal has carefully considered all points presented in connection with the DoB Objection.

46. The Parties' arguments focus on three main issues: **(1)** the timeliness of Colombia's denial of benefits and the burden of proof; **(2)** the grounds for denial of benefits, namely,

[1] Cl. Rej., ¶ 163.
[2] Resp. Reply, ¶¶ 161-163.

(a) ownership and control of the Claimant and **(b)** whether the Claimant has substantial business activities in Canada; and **(3)** the admissibility of the Claimant's ancillary claim, which the Claimant frames as a claim for breach of Article 814(2) of the FTA, but which the Respondent characterizes as a claim pursuant to Article 1101 of the FTA.

A. The Respondent's Position

(1) Timing of Colombia's denial of benefits and burden of proof

47. The Respondent's DoB Objection is based on Article 814(2) of the Treaty, which provides as follows:

> **Article 814: Denial of Benefits**
>
> …
>
> A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of such Party and to investments of that investor if investors of a non-Party or of the denying Party own or control the enterprise and the enterprise has no substantial business activities in the territory of the Party under whose law it is constituted or organized.

48. Before arguing that the conditions of Article 814(2) of the FTA are met, the Respondent addresses two preliminary matters raised by the Claimant: **(a)** whether the denial of benefits was timely, and **(b)** the burden of proving the requirements of Article 814(2) of the Treaty.

a. Timing of Colombia's denial of benefits

49. The Respondent claims that, by letter of 31 May 2018,[3] it properly denied the benefits of the FTA to the Claimant – including access to international arbitration – pursuant to Article 814(2) of the Treaty.[4]

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[3] Letter from the National Agency for the Legal Defense of the State (ANDJE) to Gran Colombia Gold Corp. (L. Paredes Arenas), dated 31 May 2018 (R-0001).

[4] Resp. Mem., ¶¶ 5, 7, 13 and Resp. Reply, ¶¶ 2, 38. According to the Respondent, the reference in Article 814(2) of the FTA to the Contracting Parties' right to deny "the benefits of this Chapter [*i.e.*, Chapter Eight]" necessarily includes, as among the benefits which may be denied, the right to submit a claim to arbitration under Section B of Chapter Eight of the FTA. *See* Resp. Mem., ¶¶ 6, 9 and Resp. Reply, ¶ 3.

50. The Respondent submits that the denial of benefits was timely. In this regard, it requests the Tribunal to dismiss the Claimant's two main arguments to the contrary, namely: *first*, that when Colombia denied the benefits of the FTA to the Claimant, GCG had completed the process of submitting the dispute to arbitration by filing its Request for Arbitration to ICSID on 25 May 2018, and, *second*, that the denial of benefits clause cannot apply retroactively to an arbitration agreement that was already in effect as of 25 May 2018.[5]

51. ***First***, the Respondent claims that, at the time Colombia denied the benefits of the FTA to GCG on 31 May 2018, the Claimant had not yet completed the process of submitting the dispute to ICSID. While the Request for Arbitration was filed electronically on 25 May 2018, Colombia was informed of the filing and received a copy of the Request on 30 May 2018. Moreover, ICSID did not register the case until 2 July 2018 (*i.e.*, 32 days after Colombia's denial of benefits), after having requested certain clarifications and obtained additional documentation from GCG.[6]

52. The Respondent adds that, even assuming, *arguendo*, that the Request for Arbitration was validly filed on 25 May 2018, it still denied the benefits of the FTA to GCG at the earliest possible time, merely one day after it received a copy of the Request for Arbitration. There was no reason for Colombia to deny the benefits of Chapter Eight of the FTA before then, as it had been engaged in negotiations with GCG and could not be certain that GCG would seek to invoke the benefits of the FTA until receiving GCG's Request for Arbitration.[7]

53. ***Second***, the Respondent claims that nothing in Article 814(2) of the Treaty imposes a specific time limit for Colombia to deny the benefits of Chapter Eight. Among other arguments, the Respondent claims that: ***(i)*** Article 814(2) should be interpreted according to the ordinary meaning of its terms (which contain no time limit requirement), pursuant to Article 31(1) of the Vienna Convention on the Law of Treaties ("**VCLT**"); ***(ii)*** unlike other treaties, the FTA does not require the State Party to give prior notification of the denial of benefits, which shows that the State Parties to the FTA actively chose not to include any

[5] Resp. Mem., ¶ 14.
[6] Resp. Mem., ¶¶ 15-17 and Resp. Reply, ¶ 42.
[7] Resp. Mem., ¶ 18 and Resp. Reply, ¶¶ 38-46.

requirements concerning the timing of the denial of benefits; ***(iii)*** the decisions the Claimant cited in support of its arguments regarding timeliness concern the application of a different treaty and are inapposite; and, in contrast, ***(iv)*** other tribunals have found that there is no justification for imposing any time limits not expressly included in the wording of denial of benefits clauses.[8]

54. In addition, the Respondent argues that it would be unworkable to impose upon Colombia a requirement to deny the benefits of the FTA prior to the submission of any particular dispute to arbitration, as it could not practically or reasonably be expected to investigate and issue denial of benefits notices to all potential foreign investors who may fall within the scope of Article 814(2). The Respondent further rejects the Claimant's contention that GCG's Notice of Intent implied that it would invoke the benefits of the Treaty. It stresses that the purpose of such notification is the amicable settlement of claims against the State. Also, in this case, there was uncertainty as to whether GCG would resort to arbitration since the Parties extended their negotiation period and the Request for Arbitration was filed several months after the negotiations ended.[9]

55. Finally, the Respondent rejects the Claimant's assertion that a presumption of non-retroactivity of a denial of benefits results from Article 25(1) of the ICSID Convention. The Respondent argues that denial of benefits clauses form part of the investment protection offered by host States, essentially as a condition on which any consent is predicated, and therefore the invocation of this condition cannot be characterized as a withdrawal of consent. The Respondent further argues that a general presumption of non-retroactivity based on a provision of the ICSID Convention that concerns only one of many advantages that a State could deny under Article 814(2) would be unreasonable, and the Claimant's argument that Article 28 of the VCLT codifies a presumption of non-retroactivity is unsustainable, since that provision simply delimits the temporal scope of Colombia's obligations, not the Claimant's rights or obligations.[10]

[8] Resp. Mem., ¶¶ 19-31.
[9] Resp. Mem., ¶¶ 26-31 and Resp. Reply, ¶¶ 43-44, 46.
[10] Resp. Reply, ¶¶ 32-36.

b. Burden of proof

56. The Respondent considers that the Claimant's characterization of the principle *onus probandi incumbit actori*, to support its contention that the Respondent bears the burden of proving the justification in fact and law for the DoB Objection, is simplistic, selective and incomplete as a matter of international law, as it ignores that the Claimant bears the burden to rebut the evidence Colombia presents.[11]

57. In this regard, the Respondent asserts that the decisions on which the Claimant relies expressly refer to both parties' obligation to cooperate in the provision of evidence. Moreover, the ICSID Rules underline the tribunal's discretion to freely assess the evidence presented by the parties.[12]

58. Accordingly, the Respondent concludes that the Claimant has a burden to cooperate and assist the Tribunal in establishing the relevant facts, and the Tribunal is free to rely on the evidence provided by the Respondent and to draw adverse inferences from the Claimant's lack of cooperation.[13]

(2) Grounds for Denial of Benefits

59. Article 814(2) of the Treaty grants State Parties the right to deny the advantages of Chapter Eight of the FTA to investors which are owned or controlled by nationals of the denying State Party or of third States, and which have no substantial business activities in their State of incorporation. As summarized below, the Respondent claims that the grounds for denial of benefits are met in this case since GCG **(a)** is owned or controlled by non-Canadians, and **(b)** has no substantial business activities in Canada, its State of incorporation.[14]

60. As a preliminary matter, the Respondent submits that the requirements of Article 814(2) of the FTA were satisfied in this case at the time GCG claimed the benefits of the Treaty, regardless of whether such date is considered to be 2 July 2018 (the date on which ICSID

[11] Resp. Reply, ¶¶ 5, 47-58.
[12] Resp. Reply, ¶¶ 49-54.
[13] Resp. Reply, ¶ 56-58.
[14] *See*, *e.g.*, Resp. Mem., ¶¶ 13, 32.

registered this case), as the Respondent maintains, or 25 May 2018 (the date of GCG's initial filing of its Request for Arbitration), as the Claimant maintains.[15]

a. Ownership and control of the Claimant

61. The Respondent first refers to ***(i)*** the applicable standard, and then proceeds to submit that GCG was neither ***(ii)*** owned by nationals of Canada, nor ***(iii)*** controlled by nationals of Canada, on any of the potentially applicable critical dates.

62. ***First***, with regard to the applicable standard, the Respondent argues that: the requirements of "ownership" and "control" are alternative requirements;[16] such requirements must be assessed by reference to ultimate ownership and control of GCG and not merely to nominal ownership or formal control by virtue of direct shareholding;[17] and relevant factors to determine *de facto* control include financial interest in the investment, the ability to exercise substantial influence over the investment's management and operation and the selection of board members, and the fact of serving as a consistent driving force behind the company.[18]

63. In addition, the Respondent considers the Claimant's suggestion that "ownership" of the enterprise must be exercised by a single investor to be unsupported by the wording of Article 814(2) of the FTA (which expressly refers to ownership and control exercised by "investors"), and incompatible with the Treaty's broad definition of "enterprise" in Article 106 and the principle of *effet utile*. The concepts of both ownership and control must be interpreted broadly, the Respondent says, to include indirect and beneficial ownership and indirect and *de facto* control. This is necessary to accord meaning and effectiveness to the underlying purpose of denial of benefits clauses, which exist to safeguard against the use of nationalities of convenience to take advantage of the FTA's protections.[19]

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[15] Resp. Mem., ¶¶ 33-40.
[16] Resp. Mem., ¶ 42; Resp. Reply, ¶ 68.
[17] Resp. Mem., ¶ 43.
[18] Resp. Mem., ¶ 45 and Resp. Reply, ¶¶ 91-92.
[19] Resp. Mem., ¶¶ 9-12, 42, 46-47 and Resp. Reply, ¶¶ 6, 69, 78-89, 91, 101.

64. Further, the Respondent rejects the Claimant's assessment of control based on Canadian corporate and securities law. Instead, it argues that the existence of control should be assessed on a case-by-case basis (absent a definition of "control" in the FTA) and remains a matter of international law and not national law.[20]

65. ***Second***, the Respondent claims that GCG is not owned by nationals of Canada. It argues that, at the time GCG claimed the benefits of the Treaty, Canadian nationals did not own the majority of GCG's shares. The Respondent bases its analysis of GCG's ownership on public corporate documents issued prior to 25 May and 2 July 2018.[21]

66. The Respondent submits that, while GCG did not have any individual shareholders who owned shares carrying more than 10% of the attached voting rights as of 4 May 2018, publicly available information establishes that "almost all of GCG's publicly known shareholders were not Canadian nationals."[22] The Respondent's evidence in this regard includes:[23]

- a Management Information Circular of GCG dated 4 May 2018, which identifies six shareholders, each holding between 0.001% and 3.89% of shares in GCG;
- an Alternative Monthly Report of GCG dated 5 June 2018, which shows that GCG's shareholding structure remained largely the same between 25 May and 2 July 2018;
- publicly available sources demonstrating that the six shareholders identified are nationals or companies incorporated under the laws of the British Virgin Islands, Colombia, Cuba, Italy, the United States of America, and Venezuela, and do not appear to be Canadian nationals; and

[20] Resp. Reply, ¶¶ 7, 94, 116.
[21] Resp. Mem., ¶¶ 48-59.
[22] Resp. Mem., ¶¶ 49-50.
[23] Resp. Mem., ¶¶ 51-54 (referring, *inter alia*, to GCG's Management Information Circular, 4 May 2018 (R-0011) ("**GCG's Management Information Circular**") and GCG, Alternative Monthly Report, 5 June 2018 (R-0012), pp. 1-2).

- reports from the Canadian System for Electronic Disclosure by Insiders which identify other GCG shareholders that are not Canadian.

67. In addition, the Respondent rejects the Claimant's reliance on shareholding information which post-dates 2 July 2018, deeming this irrelevant for purposes of the DoB Objection.[24] It further opposes the Claimant's assertion that, as of 30 May 2018, 99.632% of GCG's shares were registered in the name of a Canadian securities depository. It considers that the Claimant's argument fails because it focuses on direct (formal) ownership as opposed to beneficial ownership. In this case, it is undisputed that GCG has a myriad of beneficial owners.[25]

68. The Respondent concludes that GCG had 11 known shareholders as of 25 May and 2 July 2018, out of which 9 were nationals of Colombia or a third State and held at least 11.731% of GCG's outstanding shares. Beyond such information, which is publicly available, GCG has not provided a more detailed breakdown of the nationality of its beneficial shareholders as of the relevant dates. In other words, GCG has failed to rebut Respondent's *prima facie* case regarding beneficial ownership made on the available evidence. Therefore, according to the available evidence, the Tribunal should find that GCG was not owned by Canadian nationals at the time it invoked the benefits of the FTA.[26]

69. ***Third***, the Respondent claims that GCG is not controlled by nationals of Canada. Instead, the Claimant is controlled by GCG's two founders, Messrs. Iacono (an Italian citizen who obtained Colombian nationality in 2010) and de la Campa (a citizen of Venezuela and Cuba, who likewise obtained Colombian nationality in 2010).[27]

70. The Respondent submits that Messrs. Iacono and de la Campa founded GCG in 2010 through a so-called "**Reverse Takeover**," which allowed GCG's predecessor, Gran Colombia Gold S.A. ("**GCG Panama**"), a Panamanian entity, to take over Tapestry Resources Corp.'s ("**Tapestry**") corporate position as a Canadian public company.[28]

[24] Resp. Mem., ¶ 56.
[25] Resp. Reply, ¶¶ 100-107.
[26] Resp. Mem., ¶¶ 57-58 and Table 1; Resp. Reply, ¶¶ 9, 98, 105, 111, 114.
[27] Resp. Mem., ¶¶ 60-91 and Resp. Reply, ¶ 122.
[28] Resp. Mem., ¶¶ 5, 62-63, 65, 89 and Resp. Reply, ¶ 124.

The Respondent adds that GCG Panama's registry office was in Colombia and its business activity had a primary emphasis on Colombia, while Tapestry served as a shell company for GCG Panama's Colombian activities.[29]

71. The Respondent claims that Messrs. Iacono and de la Campa control the Claimant based, *inter alia*, on the following: they exercise substantial influence over the management and operation of GCG in their capacity of directors of the company (and their ability to control GCG is recognized in GCG's corporate documents); Mr. Iacono is "the public face of GCG," regularly referenced in the company's press statements in his capacity as its Co-Chairman; and Mr. Iacono has publicly acknowledged that he and Mr. de la Campa share a working relationship with members of GCG's management far beyond GCG's lifespan.[30]

72. Moreover, the Respondent relies on GCG's documents to assert that at the time GCG invoked the benefits of the FTA, there was no Canadian majority in GCG's Board of Directors.[31]

73. Finally, the Respondent criticizes the Claimant's lack of cooperation in establishing the relevant facts concerning the precise role of Messrs. Iacono and de la Campa within GCG, as well as its lack of an alternative case as to whom controls GCG.[32]

b. Claimant's business activities in Canada

74. The Respondent first refers to ***(i)*** the applicable legal standard, and then submits that ***(ii)*** GCG does not have substantial business activities in Canada.

75. ***First***, the Respondent argues that the phrase "substantial business activities" implies that the investor must not be a shell company. Instead, its activities should go beyond the normal functions required merely by the fact of its corporate existence. Tribunals should therefore focus on "the genuineness of the business," that is, whether the activities in the home State are both real and "material." In conducting this materiality analysis, the

[29] Resp. Mem., ¶¶ 64 (citing Tapestry Resources Corp., Filing Statement, 12 August 2010 (R-0034)) and 66.
[30] Resp. Mem., ¶¶ 67-70 (citing GCG's Management Information Circular, p. 19) and Resp. Reply, ¶ 122.
[31] Resp. Mem., ¶¶ 73-75.
[32] Resp. Reply, ¶¶ 8, 116, 118-120.

Respondent contends, tribunals must take into account the nature of the business at issue, and assess the existence of substantial activities on a case-by-case basis.[33]

76. Moreover, the Respondent submits that, pursuant to Article 814(2) of the FTA, the company not only must have substantial activities, but must locate those substantial activities in the territory where the enterprise is organized.[34] In considering the *locus* of a company's substantial activities, the Respondent contends, it is important to distinguish mining enterprises (which is what GCG publicly contends it is) from investment or holding companies, which were at issue in the cases on which the Claimant relies, and which the Respondent for that reason considers inapposite.[35]

77. ***Second***, the Respondent claims that GCG did not have any substantial business activities in Canada at the time it invoked the benefits of the Treaty. It argues that: GCG's public filings state that substantially all of its assets are located outside of Canada; GCG's documents confirm that it has a primary emphasis on acquiring and developing properties in Colombia, with no identified projects in Canada; GCG's directors and management appear to be located outside of Canada; GCG had an insignificant number of employees in Canada (less than 10, in contrast to more than 2,000 in Colombia); and GCG does not appear to undertake any material or recurrent activities at either its head office (where the entrance does not have GCG's name, logo or any other signs of corporate activity) or its registered office (where GCG's name does not appear in the list of tenants).[36]

78. As further evidence that GCG did not conduct any substantial activities in Canada, the Respondent mentions that: GCG acknowledged that it undertook mining operations only in countries other than Canada; GCG's key functions in Canada, as identified by the Claimant, relate only to the maintenance of its status as a publicly-traded company and are unrelated to mining activities; GCG's fundraising and investing activities were mainly

[33] Resp. Mem., ¶¶ 78-80 and Resp. Reply, ¶¶ 129-130.
[34] Resp. Reply, ¶¶ 135.
[35] Resp. Reply, ¶¶ 131, 133.
[36] Resp. Mem., ¶¶ 81-91.

targeted towards servicing debt, not financing mining operations; and GCG has failed to identify any mining-related premises in Canada.[37]

79. In its Reply, the Respondent rejects the Claimant's argument that GCG is an investment management company (as opposed to a gold and silver exploration and development company), and therefore only must demonstrate substantial activities in Canada related to services of investment management. The Respondent finds such argument contrary to GCG's representations to investors and the public. Rather, the Respondent asserts, this is a case brought by a company which regularly described itself as a gold and silver exploration, development and production company but did not undertake any substantial activities in Canada with regard to its core mining business at the time it invoked the benefits of the Treaty.[38]

80. Based on the above, the Respondent requests the Tribunal to rule that Colombia properly invoked the denial of benefits provision of the FTA, and accordingly that the Tribunal lacks jurisdiction over GCG's claims in this case.

(3) The Claimant's Ancillary Claim under Article 1101 of the FTA

81. The Respondent asks the Tribunal to declare that it does not have jurisdiction with regard to the new claim presented for the first time in the Claimant's Counter-Memorial on Jurisdiction, which the Respondent characterizes as a claim regarding Article 1101 of the FTA.[39]

82. The Respondent argues that Claimant's new claim must be rejected because: ***(i)*** it is not incidental or additional to the claims contained in GCG's Request for Arbitration or its Memorial, but constitutes an entirely new claim; and ***(ii)*** it does not meet the requirement of ICSID Arbitration Rule 40, according to which ancillary claims must be within the scope of the consent of the parties and within the jurisdiction of the Centre. Regarding this latter argument, the Respondent submits that GCG may not invoke Article 1101 of the FTA, because Chapter Eleven of the FTA as a whole concerns investments in financial

[37] Resp. Reply, ¶¶ 150-156.
[38] Resp. Reply, ¶¶ 10, 139-149.
[39] Resp. Reply, ¶ 12.

institutions, which does not apply to GCG. Moreover, the Respondent contends, the provisions of Chapter Eleven of the FTA fall outside the categories of claims that investors of a party may submit to arbitration under Section B of Chapter Eight of the Treaty. To adjudicate claims based on Chapter Eleven of the FTA, the Claimant would have to initiate dispute resolution pursuant to Article 1101(2)(b) of the Treaty.[40]

B. The Claimant's Position

(1) Timing of Colombia's denial of benefits and burden of proof

83. The Claimant submits that the alleged denial of benefits was untimely and that the Respondent has not met its burden of proof concerning the DoB Objection.

a. Timing of Colombia's denial of benefits

84. The Claimant asserts that Colombia's effort to deny benefits to GCG was untimely based on two main grounds: ***(i)*** consent to ICSID arbitration was perfected prior to Colombia's supposed denial of benefits; and ***(ii)*** the denial of benefits clause cannot operate retroactively.[41]

85. ***First***, the Claimant asserts that Colombia's consent was perfected prior to its purported denial of benefits and may not be unilaterally withdrawn.[42] The Claimant states that Colombia provided advance consent to the submission of claims to arbitration under Article 823 of the FTA on 15 August 2011 (the date of the FTA's entry into force). GCG in turn gave its consent when it submitted its claim to arbitration on 25 May 2018 (*i.e.*, when its Request for Arbitration was received by the ICSID Secretary-General pursuant to Article 822(4) of the Treaty). Accordingly, consent to ICSID arbitration was perfected on 25 May 2018.[43] The Claimant also highlights the interplay between Articles 823(2) and 822(4) of the Treaty and Article 25(1) of the ICSID Convention, which provides that once consent has been given, no party may withdraw its consent unilaterally.[44]

[40] Resp. Reply, ¶¶ 13-16.
[41] Cl. C-Mem., ¶¶ 141-180.
[42] Cl. C-Mem., ¶¶ 142-161.
[43] Cl. C-Mem., ¶¶ 142-144 and Cl. Rej., ¶ 147.
[44] Cl. C-Mem., ¶¶ 150-151 and Cl. Rej., ¶ 135.

Therefore, since the Respondent purported to deny benefits after consent to ICSID arbitration was perfected, its letter of 31 May 2018 can have no impact on the Tribunal's jurisdiction.[45]

86. In this regard, the Claimant also points out that denial of benefits is not included among the conditions to consent set out in Article 821 of the FTA regarding conditions precedent to arbitration and, accordingly, Article 823 of the Treaty does not make the Parties' consent subject to a subsequent denial of benefits.[46]

87. According to the Claimant, none of the Respondent's arguments to the contrary has merit.[47] For instance, it dismisses the Respondent's assertion that consent was perfected only upon ICSID's registration of the case, based on the clear terms of Article 822(4) of the FTA and the fact that ICSID's screening process of requests for arbitration mean that there is always a delay between the receipt of the request and its registration.[48]

88. ***Second***, the Claimant argues that nothing in the text, the context or the object of the FTA suggests that the denial of benefits clause may have retroactive effects.[49] For instance, Article 814(2) contains no wording to the effect that a denial of benefits has retrospective effects. Regarding context, other provisions of the FTA (including Articles 2114 and 2115) also deal with adjustment of benefits and the mechanisms in those articles are prospective only.[50] The Claimant further refers to the general principle of non-retroactivity of treaty provisions codified in Article 28 of the VCLT (and applied in a number of international proceedings) to conclude that the absence of a stated retroactive effect signals an intent for the treaty to apply prospectively.[51]

89. Moreover, the Claimant rejects the Respondent's argument that the Treaty imposes no time limit on denial of benefits decisions. GCG argues that "the real issue is not whether

[45] Cl. C-Mem., ¶ 152 and Cl. Rej., ¶ 8.
[46] Cl. Rej., ¶¶ 136-137.
[47] Cl. C-Mem., ¶¶ 153-180. *See also* Cl. Rej., ¶¶ 147-154.
[48] Cl. C-Mem., ¶¶ 154-158.
[49] Cl. C-Mem., ¶¶ 162-179 and Cl. Rej., ¶¶ 133-146.
[50] Cl. C-Mem., ¶¶ 163, 169-170. *See also* Cl. Rej., ¶¶ 140-142.
[51] Cl. C-Mem., ¶¶ 171-174 and Cl. Rej., ¶ 145.

Article 814(2) applies retroactively, but whether *a decision to deny benefits* under the authority of that Article has retroactive effect."[52]

90. In addition, the Claimant argues that the six months' advance notice period, in the form of a notice of intent, that Article 821(2)(c) of the FTA requires before a claim may be submitted to arbitration, constitutes sufficient time for a State to consider whether denial of benefits is warranted. In the Claimant's view, it also shows the Contracting Parties understood that after submission to ICSID arbitration, the consent given could not be withdrawn. In this case, there was a period of almost one year and a half (16 months) after GCG's Notice of Intent, and before arbitration was commenced, during which Colombia could have denied the benefits of the Treaty to GCG.[53] Certainly, the Claimant points out, the terms of the Notice of Intent and of the letter declaring the Parties' negotiations unsuccessful showed no uncertainty regarding GCG's reliance on its rights under the FTA, including the right to resort to arbitration.[54]

91. Finally, the Claimant submits that the Respondent's reliance on cases dealing with treaties lacking equivalent notice provisions is misplaced and that its remaining authorities are inapposite.[55]

b. Burden of proof

92. The Claimant refers to the principle of international law that each party has the burden of proving the facts on which it relies (*onus probandi incumbit actori*) to observe that Colombia, as the State party raising objections to jurisdiction, "bears the burden of proving the justification in fact and law for its purported denial of benefits."[56] The Claimant argues that the Respondent has not met such burden of proof.

93. In its Rejoinder, the Claimant addresses the issue of burden of proof as part of its analysis of one of the grounds for denial of benefits (alleged control by non-Canadians), as it

[52] Cl. Rej., ¶ 146 (emphasis in the original).
[53] Cl. C-Mem., ¶¶ 176, 179 and Cl. Rej., ¶ 148.
[54] Cl. Rej., ¶¶ 150-153.
[55] Cl. C-Mem., ¶¶ 177-178.
[56] Cl. C-Mem., ¶ 23. *See also id*., ¶¶ 24-26 and Cl. Rej., ¶ 92.

considers that there is no evidentiary dispute (only a legal dispute) between the Parties concerning the second requirement of denial of benefits (alleged lack of substantial business activities in Canada).[57] In that context, the Claimant relies on the *Apotex* case to distinguish "between the legal burden of proof (which never shifts) and the evidential burden of proof (which can shift from one party to another, depending upon the state of the evidence)."[58] It adds that the party on whom the burden rests must present *prima facie* evidence that proves this proposition for the evidential burden to shift. However, in this case, for the reasons identified below, Colombia has not satisfied that threshold.[59]

94. Finally, the Claimant refutes the Respondent's suggestion that the relevant evidence is uniquely within GCG's control. It asserts that the legal issue is whether the facts relied upon by Colombia as a basis to deny benefits under the Treaty supported that decision. Therefore, it is incumbent upon Colombia to provide the basis for its attempted denial of benefits in May of 2018.[60]

(2) Grounds for Denial of Benefits

95. As summarized below, the Claimant submits that the DoB Objection should be rejected because Colombia has failed to prove that GCG **(a)** is owned or controlled by non-nationals of Canada and **(b)** has substantial business activities in Canada, its State of incorporation.

96. As a preliminary matter, the Claimant submits that the two requirements of Article 814(2) of the FTA are cumulative and the Respondent therefore must prove both requirements in this case.[61] In the Claimant's view, neither of these requirements of Article 814(2) of the FTA was satisfied on the relevant date, regardless of whether such date is considered to be 25 May 2018 (the date of GCG's initial filing of its Request for Arbitration), 31 May 2018

[57] Cl. Rej., ¶ 90.
[58] Cl. Rej., ¶ 91 (citing *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014 ("***Apotex***") (CL-0208), ¶ 8.8).
[59] Cl. Rej., ¶¶ 91, 93.
[60] Cl. Rej., ¶¶ 94-95.
[61] Cl. C-Mem., ¶ 28.

(the date of the Respondent's alleged denial of benefits), or – as the Respondent maintains – 2 July 2018 (the date on which ICSID registered this case).[62]

a. Ownership and control of the Claimant

97. The Claimant first refers to ***(i)*** the applicable standard, and then proceeds to submit that GCG is ***(ii)*** owned by nationals of Canada, and ***(iii)*** controlled by nationals of Canada.

98. ***First***, regarding the applicable standard, the Claimant refers to the definitions of the terms "investor of a Party" and "investment of an investor of a Party," contained in Article 838 of the FTA, to argue that the definition of the latter term in the FTA's Spanish version shows that ownership concerns direct legal title (not indirect or ultimate beneficial ownership), while control by contrast deals with either direct or indirect authority.[63]

99. Moreover, the Claimant refers to the definition of the term "enterprise" in Article 106 of the FTA, as "enterprise" is the object of the verb "own or control" in Article 814(2). It finds that some of the forms of entity mentioned in that definition (*e.g.*, "sole proprietorship") are capable of being owned by a single person. According to the ordinary meaning of the terms, owning an enterprise may encompass a situation where an investor owns all of the corporation's shares, whereas controlling an enterprise implies shareholding or contractual rights which accord a decisive power over the company's future.[64] Therefore, the Claimant concludes, "for Colombia to prove that [an] investor of other than Canada 'owns' GCG, it must show that such an investor owns all of Claimant GCG's outstanding shares."[65] Accordingly, the Claimant rejects the Respondent's allegation that an investor may own an enterprise even if the investor owns only a part of it.[66]

100. Concerning the legal standard applicable to the issue of control, the Claimant argues that: an investor may exercise control through either the legal capacity to control the enterprise or *de facto* control; tribunals have required compelling evidence to support an allegation

[62] Cl. C-Mem., ¶¶ 29-34.
[63] Cl. C-Mem., ¶¶ 80-83 and Cl. Rej., ¶¶ 65, 71-72.
[64] Cl. C-Mem., ¶¶ 84-87 (citing *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019 (CL-0192), ¶¶ 200-203).
[65] Cl. C-Mem., ¶ 88.
[66] Cl. Rej., ¶¶ 57, 59-64.

of *de facto* control; while the content of "control" in the Treaty is a matter of international law, the Tribunal may be assisted by Canadian securities law in applying that term to a public Canadian company such as GCG, and such law contains a rebuttable presumption of control where holders may exercise direction over 20% or more of a class of securities; and the reference to "investors" in Article 814(2) of the FTA, read jointly with Article 808(2), suggests that control over the enterprise must be exercised in the capacity of an investor (not merely through separate functions as an employee, officer or director).[67]

101. ***Second***, the Claimant submits that no single shareholder owns GCG. However, the owner of substantially all of GCG's shares is Clearing and Depository Services Inc. ("**CDS**"), a Canadian company.[68] The Claimant refers to the British Columbia Business Corporations Act, which requires corporations to maintain a central securities register listing the owners of shares in companies governed by that Act. Such register shows that, in May 2018, there was no single owner of the entirety of GCG's outstanding shares, and indeed 90 separate owners of shares in GCG, but ownership was dominated by CDS, which owned more than 99% of GCG's outstanding shares. Accordingly, the Claimant argues that pursuant to Canadian law, the legal owner of nearly all of GCG's shares is Canadian.[69]

102. In addition, the Claimant argues that, while Canadian corporate and securities law recognizes the concept of beneficial owners of shares, these are not registered owners of shares. As the Treaty's reference to ownership concerns legal title, beneficial ownership is not pertinent to the question of who holds legal title of the shares.[70] In any event, the identity of all of GCG's beneficial owners is not ascertainable, except for a limited class of beneficial owners who have provided permission for their identities to be disclosed (the so-called Non-Objecting Beneficial Owners or "**NOBOs**"). Focusing therefore on the limited information that exists concerning the NOBOs, the records show nearly 1,900 beneficial owners, representing about 17% of GCG's outstanding shares as of May 2018,

[67] Cl. C-Mem., ¶¶ 112-120 and Cl. Rej., ¶ 87.
[68] Cl. C-Mem., ¶¶ 3, 78, 89, 94 and Cl. Rej., ¶¶ 15, 73.
[69] Cl. C-Mem., ¶¶ 90-94.
[70] Cl. C-Mem., ¶¶ 95-97 and Cl. Rej., ¶ 75.

97% of whom were Canadian residents. Hence, no beneficial owner could be viewed as "owning" GCG.[71]

103. The Claimant also rejects the Respondent's contention that a majority of GCG's shares were not owned by Canadian nationals on May 2018. It argues in this regard that: Respondent's argument is based on shares beneficially owned by individuals who, in the aggregate, account for less than 12% of GCG's outstanding shares in May 2018; the argument fails as a matter of law because that 12% of shares does not meet the legal threshold of ownership (*i.e.*, ownership of all the outstanding shares of an enterprise); the Respondent *prima facie* fails to identify a non-Canadian who can be said to "own" GCG; and the wording of the FTA does not support the Respondent's proposed interpretation that ownership includes indirect and beneficial ownership. Accordingly, the Respondent has failed to prove that investors of a third State owned GCG at the relevant times.[72]

104. ***Third***, the Claimant asserts that, at all relevant times, no single shareholder controlled GCG.[73] The Claimant notes that CDS owns shares to allow financial intermediaries to participate in the CDS registry system and, in turn, those intermediaries held the shares for a wide share of beneficial owners. The record of this case does not establish any beneficial owner of GCG's shares of any nationality having a controlling interest in GCG (*i.e.*, carrying more than 10% of the voting rights attached to the outstanding common shares). Messrs. Iacono and de la Campa, for instance, collectively controlled only 5.79% of GCG's shares, which does not constitute a controlling interest by any objective standards.[74]

105. The Claimant therefore rejects the Respondent's contentions concerning GCG's alleged control by non-Canadians.[75] It argues in this regard that: the Respondent's allegation that Messrs. Iacono and de la Campa were the "public face" and directors/officers of GCG is legally insufficient to establish the element of control, because directors are elected by (and

[71] Cl. C-Mem., ¶¶ 4, 98-102 and Cl. Rej., ¶ 81.
[72] Cl. C-Mem., ¶¶ 103-108 and Cl. Rej., ¶¶ 77-78, 93.
[73] Cl. C-Mem., ¶¶ 76, 109, 121.
[74] Cl. C-Mem., ¶¶ 6, 122-123 and Cl. Rej., ¶¶ 110-111.
[75] Cl. C-Mem., ¶¶ 125-139.

serve at the pleasure of) the company's shareholders;[76] the 2018 Management Information Circular to which the Respondent refers recognizes that, as of the date of that circular, Messrs. Iacono and de la Campa did not hold a controlling combination of shares;[77] and the fact that Messrs. Iacono and de la Campa are not Canadian does not strip GCG of its Canadian nationality.[78] Also, the Respondent's allegation that Messrs. Iacono and de la Campa exercise substantial influence over GCG because they have been directors of the company since 2010 fails both as a matter of law and evidence, since the activities the Respondent identifies as demonstrating the extent of their influence are simply within the directors/officers' scope of work.[79]

106. Moreover, the Claimant notes that, while it is correct that GCG historically was the result of a reverse takeover, that 2010 transaction is not pertinent to the issue of control in 2018.[80] The Claimant also asserts that it is irrelevant whether a majority of GCG's Directors are Canadian, for purposes of determining control. Finally, the Claimant observes that the absence of a controlling beneficial owner in a public Canadian company is not an unusual scenario, nor is it evidence of non-Canadian control.[81]

b. Claimant's business activities in Canada

107. The Claimant first refers to ***(i)*** the applicable legal standard, and then submits that ***(ii)*** GCG has substantial business activities in Canada.

108. ***First***, with regard to the applicable standard, the Claimant argues that, as the Respondent acknowledges, the terms "substantial business activities" in Article 814(2) of the FTA imply that the investor must not be a shell company; *a contrario sensu*, the Claimant notes, an enterprise with any business activity of substance may not be denied benefits.[82]

[76] Cl. C-Mem., ¶¶ 16, 126 and Cl. Rej., ¶¶ 118, 120.
[77] Cl. C-Mem., ¶¶ 130-132 (referring to Resp. Mem., ¶ 68 citing GCG's Management Information Circular, p. 19).
[78] Cl. C-Mem., ¶ 127.
[79] Cl. C-Mem., ¶¶ 134-135.
[80] Cl. C-Mem., ¶ 129 and Cl. Rej., ¶ 119.
[81] Cl. C-Mem., ¶¶ 136-137.
[82] Cl. C-Mem., ¶¶ 37-39.

109. In this regard, the Claimant relies on prior cases in which tribunals have found that: the "substantial business activities" test is met where the record shows at least a relatively small number of activities in terms of quantity and quality (*i.e.*, "substantial" relates to the materiality, not the magnitude, of the business activity), and is dependent on the nature of the business; funding sourced through financial markets in the country in which an enterprise is incorporated constitutes proof of a genuine connection to that country; and in one prior case, the tribunal considered that the "substantial business activities" test was satisfied by an investor's status as a holding company with substantial international assets under its control.[83]

110. In addition, the Claimant submits that, contrary to the Respondent's assertions, no tribunal has ever applied a limitation of "substantial business activities" that is focused on the sector of activity performed,[84] such that (for example), a company involved in overseas mining activities must also conduct mining in its country of incorporation in order to satisfy the relevant Treaty test.

111. ***Second***, the Claimant submits that it conducts substantial activities in Canada. In this regard, the Claimant mentions, *inter alia*, that GCG has raised over US$500 million in Canada's equity and debt markets over the past decade; pays millions of dollars every year in Canada to Canadians for salaries, goods and services; and conducts some of its most important corporate functions from Canada.[85]

112. The Claimant states that most of its key functions are performed out of its global headquarters in Toronto (including accounting, shareholding relations, legal and IT support), where it incurs expenses for office space rent, utilities and other costs related to its local activities. The Claimant dismisses the Respondent's photographs of the premises, suggesting that they may depict the entrance in the brief period where renovation works were underway, and presents pictures taken on March and April 2020 which are said to accurately depict GCG's global headquarters since October 2017.[86] Moreover, GCG

[83] Cl. C-Mem., ¶¶ 37, 40-43, 66-67 and Cl. Rej., ¶ 46.
[84] Cl. Rej., ¶¶ 42-44.
[85] Cl. C-Mem., ¶¶ 2, 35, 45, 56 and Cl. Rej., ¶ 21.
[86] Cl. C-Mem., ¶¶ 46-49.

employs eight full-time employees at its global headquarters in Toronto, to whom it paid compensation exceeding CAD$ 1 million in 2018 alone; it incurs expenses for legal services in Canada; and it contracts professional services in Canada on an as-needed basis, including accounting and tax related services. In addition, in or about May 2018, GCG held six bank accounts in Canada with accounts holding assets in excess of US$25,500,000.[87]

113. The Claimant notes that it raises the financial resources for GCG's global operations on the Canadian capital markets and lists some of its most significant fundraising and investment transactions in Canada. It further notes that these transactions entailed millions spent on professional services from Canadian advisors and bankers, and that all securities issued by GCG trade on the Toronto Stock Exchange. Moreover, the Claimant stresses that GCG's shareholder and investor relations activities are performed in Canada, including the organization of the annual general and special meetings of GCG's shareholders in Toronto, the publication of official documents, press releases, social media communications, among other activities.[88]

114. The Claimant rejects the Respondent's contentions concerning the alleged non-substantial activities of GCG in Canada. Among other arguments, the Claimant submits the following: GCG had material assets in Canada in May 2018, including bank accounts (and even if it did not, it would still meet the "substantial business activities" test given its standing as a holding company with substantial international assets); the question of whether GCG's primary emphasis for mining operations in 2018 was Colombia is unrelated to whether GCG nonetheless had substantial business activities in Canada; and Respondent's argument that some of GCG's directors and management appear to be located outside Canada is irrelevant, as the presence of even a small number of full-time employees in Canada is sufficient to establish substantial business activities.[89]

115. Finally, the Claimant considers as legally misplaced the Respondent's observation that GCG did not prove it conducted any mining operations activities in Canada. According to

[87] Cl. C-Mem., ¶¶ 50-54 and Cl. Rej., ¶ 21.
[88] Cl. C-Mem., ¶¶ 56-62.
[89] Cl. C-Mem., ¶¶ 65-75.

the Claimant, Article 814(2) requires the Respondent to show that GCG has "no substantial business activities" in Canada, but does not limit the inquiry about business activities to a particular type or sector of activities.[90] Similarly, because the focus of a denial of benefits inquiry is on the activities of the investor (the Canadian entity) on a standalone basis, the activities of other operational companies (*i.e.*, mining operating companies) that GCG owns and controls are not pertinent for the DoB Objection.[91]

116. In sum, given that the record shows substantial business activities of GCG in Canada, that the Claimant's shares are largely owned by a Canadian company and the fact that it has no controlling investor, the Claimant requests the Tribunal to reject the DoB Objection and resume the proceedings on the merits.[92]

(3) Claimant's Ancillary Claim under Article 1101 of the FTA

117. In its Counter-Memorial, the Claimant refers to Article 1101 of Chapter Eleven of the Treaty regarding financial services, which incorporates by reference Section B of Chapter Eight (Investment - Settlement Of Disputes Between An Investor And The Host Party) for claims that a Party has breached, *inter alia*, Article 814 of the FTA regarding denial of benefits.[93] The Claimant contends that this reference demonstrates the possibility of bringing a substantive claim under the FTA for alleged breach of Article 814.

118. The Claimant submits that "out of an abundance of caution," it therefore presents an incidental claim under ICSID Arbitration Rule 40, alleging that Colombia has breached Article 814(2) of the FTA by means of its unfounded denial of benefits to GCG. The Claimant adds that this incidental claim is within the Tribunal's jurisdiction as it arises directly out of the subject matter of the dispute and falls within the scope of the Parties' consent.[94]

[90] Cl. Rej., ¶¶ 2-3, 17, 23-24, 34-41.
[91] Cl. Rej., ¶¶ 27-28, 53.
[92] Cl. C-Mem., ¶¶ 19, 139.
[93] Cl. C-Mem., ¶ 183.
[94] Cl. C-Mem., ¶¶ 185-187 and Cl. Rej., ¶¶ 158-162.

V. CANADA'S NON-DISPUTING PARTY SUBMISSION

119. Canada's non-disputing party submission focuses on three main issues: **(1)** general observations concerning Article 814 of the Treaty; **(2)** burden of proof and timing of a denial of benefits under Article 814(2); and **(3)** the grounds for denial of benefits.

120. ***First***, as a preliminary matter, Canada states that Article 814 of the Treaty must be understood by reference to the Contracting Parties' objectives set out in the Treaty's preamble (including the stimulation of mutually beneficial business activity and the strengthening of friendly relations between the Contracting Parties). The denial of benefits provision allows a Contracting Party to deny the benefits of the FTA if the objectives of the Treaty would not be advanced, such as where investors are enterprises with no real economic link or ties with the country in which they are constituted or organized. This prevents enterprises of non-Parties or of the denying Party from gaining access to treaty protection simply through incorporation in the jurisdiction of a Contracting Party.[95]

121. ***Second***, with regard to burden of proof, Canada submits that a claimant must meet its burden of establishing that it satisfies the definition of "investor of a Party" and of "investment of an investor of a Party" under Article 838 of the Treaty. If so, then the burden is on the party wishing to invoke the denial of benefits provision to establish that the conditions to deny benefits are met. A tribunal may take into account all evidence before it to determine whether the conditions to deny benefits under the Treaty are met, including evidence submitted by either disputing party. As to the consequences of a proper invocation of Article 814(2), Canada states that the investor of the other Contracting Party will not be entitled to treaty protection and a tribunal will not have jurisdiction over claims of breach of the treaty obligations.[96]

122. Concerning the timing of a denial of benefits, Canada notes that the FTA does not contain any time limitation to invoke the denial of benefits provision, nor any restriction precluding a Contracting Party from invoking this provision after a claim has been submitted to arbitration. It refers to rulings of arbitral tribunals that have invoked a similar absence of

[95] Canada's NDP Submission, ¶¶ 5-9.
[96] Canada's NDP Submission, ¶¶ 10-14.

any limiting language when interpreting comparable provisions in other agreements, and argues that requiring States to invoke a denial of benefits before a claim is submitted to arbitration would entail an unnecessary and untenable burden on the respondent State. Accordingly, Canada submits that a State's advance consent to arbitrate under the FTA is limited by the denial of benefits provision, and that this provision can be invoked after the submission of a claim.[97]

123. ***Third***, Canada addresses the two grounds for denial of benefits, namely ownership or control of the enterprise and whether the enterprise has substantial business activities in the other party in which it is incorporated.

124. With respect to "ownership" or "control" under Article 814(2) of the FTA, Canada notes that neither term is defined in the Treaty. Hence, these terms should be interpreted according to Article 31 of the VCLT. Also, because there is no established definition of those terms under international law, these concepts can derive meaning from domestic corporate law. In Canada's view, ownership of a corporation usually requires at a minimum the ownership of a majority of the voting shares, while control of a corporation is a fact-based inquiry that may extend beyond consideration of share ownership and must be considered on a case-by-case basis.[98]

125. Finally, concerning the existence of substantial business activities under Article 814(2) of the FTA, Canada argues that such determination requires a fact-based analysis, as it will depend on the circumstances of the case and a number of factors. It adds that the materiality of the business activity is the key question to establish whether the enterprise has real business operations creating an economic link to the other Party in which it is incorporated.[99]

[97] Canada's NDP Submission, ¶¶ 15-20.
[98] Canada's NDP Submission, ¶¶ 21-25.
[99] Canada's NDP Submission, ¶¶ 26-29.

VI. TRIBUNAL'S ANALYSIS

A. Timing of Colombia's denial of benefits

126. The Tribunal begins with the uncontroversial proposition that pursuant to VCLT Article 31(1), Article 814(2) of the FTA – like any other treaty provision – is to be interpreted and applied in accordance with the "ordinary meaning" of its terms, in the "context" in which they occur and in light of the Treaty's "object and purpose."[100] But in assessing the terms of any particular treaty provision, it is relevant to consider not only what they say, but equally what they do not say. Here, Article 814 of the FTA is entirely silent with respect to any time frame within which a Contracting Party may invoke its provisions to deny the benefits of the FTA's Chapter Eight (on "Investment") to an enterprise of the other Contracting Party. The only conditions regulating such a denial of benefits are non-temporal in nature, *e.g.*, with respect to Article 814(2), that "investors of a non-Party or of the denying Party own or control the enterprise and the enterprise has no substantial business activities in the territory" where it is constituted or organized.

127. In these circumstances, the Tribunal would have great difficulty concluding that the FTA implicitly contains an additional (temporal) limitation on the Contracting Parties' exercise of the right they expressly agreed to retain in Article 814, but without stating any such limitation. States are free to grant reciprocal protections to investors through the mechanism of investment treaties, but they are also free to condition such grants on particular qualifying principles. Some such conditions are framed as absolute: for example, that an investor must satisfy stated nationality requirements in order to qualify for treaty benefits. Other conditions may be framed in terms of State discretion, allowing a State Party to choose whether to invoke them, even if the requirements for doing so are met. Article 814 falls in the latter category ("A Party *may* deny …"): it permits, but does not require, a State Party to invoke its terms with respect to a given investor and its investments. In confirming that the State Parties thus have a choice with respect to denial of benefits, it would have been easy for the Contracting Parties to specify a deadline by which such choice must be made, in order to limit their mutual exercise of discretion. The fact that the

[100] VCLT (CL-0173), Article 31(1).

Contracting Parties did not do so must be given considerable weight. In general, it is not for arbitral tribunals, in interpreting the text of investment treaties, to read into such texts additional requirements (either on States or on investors) that the State Parties have not chosen to impose.

128. In this case, both the Claimant and the Respondent have offered arguments about the potential *practical consequences* of each other's position with respect to when States may deny FTA benefits to investors under Article 814(2), coupled with *object and purpose* arguments that are predicated on accepting the propositions about practical consequences. For example, the Respondent argues that the Claimant's approach – requiring any denial of benefits to predate the filing of a request for arbitration – would impose an impossible burden on States (which they could not have intended to assume) to investigate and monitor, for all investors in their country with whom they have no dispute whatsoever, potentially evolving facts regarding ownership and control or the extent of business activities in their State of incorporation.[101] The Claimant responds that its reading would not require any such sweeping monitoring program, because FTA Article 821.2(c) requires any investor wishing to pursue an arbitration claim to provide at least six months' advance notice of its intent to do so, which should provide sufficient time for a State to make any Article 814(2) determinations with regard to that specific investor. For its part, the Claimant argues that the Respondent's approach – allowing States to deny benefits even after a case has been filed – would run counter to the FTA's objective of providing investors with predictability about available protections. The Respondent replies that any object and purpose of predictability is ensured by investors understanding, in advance, that they must organize their ownership, control and business activities in such a way as to meet the minimal threshold for avoiding any issue of denial of benefits.

129. In the Tribunal's view, there is little need to enter into this debate. States have a choice whether to incorporate in their treaties express limits on when any denial of benefits must be invoked. While it may be interesting to debate whether they should do so – which would involve balancing a number of considerations – ultimately that is a policy question that is

[101] Canada expresses similar concerns in its NDP Submission. *See* Canada's NDP Submission, ¶ 17.

not for tribunals to resolve. Absent any evidence that particular States intended to impose a particular limitation on a right which they granted or reserved in a particular treaty, it is not within a tribunal's remit to impose such an additional limitation.

130. For these reasons, the Tribunal declines the Claimant's invitation to conclude that the Contracting Parties to the FTA may invoke Article 814(2) to deny benefits to an investor only up until the date the investor files its request for arbitration.[102] As Article 814(2) contains no such temporal restriction, investors operating in Canada and Colombia must understand, *ex ante*, that any protections otherwise offered to them in Chapter Eight of the FTA (which includes both substantive protections and dispute resolution mechanisms) may be subject to their ability to demonstrate that they meet the ownership or control and substantial business activity requirements of that provision. This is little different from understanding, *ex ante*, that they may eventually be called upon to substantiate their claims of qualifying nationality, or their status as *bona fide* investors with qualifying investments, or any other core jurisdictional requirements of the Treaty. Moreover, the fact that the FTA effectively conditions Treaty protection on the Article 814(2) requirements – although State Parties may choose whether or not to invoke the conditions in a particular case – does not mean that the Treaty in that respect operates "retroactively," or in contravention of Article 25(1) of the ICSID Convention, as the Claimant contends.[103] It simply means that by the terms of the FTA itself, investors are placed on notice in advance, from the time the FTA entered into force, that they may face a risk of not being able to rely on the FTA's

[102] *See Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012 (RL-0041) ("***Pac Rim***"), ¶ 4.85 (finding that such a limitation "could not be justified on the wording of CAFTA Article 10.12.2," which contained no stated time limit for denial of benefits); *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, 31 January 2014 (RL-12) ("***Guaracachi***"), ¶ 377 (noting that the Contracting Parties to a US-Bolivia investment treaty "could have agreed" to preclude any denial of benefits after initiation of arbitration, but did "not … do so.").

[103] *See Pac Rim*, ¶ 4.90 (RL-0041) (concluding that a CAFTA Party's "consent to ICSID arbitration … is necessarily qualified from the outset by [the denial of benefits clause]," and accordingly a denial of benefits invoked after an ICSID arbitration commences "cannot be treated as the unilateral withdrawal of that Party's consent to ICSID arbitration under ICSID Article 25(1)").

protections if they choose not to organize their activities in accordance with the standards set forth in Article 814.[104]

131. Finally, while the FTA itself imposes no limitation on when States may invoke Article 814(2), the operative arbitration rules may well impose their own limitations. A State's well-grounded denial of benefits has the effect of denying jurisdiction to a claimant seeking to rely on the substantive and dispute resolution provisions of Chapter Eight of the FTA; as such, any objection to jurisdiction must be raised no later than permissible under the applicable arbitration rules. In cases governed by the ICSID Convention and Arbitration Rules, the applicable deadline for objecting to jurisdiction on any grounds is the date of a respondent's counter-memorial,[105] so that effectively becomes the deadline for any enforceable denial of benefits. In this case, Colombia invoked Article 814(2) much earlier than that – just one day after its receipt of the Claimant's Request for Arbitration – so its invocation was timely under the applicable rules.

132. The question therefore becomes simply whether Colombia's invocation of Article 814(2) was well-grounded in its substance. The Tribunal turns to that issue below.

B. Grounds for Denial of Benefits

133. It is undisputed that States have the power to agree on the characteristics of investors to whom to extend treaty protection – and provided their agreement is clear, tribunals are obligated to honor that agreement. Here, the agreement between Canada and Colombia, reflected in Article 814(2) of the FTA, is that either State may deny the benefits of FTA Chapter Eight to an enterprise registered in the other State, if two *cumulative* conditions are met: (a) the enterprise is not owned or controlled by nationals of its home State, and (b) it has no substantial business activities in its home State. An enterprise which is unable

[104] *See Guaracachi,* ¶¶ 371-372 (RL-0012) (concluding that "the denial of benefits cannot be equated to the withdrawal of prior arbitral consent … . [T]he consent by the host State to arbitration itself is conditional and thus may be denied by it, provided that certain objective requirements … are fulfilled. All investors are aware of the possibility of such a denial …."); *Ulysseas, Inc. v. The Republic of Ecuador*, UNCITRAL, Interim Award, 28 September 2010 (RL-0038), ¶ 173 (noting that "the possibility for the host State to exercise the right in question is known to the investor from the time when it made its … investment," and "the protection afforded by the BIT" remains "subject … to th[at] possibility").

[105] ICSID Arbitration Rule 41(1) (CL-0036).

to rebut even one of these showings – *i.e.*, because it is neither owned nor controlled by home State nationals, nor has any substantial business activities in its home State – cannot assume entitlement to protection by the FTA. That is because the host State retains the right on that basis to deny it the benefits of the Treaty. The enterprise in such circumstances would only be able to claim Treaty benefits if the host State chooses not to exercise its retained (but discretionary) right to deny benefits under Article 814(2).

134. Conversely, the host State has no right to deny benefits to the enterprise if *only one* of Article 814(2)'s two cumulative conditions is met. As a result, an investor need demonstrate only that it satisfies *one* of the relevant criteria, in order to defeat a putative denial of benefits.

135. Accordingly, in this case, the issue of ownership and control of GCG, as a Canadian registered company, becomes relevant only if GCG has no substantial business activities in Canada – and equally, the extent of GCG's business activities in Canada becomes relevant only if the company is not owned or controlled by Canadian nationals. That reality simplifies matters to a considerable degree. The Parties have raised interesting issues about ownership and control of GCG, including how such matters are to be determined for a publicly traded company whose shares are nominally owned by the CDS, but on behalf of apparently diffuse beneficial owners whose identity is largely unavailable. The Parties also have debated the extent of any *de facto* control that may be wielded by Messrs. Iacono and de la Campa, and whether it is necessary for that inquiry to distinguish among the various capacities in which they might exert influence, including as company founders, corporate directors, or shareholders. Ultimately, however, the Tribunal need not decide any of these interesting issues, because in any event, GCG satisfies the alternate prong of the Article 814(2) inquiry, by virtue of having "substantial business activities" in Canada. The latter conclusion flows both from analysis of the phrase "any substantial business activities," and from the facts that have been demonstrated about GCG's various Canadian activities.

136. Starting with the treaty text, Article 814(2) permits a denial of benefits if there are "no substantial business activities in the territory of the Party under whose law it is constituted

or organized." The word "no," which qualifies "substantial business activities," makes clear that the inquiry is not about whether Canada is the jurisdiction with which GCG might have the *most* substantial connections. Companies may have business activities in many jurisdictions, including both the country in which they are registered and other countries in which they choose to conduct operations. Article 814(2) does not require a comparative analysis, weighing these various activities against each other to determine the single jurisdiction in which the enterprise has its most extensive or dominant connections. It simply requires that a Canadian-registered company have *some* substantial business activity in Canada.

137. The next word in the treaty text, "substantial," nonetheless provides an important materiality threshold. A business activity may not be mere cursory, fleeting or incidental, but must be of sufficient extent and meaning as to constitute a genuine connection by the company to its home State. That genuine connection is necessary to ensure that the company is one that the home State has an interest to protect, and which the host State would consider it appropriate for the home State to protect. The connection between the company and its home State cannot be merely a sham, with no business reality whatsoever, other than an objective of maintaining its own corporate existence. That requirement is reinforced by the last words in the treaty text, "business activities"; the activities of the company in its State of registration must be of a "business" nature. If the company has no activities in its home jurisdiction other than those required to maintain its bare registration, then it is impossible to conclude that it is conducting any "business" there, in any real sense of that word.

138. At the same time, while the company must have some real, material business activities in its home State, the Treaty contains no limitations on the nature of that business. It certainly does not require that the activities at home be of the *same* nature as those the company conducts in other jurisdictions. Nothing in the Treaty suggests, for example, that a company engaged overseas in natural resource exploration and development must conduct similar resource exploration or development at home, in order to satisfy the requirement of having substantial business activities there. It is entirely consistent with the Treaty text for such a company to locate coordinating or support functions in its home State, or to use its home

State as a hub for investment and financing activities that make possible the operational activities in other places. Either way, the activities in the home State must be examined on their own merits – separate from the activities undertaken in other jurisdictions, including by the company's subsidiaries or affiliates[106] – to determine if they are of sufficient reality and materiality as to satisfy the requirement that there be some "substantial business activities" in the country of registration.

139. Here, that requirement is amply satisfied, on any of the dates possibly relevant for the analysis. With respect to those dates, there has been no suggestion that the nature or substantiality of GCG's activities in Canada changed in any way between 25 May 2018 (the date it filed the Request for Arbitration), 31 May 2018 (the date Colombia invoked Article 814(2) to deny FTA benefits), or 2 July 2018 (the date ICSID registered the case). In these circumstances, the Tribunal sees no need to resolve in the abstract which of these dates might be most critical for evaluating the effectiveness of Colombia's denial of benefits. The important point is that for this entire period, the record reflects, *inter alia*, the following activities by GCG in Canada:

- Core corporate functions in Toronto: corporate finance, fundraising, accounting, shareholder relations, legal, administration and IT support;[107]
- Office space: spending over US$100,000 on rent, utilities and related expenses in 2018;[108]
- Eight full-time employees in Toronto: In 2018, GCG spent over CAD$1.2 million in Canada on compensation and benefits.[109]

[106] *See similarly Pac Rim*, ¶ 4.66 (RL-0041) (noting that the substantial business activities test "relates not to the collective activities of a group of companies, but to activities attributable to the 'enterprise' itself…. If that enterprise's own activities do not reach the level stipulated …, it cannot aggregate to itself the separate activities of other natural or legal persons to increase the level of its own activities: those would not be the enterprise's activities for the purpose of applying CAFTA Article 10.12.2").

[107] Cl. Mem., ¶¶ 251-255; Witness Statement of Michael M. Davies, 3 October 2019 ("**First Davies Statement**"), ¶¶ 13-14, 29.

[108] Cl. C-Mem., ¶ 46 (citing Second Witness Statement of Michael M. Davies, 10 April 2020 ("**Second Davies Statement**"), ¶ 25; C-0277, GCG, Schedule of Office Rent Expense in 2018; C-0278, GCG, Schedule of Other Office Expenses in 2018).

[109] Cl. C-Mem., ¶¶ 50-51 (citing Second Davies Statement, ¶ 24; C-0280, GCG, 2018 EHT Return and Remuneration Detail and Vouchers).

- Several bank accounts in Canada: Six bank accounts through which GCG actively conducts its business; in or about May 2018, those six accounts contained more than US$25 million;[110]

- Annual purchases of goods and services in Canada: GCG has spent hundreds of thousands of dollars related to accounting and advisory services, legal services, and shareholder and investor related activities, as well as miscellaneous services such as IT, liability policies and a listing fee for the Toronto Stock Exchange;[111] and

- Financing activities: GCG has raised more than US$500 million over the last 10 years, in transactions on the Canadian debt and equity markets, in order to support its operations.[112]

140. These activities are clearly "substantial," carried out over a period of years and having the depth and materiality to demonstrate a genuine and meaningful connection (and contribution) to Canada. They are undoubtedly "business" in nature, even if the business in question in Canada appears – as the Claimant contends – to be essentially investment management and financing, to support a different type of business (mining operations) conducted in Colombia by affiliated entities. The Tribunal is not persuaded by Colombia's argument that GCG must show mining activities *within* Canada, simply because its public-facing statements focus on mining activities; as the Claimant reasonably explains, public-facing statements often focus on the collective activities of a corporate group, including overseas activities and not solely home office activities. This does not change the nature of the Treaty inquiry, which is simply whether the Claimant entity – viewed on its own – has *any* substantial business activities in Canada, in any business sector.

141. In this case, the record shows that GCG does. Its activities in Canada go well beyond that which would be necessary for a "mailbox" or "shell" company to maintain its corporate form. The Tribunal accordingly has no doubt that these activities (taken together) satisfy the relevant criteria in Article 814(2), in order to render ineffective Colombia's attempted denial of benefits to GCG under the Treaty.

[110] Cl. C-Mem., ¶ 52 (citing Second Davies Statement, ¶ 26; C-0282, GCG's Bank Statements from Canadian bank accounts in or about May 2018).
[111] Cl. C-Mem., ¶¶ 53-54 (citing Second Davies Statement, ¶¶ 28-30; C-0283, GCG, KPMG Independence Letter dated 27 March 2019; C-0284, GCG Schedule of PwC on Advisory Fees in 2018).
[112] Cl. C-Mem., ¶¶ 56-59 (citing Second Davies Statement, ¶¶ 10-21; First Davies Statement, ¶ 15).

C. Admissibility of the Claimant's Ancillary Claim

142. The Tribunal notes as a threshold matter that the Parties differ in their characterization of the Claimant's ancillary claim, with the Claimant framing it as one alleging breach of Article 814(2) of the FTA,[113] and the Respondent characterizing it as one brought pursuant to Article 1101 of the FTA.[114] The first step in addressing the admissibility of any ancillary claim is a determination of *what claim in fact has been submitted*.

143. In the Tribunal's view, it is generally for the party submitting a claim to articulate what claim it actually is pursuing. To the extent there was any ambiguity on this score in the Claimant's Counter-Memorial,[115] the Claimant has now clarified its intention in its Rejoinder, stating that "the claim presented is not one under Chapter Eleven of the FTA, the financial services chapter. … [T]he claim is one under Chapter Eight for breach of Article 814(2)."[116] The Tribunal has no basis for disregarding this framing of the claim. Indeed, it would be nonsensical to decide a proposition about the admissibility of a claim, while ignoring the Claimant's clarifications about what that claim actually is.

144. The Parties clearly differ about whether the FTA contemplates any affirmative claims for a State's unfounded denial of benefits, with the Claimant saying it does, and the Respondent saying it does not. This appears to be an issue of first impression, and ultimately, any tribunal resolving this debate would need to consider a number of issues.

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[113] *See* Cl. Rej., ¶ 163 (requesting that the Tribunal "declare that Respondent breached Article 814(2) through its purporting to deny benefits in circumstances where the requirements of that Article were not met").

[114] Resp. Reply, ¶ 162 (requesting that the Tribunal "dismiss GCG's claim pursuant to Article 1101 of the FTA, including for lack of jurisdiction").

[115] *See* Cl. C-Mem., ¶ 183 (stating that "GCG has observed that the Treaty itself contemplates an additional approach to qualifying an unfounded denial of benefits," and citing Article 1101 of the FTA as "incorporat[ing] into [Chapter Eleven] by reference selected portions of the investment chapter (Chapter Eight)," including "for claims that a party has breached Article [] … 814 (Investment – Denial of Benefits"); *id.*, ¶ 184 ("[t]he Treaty thus contemplates that an appropriate remedy for a Party's unfounded invocation of the denial-of-benefits provision is a claim by the investor for breach of Article 814"); *id*., ¶ 186 ("GCG therefore presents an incidental claim that Colombia has breached Article 814(2) through its unfounded denial of benefits").

[116] Cl. Rej., ¶ 159; *see id.*, ¶ 160 (stating that while Article 1101 is "instructive in that it expressly recognizes the propriety of a claim … for an unfounded denial of benefits under Article 814," and "thus provides useful context for such a claim," "the claim asserted here is for breach of Article 814, not breach of Article 1101").

Without prejudice to further briefing, the relevant questions would seem to include *at least* the following:

a. Was Article 814 intended solely to create a defense for the Contracting States (*i.e.,* to deny benefits in certain circumstances), or also to create substantive treaty obligations (*i.e.,* not to deny benefits otherwise), which might be capable of being breached and for which a claim might be brought?

b. To the extent Article 814 might create substantive obligations, what is the applicable standard for breach? For example, is the provision breached any time a State attempts to deny benefits, simply because that attempt is later rejected by a tribunal? Or does the standard incorporate some element of wrongfulness, which distinguishes between a bad faith invocation of Article 814 and a potentially mistaken but good faith invocation, based on the State's contemporaneous understanding or belief about an investor's ownership, control and substantial business activities?

c. For this question, should an analogy be made to the assertion of other jurisdictional objections or merits defenses, which (even if unsuccessful), generally are not considered to give rise to additional substantive treaty breaches, or is a denial of benefits qualitatively different, such that an unfounded denial would be an independent breach of a State's obligations to investors?

d. To the extent any breach were to be found, would it give rise to any claim for relief other than a potential assessment of costs incurred in disputing a denial of benefits, which already may be considered in the context of a holistic costs determination at the end of an arbitration proceeding?

145. The Tribunal sees no need to engage now in any analysis of any of these questions, which the Parties have not yet briefed in any detail. As discussed during the Hearing on Jurisdiction, the only question properly before the Tribunal at this stage is whether the Claimant's new claim is *admissible* under Arbitration Rule 40.[117] The main purpose of Arbitration Rule 40 is to regulate when new claims may be asserted in the context of an ongoing proceeding, and alternatively when they may need to be pursued (if at all) through the commencement of a separate proceeding.

146. Arbitration Rule 40(1), entitled "Ancillary Claims," provides as follows:

[117] Rev. Tr. Day 1 (ENG), 148:4-150:17 (answers by Mr. Legum and Mr. Adam, for the Claimant and the Respondent respectively, to questions by the Tribunal President).

> (1) Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.
>
> (2) An incidental or additional claim shall be presented not later than in the reply and a counter-claim no later than in the counter-memorial, unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding.
>
> (3) The Tribunal shall fix a time limit within which the party against which an ancillary claim is presented may file its observations thereon.

147. The three paragraphs of Rule 40 may be seen as addressing, respectively, the substantive, temporal and procedural requirements of admissibility of an ancillary claim. The Tribunal considers these requirements in turn below.

148. With regard to the substantive requirements, the admissibility of a new claim is governed by the same regime whether the claim at issue is characterized as an "incidental" or an "additional" claim. Although the two terms are not defined, their plain meaning carries somewhat different connotations, with the word "incidental" generally connoting "something that happens in connection with something else, as a minor consequence of or an accompaniment to the other matter," whereas the word "additional" does not on its own terms necessarily require a connection to an existing event.[118] Nonetheless, Arbitration Rule 40 draws no distinction between incidental and additional claims, both of which are deemed to be subsets of a broader concept, denominated as "ancillary claims."[119] In both instances, the applicable test is the same.

149. That test has two components. First, as a threshold matter, a Tribunal must consider under Arbitration Rule 40(1) whether the new claim would "be within the scope of consent of the

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[118] *Lao Holdings N.V. and Sanum Investments Limited v. Lao People's Democratic* Republic, ICSID Case Nos. ARB/(AF)/16/2 and ADHOC/17/1 ("***Lao Holdings***"), Procedural Order No. 2 (23 October 2017), ¶ 21 (referencing various dictionary definitions of the word "incidental"), available at http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C5526/DC11255_En.pdf.

[119] *Cf. Lao Holdings*, Procedural Order No. 3 (14 November 2017), ¶ 10 (making the same observation about Article 47 of the ICSID Arbitration (Additional Facility) Rules); available at http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C5526/DC11336_En.pdf.

parties and … otherwise within the jurisdiction of the Centre." The Tribunal does not interpret this language as requiring – nor has either Party in this case suggested it requires – "a mini-trial and decision on all potential jurisdictional objections in order to determine, at the threshold stage, if an ancillary claim even may be admitted for examination."[120] Rather, "[i]f the same claim could have been admitted … for further proceedings had it had been included in an original request for arbitration, then [this] threshold admissibility inquiry … is likewise satisfied."[121] Simply put, a tribunal may admit an ancillary claim for consideration, while still permitting a respondent to raise jurisdictional objections as part of its observations on that claim.

150. The second and more immediate requirement for admissibility under Arbitration Rule 40(1) is whether the incidental or additional claim "aris[es] directly out of the subject-matter of the dispute." For this purpose, the Tribunal considers that the subject matter of the dispute cannot be defined strictly by the boundaries of the original legal claims, or the test would become a tautology requiring that any new claims arise directly from prior claims, which by definition any "additional" claim (as distinct from a purely "incidental" claim) could never satisfy. For the test to have any meaning, "the dispute" must be defined as having an objective subject matter that is broader than the original legal claims themselves, so as to allow for the possibility of an "additional" claim that is distinct from the prior claims, but still arises directly out of the same *subject matter* of the general dispute.

151. This is entirely consistent with the framing of the unofficial commentary on the original 1968 ICSID Arbitration Rules, which queries whether adjudication of the ancillary claims is necessary to "achieve the final settlement of *the dispute*," as distinct from the final settlement only of the original claims.[122] The commentary envisions that this will occur only where there is a close "factual connection" between the original and ancillary claims, but this does not mean that an ancillary claim cannot involve *additional* facts – simply that

[120] *Lao Holdings*, Procedural Order No. 3, ¶ 7.
[121] *Id.*
[122] ICSID Rules and Regulations 1968 (with commentary), available at https://icsid.worldbank.org/sites/default/files/ICSID%20Regulations%20and%20Rules%201968%20-%20ENG.pdf (commentary on Rule 40) (emphasis added).

any additional factual inquiry must have a sufficient *connection* to the matrix of facts already present in the dispute before the tribunal. A factual connection is not the same as an identity of facts.

152. On the other hand, the Tribunal does not accept that the "subject-matter of the dispute" can be defined so expansively as to mean any and all harm to a particular investment, which can be attributed to a given State under laws of international State responsibility. If one set of official acts against a particular investment (say, by Actor A in Year B) has no real factual connection to another set of official acts against that investment (say by Actor C in Year D), the fact that the two entirely separate grievances independently caused harm to the same investment would not necessarily mean that claims about the latter "aris[e] directly out of the subject-matter of the dispute" initiated to resolve the former. This again is why the Explanatory Note requires a sufficiently close "factual connection" between the two sets of claims, which cannot be established simply by observing that the they both involve the same investment and the same respondent State.

153. Applying these principles to the case at hand, the Tribunal considers that there is sufficient linkage between the original claims and the proposed new claim to satisfy the requirements of Arbitration Rule 40(1). The new claim about an allegedly unfounded invocation of the denial of benefits provision has a direct factual connection to the original claims, since the benefit sought to be denied is the ability to pursue redress for the subject matter of the original claims. It would be nonsensical, in these circumstances, to require the new claim to be brought in a separate proceeding.

154. As for the second requirement of Arbitration Rule 40 – addressing the temporal requirements for asserting an ancillary claim that meets the substantive admissibility requirement set forth in Article 40(1) – Article 40(2) distinguishes between (a) ancillary claims that may be presented as a matter of right ("[a]n incidental or additional claim shall be presented no later than in the reply"), and (b) ancillary claims that may be presented later only with Tribunal authorization ("unless the Tribunal, upon justification by the party presenting the ancillary claim an upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in this proceeding"). There is no

dispute that the Claimant's new claim in this case falls into the former category, as it was presented during an initial bifurcated phase of this case to consider one of the Respondent's jurisdictional objections, and well prior to the Claimant's reply on the merits.

155. Finally, the third provision in Arbitration Rule 40 addresses the procedural implications of a decision to admit an ancillary claim. Rule 40(3) provides that "[t]he Tribunal shall fix a time limit within which the party against which an ancillary claim is presented may file its observations thereon." Taken together with Rule 40(2), which provides claimants the right to file ancillary claims as late as their reply on the merits, the text suggests that an ancillary claim may be permitted even if only one round of responsive briefing still may be afforded in the written stage of the proceeding (*i.e.,* in a respondent's rejoinder memorial). This is consistent with the unofficial commentary to Rule 40, which sets out explicitly that "[n]ormally the written procedure on an ancillary claim is restricted to one 'round,'" although tribunals obviously have discretion to permit additional briefing if they consider this appropriate.[123] Be that as it may, because the Claimant in this case pleaded its ancillary claim prior to the Respondent's counter-memorial on the merits, the Respondent will have two opportunities to address the claim, namely in that submission and, after the Claimant responds in its reply on the merits, in its subsequent rejoinder.

156. For these reasons, the Tribunal considers that the substantive, temporal and procedural requirements of Arbitration Rule 40 have been met. The Tribunal accepts the Claimant's new claim as admissible, without prejudice to the Respondent's ability to challenge that claim, in its forthcoming written submissions, on either jurisdictional or substantive grounds.

[123] *Id.* (commentary on Rule 40). Indeed, even with respect to claims originally pleaded, the ICSID Arbitration Rules grant parties as a matter of right only one round of written submissions, while making a potential second round subject to party agreement or tribunal discretion. *See* ICSID Arbitration Rule 31(1) ("the written procedure shall consist of … (a) a memorial by the requesting party; (b) a counter-memorial by the other party; and, *if the parties so agree or the Tribunal deems it* necessary: (c) a reply by the requesting party; and (d) a rejoinder by the other party.") (emphasis added).

VII. DECISION

157. For the reasons set forth above, the Tribunal decides as follows:

(1) the Respondent's request to dismiss the Claimant's claims, on the basis that the Respondent validly denied the benefits of Chapter Eight of the FTA to Claimant pursuant to Article 814(2) of the FTA, is denied;

(2) the Claimant's request to dismiss the Respondent's objection to jurisdiction on the basis of Article 814(2) of the FTA is granted;

(3) the Respondent's request to dismiss the Claimant's new claim for breach of Article 814(2) of the FTA, on the grounds that it does not meet the requirements for an ancillary claim under Arbitration Rule 40, is denied;

(4) the Claimant's request for a declaration that Respondent breached Article 814(2) through its purporting to deny benefits is denied as premature, pending further briefing from the Parties regarding the availability of relief for such a claim; and

(5) the Tribunal reserves decision on the Parties' respective requests for costs, for determination in conjunction with any subsequent such requests at the close of this proceeding.

[Signed] [Signed]

Professor Bernard Hanotiau
Arbitrator

Professor Brigitte Stern
Arbitrator

[Signed]

Ms. Jean E. Kalicki
President of the Tribunal