
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**AMEC FOSTER WHEELER USA CORPORATION (USA),
PROCESS CONSULTANTS, INC. (USA), AND
JOINT VENTURE FOSTER WHEELER USA CORPORATION AND PROCESS CONSULTANTS, INC. (USA)**
Claimants

v.

THE REPUBLIC OF COLOMBIA
Respondent

ICSID Case No. _____

REQUEST FOR ARBITRATION

December 6, 2019

*Amec Foster Wheeler USA Corporation, Process Consultants, Inc., and Joint Venture Foster
Wheeler USA Corporation and Process Consultants, Inc. v.
The Republic of Colombia*

REQUEST FOR ARBITRATION

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REQUEST FOR ARBITRATION

I. INTRODUCTION

1. Amec Foster Wheeler USA Corporation and Process Consultants, Inc., individually and as members of a contractual joint venture named FPJVC (collectively, “FPJVC” or “Claimants”) hereby submit this Request for Arbitration with respect to the legal dispute described herein with the Republic of Colombia (“Colombia” or “Respondent”) (Claimants and Respondent together, the “Parties”), in accordance with Chapter 10 of the United States-Colombia Trade Promotion Agreement (the “TPA”), which entered into force on May 15, 2012.¹ Claimants hereby elect to proceed with this arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “ICSID Convention”) and the ICSID Rules of Procedure for Arbitration Proceedings (the “ICSID Arbitration Rules”), in accordance with Article 10.16.3(a) of the TPA.²

2. Respondent has violated Claimants’ rights under the TPA and international law. As set forth below, Respondent, acting through the *Contraloría General de la República* of Colombia (the “CGR”), has improperly initiated a fiscal liability proceeding against Claimants in which Respondent seeks approximately US\$2.43 billion,³ despite the lack of any colorable legal or factual basis to do so, causing serious and substantial damage to Claimants even in advance of a final ruling. It is, moreover, clear that the CGR has prejudiced the case, and that a ruling adverse to Claimants is a virtual certainty.

¹ See United States Department of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2019*, at 91, available at <https://www.state.gov/wp-content/uploads/2019/05/2019-TIF-Bilaterals-web-version.pdf>. Chapter 10 of the TPA is attached hereto as CL-1 for the convenience of the Tribunal.

² See also Ex. CL-1, TPA, Art. 10.16.5 (“The arbitration rules applicable under paragraph 3, and in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration except to the extent modified by this Agreement.”).

³ The Charges or Auto No. 773 (as defined herein) also ordered the commencement of a separate proceeding related to the loss of profits allegedly suffered by Reficar for the amount of US\$1.94 billion as a result of the delays of the Project that should have delivered in August 31, 2013. See Article FIRST of Auto No. 773.

3. This dispute arises from a November 2009 contract between FPJVC and Refinería de Cartagena S.A. (“Reficar”) (the “Contract”) for the provision of services in connection with the modernization and expansion of a large, state-owned oil refinery located in Cartagena, Colombia (the “Project”).⁴ Reficar is wholly owned by Ecopetrol, S.A. (“Ecopetrol”); Respondent, in turn, owns approximately 88% of Ecopetrol’s voting capital stock and appoints the majority of Ecopetrol’s board of directors, and, through the board, Ecopetrol’s chief executive officer, as well as the entire Board of Directors of Reficar. Accordingly, the decision-making authority for both Reficar and Ecopetrol is vested in Respondent.

4. The initial terms of the Contract contemplated a traditional project management consultant role for FPJVC in which FPJVC would have had customary project management responsibilities and decision-making authority over the Project. Shortly after signing the Contract, however, Reficar radically changed FPJVC’s scope of work so that FPJVC was not acting as project manager and owner’s representative with decision-making authority. Instead, Reficar assumed management of the Project itself and acted as the sole decision-making authority. FPJVC personnel worked as consultants under the direction of Reficar’s project management team, but neither they nor FPJVC had authority over management of, or the expenditures for, the Project. Reficar, as well as FPJVC and Ecopetrol, acknowledged and memorialized these changes in the scope of FPJVC’s work both in subsequent communications and documents, and throughout the course of performance of the Contract.

5. Also intimately involved in the Project were Chicago Bridge & Iron (“CB&I”), which was the Engineering Procurement and Construction (“EPC”) contractor, and Ecopetrol and its Board of Directors, which worked with Reficar to make decisions about the Project and to approve specific large increases in the Project’s capital expenditures reflected by “Change Controls.”

6. In order to assist Ecopetrol with its oversight of the Project and to monitor its investment, Ecopetrol retained a construction consultant, Jacobs Consultancy (“Jacobs”),⁵ to independently investigate and issue reports tracking the progress of the Project, including

⁴ A copy of the Contract, without Appendices 1-7 and 9-29, is attached hereto as Exhibit C-1.

⁵ Jacobs is a technical professional services firm that provides technical, professional, and construction services, as well as scientific and specialty consulting services. Jacobs is a direct competitor of Amec Foster Wheeler USA Corporation.

identifying any delays and cost overruns and the reasons for them. Toward the end of the Project, Jacobs issued its October 2015 Report (the “Jacobs Report”) to Ecopetrol, which concluded unequivocally that FPJVC was not to blame for the Project delays and cost increases, emphasizing, among other things, that Reficar made all major decisions regarding the Project and that FPJVC’s “staff was placed only in positions of support, with inexperienced personnel of REFICAR in positions of direct control.”⁶ The Jacobs Report found that Reficar had elected to itself assume responsibility for management, budget, and administrative costs and expenses from the Project. As noted above, Ecopetrol, an agency and instrumentality of Respondent, and the corporate parent of Reficar, commissioned the Jacobs Report.

7. The Contract provides [REDACTED]

[REDACTED]

8. The Contract further provides [REDACTED]

[REDACTED]

9. In 2018, Respondent initiated the CGR proceeding against FPJVC, CB&I, the Ecopetrol Board of Directors, and Reficar’s directors and six of its officers, alleging that they were jointly and severally responsible for approximately US\$2.43 billion in alleged damages to Colombia arising out of the claimed mismanagement of the Project.⁸

10. Under Colombian Law 610 of 2000, the CGR is empowered to bring fiscal liability proceedings only against fiscal managers – that is, “those who have decision-making power over State resources or public funds under their control”⁹ – when, through fraudulent or grossly

⁶ A copy of the Jacobs Report is attached hereto as Exhibit C-2.

⁷ Ex. C-1, Contract § 10.1.

⁸ Notably, Respondent pursued the CGR proceeding against FPJVC despite the fact that Respondent, through Reficar, paid FPJVC everything FPJVC was owed under the Contract, and did so only after Reficar had initiated an ICC arbitration against Chicago Bridge & Iron (“CB&I”), the EPC contractor on the Project, seeking to recover all of the same alleged damages from CB&I. Reficar has not brought an ICC arbitration (or any other action) against FPJVC.

⁹ Constitutional Court, Judgment C-832 of 2002.

negligent conduct with respect to public funds, they cause economic harm to the Colombian State.¹⁰

11. The Colombian Constitution expressly limits the CGR's jurisdiction to the supervision of "fiscal management of the State":

Fiscal control is a public duty exercised by the Comptroller General of the Republic, which supervises the fiscal management of the administration and private individuals or entities that manage the Nation's funds or assets.

Such control shall be exercised in a subsequent and selective manner in accordance with the procedures, systems, and principles established by law.

The supervision of the fiscal management of the State includes the exercise of financial control, management and results, based on efficiency, economy, equity and the valuation of environmental costs. In exceptional cases, provided by law, the Comptroller may exercise subsequent control over the accounts of any territorial entity.

The Comptroller is a technical entity with administrative and budgetary autonomy. It shall not have any other duties than the ones related to its own organization

Constitución Política de Colombia, Art. 267.

12. FPJVC was not a fiscal manager under Law 610, and there is no colorable basis upon which it could be asserted to be one. The CGR, unsurprisingly, also failed to plead the elements required by Article 5 of Law 610:

- The CGR did not include any specific allegations related to fraudulent or grossly negligent conduct and made no effort to articulate how FPJVC's conduct caused the alleged harm, instead asserting mere conclusory allegations inferring wrongful conduct and causation based upon the fact that the Project grew in cost and was delayed, essentially seeking to impose *strict liability* upon FPJVC for the fiscal increases; and
- The CGR did not identify specific economic damage to the State, maintaining instead that Project budget increases that Reficar and Ecopetrol approved constituted such damage.

¹⁰ Article 5 of Law 610 of 2000 states that the first element of fiscal liability is fraudulent or negligent conduct. Colombian courts, however, have interpreted the statute to mean fraudulent or *grossly* negligent conduct. See Constitutional Court, Judgement C-340 of 2007 and C-338 of 2014.

Consequently, the CGR's exercise of jurisdiction over FPJVC is a grave misapplication of Colombian law that constitutes a denial of justice and a breach of the fair and equitable treatment standard.

13. Significantly, the CGR dismissed the Ecopetrol Board of Directors – all of whom are prominent Colombian nationals – even though those directors approved Project expenditures and had some decision-making authority, and FPJVC did not approve expenditures or have any decision-making authority. The CGR's refusal to apply the same legal standard to FPJVC, a foreign investor, further confirms the unlawful treatment of FPJVC.

14. Even if there were some colorable jurisdictional basis for the CGR proceeding – although there is not – Colombia's action would nonetheless violate FPJVC's rights under the TPA. The theory under which Colombia is proceeding against FPJVC violates its rights in two ways. First, the CGR proceeding deprives FPJVC of the protections of the Contract negotiated with Reficar, an agency or instrumentality of Colombia, notably FPJVC's right to have all disputes resolved through arbitration under the ICC Rules. Moreover, the liability and damage theories on which the CGR is proceeding constitutes a violation of FPJVC's most basic rights, including its right to due process. The CGR has simply claimed damages for expenditures on the Project in excess of Reficar's budget – which was based on the estimate of the EPC Contractor, CB&I, and not of FPJVC – and asserted that FPJVC is grossly negligent in failing, in some undescribed manner, to prevent those expenditures. Colombia, acting through the CGR, does not even attempt to show a causal link between those expenditures, all of which Reficar approved, and any act or omission of FPJVC, let alone acts even arguably constituting gross negligence. To impose damages on such a basis, or to seek to do so, violates FPJVC's rights under the TPA, as the recent award against Colombia in the *Glencore* arbitration makes clear.¹¹

II. PARTIES TO THE ARBITRATION

A. Claimants

15. Claimant FPJVC is a contractual joint venture that, among other things, provides engineering, management and consulting services to the oil and gas sector. Each of its members, Claimants Amec Foster Wheeler USA Corporation and Process Consultants, Inc., is a corporation organized under the laws of the State of Delaware, United States of America. Claimant Amec

¹¹ See *Glencore International A.G. v. The Republic of Colombia*, ICSID Case No. ARB/16/6, Award, ¶ 27 (Aug. 27, 2019).

Foster Wheeler USA Corporation's address is 17325 Park Row Drive, Houston, Texas 77084 USA, and Claimant Process Consultant, Inc.'s address is 53 Frontage Road, Hampton, New Jersey 08827 USA. Claimants are thus enterprises of the United States within the meaning of the TPA.

16. Claimants have a long history of investment in Colombia, which began in 1975 with a local engineering company called Tecniavance. Claimants continue to maintain an office in Bogota with over 700 personnel, which is one of the most important engineering companies in Colombia and supports projects in Colombia and around the world.

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

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Ari M. Berman
Pillsbury Winthrop Shaw Pittman LLP
31 West 52nd Street
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B. Respondent

18. Upon information and belief, the two public authorities in charge of representing Respondent Republic of Colombia in investment arbitrations are the Agencia Nacional de Defensa Juridica del Estado (Mr. Camilo Gómez Álzate, Director) and the Ministerio de Comercio, Industria y Turismo (Mr. José Manuel Restrepo Abondano, Minister of Commerce, Industry and Tourism). Upon information and belief, Respondent is represented at the Agencia Nacional de Defensa Juridica del Estado by:

Ana María Ordoñez Puentes
Directora Dirección de Defensa Jurídica Internacional
Agencia Nacional de Defensa Juridica del Estado
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In accordance with Annex 10-C of the TPA, notice and other documents shall be served on Respondent Republic of Colombia by delivery to Dirección de Inversión Extranjera y Servicios, Ministerio de Comercio, Industria y Turismo, Calle 28 # 13 A – 15, Bogotá D.C. – Colombia.

19. By law, Colombia owns all hydrocarbons found within its national territory. The National Hydrocarbons Agency (or *Agencia Nacional de Hidrocarburos*) manages the extraction, sale, or leasing of those natural resources and the supply of energy for the benefit of Colombia and various Colombian-owned and controlled entities, including Ecopetrol. Ecopetrol and Reficar carry out many, if not all, of the National Hydrocarbons Agency's duties.

20. Colombia owns approximately 88% of Ecopetrol's voting capital stock and appoints the majority of Ecopetrol's board of directors, and, through the board, Ecopetrol's chief executive officer. As of May 2009, Ecopetrol owns 100% of Reficar.¹²

21. Throughout the relevant time period, Reficar's and Ecopetrol's Boards of Directors were comprised largely of Colombian government officials. From 2006 to the present, Reficar's Board of Directors has included Colombia's Minister of Mines, Vice Minister of Mines, Director or Special Administrative Unit for Pension Management and Contributions to Social Protection, Director of the National Mining Agency, Vice Minister of Energy, and the Executive Director of the Energy and Gas Regulation Commission. Reficar's Board of Directors also includes the CEO, CFO, Downstream Vice President, and Senior Financial Officer of Ecopetrol. Similarly, from 2010 to 2018, Ecopetrol's Board of Directors has consisted of Colombian government officials, including Colombia's Director of National Planning Department, Minister of Finance, Minister of Mines and Energy, Minister of Internal Affairs, Finance Regulation Director at the Ministry of Finance, Technical Vice Minister at the Minister of Finance, and Minister of Health.

III. PROCEDURAL AND JURISDICTIONAL REQUIREMENTS

A. Consent and Waiver

22. Colombia has consented to this arbitration pursuant to Article 10.17.1 of the TPA, which provides that “[e]ach Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement.”

23. With respect to Claimants, Article 10.18.2 of the TPA provides, in part:

¹² Ex. C-2, Jacobs Report at 13. Reficar was originally formed with the participation of Ecopetrol at 49% and Glencore International at 51%. In May 2009, however, Glencore sold its interest in Reficar to Ecopetrol, and Ecopetrol now owns 100% of Reficar.

2. No claim may be submitted to arbitration under this Section unless:
 - (a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement; and
 - (b) the notice of arbitration is accompanied,
 - (i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant’s written waiver . . .

of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.

3. Notwithstanding paragraph 2(b), the claimant (for claims brought under Article 10.16.1(a)) . . . may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant’s . . . rights and interests during the pendency of the arbitration.

24. By submitting this Request for Arbitration, Claimants hereby consent to arbitration in accordance with the procedures set forth in Chapter 10 of the TPA. FPJVC has taken all necessary internal actions to authorize the commencement of this arbitration.¹³ Claimants have also executed a power of attorney authorizing Pillsbury Winthrop Shaw Pittman LLP to act as their representative in this arbitration.¹⁴

25. Claimants waive their rights “to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16” of the TPA. For the avoidance of doubt, this waiver is without prejudice of Claimants’ right to defend themselves in the fiscal liability proceeding and any related proceedings, including any appeals, and to initiate or continue any action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of Colombia, provided that the action is brought for the sole purpose of preserving Claimants’ rights and interests during the pendency of this arbitration.¹⁵

¹³ See Claimants’ Power of Attorney, Waiver, and Authorization to Commence Arbitration, attached hereto as Exhibit C-3.

¹⁴ *Id.*

¹⁵ *Id.*

B. Claimants Are Qualified to Submit a Claim to Arbitration Under the TPA

26. Claimants are qualified to commence this arbitration against Colombia pursuant to Article 10.16.1(a) of the TPA, because Respondent has (1) breached multiple obligations under Section A of the TPA, and (2) breached an investment agreement.

27. Article 10.16.1(a) of the TPA provides, in relevant part, that:

In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:

(a) the claimant, on its own behalf, may submit to arbitration under this Section a claim

(i) that the respondent has breached

(A) an obligation under Section A,

(B) an investment authorization, or

(C) an investment agreement;

and

(ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach

28. Article 10.28 of the TPA, in turn, defines:

- “claimant” as “an investor of a Party that is a party to an investment dispute with another Party”;
- “an investor of a Party” as, among other things, “a national or an enterprise of a Party, that attempts through concrete action to make, is making, or has made an investment in the territory of another Party”;
- “enterprise of a Party” as “an enterprise constituted and organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there”;
- “investment” as “every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital and other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include: (a) an enterprise; (b) shares, stocks, and other forms of equity participation in an enterprise; (c) bonds, debentures, other debt instructions, and loans; (d) futures, options, and other derivatives; (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts; (f) intellectual property rights; (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges”; and

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

29. Claimant Joint Venture Foster Wheeler USA Corporation and Process Consultants, Inc. is a contractual joint venture. Each of its members – Claimant Amec Foster Wheeler USA Corporation and Claimant Process Consultants, Inc. – is a corporation organized under the laws of the State of Delaware, United States of America, and is hence an enterprise of the United States within the meaning of the TPA. Claimants contracted with Reficar, a Colombian-owned enterprise, to provide project management services in connection with the construction and expansion of an oil refinery owned by Colombia to supply environmentally clean motor fuels to meet Colombian demand. In doing so, Claimants invested significant amounts of time, capital, personnel, and labor in Colombian territory. All of these acts were done with the expectation that Claimants would return a profit. The Contract also created rights, both tangible and intangible, to a contractual benefit having economic value to Claimants. As such, Claimants are “investor[s] of a Party” and have made an “investment” under the TPA.

30. The actions of Colombia, as detailed below, breached Article 10.3 (National Treatment), Article 10.4 (Most-Favored-Nation Treatment), Article 10.5 (Minimum Standard of Treatment), and Article 10.7 (Expropriation and Compensation) of the TPA, and, as a result, Claimants have incurred significant loss and damage by reason of, or arising out of, those breaches. Claimants therefore satisfy all requirements to submit a claim to arbitration under Article 10.16.1(a)(i)(A) of the TPA.

31. Additionally, the Contract is an “investment agreement,” as defined by the TPA, because Reficar is “a national authority of a Party” by virtue of the fact that it is wholly owned by Ecopetrol, a Colombian entity controlled by the Ministry of Mines and Energy. Therefore,

Respondent's breach of the Contract entitles Claimants to submit a claim to arbitration under Article 10.16.1(a)(i)(C) of the TPA.

C. Claimants Are Qualified to Submit a Claim to Arbitration Under the ICSID Convention

32. Article 10.16.3 of the TPA provides, in relevant part:

Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1:

(a) under the ICSID Convention and the ICSID Rules of Procedures for Arbitration Proceedings, provided that both the respondent and the Party of the claimant are parties to the ICSID Convention

33. Claimants satisfy all jurisdictional requirements to bring this arbitration under the ICSID Convention and the ICSID Arbitration Rules. Both the United States and Colombia are Contracting States to the ICSID Convention.¹⁶ In this regard, Article 25(1) of the ICSID Convention provides:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

34. The legal dispute at issue arises directly out of Claimants' investments in Colombia.

35. Claimants therefore exercise their right to submit their claim under the ICSID Convention and the ICSID Arbitration Rules in accordance with Article 10.16.3(a) of the TPA.

D. Notice and Time Requirements

36. In order for a claimant to submit a claim to arbitration under the TPA: (1) "the claimant and respondent should initially seek to resolve the dispute through consultation and negotiation"¹⁷; (2) at least "six months [must] have elapsed since the events giving rise to the claim"¹⁸; (3) no "more than three years [may] have elapsed from the date on which the claimant

¹⁶ See ICSID, Database of ICSID Member States, *available at* <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx> (indicating that Colombia signed the ICSID Convention on May 18, 1993, with the Convention entering into force for Colombia on August 14, 1997; and that the United States signed the ICSID Convention on August 27, 1965, with the Convention entering into force for the United States on October 14, 1966).

¹⁷ Ex. CL-1, TPA, Art. 10.15.

¹⁸ *Id.*, Art. 10.16.3.

first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant . . . has incurred loss or damage”¹⁹; and (4) “[a]t least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration (‘notice of intent’).”²⁰ Claimants have satisfied all of these requirements.

37. *First*, the Parties sought to resolve their dispute through consultation and negotiation, but were unsuccessful in doing so. A negotiation meeting took place on July 16, 2019, but the Parties reached no agreement on the settlement of the dispute during or after the conclusion of this negotiation.

38. *Second*, as detailed below, the events giving rise to the claim occurred more than six months prior to the submission of this Request for Arbitration, on March 10, 2017, when Claimants first received notice that the CGR had opened a fiscal liability proceeding against them.

39. *Third*, as detailed below, the events giving rise to the claim occurred less than three years prior to the submission of this Request for Arbitration.

40. *Fourth*, on December 26, 2018, Claimants submitted a Notice of Intent to Submit a Claim to Arbitration Under Chapter Ten of the United States-Colombia Free Trade Agreement (“NOI”) to Respondent, stating, *inter alia*, that FPJVC:

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

NOI, dated December 26, 2018.²¹

41. The required ninety-day period between submitting the NOI and submitting a request for arbitration concluded on March 26, 2019. As more than ninety days have elapsed since

¹⁹ *Id.*, Art. 10.18.1.

²⁰ *Id.*, Art. 10.16.2.

²¹ A copy of the NOI is attached hereto as Exhibit C-4.

Claimants delivered the NOI to Colombia, Claimants are entitled to, and do, submit this Request for Arbitration.

E. Governing Law and Language of the Arbitration

42. Claimants are submitting claims under both Article 10.16.1(a)(i)(A) and Article 10.16.1(a)(i)(C) of the TPA.

43. The TPA and applicable rules of international law apply to claims submitted under Article 10.16.1(a)(i)(A). *See* TPA, Art. 10.22(1) (“the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law”).

44. Colombian law, which governs the Contract,²² applies to claims submitted under Article 10.16.1(a)(i)(C). *See* TPA, Art. 10.22(2)(a) (“the tribunal shall apply . . . the rules of law specified in the pertinent investment authorization or investment agreement, or as the disputing parties may otherwise agree”).

45. Claimants propose that this arbitration be conducted in English.

F. Constitution of the Arbitral Tribunal

46. Under Article 10.19.1 of the TPA:

Unless the disputing parties otherwise agree, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.

47. As the Parties have not otherwise agreed to the number and appointment of arbitrators, the default provisions of Article 10.19.1 remain applicable.

48. In accordance with TPA Article 10.19.4(b), Claimants agree to the appointment of each individual member of the Tribunal.

IV. FACTUAL BASIS FOR CLAIMANTS’ CLAIMS

A. The Project

49. Ecopetrol owns an oil refinery in Cartagena, Colombia, which it acquired in 1974. Around 2004, Ecopetrol began searching for an international partner for a construction megaproject to modernize and expand the refinery’s capacity from 80,000 to 165,000 barrels a day. The Project is one of the biggest and most ambitious projects that has taken place in Colombia in the last several years.

²² Ex. C-1, Contract § 29.

50. Reficar was incorporated in 2007 as a private company to execute the Project. For several reasons, a project of this magnitude required Reficar to hire various entities to complete it.

51. *First*, “[m]ega-projects are extremely complex exercises and for that reason require a much-disciplined management during execution in order to comply with the plans.”²³ Reficar therefore entered into the Contract with FPJVC in November 2009 for FPJVC to provide project management services.

52. *Second*, Reficar needed to contract with an EPC contractor(s) to do the work. Initially, the Project was to be executed jointly by two EPC contractors: Technip and CB&I. For reasons unknown to Claimants, and against FPJVC’s recommendation, Technip was excluded from the Project and CB&I was selected as the sole contractor. In June 2010, Reficar entered into a cost reimbursable Engineering, Procurement, and Construction Contract (the “EPC Contract”) with CB&I. In the EPC Contract, CB&I agreed that the construction stage of the Project would be completed by February 28, 2013, and that CB&I would be responsible for the development of the Project schedule with mutual agreement with Reficar. CB&I, and not FPJVC, set the Project completion date and estimated cost – a date and cost that CB&I failed to deliver.

53. CB&I eventually completed the Project in July 2016 according to specifications, but at a total cost of about US\$6.1 billion – nearly three years late and more than double its original estimated cost.²⁴

B. FPJVC’s Original Scope of Work in the Contract

54. The Contract originally called for FPJVC to perform certain project management services and gave certain authority and responsibility to FPJVC, as set forth in Appendix 8, including: [REDACTED]

[REDACTED]

²³ Ex. C-2, Jacobs Report at 3.

²⁴ *Id.* at 5.

²⁵ See Ex. C-1, Contract, Appendix 8 §§ 1.1.1, 1.1.2.1, 1.1.2.4, 1.1.2.5 & 1.4(a).

²⁶ *Id.* § 5.

55. Notwithstanding Appendix 8 to the Contract, [REDACTED]

C. Reficar Changes FPJVC's Scope of Work

56. Nearly as soon as the Contract was signed, and despite all the project management responsibilities the Contract gave to FPJVC, Reficar changed FPJVC's responsibilities such that FPJVC was not permitted to perform its contractual obligations and did not manage the Project or have control over any funds. Instead, Reficar itself took on these functions and was the only entity with decision-making authority on the Project. FPJVC's role was reduced to that of supporting Reficar's management of the Project.²⁹

57. Indeed, at an early meeting in Houston, Texas in December 2009 – the month after the Contract was signed – Reficar advised FPJVC that it intended to manage the Project itself with the support of FPJVC. Reficar referred to the changed management of the Project as an “Integrated Project Management Team” (“iPMT”), although, in reality, Reficar led it with FPJVC personnel relegated to providing support to Reficar management. Additional similar discussions regarding a material change to FPJVC's role were subsequently held, including at an April 2010 meeting in Sugarland, Texas.

58. Reficar decided that it would directly manage the Project itself without the use of FPJVC as a project manager and would limit FPJVC's participation to assisting Reficar's management team by providing personnel in the areas, and for the positions, that Reficar determined were necessary. Under this changed scope of work, neither FPJVC, nor the personnel it seconded to Reficar, had decision-making authority; instead, FPJVC personnel acted as consultants to Reficar's own management to supplement and strengthen the Reficar Project Management Team (“PMT”), with all direction and decision-making power vested in Reficar.

59. Approximately four months after the December 2009 meeting, Elantis Risk Engineering Limited, which provides independent insurance-focused risk engineering and loss control consultancy services, delivered a report to be used by Reficar to place Construction All

²⁷ *Id.* § 4.

²⁸ *Id.* § 23.

²⁹ In addition, CB&I objected to being managed by its competitor FPJVC as a PMC.

Risk insurance for the Project (the “Elantis Report”). The Elantis Report reflected the changed scope of FPJVC’s work and documented that “Reficar have appointed *its own Project Management Team (PMT)* which includes personnel from Foster Wheeler to oversee implementation of the project.” (Emphasis added.) The Elantis Report describes FPJVC’s role with respect to Reficar’s owner PMT as follows:

At the time of the review Reficar were in the process of strengthening the Project Management Team (PMT) to ensure that the project meets the requirements of Reficar and to support and work in parallel with CB&I. Reficar have awarded a contract to Foster Wheeler *to provide* engineering and technical *support to the Reficar PMT*.

(Emphasis added.)

60. As far as FPJVC is aware, neither Reficar nor anyone else associated with the Project objected to or purported to correct the Elantis Report’s description of FPJVC’s role.

61. Subsequent monthly FPJVC progress reports similarly reflect Reficar’s decision to change the scope of FPJVC’s role in the Project. By way of example, in Monthly Report No. 2, for March 2010, FPJVC directly addressed its new responsibilities and diminished decision-making authority, and expressed its concomitant concerns to Reficar:

[Foster Wheeler (“FW”)] must be empowered, informed, and included in decision making on the project. *The authority to execute contractual obligations has not been delegated by Reficar*, despite several drafts of delegation of authority letters that have been provided to Reficar management. *In order to fulfill our obligations, FW must have authority to directly influence the associated Contractors on the project.*

* * *

Reficar and FW do not have alignment on the joint PMT organization, along with no specific authority to act on behalf of Reficar or stand alone as the PMC team. . . . CBI is not fully aware of FW roles and responsibilities since there has been no notification or delegation of authority issued to CB&I. . . . Client organization structure is not adequate for monitoring the activities of EPC phase for such a large project. FW is mirroring this organization by providing support as requested by client, as opposed to facilitating the work and supporting effective decision making.

(Emphasis added.)

62. Despite FPJVC’s stated concerns, Reficar adhered to its decision and confirmed the change in scope of FPJVC’s role and obligations under the Contract to others. In a May 18, 2010, letter, Reficar informed CB&I of the change in scope of FPJVC’s role: it announced Reficar’s appointment of John Gilchrist, of Reficar, as Project Director, and informed CB&I that “[i]n his

new role, John will lead the Project Management Team, integrated by the Reficar and the Foster Wheeler team members and will be the main contact person for all the Detail Engineering aspects of the Project.”

63. In its July 26, 2010, Master Project Execution Plan, Reficar explained its decision to modify the scope of FPJVC’s role and responsibilities:

Quite early in [the front-end engineering design], Reficar recognized that the project likely would not be converted to [lump sum turn key] for EPC and that EPC would be done under a reimbursable contract. This caused concern in Reficar because neither Reficar nor its owner, Ecopetrol, has adequate human resources to properly staff an Owners Team for such a large and complex project. One solution was to hire a Project Management Consultant to supervise the EPC Contractor. *As Reficar considered this option, we learned that inserting a PMC between Reficar and the Contractor would add significant cost to the project and also extend the project schedule. Reficar ultimately decided to contract Foster Wheeler in a unique profit sharing JV arrangement to strengthen the Owner’s Team. A contract with Foster Wheeler was signed in November 2009 and key members from Foster Wheeler joined the Owners Team in December 2009, contemporaneous with start of EPC.*

(Emphasis added.)

64. Approximately a year later, by letter dated August 17, 2011, Reficar informed FPJVC that it was again changing the scope of FPJVC’s role and responsibilities and that Reficar was assuming control of costs for the Project:

In order to separate control cost responsibilities from the execution functions, please be advised that in Reficar’s organizational structure, the Project Cost Control was internally transferred to [Reficar] since August 6th. . . . *[Reficar] will assume responsibility for control, budget, and administrative costs & expenses from the Project and Reficar Operations*, directly reporting to the Vice President of Finance.

(Emphasis added.)

65. On December 11, 2013, at Meeting No. 131 of Reficar’s Board of Directors, Mr. Carlos Vergara, in his capacity as Reficar’s Manager of the Contract, presented a comparison of the project management scheme originally set forth in the Contract with the modified structure actually utilized for the Project (*i.e.*, a structure in which FPJVC was used to strengthen Reficar’s owner PMT, as opposed to acting as a traditional PMC). According to the minutes of that meeting, Mr. Vergara explained that the Contract originally called for FPJVC to deal directly with the EPC Contractor (CB&I), but that arrangement “was not accepted by CB&I for it was not contemplated

by the EPC Contract.”³⁰ Consequently, Mr. Vergara explained that the modified project management structure ultimately utilized by Reficar was a “mixed organization” comprised of Reficar, Ecopetrol support personnel, and FPJVC support personnel.

66. In sum, and in accordance with Reficar’s change in FPJVC’s scope of work, throughout the Project FPJVC personnel only supported Reficar. Reficar managed the Project and decided whether or not to follow FPJVC’s advice. Reficar’s representatives led the iPMT, and at all times supervised, directed, and controlled CB&I; FPJVC had no right or power to direct or control CB&I. Reficar exclusively made all decisions related to the execution plan for the engineering, procurement, and construction of the Project. FPJVC did not have any decision-making authority to direct the manner in which CB&I and other contractors performed their contractual duties, to agree to or reject Change Orders, or to control what each contractor spent.

67. For its part, FPJVC performed according to the changed scope of work through the Project’s completion, and Reficar paid FPJVC in full, without objection or reservation, for its work.

68. To supervise the Project’s progress, Ecopetrol retained an independent third-party construction consultant, Jacobs. During the execution of the Project, Ecopetrol requested that Jacobs increase its technical assistance to include analysis of the Project’s progress analysis and follow-up and offer recommendations for improvement. Near the end of the Project in October 2015, Jacobs issued a comprehensive report entitled, “Cartagena Refinery Expansion Project History and Project Analysis.” The Jacobs Report explained that a portion of the Project delays and cost overruns resulted from Reficar’s decision to diminish FPJVC’s responsibility for the Project. The Jacobs Report concluded that Reficar did not permit FPJVC to act as a traditional project manager and owner’s representative (*i.e.*, with management autonomy and the ability to act on behalf of Reficar):

Managing a reimbursable contract requires an extensive project management team with more experience [than Reficar had]. Reficar acknowledged this limitation and engaged a project consultant (Foster Wheeler) to provide additional resources. However, instead of letting the management consultant take all the responsibility

³⁰ The CGR neglected to address these Reficar board meeting minutes in the 4,751-page Charges, despite summarizing numerous other Reficar board meeting minutes therein.

of the project, the consultant's staff was placed only in positions of support, with inexperienced personnel of Reficar in positions of direct control.³¹

69. The Jacobs Report further found that:

- “FPJVC’s team had no authority and became only additional personnel in Reficar’s team.”³²
- “Without having any authority, FPJVC’s personnel could only make suggestions and provide tools for project management.”³³
- “All the decisions had to be made by Reficar’s managers, who had little experience in a project this size and were outrun trying to handle the changes and deviations.”³⁴
- “Once REFICAR agreed to execute the project on a reimbursable basis, REFICAR recognized that neither REFICAR or its owner Ecopetrol had the sufficient number of experienced personnel for properly setting up a team to manage a large and complex project. A common approach in these cases is to hire a Project Management Contractor (PMC) to supervise the EPC contractor and manage the project on the owner’s behalf. The PMC is typically a contractor with experience in the execution of large projects and who takes the responsibility for supervision and management. **REFICAR considered this option, but chose not to implement it.** We are unaware of the discussions and analyses leading to this decision, but in some documents it is indicated that REFICAR believes that introducing a PMC between the owner and the EPC contractor would add cost to the project and would make the schedule longer. **REFICAR decided to engage Foster Wheeler (FW) only to supplement its management team. With this decision, REFICAR set up what is referred to as an integrated project management team (PMT) with the support of Foster Wheeler.**”³⁵
- “In an integrated management team (PMT), the authority and responsibility for decision-making must be delegated in specific positions within the organization, and these positions should not be duplicated. **This was not so in the REFICAR project, and all the decisions had to be made only by REFICAR managers. FW’s team had no authority and became only additional personnel in REFICAR’s team,** and many of the management functions were duplicated.”³⁶

³¹ Ex. C-2, Jacobs Report at 8. The CGR referred to various reports provided by Jacobs throughout the Charges, but the Jacobs Report is conspicuously absent.

³² *Id.* at 19.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* § 4 (emphasis added).

³⁶ *Id.* (emphasis added).

- *“Without having any authority, FW’s personnel could only make suggestions and provide tools for project management, and were not motivated to make decisions or take corrective actions. All the decisions had to be made by REFICAR’s managers, who had little experience in a project this size and were outrun trying to handle the changes and deviations. Foster Wheeler’s team became a team that made an excessive amount of analysis to support routine decisions. This often leads to delays, because routine decisions are made late and many decisions were reverted, occasionally several times during project execution.”*³⁷
- *“In this project, the responsibility of managing the day-to-day activities was totally under the control of the contractor CB&I, but the overall management and running was ultimately under the responsibility of REFICAR.”*³⁸
- *“The difference between quick resolutions needs and REFICAR’s approval and contracting procedures were never fully solved. Additionally, company policies did not allow to hand the control of the project over to the management consultant (FW) and exploit their experience, which would have expedited decision-making within the project.”*³⁹

70. In short, Reficar made it clear that FPJVC did not have decision-making authority from the beginning of FPJVC’s involvement in the Project. FPJVC’s role throughout the Project involved assisting the Project management team, in contrast to the terms of the Contract. FPJVC was not allowed to control or direct CB&I’s performance of its obligations under the EPC Contract, but rather was left to make suggestions as to the management of the Project. Accordingly, CB&I and Reficar made all major decisions during the course of the Project.

D. Reficar’s ICC Proceeding against CB&I

71. Prior to the issuance of the Charges, Reficar separately sought recovery of the same cost overruns and damages for Project delays in an ICC arbitration against only CB&I. On July 16, 2015,⁴⁰ Reficar initiated an arbitration against CB&I in the ICC, and on March 16, 2018, Reficar filed its Exhaustive Statement of Claim and request for relief against CB&I (the “CB&I Arbitration”).

³⁷ *Id.* (emphasis added).

³⁸ *Id.*

³⁹ *Id.* § 6 (emphasis added).

⁴⁰ Notably, Reficar instituted its ICC Arbitration against CB&I even before the October 2015 Jacobs Report was issued to Ecopetrol, which further supports the independent nature of Jacobs’ findings.

72. Reficar’s claim against CB&I arises from CB&I’s failure to execute the Project, and Reficar has requested damages of over US\$2.4 billion for alleged cost overruns and delays related to the Project.⁴¹

73. The damages sought by Reficar in the CB&I Arbitration are substantially the same as those sought from FPJVC by the CGR in the fiscal liability proceeding.

74. Reficar did not join FPJVC as a respondent in the CB&I Arbitration, or otherwise assert claims against FPJVC, [REDACTED]

[REDACTED]. Reficar has not made a claim against FPJVC in any other forum for anything related to FPJVC’s performance under the Contract.

75. The hearing on the merits in the CB&I Arbitration is presently scheduled to take place in April 2020.

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

76. On March 10, 2017, Respondent, through the CGR, commenced a fiscal liability proceeding based on Colombian Law 610 of 2000 (“Law 610”) against various entities and individuals, including CB&I and FPJVC, for alleged acts of gross negligence in the expenditure of Colombia’s funds in connection with the Project.

77. Respondent commenced the fiscal liability proceeding against FPJVC despite the absence of any specific allegations or evidence that FPJVC breached the Contract or was in any way responsible for delay or excess costs related to the Project.

78. In accordance with the Constitution of Colombia and Law 610, the CGR has jurisdiction to hold “fiscal managers” liable when, through fraudulent or grossly negligent conduct, in the course of fiscal management they cause damage to the public. As stated by the Constitutional Court of Colombia, “[f]iscal liability . . . can only be imposed with respect to public officials and private parties who are legally entitled to exercise fiscal management, that is, *those who have decision-making power over State resources or public funds under their control.*”⁴² The CGR “must state with rigorous specificity the extent of competence or capacity of the public

⁴¹ Reficar seeks up to approximately US\$4.5 billion in total damages against CB&I (including lost profits).

⁴² Constitutional Court, Judgment C-832 of 2002 (emphasis added).

official or the private party with respect to a specific instance of fiscal management,” and “fiscal management is always linked to State assets or funds that are *unequivocally under the administrative or dispositive control of specifically identified public officials or private parties.*”⁴³ Conversely, if the investigated party is not a “fiscal manager,” the CGR does not have jurisdiction to initiate a fiscal liability proceeding.⁴⁴

79. After initiating the proceeding, the CGR began an investigation, which involved a “a multidisciplinary team conformed of 15 officers of the Special Investigations Unit against Corruption, including economists, accountants, engineers, and lawyers, [who] participated full time, for nearly a year-and-a-half by making more than 6 visits to Reficar in Bogota and in the Plant in Cartagena.”⁴⁵

80. After that investigation, on June 5, 2018, the CGR issued charges, referred to as “Auto 773,” (the “Charges”) alleging that the Change Controls caused “loss of public funds that produced fiscal damage.”⁴⁶ The Charges allege that FPJVC contributed in “great measure” to the alleged waste by not preventing the decisions that led to Change Control Nos. 2, 3, and 4, and that FPJVC’s:

omissions identified in a deficient management and support of technical auditing, supervision, and control of the activities of execution in the project, in accordance with its commitment to fulfill the management, technical and administrative supervision both for the EPC and the PCS stages; actions and omissions that contributed to the generation of damage as a result of anti-economic, inefficient, and ineffectual fiscal management.⁴⁷

81. The Change Control process is an internal Ecopetrol process that Reficar, its subsidiary, adopted for the Project. Reficar led the process, which sought to ensure that there were available funds to finish the Project. Reficar and the Ecopetrol Board of Directors approved the Change Controls. FPJVC’s supporting role in that process was limited to analyzing the data available from the different contractors, mainly CB&I, and providing assessments of the Project status, issues, and likely end cost and completion dates.

⁴³ Constitutional Court, Judgment C-840 of 2001 (emphasis added).

⁴⁴ Constitutional Court, Judgment C-131 of 2003.

⁴⁵ Press Release No. 84, dated June 6, 2018.

⁴⁶ See generally Auto No. 773 (June 5, 2018).

⁴⁷ Auto No. 773 (June 5, 2018) at 3580 & 3715.

82. The CGR contends that approval of Change Control Nos. 2, 3, and 4 resulted in the loss of value to the public. Change Control Nos. 2 and 3 encompassed increased CB&I costs. Change Control No. 2, for instance, included such cost components as: (i) overcharges due to underestimated items and omissions in the initial estimate; (ii) scope increases to improve plant reliability, operability, and ease of maintenance; (iii) changes in execution strategy; (iv) strikes and poor labor productivity; (v) extension of the Project's completion date; (vi) negative currency exchange rate impacts, etc. Change Control No. 4 included Reficar costs not within CB&I's scope, including costs related to start up and commissioning.

83. The Charges against FPJVC are all based on the premise that FPJVC was somehow grossly negligent in meeting its obligations under and related to the Contract in managing the Project and that those alleged failures resulted in the waste of public funds.⁴⁸ In reaching that conclusion, the CGR asserted that FPJVC's scope of work had not been altered in any way from the original Contract:

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

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

84. In asserting that "FPJVC's obligations were not modified,"⁴⁹ and suggesting that even if FPJVC was instead a part of Reficar's project management team FPJVC was required, in some unspecified manner, to override Reficar's decisions, the CGR completely disregarded the standards imposed by Colombian law.

⁴⁸ *See id.* at 3467-68 (describing contractual duties), 3707 (quoting FPJVC's responsibilities under the Contract to submit reports to the vice-president of the Project) & 3708-10 (quoting FPJVC's responsibilities under the Contract relating to the engineering, procurement, and construction phases of the Project).

⁴⁹ *Id.* at 3483.

85. Based on that fatally flawed analysis, the CGR charged FPJVC with materially contributing to the approval of Change Control Nos. 2, 3, and 4 by not “preventing the unjustified increase of the project costs.”⁵⁰ The CGR claims that FPJVC had been grossly negligent in performing its contractual duties and, as such, should be jointly and severally liable for more than US\$2.43 billion.

86. The Charges do not specify in any way what acts or omissions by FPJVC allegedly constitute gross negligence, nor do they even purport to explain how FPJVC could have exercised control over Reficar’s decision-making. Rather, the Charges make an entirely conclusory assertion of gross negligence and fail to acknowledge that Ecopetrol’s own consultants concluded that Reficar directed a change in FPJVC’s scope of work that left FPJVC with “no authority” and only the ability to “make suggestions.” Furthermore, the CGR did not mention, let alone address, in Auto 773 substantial additional evidence provided to it during the investigative phase of the CGR proceeding which demonstrates the change in FPJVC’s role and scope of work on the Project.

87. Notwithstanding its lack of specificity and paucity of substantiation, the Charges are the largest brought by the CGR in the history of Colombia, as confirmed by press release number 84 (on June 6, 2018), which states: “This decision represents the biggest loss that the Colombian State has suffered in the country’s history, 4 times bigger than the Saludcoop matter in 2013.” The Nation’s Chief Prosecutor has publicly declared that “in Colombia there hasn’t been any other embezzlement for more than [COP]\$600 billion like the one in Reficar.” Colombian press has widely reported on the CGR’s sensationalized and inflammatory public statements: the “El Tiempo” newspaper has labeled this process as the “biggest fiscal trial in the history”; the magazine “Dinero” has reiterated the statement made by the CGR in its press release; and the magazine “Semana” wondered whether this has been the biggest scandal of the century.

88. The Charges consist of 4,751 pages. As far as Claimants are aware, there is no precedent from either the Constitutional Court, the Supreme Court of Justice, the State’s Council, or the CGR for a charge of such volume.

89. Nonetheless, the CGR initially ordered FPJVC to file its response to the Charges, including the submission of all evidence in support of its defenses, within a mere *ten days*. The ten-day period is based on Article 50 of the Law 610 of 2000, which states:

⁵⁰ *Id.* at 3711.

ARTICLE 50. NOTICE. The alleged liable parties will have a period of ten (10) days which will begin to run a day after the charge was personally served to file their responsive pleading regarding all the allegations contained in the tax liability charge, as well as to request and submit all the corresponding evidence.

90. To be able to read the Charges in ten days, a person would need to read 475 pages per day, or nineteen pages per hour, without sleeping. Further, because the Charges were issued in Spanish, and because FPJVC is comprised of U.S. companies whose personnel do not necessarily speak or read Spanish, the Charges also needed to be translated, making the ten-day deadline even more ludicrous.

91. As a result of the filing of various recusal motions, each of which led to a brief suspension of that deadline, FPJVC ultimately had approximately four months to file its objection and response, still an absurdly short period of time within which to prepare and file its response.

92. The CGR has since begun preparing for enforcement proceedings against FPJVC. For example, the CGR has sent a letter to the United States Department of Justice requesting its help locating FPJVC assets in the United States in order to collect on a potential judgment.

F. The Contract’s Dispute Resolution and Limitation of Liability Provisions

93. [REDACTED]

94. [REDACTED]

⁵¹ Ex. C-1, Contract § 27.1.

⁵² *Id.* § 27.3.

⁵³ See Article 116 of the Colombian Constitution (“Private individuals can be temporarily vested with the power to administer justice in their capacity of jurors in criminal trials, mediators, or arbitrators authorized by the parties to issue awards that are based in law and equity, according to the terms and conditions set forth by law.”).

[REDACTED]

95. [REDACTED]

[REDACTED]

V. COLOMBIA’S BREACHES OF ITS OBLIGATIONS UNDER THE TPA AND INTERNATIONAL LAW

96. Colombia’s conduct violates the TPA’s promises of National Treatment (Article 10.3), Most-Favored-Nation Treatment (Article 10.4), and Minimum Standard of Treatment (Article 10.5), and constitutes Expropriation in violation of Article 10.7 of the TPA. Additionally, Colombia’s breach of the Contract itself constitutes a breach of the TPA.

A. The CGR’s Exercise of Jurisdiction and Assertion of Charges Against FPJVC Deny FPJVC Fair and Equitable Treatment and Violates Article 10.5 of the TPA

97. The CGR’s unlawful exercise of jurisdiction and assertion of fiscal liability charges against FPJVC without any colorable legal or factual basis, in contravention of both Colombian law and the Contract, has (1) denied FPJVC justice, (2) deprived it of due process, and (3) frustrated its legitimate expectations, all in violation of the TPA’s Minimum Standard of Treatment.⁵⁵

98. Article 10.5 of the TPA requires Colombia to provide covered investments with “fair and equitable treatment” (“FET”), which “includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.”

99. The FET standard “grant[s] considerable discretion to tribunals to review the ‘fairness’ and ‘equity’ of government actions in light of all the facts and circumstances of the case, without necessarily deliberating on the requirements of either national or international law.”⁵⁶

100. “[T]he full range of international law sources, including general principles and modern treaties and other conventional obligations”⁵⁷ must be taken into account in determining

⁵⁴ Ex. C-1, Contract § 10.1.

⁵⁵ Ex. CL-1, TPA Art. 10.5.

⁵⁶ *Redfern and Hunter on International Arbitration*, 5th ed., § 8.60.

⁵⁷ *Id.* at p. 20.

the specific meaning of the TPA's FET standard. Pursuant to Article 38 of the Statute of the International Court of Justice,⁵⁸ sources of international law include:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

There is a general understanding that the foregoing sources “are the legal basis for the Fair and Equitable standard.”⁵⁹

101. Additionally, since Chapter 10 of the TPA does not define the term “fair and equitable,” its meaning should be interpreted in accordance with the Vienna Convention on the Law of Treaties (the “Vienna Convention”).⁶⁰ The “ordinary meaning” rule of construction set forth in Article 31(1) of the Vienna Convention is often used as a basis to analyze the meaning behind each agreement.⁶¹ In *MTD v. Chile* the Tribunal gave the “fair and equitable” standard its ordinary meaning as follows:

In their ordinary meaning, the terms “fair” and “equitable” used in Article 3(1) of the BIT mean “just”, “even-handed”, “unbiased”, “legitimate”.⁶²

102. “It has been held that a failure to ensure due process, consistency, and transparency in the functioning of public authorities and the lack of a predictable and stable framework for investment contrary to legitimate expectations of the investor and commitments made by the host State, are breaches of fair and equitable treatment standards.” *Redfern and Hunter on International Arbitration*, 5th ed., § 8.65; *see also CMS Gas Transmission Co. v. Argentine Republic*, ICSID

⁵⁸ Article 93 of the Charter of the United Nations states that: “[a]ll Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice.” Both the United States and Colombia are members of the United Nations.

⁵⁹ Ioana, Tudor, “The Fair and Equitable Treatment Standard in the International Law of Foreign Investment.” (Oxford University Press 2008), p. 9.

⁶⁰ Campbell McLachlan, Lauren Shore and Matthew Weiniger, “International Investment Arbitration” (Oxford: Oxford University Press 2007). p. 6.

⁶¹ Andrew Newcomb, Lluís Paradell, “Law and Practice of Investment Treaties: Standard of Treatment” (Kluwer Law International 2009), p. 111.

⁶² *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, ¶ 113 (May 25, 2004).

Case No. ARB/01/8, Award, ¶ 284 (May 12, 2005) (“the Treaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment, founded on solemn legal and contractual commitments, is not different from the international law minimum standard and its evolution under customary law.”).

103. Fair and equitable treatment includes the elements of due process and transparency, and the protection against conduct that is arbitrary, unreasonable, disproportionate, and lacking in good faith. *Deutsche Telekom v. India*, PCA Case No. 2014-10, Interim Award, ¶ 336 (Dec. 13, 2017). In judicial and administrative proceedings adjudicators must render a “reasoned, even-handed and unbiased decision.” *Glencore International A.G. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, ¶ 1318 (Aug. 27, 2019).⁶³

104. As discussed below, Respondent violated the minimum standard of treatment that Colombia owed to FPJVC in accordance with the FET standard by improperly subjecting FPJVC to groundless fiscal liability proceedings under Law 610.

1. Colombia Grossly Misapplied, and Departed From, Colombian Law, Which Constitutes a Denial of Justice

105. The CGR’s unlawful exercise of jurisdiction and assertion of fiscal liability charges against FPJVC is a gross departure from Colombian law and constitutes a denial of justice and a breach of the FET standard.

106. A host State’s denial of justice breaches the FET standard. *The Loewen Group, Inc. & Raymond L. Loewen v. United States of America*, ICSID Case No. ARB (AF)/98/3, Award, ¶ 132 (June 26, 2003); *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/00/3, Award, ¶ 98 (Apr. 30, 2004); *International Thunderbird Gaming Corporation v. United Mexican States*, (UNCITRAL Rules) IIC 136, Award, ¶ 194 (Jan. 26, 2006).

107. A denial of justice may be evident from a proceeding reaching a decision that “no competent judge could reasonably have made.” J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), at p. 89 (hereinafter, “J. Paulsson”). “Surprising departures from settled patterns of reasoning or outcomes, or the sudden emergence of a full-blown rule where none existed, must be viewed with the greatest skepticism if their effect is to disadvantage a

⁶³ “The obligation to provide FET binds the State,” and “can be breached by the conduct of any branch of government,” including “the executive or administrative branch or its separate agencies, by means of administrative acts that directly target the investor or the investment.” *Glencore*, ICSID Case No. ARB/16/6, Award, ¶ 1309.

foreigner.” *Id.* at 199-200. Such “gross incompetence” is a violation of the State’s “duty to establish and maintain a decent system of justice.” *Id.* at 200.

108. “Denial of justice may occur irrespective of any trace of discrimination or maliciousness, if the judgment at stake shocks a sense of judicial propriety. . . . In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment.” *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, ¶ 193 (Nov. 6, 2008) (internal quotations omitted). A tribunal may review national authorities’ scope of jurisdiction or application of the law “if the result were to show discrimination or severe impropriety.” *Id.* at ¶ 206.

109. Here, Colombia, through the CGR, denied FPJVC justice by, *inter alia*: (1) baselessly concluding that FPJVC was a “fiscal manager” under Article 3 of Law 610 and asserting jurisdiction over FPJVC in a fiscal liability proceeding; (2) failing to articulate viable theories of liability, causation, and damages against FPJVC, as required by Article 5 of Law 610; (3) claiming damages against FPJVC that are arbitrary and grossly disproportionate to the alleged harm caused by FPJVC; and (4) subjecting FPJVC to conflicting directives of its instrumentalities, Reficar, and the CGR, in violation of the harmonious collaboration principle in Article 113 of the Colombian Constitution.

110. FPJVC diligently has pursued all available and practical local remedies to no avail. To the extent Colombia were to claim that any meaningful local remedies are still available, which they are not, FPJVC is not required to pursue them because any such remedies would be: (1) ineffective (*see Chevron v. Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II, §§ 7.133 & 7.144 (Aug. 30, 2018)); (2) futile or improbable (*Ambiente Ufficio v. Argentina*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, ¶¶ 599 & 610 (Feb. 8, 2013); and/or (3) unavailable (*Chevron*, PCA Case No. 2009-23, Second Partial Award on Track II, § 7.122).

- (a) The CGR’s conclusion that FPJVC was a “fiscal manager” is a gross misapplication of, and departure from, Colombian law

111. The CGR’s determination that FPJVC was a “fiscal manager” under Article 3 of Law 610 is a gross misapplication of Colombian law and, therefore, constitutes a denial of justice. *See J. Paulsson, at p. 89.*

112. Law 610 authorizes the imposition of fiscal liability upon public officials and private persons who cause damage to the state through “fiscal management.”⁶⁴ Only persons who “handle or manage public funds or resources” can engage in fiscal management.⁶⁵

113. The Colombian Constitution expressly limits the CGR’s jurisdiction to the supervision of “fiscal management of the State”:

Fiscal control is a public duty exercised by the Comptroller General of the Republic, which supervises the fiscal management of the administration and private individuals or entities that manage the Nation’s funds or assets.

Such control shall be exercised in a subsequent and selective manner in accordance with the procedures, systems, and principles established by law.

The supervision of the fiscal management of the State includes the exercise of financial control, management and results, based on efficiency, economy, equity and the valuation of environmental costs. In exceptional cases, provided by law, the Comptroller may exercise subsequent control over the accounts of any territorial entity.

The Comptroller is a technical entity with administrative and budgetary autonomy. It shall not have any other duties than the ones related to its own organization . . .

Constitución Política de Colombia, Art. 267.

114. Article 268(5) of the Colombian Constitution further limits the CGR’s jurisdiction to the determination of “liability derived from fiscal management.” Interpreting Article 268(5) of the Colombian Constitution, the Colombian Constitutional Court has explained that the CGR has the power to determine “the liability stemming from fiscal management” through a “fiscal liability proceeding”:

The jurisdiction vested in the fiscal control entities is exercised in two teleologically related moments; ... in the first moment, the entities perform fiscal control within their jurisdiction, by formulating the corresponding observations, conclusions, recommendations and, if applicable, any interpretation derived from the analysis of the fiscal management acts upon which such analysis is carried out. *If, as a result of that supervision, any information concerning facts or omissions that may*

⁶⁴ Law 610, Arts. 1, 4, 5 and 6.

⁶⁵ Law 610, Art. 3.

constitute an economic damage arises, either immediately or subsequently, the second moment, that is, the fiscal liability proceeding will initiate, proceed, and conclude.

Such proceeding is based on section 5 of article 268 of the Constitution, according to which *the Comptroller General of the Republic has the power to determine the liability stemming from fiscal management*, impose the applicable fines, collect such fines, and exercise the enforcement jurisdiction with respect to such liability. *These powers are also based in the public duty that consists in supervising and controlling the fiscal management exercised by public officials or private individual/entities in relation to the assets and public funds under their control.* These powers are also granted to the Local Comptrollers (Art. 272, Sec. 6 P.C.).

Constitutional Court, Judgment C-832 of 2002. (Emphasis added.)

115. The Constitutional Court has stated, with respect to the nature of liability that can be established in a proceeding commenced by the CGR:

... Fiscal liability, pursuant to numeral 5 of article 268 of the Constitution, can only be imposed with respect to public officials and private parties who are legally entitled to exercise fiscal management, that is, those who have decision-making power over State funds or assets under their control.

Constitutional Court, Judgment C-832 of 2002. (Emphasis added.)

116. Colombian case law clearly and consistently defines the subject of fiscal liability proceedings as *only* including “a person who has the capacity of a fiscal manager under the terms set forth in the Law”:

The purpose of Law 610, 2000, is to govern fiscal liability of those who perform fiscal management (article 4 of Law 610, 2000). Such management is, as stated therein, “the acts that public officials and private law entities/individuals who manage or administer public resources or funds carry out” (article 3 Law 610, 2000). It is clear then that the subject of the fiscal liability proceedings can only be [a person] who has the capacity of a fiscal manager under the terms set forth in the Law; that is, if the conduct was not performed by a fiscal manager, a fiscal proceeding cannot be initiated vis-à-vis such party, or, if it has been initiated, there would be grounds to dismiss such fiscal action.

Constitutional Court, Judgment C-131 of 2003.

117. Under this standard, there is no colorable basis upon which the CGR could conclude that FPJVC was a fiscal manager. FPJVC did not supervise, recommend, execute, or make any decisions regarding the funds expended on the Project. Nor did it manage, control, or direct CB&I’s activities or expenditures on the Project, as confirmed, *inter alia*, by the Jacobs Report.

118. Shortly after the Parties signed the Contract, Reficar exercised its right under Sections 4 and 23 of the Contract to narrow the scope of FPJVC’s services, electing to manage the

Project itself and strip FPJVC of any decision-making authority or any management or administration of funds for the Project.

119. Reficar’s representatives led the iPMT, and at all times supervised, directed, and controlled CB&I. Reficar exclusively made all decisions related to the execution plan for the engineering, procurement, and construction of the Project; in its role as modified by Reficar, FPJVC had no right or power to direct or control CB&I. The record is replete with uncontested and irrefutable proof of this dynamic. *See supra* Section 4.C.

120. The CGR’s position that FPJVC is a “fiscal manager,” and its wrongful exercise of jurisdiction against FPJVC, are “surprising departure[s] from settled patterns of reasoning or outcomes,” which “must be viewed with the greatest skepticism because the effect of such a decision is to disadvantage [FPJVC,] a foreigner.” J. Paulsson, at p. 89.

121. “[I]n the light of all the available facts, the impugned decision [is] clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment.” *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, ¶ 193 (Nov. 6, 2008).

(b) The CGR’s failure to plead the elements of fiscal liability, as required by Article 5 of Law 610, is a gross misapplication of, and departure from, Colombian law

122. The CGR grossly departed from Colombian law by failing to even plead the elements required under Law 610 to establish fiscal liability.

123. Article 5 of Law 610 sets out the tort standard for fiscal liability, requiring the CGR to plead and prove three essential elements:

The fiscal liability is comprised of the following elements: [(1)] A fraudulent or negligent conduct attributable to a person that performs fiscal management[; (2)] An economic damage to the State[; and (3)] A causal connection between the two previous elements.

Law 610, Art. 5.⁶⁶

124. With respect to the first and third mandatory elements (i.e., liability and causation), the Charges include only conclusory allegations, inferring wrongful conduct and causation based

⁶⁶ As previously noted, Article 5 of Law 610 of 2000 states that the first element of fiscal liability is fraudulent or negligent conduct. Colombian courts, however, have interpreted the statute to mean fraudulent or *grossly* negligent conduct. *See* Constitutional Court, Judgement C-340 of 2007 and C-338 of 2014.

upon the fact that the Project grew in cost and was delayed, essentially seeking to impose *strict liability* upon FPJVC for the fiscal increases.

125. With respect to the second mandatory element of fiscal liability (i.e., damages), the CGR made no effort to identify specific economic damages to the State caused by FPJVC's conduct. The CGR contends the public was damaged by the cost increases above Reficar's budget because this reduced the public's return on investment for the Project. It relies on Change Control Nos. 2, 3, and 4 that Reficar and Ecopetrol approved during the Project. Each Change Control, however, included multiple distinct cost components, each with its own cause (e.g., labor strikes, plant betterments to improve reliability, etc.). The CGR makes no attempt to even identify these cost components, let alone establish a causal link between these expenditures and any act or omission of FPJVC. Basically, the CGR is seeking to establish damage to the public through a "total cost method" approach, making no effort to explain the cost increases or validate the underlying budget.⁶⁷

126. The CGR's failure to identify the elements of fiscal liability in any colorable manner, and in direct violation of Colombian law, as required by Article 5 of Law 610 constitutes a denial of justice and violates the FET standard. It also constitutes a violation of FPJVC's fundamental right of due process. *See infra* Section V.A.3.

(c) The CGR claimed arbitrary damages that are grossly disproportionate to the alleged harm caused by FPJVC

127. The damages claimed by the CGR are grossly disproportionate to the harm allegedly caused by FPJVC, further violating the FET standard.

128. Imposing liability that is grossly disproportionate to the harm caused by the party constitutes a denial of justice and violates the FET standard. *See, e.g., Merck Sharp & Dohme (I.A.) Corp. v. The Republic of Ecuador*, PCA Case No. 2012-10, Partial Final Award, (Jan. 25, 2018) (holding that Ecuador committed a denial of justice because, *inter alia*, claimant was ordered by Ecuadorian courts to pay "a figure that self-evidently lacks a proportionate relationship with the underlying cause of action"; *Loewen*, ICSID Case No. ARB (AF)/98/3, Award, ¶ 113 (noting, in *dicta*, that "[t]he total award (even the award of compensatory damages) appears to be grossly disproportionate to the damage suffered by [respondent]. . . . Granted that a substantial award of

⁶⁷ Indeed, elsewhere in its Charge, the CGR actually criticizes CB&I for underestimating the Project's cost, undercutting the very budget it is relying on to establish that the public was damaged.

damages on this claim might well be justified, Claimants had very strong grounds for arguing that verdict . . . was excessive.”).

129. In the CGR proceeding, FPJVC is charged with liability for the entire amount of the subject budget increases, with no explanation as to how FPJVC caused Change Control Nos. 2, 3, and 4. *See* Auto 773. Additionally, the US\$2.43 billion amount was calculated without any analysis of the specific cost components making up each Change Control or explanation why they each constituted damage to the public. Faced with the impossible task of having to explain why a design change to improve plant reliability, operability, and ease of maintenance, for instance, constituted harm to the State, the CGR opted instead to treat each budget increase as a homogeneous damage event.⁶⁸ But, even if this were proper under Law 610 (which it is not), the approach is flawed because CB&I did not have a lump-sum contract and the CGR has made no effort to establish the validity of the CB&I estimate underpinning Reficar’s budget. Without a valid baseline, the quantum of the alleged damage is pure speculation. Thus, even if causation could be shown (which it cannot be), the US\$2.43 billion of damages the CGR claims from FPJVC is grossly disproportionate to the “harm” suffered by the State.⁶⁹

130. The CGR’s damages calculation (which lacks any rational basis to the alleged harm caused by the FPJVC) is illogical, unreasonable, and arbitrary. Indeed, in *Glencore*, an ICSID tribunal found a similar damages methodology followed by the CGR to be of “startling simplicity” and “arbitrary and unreasonable” and granted an offsetting award equal to the amount of the penalty imposed by the CGR. ICSID Case No. ARB/16/6, Award, ¶ 1480.

131. Here, just as in *Glencore*, “[t]he determination of the existence and quantum of damages made by the *Controlaría* in [Auto 773] is biased, contrary to basic principles of legal reasoning and financial logic,” and incompatible with the standard of conduct that Colombia undertook to provide to protect U.S. investors under Article 10.5 of the TPA. *Id.* at ¶ 1475.

⁶⁸ It is perhaps revealing that the Controller General identified the specific cost components of each Change Control in his press release No. 35, announcing the opening of the fiscal liability investigation in March 2017, but that these components were not addressed, or even identified, in the CGR’s June 2018 Charges.

⁶⁹ The US\$2.43 billion of damages that the CGR claims is approximately ten times FPJVC’s gross revenue from its work on the Project.

- (d) Colombian instrumentalities have subjected FPJVC to conflicting directives, in violation of Colombia's "Harmonious Collaboration" principle

132. Colombia – through the CGR and Reficar – has breached Article 10.5 of the TPA and customary international law by frustrating FPJVC's reasonable expectations that Colombia would treat its investment in a transparent, consistent, and predictable manner, that Colombia would act in good faith, and that it would refrain from arbitrary or unreasonable treatment in interpreting its own law.

133. In addition to the gross departures from Colombian law discussed above, *see supra* Sections V.A.1(a)-(b), Colombia violated the "Harmonious Collaboration" principle established in the Colombian Constitution. Colombia's disregard for its own laws and rules amounts to a due process failure and a breach of the fair and equitable treatment standard. *See TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, ¶ 457 (Dec. 19, 2013).

134. Article 113 of the Colombia Constitution provides that "[t]he different State organs have separate duties, but they should collaborate harmoniously in furtherance of the State's objectives." The "Harmonious Collaboration" principle applies to "not only the organs that comprise the executive, legislative and judicial branches of the government, but also all other authorities whose duties are necessary for the achievement of the States' objectives."

135. Colombia, through Reficar and the CGR, has subjected FPJVC to conflicting directives in violation of the fair and equitable treatment standard. As discussed above, Reficar actually managed the Project, and, as the Jacobs Report found, "all the decisions had to be made only by Reficar managers" and "FPJVC's team had no authority and became only additional personnel in Reficar's team." Reficar approved each of the now-challenged three Change Controls.

136. Yet, through the CGR's fiscal liability proceeding, Respondent seeks to hold FPJVC responsible for billions of dollars of alleged fiscal damages for following the specific directives of another instrumentality of Respondent. At the same time, neither the CGR nor any other arm of the Colombian government has sought relief against Reficar. Indeed, when the fiscal liability proceeding was commenced by the CGR, Reficar had already filed an arbitral demand against CB&I seeking to recover the very same damages.

137. Reficar's and the CGR's conflicting actions have frustrated FPJVC's reasonable expectations of consistent, transparent, and predictable treatment under international law. Accordingly, Colombia has failed to provide fair and equitable treatment to Claimants' investment under Article 10.5 of the TPA. *Metalclad v. Mexico*, ICSID Case No. ARB/AF/97/1, Award, ¶ 99 (Aug. 30, 2000) (failure "to ensure a transparent and predictable framework for [claimant's] business planning and investment" violated the FET standard).

2. Even If There Were Some Legitimate Basis for the CGR Proceeding, FPJVC Should Receive a Credit for Any Recovery Obtained by Reficar from CB&I

138. Colombia has failed to provide fair and equitable treatment to FPJVC by seeking the same damages from CB&I in the CB&I Arbitration that it seeks from FPJVC in the CGR proceeding. If Colombia recovers damages from CB&I and is subsequently awarded those same damages from FPJVC, which is allegedly jointly and severally liable, Colombia would unjustly receive a double recovery.

139. State-owned Reficar is seeking up to approximately US\$4.5 billion in damages from CB&I under several damages theories that include compensatory damages, lost profits, and disgorgement. If Reficar succeeds, it would get an award declaring that it should be paid an amount equal to or greater than the one that has been quantified by the CGR in the fiscal liability proceeding.

140. When the CGR issued the Charges against FPJVC, it determined that FPJVC was jointly and severally liable for more than US\$2.43 billion in damages, which, under Colombian law, are compensatory in nature, not punitive, further indicating that Colombia is seeking the same damages from both CB&I and FPJVC.

141. It would be inconsistent and inequitable for Reficar to be awarded damages against CB&I in one proceeding – particularly on the theory that CB&I is solely responsible for those losses – and for Colombia to seek those same damages from FPJVC in the CGR proceeding. The prohibition of double recovery for the same loss, *enrichissement sans cause*, is a well-established principle in international law. Indeed, tribunals have specifically reduced a party's award where damages have already been awarded for the same loss in parallel ICC proceedings. *See, e.g., Venezuela Holdings B.V. and others (formerly Mobil Corporation and others) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award, ¶¶ 378-381 (Oct. 9, 2014)(deducting from the claimants' award the amount already received by the claimants pursuant to a parallel ICC award of the same damages, in order to avoid double recovery).

142. Any award against CB&I in favor of Reficar should reduce the losses caused by the alleged acts or omissions of FPJVC, assuming that there was any legitimate basis for proceeding against FPJVC; the CB&I Arbitration concerns, in part, the same cost overruns at the Project at issue in the CGR proceeding and any damages awarded to Reficar would be duplicative of the damages sought by the CGR against FPJVC.

3. Colombia Has Deprived FPJVC of Procedural Due Process in Violation of International Law and Colombian Law

143. Article 10.5(1) of the TPA states that “[e]ach Party shall accord to covered investments treatment in accordance with customary international law,” including “fair and equitable treatment,” which “includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal systems of the world.” Article 10.1(2) of the TPA further states that a Party’s obligations under the TPA “shall apply to a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party, such as the authority to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges.”

144. Therefore, “the obligation to provide ‘fair and equitable’ treatment binds the State, and accordingly can be breached by the conduct of any branch of government,” including an administrative agency such as the CGR. *Glencore*, ICSID Case No. ARB/16/6, Award, ¶ 1309. Considering that (1) the CGR exercises both a regulatory and an administrative authority delegated to it by the Colombian State, which includes the authority to commence fiscal liability proceedings and determine fiscal liability, and (2) that fiscal liability proceedings can result in the imposition of “a duty to pay a specific amount of money by the liable party,”⁷⁰ Colombia has a treaty obligation to ensure the CGR accords FPJVC “fair and equitable treatment,” including due process, as a covered investor under the TPA.

145. The CGR is an autonomous governmental agency of the Colombian State, entrusted with the supervision and control of the use of public funds.⁷¹ The CGR exercises this constitutionally vested power through an administrative proceeding called “*Proceso de Responsabilidad Fiscal*” (a fiscal liability proceeding), which is governed by Law 610.

⁷⁰ *Id.*, Art. 53.

⁷¹ Decreto 267 de 2000, Arts. 1 & 3, Febrero 22, 2000, Diario Oficial [D.O.] (Colom.).

146. The Preamble of the TPA states that the United States and Colombia:

RECOGNIZE that Articles 13 and 100 of the Colombian Constitution provide that foreigners and nationals are protected under the general principle of equality of treatment.

147. Accordingly, Colombia has a treaty-based obligation⁷² to accord, and ensure that the CGR accords, to FPJVC the same civil rights and the same guarantees granted to Colombian citizens. Since the notion of due process “is a vital element of ‘fair and equitable treatment’”⁷³ – which is consistent with the language of Article 10.5(1) of the TPA – Colombia’s obligations to accord FPJVC fair and equitable treatment and the same civil rights and same guarantees granted to Colombian citizens also includes the obligation to guarantee, and ensure that the CGR guarantees, due process in all judicial and administrative proceedings.⁷⁴

148. It is settled under Colombian law that a person or entity subjected to administrative charges must be informed in reasonable detail of the bases of such charges.⁷⁵ As the Constitutional Court of Colombia has explained:

An administrative act which decides the merits of the case . . . that is not well reasoned, will violate that fundamental right of due process that governs the administrative proceeding. Such acts must express the factual and legal circumstances upon which is based. The obligation that the administrative authorities have to explain the reasons upon which the act is based has three objectives: (1) it puts the parties on notice regarding the reasons of the decision and that such decision is not based on an arbitrary act committed by the authority, which will enable the interested party to challenge such decision or exercise the legal remedies that it deems convenient; (2) it will subject the authority to the applicable laws and regulations, since by issuing reasoned acts it must legally justify its acts; and (3) the administrative function is meant to serve the general interest.⁷⁶

⁷² See Article 26 of the Vienna Convention, which states: “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”

⁷³ Rudolf Dolzer & Christoph Schreuer, “Principles of International Investment Law” (2nd. Ed. Oxford University Press, 2012), p. 154.

⁷⁴ Pursuant to Article 29 of the Colombian Constitution, due process shall apply to all judicial and administrative acts.

⁷⁵ In the context of fiscal liability proceedings, specifically, Article 2 of Law 610 sets forth the following governing principles: “[i]n any fiscal liability proceeding due process will be guaranteed and the corresponding proceeding will be conducted in accordance with the principles set forth in articles 29 and 209 of the of the Political Constitution as well as those principles set forth in the *Código Contencioso Administrativo* [Contentious Administrative Code].”

⁷⁶ Corte Constitucional, Sentencia T-108 de 2012, M.P.: Maria Victoria Calle Correa [Constitutional Court Judgment T-108 of 2012, Judge Maria Victoria Calle Correa].

149. Further, the Constitutional Court of Colombia has set forth some of the specific due process rights afforded to parties in the context of fiscal liability proceedings, including, but not limited to:

[a] fiscal liability proceeding is subject to the due process fundamental right provided in article 29 of the Constitution. Therefore, the substantive and procedural safeguards provided in such provision, such as the legality principle, natural judge, jurisdiction, presumption of innocence, right to present a defense, to offer and rebut evidence, double jeopardy, also apply to these types of proceedings. These fundamental rights must also be harmonic with the principles of equal treatment, morality, efficacy, economy, celerity, impartiality, and publicity which must govern all the administrative acts, specifically the ones concerned with fiscal control.⁷⁷

150. The Constitutional Court of Colombia has further explained that “one of the main fundamental rights of due process is the right to present a defense, which means the opportunity that all persons shall have to be heard, to explain his own reasons and arguments, to controvert, to rebut, and to object to evidence, as well as to offer and request the evaluation of the evidence that is favorable to his case, including the exercise of the legal remedies provided by law.”⁷⁸

151. Based on the foregoing, Colombia is obligated to provide, and to ensure that the CGR provides, the following due process rights:

- (a) A fundamental requirement of equality between the parties in judicial and administrative proceedings and their equal right to be heard;
- (b) The right to due notice;
- (c) The right to present a defense; and
- (d) The right to have a fair trial, which includes the principles of “independence [and] impartiality of judges.”

Charles T. Kotuby Jr., (fn. 19), p. 428 & 429 (citing Bin Cheng, “General Principles of Law as Applied by International Courts and Tribunals 1 (Cambridge Univ. Press 2006) (1953) at 291-98; and ALI/UNIDROIT Principles of Transnational Civil Procedure, 2004 Uniform L. Rev., 758,

⁷⁷ Corte Constitucional, Sentencia C-832 de 2008, M.P.: Rodrigo Escobar Gil. [Constitutional Court, Judgment C-832 of 2008, Judge: Rodrigo Escobar Gil]. [Translation from Spanish] [Emphasis Added].

⁷⁸ Corte Constitucional, Sentencia C-838 de 2013, M.P.: Luis Ernesto Vargas Silva [Constitutional Court Judgment C-838 of 2013, Judge: Luis Ernesto Vargas] [Translation from Spanish].

760-66, and 768). These procedural safeguards are not only reflected in the U.S. and Colombia's domestic legal systems, but the majority of civilized legal systems universally recognize them.⁷⁹

152. In addition, Article 2 of Law 610 mandates that due process be afforded: "Guiding principles of fiscal action. In the exercise of the action of fiscal responsibility will guarantee due process and its process will come subject to the principles set out in articles 29 and 209 of the Constitution and to the contents in the administrative code."

153. Colombia's failure to provide FPJVC with due process, as discussed below, constitutes a breach of the FET standard set forth in Article 10.5 of the TPA. *See Glencore*, ICSID Case No. ARB/16/6, Award, ¶ 1319 ("It is undisputed that a breach of due process, whether in judicial proceedings or in administrative proceedings, may result in the violation of the FET standard.").

154. Colombia, through the CGR, breached the FET standard by denying FPJVC due process by failing to: (1) provide FPJVC with a fair and equal opportunity to present its case, to marshal appropriate evidence, and to be heard; (2) provide FPJVC with proper notice regarding the reasons for the Charges; and (3) act in a reasoned, even-handed, and unbiased manner in the course of the fiscal liability proceeding.

155. Colombia's failure in this regard further violates the FET standard because it constitutes a denial of justice. *See Case Concerning Elettronica Sicula SpA (ELSI) (U.S. v. Italy)*, 1989 ICJ Reports 15, ¶ 76 (a claim for denial of justice arises from "a willful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety."); *see also* J. Paulsson, at pp. 89-90 (denial of justice arises from "a failure to abide by the obligation to provide an acceptable mechanism to hear the grievances of foreigners."); M. Fitzmaurice & D. Sarooshi, *Issues of State Responsibility Before International Judicial Institutions* (2004), at 58 ("[b]ad faith and not judicial error seems to be the heart of the matter, and bad faith may be indicated by an unreasonable departure from the rules of evidence and procedure.") (internal quotations omitted); *Rumeli Telekom A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, ¶ 653 (July 29, 2008) ("a court procedure which does not comply with due process is in breach" of the standards governing denial of justice).

⁷⁹ Charles T. Kotuby Jr., (fn. 19), p. 428 & 429 (citing Bin Cheng, "General Principles of Law as Applied by International Courts and Tribunals 1 (Cambridge Univ. Press 2006) (1953) at 291-98; and ALI/UNIDROIT Principles of Transnational Civil Procedure, 2004 Uniform L. Rev. 758, 760-66, and 768).

(a) Violation of the right to be heard and present a defense

156. The fiscal liability proceeding is one of the largest, if not the largest, by amount, in the history of Colombia.⁸⁰ The Charges are set forth in 4,751 pages, which had to be translated to English, the working language of FPJVC, so that FPJVC could review and analyze the Charges.

157. The CGR initially ordered FPJVC to file its response to the Charges, including the submission of all evidence in support of its defenses, within a mere ten days. While the ten-day period to respond to the charges is specified in Colombian law, the CGR should have granted a reasonable extension. Such a change to the schedule is expressly authorized by Colombian law, and no reasonable person could have believed that an appropriate response to these charges could be investigated, formulated, and submitted within ten days. Although the ten-day period was, in effect, extended in small increments to approximately four months due to the filing of various recusal motions, the response time was nonetheless grossly insufficient to conduct a thorough analysis, conduct interviews, gather evidence, secure expert opinions, and prepare a written response.

158. Colombia breached the FET because the CGR, as the decision-maker, the investigator, the accuser, and the adjudicator in the fiscal liability proceeding, deviated from the basic principle that there be a fair balance of opportunities afforded to each party to a proceeding. For instance, the CGR employed a large team over a period of approximately fifteen months to compile the 4,751-page document prior to the issuance of the Charge, while the CGR's actions completely limited FPJVC's right to present its defense, submit relevant contentions of fact and law, and offer supporting evidence in support of such defense.

(b) Failure to give proper notice regarding the reasons for the Charge

159. The Charges impute joint fiscal liability on FPJVC for its alleged gross negligence in management, supervision, and control of the EPC Contractor, and assert that FPJVC's acts or omissions directly contributed to the approval of Change Control Nos. 2, 3, and 4 by not preventing cost overruns.

160. Notwithstanding its enormous length, the Charges do not detail, in any way, the specific acts and omissions of FPJVC that purportedly constitute gross negligence in the

⁸⁰ See *Contraloría impute responsabilidad fiscal por us\$2400 millones en Reficar*, EL UNIVERSAL, June 6, 2018, available at <https://www.eluniversal.com.co/colombia/contraloria-imputo-responsabilidad-fiscal-por-us2400-millones-en-reficar-280231-FBEU396164>.

performance of the Contract. Rather, gross negligence is baldly asserted based on the CGR's unsubstantiated determination that FPJVC was the project manager, that FPJVC's duties were not changed and/or narrowed, and that the Project incurred significant delay and cost overruns.⁸¹

161. By failing to detail the acts or omissions alleged to constitute gross negligence by FPJVC and to specify how such acts or omissions caused any loss or how such acts or omissions “contributed to the approval of change controls 2, 3, and 4,” Colombia has violated FPJVC's fundamental right to due notice and to present a defense.⁸²

162. This violation has made it impossible for FPJVC to have notice of and controvert the following:

- (a) The specific legal and factual circumstances that the CGR considered in determining that FPJVC was grossly negligent during the Project;
 - (b) The specific acts and/or omissions alleged to constitute gross negligence by FPJVC and how they *directly* contributed to the approval of Change Control Nos. 2, 3, and 4; and
 - (c) The legal and factual circumstances that the CGR considered when imputing joint and several liability to FPJVC vis-à-vis other respondents in the fiscal liability proceeding – including persons who were charged with fraud and corruption – and the reason why FPJVC is being charged for the fraud of others.
- (c) Violation of the right to a fair trial and of the principles of independence and impartiality

163. Far from acting impartially, the CGR has repeatedly made inflammatory statements in the media, in press releases, and on its social networking pages that exhibit bias and predetermination by asserting that there was fraudulent conduct and corruption on the Project, for which FPJVC is responsible. *See supra* Section IV.E.

⁸¹ The CGR's failure to set forth FPJVC's alleged acts or omissions that purportedly constitute gross negligence is, perhaps, unsurprising in light of the fact that Reficar consistently and entirely paid FPJVC for its work related to the Project.

⁸² The CGR has also ignored the requirements of Law 610 for establishing fiscal liability. Under Article 5 of Law 610, as interpreted by Colombian courts, the CGR must establish fraudulent or grossly negligent conduct by a person engaged in fiscal management, damage to the public, and a causal link between these two elements. Sentence C-338-2014 states that “the [Colombian] Court has stated, in regard to fiscal liability, that any form of strict liability is prohibited and therefore, such liability must be individualized and be analyzed considering the subject's conduct.” The Charges do not “individualize” or contain any type of analysis based on FPJVC's “conduct.” To the contrary, they seek to impose strict liability on FPJVC for Change Control Nos. 2, 3, and 4, in violation of FPJVC's due process rights. Additionally, each budget increase comprised multiple, diverse cost items, each with its own basis, but the CGR simply treats each Change Control as if it were a single increase in costs and nowhere even identifies the specific cost increases that comprised each Change Control budget increase request.

164. “Bias of a decision maker results in a breach of the FET standard. A decision based on prejudice for or against a person or a group cannot be said to be fair and equitable . . . [and] the principle that bias is inconsistent with the FET standard is clear” *Glencore*, ICSID Case No. ARB/16/6, Award, ¶¶ 1348-49. “The existence and effects of bias can be provided by direct evidence or by reasonable inferences drawn from proven indicia.” *Id.* ¶ 1349.

165. Colombia’s press campaign against FPJVC is akin to its efforts criticized by the tribunal in *Glencore*. In *Glencore*, the *Controlara General* (i.e., “the highest authority within the *Controlaría*”), Ms. Sandra Morelli, who held this position from 2010 to 2014, gave a public interview regarding the CGR’s investigation that suggested she had already decided that the claimant was fiscally liable. *Id.* ¶ 483. The *Glencore* tribunal commented that “Ms. Morelli’s public statements were reprehensible and ill-advised, and *if she had indeed ruled on appeal they might have breached the FET standard.*” *Id.* ¶ 1358 (emphasis added). Here, in a May 5, 2016 press release, Ms. Morelli’s successor, Mr. Edgardo Maya, provided a statement describing FPJVC’s “management control” as “shameful.”⁸³ And, in an article published the following day on May 6, 2016, Mr. Maya was quoted as stating that “[t]he management control carried out by [FPJVC] is really embarrassing.”⁸⁴

166. That failure to treat FPJVC fairly and without prejudice is also evidenced by the dismissal of the Ecopetrol directors, each of whom is a Colombian national, from the CGR proceeding on grounds that they were not fiscal managers and that they lacked final authority over expenditures on the Reficar Project, and the CGR’s refusal to apply that clear legal principle to FPJVC, a national of the United States.

167. These acts constitute a further denial of fair and equitable treatment in violation of Article 10.5 of the TPA, Article 29 of the Colombian Constitution, and international law. FPJVC is entitled to a fair hearing by an independent and impartial tribunal and has been deprived of that right.

⁸³ See Comunicado de Prensa No. 82, available at https://protect-us.mimecast.com/s/SILMCG69jMhmPpKqUKUq_O.

⁸⁴ See *Contralor reconoce que debio ser mas diligente durante cuatro anos Reficar*, LA OPINION, May 6, 2016, available at <https://www.laopinion.com.co/colombia/contralor-reconoce-que-debio-ser-mas-diligente-durante-cuatro-anos-reficar-111371#OP>.

4. Colombia's Actions Frustrated FPJVC's Legitimate Expectations

168. Colombia's misapplication of its own laws (*see supra* Sections V.A.1), denial of due process (*see supra* Section V.A.3), and denial of National Treatment (*see infra* Section V.B) also frustrated FPJVC's legitimate expectations that Colombia would provide a fair and predictable legal framework and apply its laws consistently and in a non-discriminatory manner.

169. "[T]he frustration of an investor's legitimate expectations" is among the factors to be considered in determining whether a State has breached the FET standard. *Glencore*, ICSID Case No. ARB/16/6, Award, ¶¶ 1366-67; *see also* Preamble to the TPA (stating the purpose of the TPA to "[e]nsure a predictable legal and commercial framework for business and investment . . .").

170. Legitimate expectations "arise when a State (or its agencies) makes representations or commitments or gives assurances, upon which the foreign investor (in the exercise of an objectively reasonable business judgment) relies, and the frustration occurs when the State thereafter changes its position as against those expectations in a way that causes injury to the investor." *Glencore*, ICSID Case No. ARB/16/6, Award, ¶¶ 1366-67.

171. When FPJVC decided to make an investment in Colombia, it did so with the expectation that Colombia would "act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations." *Tecmed v. Mexico*, ICSID Case No ARB (AF)/00/2, Award, ¶ 154 (May 29, 2003).

172. Colombia has frustrated FPJVC's legitimate expectations that Colombia would provide a fair and predictable legal framework and apply its laws consistently and in a non-discriminatory manner. *See supra* Sections V.A.1 – V.A.3. FPJVC expected that its due process rights would be protected, including that it would not be held liable without the proof of causation, or for grossly disproportionate damages. Colombia has also frustrated FPJVC's legitimate expectations in this regard. *See supra* Section V.A.1(b-c).

173. FPJVC also expected its contractual rights to be enforced, [REDACTED]

[REDACTED] As discussed below, however, *see infra* Sections V.C & V.E, Colombia has also frustrated FPJVC's legitimate expectations in this regard.

B. Colombia Breached the National Treatment Standard Under Article 10.3 of the TPA

174. The CGR's failure to apply the same legal standard to FPJVC as applied to the Reficar and Ecopetrol defendants violates the TPA's obligation of National Treatment.⁸⁵

175. Article 10.3 of the TPA requires Colombia to accord foreign investors "National Treatment," *i.e.*, "treatment no less favorable than that it accords, in like circumstances, to its own investors" and "to investments in its territory of its own investors."⁸⁶

176. On August 15, 2018, the CGR issued Auto 0188, confirming the dismissal of the charges against members of the Ecopetrol Board of Directors on the grounds that those members did not qualify as "fiscal managers" under Law 610 despite the fact that they were involved in the Change Control approval process and were part of the team that supported Reficar.

177. The CGR, however, refused to dismiss FPJVC even though FPJVC had much less authority and control than the Ecopetrol Board of Directors. In fact, FPJVC had no authority over management of, or the expenditures for, the Project. So, if the Ecopetrol directors were not fiscal managers despite all the authority that they had, then FPJVC certainly was not a fiscal manager because it had even less authority than the Ecopetrol directors. But, the CGR refused to dismiss FPJVC, thereby according FPJVC, a foreigner, less favorable treatment than that accorded to Colombian nationals.

178. By subjecting FPJVC, an investor of the United States, to substantially less favorable treatment than the directors of Ecopetrol – Colombians responsible for the conduct complained of by the CGR – Colombia has violated Article 10.3 of the TPA.

C. Colombia Has Deprived FPJVC of Fundamental Protections in the Contract and Indirectly Expropriated Its Benefits in Violation of Article 10.7 of the TPA

179. Colombia has also violated Article 10.7 of the TPA by depriving FPJVC of fundamental protections under the Contract.

180. Article 10.7 of the TPA provides that "[n]o Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization," except under limited circumstances.

⁸⁵ Ex. CL-1, TPA Art. 10.3.

⁸⁶ *Id.*, Art. 10.3.

181. Under customary international law, a State’s deprivation of an investor’s contractual right(s) may constitute expropriation. See *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, ¶ 7.5.4 (Aug. 20, 2007 (holding that “[t]here can be no doubt that contractual rights are capable of being expropriated, and a number of treaty cases have arisen out of contractual disputes.”); *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award and Dissenting Opinion, ¶ 241 (Aug. 19, 2005 (“[t]here is an amplitude of authority for the proposition that when a State deprives an investor of the benefit of its contractual rights, directly or indirectly, it may be tantamount to a deprivation in violation of the [BIT’s expropriation provision]”) (citing *Tecmed v. Mexico*, ICSID Case No. ARB (AF)/00/2, Award, (May 29, 2003); *Metalclad v. Mexico*, ICSID Case No. ARB/AF/97/1, Award, (Aug. 30, 2000); *CME Czech Republic B.V. v. The Czech Republic*, (UNCITRAL Rules) 9 ICSID Rep. 264, Award, (Mar. 14, 2003); see also *Emmis International Holding, B.V., EMMIS Radio Operating, B.V., and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Award, (Apr. 16,2014) (stating that contractual rights may be expropriated, and this position is “well established in customary international law”); *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, (Sept. 28,2007) (same); *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, (Oct. 5, 2012) (same).

182. [REDACTED]

87 [REDACTED]

88 [REDACTED]

183. [REDACTED]

184. Notwithstanding those protections, Colombia, through the CGR proceeding – [REDACTED] – has asserted that FPJVC failed to perform under the Contract. Colombia’s claims, including any dispute regarding the scope of FPJVC’s duties under the Contract, [REDACTED] not by a state-run CGR proceeding in which Colombia seeks to impose more than US\$2.4 billion of liability on FPJVC for FPJVC’s performance under the Contract.

185. Despite its obligation to recognize and enforce [REDACTED] in accordance with its own laws and its international obligations under the New York and Panama Conventions, Colombia has refused to [REDACTED] [REDACTED] despite due demand that it do so.

186. [REDACTED]

187. In short, Colombia has used the CGR fiscal liability proceedings to deprive FPJVC of its arbitration rights and to strip FPJVC of its bargained-for liability protections set forth in the Contract, in violation of Article 10.7 of the TPA.

D. Colombia Breached Article 10.4 of the TPA by Subjecting FPJVC to Discriminatory Treatment

188. Colombia has breached Article 10.4 of the TPA and Claimants have incurred – and continue to incur – significant losses as a result of this breach. Article 10.4 of the TPA (the “MFN Clause”) provides:

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

189. Article 10.4 of the TPA requires that Colombia accord to U.S. investors and their investments treatment that is no less favorable than the treatment Colombia accords investors and investments of third states.

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

191. Colombia has violated the MFN Clause by according more favorable treatment to Swiss Confederation investors and covered investments of Switzerland.

192. Specifically, Article 10(3) (the “Umbrella Clause”) of the Agreement Between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments (the “Colombia-Swiss Treaty”), executed on May 17, 2006 and presently in force, provides:

Each party shall observe any obligation deriving from a written agreement concluded between its central government or agencies thereof and an investor of the other Party with regard to the specific investment, which the investor could rely on in good faith when establishing, acquiring or expanding the investment.

193. The Umbrella Clause is more favorable to Swiss Confederation investors and investments than to U.S. investors and investments, because it permits Swiss Confederation investors to bring contractual obligations under the protective umbrella of the Colombia-Swiss Treaty. In other words, the Umbrella Clause imposes on Colombia, as a matter of treaty law, the observance of obligations stemming from a written agreement between Colombia *or its agencies* and Swiss Confederation investors.

194. Ecopetrol and Reficar are agencies of Colombia within the meaning of the Umbrella Clause. Colombia owns all of the hydrocarbons found within its national territory by law. Colombia also owns approximately 88% of Ecopetrol’s voting capital stock and appoints the majority of Ecopetrol’s board of directors, and, through the board, Ecopetrol’s chief executive officer. Reficar is 100% directly and indirectly owned by Ecopetrol. Under Colombian law, both Ecopetrol and Reficar are delegated responsibility to manage and extract hydrocarbons in Colombia, including the authority to enter into agreements and related contracts on behalf of Colombia.

195. Accordingly, under both Colombian and international law, Reficar, on behalf of Colombia, entered into the Contract with FPJVC. And any of Reficar’s obligations that FPJVC

relied on in good faith when agreeing to the terms of the Contract are imposed on Colombia for the purposes of the Umbrella Clause. *See Noble Ventures v. Romania*, ICSID Case No. ARB/01/11, Award, ¶ 86 (Oct. 12, 2005).

196. [REDACTED]

197. First, Colombia breached the dispute resolution provision by directing or permitting the CGR to bring fiscal liability proceedings against FPJVC – [REDACTED].

198. Second, Colombia breached Section 10(4) of the Contract by directing or permitting the CGR to claim approximately US\$2.43 billion in damages from FPJVC, [REDACTED].

199. Third, Colombia breached Section 10(4) of the Contract by directing or permitting the CGR to [REDACTED].

200. In the event a dispute arose between the parties, FPJVC expected the transparency, predictability, and certainty of resolution of any dispute by ICC arbitration, as opposed to an opaque, unpredictable, and uncertain local proceeding. Colombia has effectively circumvented the negotiated protections of the Contract that Colombian-controlled Reficar willingly executed and has instead directed the CGR (another Colombian governmental instrumentality) to prosecute FPJVC for alleged gross negligence as a project manager.

E. Colombia’s Violations of the Contract Are Violations of the TPA

201. As the ICSID Tribunal in *El Paso Energy International Company v. Argentine Republic* stated:

[I]f the State interferes with contractual rights by a unilateral act, whether these rights stem from a contract entered into by a foreign investor with a private party,

a State autonomous entity or the State itself, in such a way that the State's action can be analyzed as a violation of the standards of protection embodied in a BIT, the treaty-based arbitration tribunal has jurisdiction over all the claims of the foreign investor, including the claims arising from a violation of its contractual rights.

ICSID Case No. ARB/03/15, Decision on Jurisdiction, ¶ 84 (Apr. 27, 2006).

202. Accordingly, all of Colombia's actions that constitute contract violations, *see supra* Sections V.C, also constitute violations of the TPA. Consequently, the Tribunal has jurisdiction over FPJVC's claims arising from a violation of its contractual rights.

203. Additionally, the TPA specifically allows for investors, like FPJVC, to seek relief against the State in ICC arbitration for violations of a contract if it qualifies as an "investment agreement."⁸⁹ As discussed above, Article 10.28 of the TPA defines "investment agreement":

[A] written agreement between a national authority of a Party and a covered investment or an investor of another Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor: (a) with respect to natural resources that a national authority controls, such as for their exploration, extraction, refining, transportation, distribution, or sale; (b) to supply services to the public on behalf of the Party, such as power generation or distribution, water treatment or distribution, or telecommunications; or (c) to undertake infrastructure projects, such as the construction of roads, bridges, canals, dams, or pipelines, that are not for the exclusive or predominant use and benefit of the government.⁹⁰

204. The Contract is an "investment agreement" because it was executed between Reficar, a "State entity"⁹¹ and "national authority of a Party,"⁹² and FPJVC, an "investor of another

⁸⁹ Ex. CL-1, Art. 10.16.1(a)(i)(C).

⁹⁰ *Id.*, Art. 10.28.

⁹¹ Law 80 of 1993, or *Estatuto General de Contratación de la Administración Pública* [Public Administration Contracting General Statute], defines "State Entities" as : "The Nation, the regions, the Departments, Provinces, the Capital District and special districts, metropolitan areas, municipal associations, Indian reservations and municipalities; public establishments, State industrial and commercial corporations, *mixed economy corporations in which the State has ownership of more than 50% of the shares of the corporation, as well as indirect decentralized entities*, and any other legal entities in which there is such majoritarian ownership, regardless of the name they adopt" L.80/93, Art. 2, Octubre 28, 1993, Diario Oficial [D.O.] (Colom.) (emphasis added). Reficar falls directly within that definition.

⁹² The TPA defines "national authority of a Party" as "an authority at the central level of government." As stated above, throughout the relevant time period Reficar's Board of Directors and decision-making authority was largely comprised of high ranking Colombian government officials which, from 2006 to the present, has included Colombia's Minister of Mines, Vice Minister of Mines, Director of the Special Administrative Unit for Pension Management and Contributions to Social Protection, Director of National Mining Agency, Vice Minister of Energy, and Colombia's Executive Director of the Energy and Gas Regulation Commission. Additionally, Reficar is a wholly owned subsidiary of the governmental entity, Ecopetrol, which is linked and subject to the administrative

Party.” Additionally, under Colombian law, the Contract is a “State Contract”⁹³ – it grants rights regarding hydrocarbons, which are owned exclusively by the State and managed by the *Agencia Nacional de Hidrocarburos*. The Contract also concerns the undertaking of the State’s infrastructure – *i.e.* the expansion and refurbishment of one of the State’s oil refineries – as the purpose of the Project was to “improve the quality of the fuels to meet Colombian and international environmental specifications” by producing “ultra low sulfur gasoline and diesel” that would boost the supply of “environmentally clean more fuels ... to meet Colombian demand and then export to Caribbean and US Markets.”⁹⁴ Indeed, agreements similar to the Contract have frequently been recognized as “investment agreements” by international arbitral tribunals.⁹⁵

205. Because the Contract is an “investment agreement” as contemplated by the TPA, Article 10.16.1(a)(i)(C) of the TPA grants FPJVC the right to submit any claims for violation of the Contract to ICC Arbitration.

VI. DAMAGES

206. Claimants have suffered substantial harm as a result of Respondent’s actions. Respondent’s improper assertion of fiscal liability charges against Claimants seeking more than US\$2.4 billion has gravely injured Claimants’ reputation and credit. That harm is compounded by

control of Colombia’s Ministry of Mines and Energy. Ecopetrol’s Board of Directors was similarly dominated by Colombian governmental officials throughout the relevant time period and these officials, from 2010 to 2018, have included Colombia’s Minister of Finance, Minister of Mines and Energy, Minister of Internal Affairs, and Minister of Health. In other words, any decisions made by either Reficar or Ecopetrol would, at the very least, indirectly represent decisions made by the State. *See Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 16 July 2001 (holding that a public legal entity whose shares capital was dominated by the Kingdom of Morocco through the Treasury and whose board of directors included the Ministry of Infrastructure, the Director of Highways and Road Traffic, the Head of the Moroccan Port Authorities, the President of the Board of the National Bank for Economic Development, and the Director of the Budget translated into “*de facto*” control by the State. Therefore, the entity was a “State company, acting in the name of the [State]”).

⁹³ Law 80 of 1993 defines “State Contracts” as “every legal act that creates obligations and that is executed by State Entities, which are either governed by the rules of private law or other special regulations, or created by mutual consent of the parties.” L.80/93, Art. 32, Octubre 28, 1993, Diario Oficial [D.O.] (Colom.).

⁹⁴ *See* Contract at Appendix 6 (Description and Scope of the PMDC).

⁹⁵ *PSEG Global Inc., the North American Coal Corporation, and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Decision on Jurisdiction, (June 4, 2004) (finding that contract involving the development of a lignite-fire electric power plant was an investment agreement); *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No. UN3467, Final Award, (July 1, 2004) (finding that an oil exploration and production participation contract between a California company and a State-owned corporation of Ecuador is an investment agreement under the Ecuador-US BIT); *see also Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, (Nov. 10, 2017 (noting without discussion that a joint venture agreement concerning the exploration of State’s mineral deposits was an investment agreement).

Respondent's repeated incorrect and injurious statements in the media that FPJVC is responsible for fraudulent conduct and corruption on the Project. Claimants are entitled to compensation, in the form of moral damages, for such harm. Moreover, Claimants have incurred, and will continue to incur, substantial costs and attorneys' fees in connection with the CGR proceeding and the present action.

207. "Public international law has recognized the availability of moral damages since at least 1923, when the U.S.-German Claims Commission awarded them in connection with Germany's 1915 sinking of the luxury liner *Lusitania*." Investment Treaty Arbitration and International Law, Vol. 3, Chapter 9, *Unexceptional Circumstances: Moral Damages in International Investment Law*, Wade M. Criell & Silvia M. Marchili, at p. 214. "In the *Lusitania* cases, the Commission provided what has since become the most oft-quoted summary of the concept of moral damages in international law:

'That one injured is, under the rules of international law, entitled to be compensated for *an injury inflicted resulting in* mental suffering, injury to his feelings, humiliation, shame, degradation, *loss of social position or injury to his credit or reputation*, there can be no doubt, and such compensation should be commensurate to the injury. Such damages are very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated therefore as compensatory damages, but not as penalty.'

Id. (quoting Opinion in the *Lusitania Cases*, Nov. 1, 1923, UNRIAA, Vol. VII, 32, at 40 (emphasis added)).

208. Indeed, in his Concurring and Dissenting Opinion in *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Professor Born noted that one who has suffered a violation of international law has necessarily been damaged and is entitled to relief, even if only for moral damages and legal fees:

[W]hile [claimant] did not demonstrate a quantifiable monetary loss, it did demonstrate an unacceptable breach of fundamental international rights and protections. In my view, that breach demands a remedy beyond merely declaring it a violation of the relevant BIT. The [respondent's] conduct caused moral damages to [claimant], as well as the legal costs inevitable, given the [respondent's] refusal to acknowledge in any fashion the effects and nature of its conduct, in [claimant] obtaining international recognition of the violation of its rights. In these circumstances, I am unable to join a decision granting only declaratory relief and would instead make an award of costs in favor of [claimant].

ICSID Case No. ARB/05/22, Concurring and Dissenting Opinion, ¶ 33 (July 18, 2008).

209. Moral damages are not only available to natural persons. Companies and other legal entities may also claim moral damages: “a company is always entitled to make a claim for moral damages under the rubric of a loss of credit, loss of business opportunities, and various forms of reputational harm.” *Id.* at 228 (citing *Desert Line Projects LLC v. Yemen*, ICSID Case No. ARB/05/17, Award, (Feb. 6, 2008); *see also* P. Dumberry, *Compensation for Moral Damages in Investor-State Arbitration Disputes*, 27 *Journal of International Arbitration* 3 (2010), at p. 249 (moral damages are potentially recoverable for “injury to the credit and reputation of a legal entity, *i.e.*, a corporation.”).

210. “If a company’s reputation is harmed as a result of certain state measures, then not only does the harm suffered by the company fall within the ambit of a moral damages analysis, but it also ‘arises directly out of an investment.’ Expropriatory actions, unfair treatment, arbitrary measures, discriminatory measures, and a lack of diligence in providing full protection and security are just as likely to cause harm to a company’s reputation in certain situations as they are to give rise to other forms of compensatory damages.” *Id.* at p. 224.

211. “A useful starting point of any analysis of moral damages in international law is the well-established basic principle of ‘full reparation’ for the injury caused by an internationally wrongful act. Reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.” S. Vasudev, *Damages for Non-Material Harm in Investment Treaty Arbitration*, ASA Bulletin (Scherer ed.) (2019).

212. ICSID tribunals frequently follow the “International Law Commission, Articles on State Responsibility” or “ILC.” *See Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, ¶ 779 (July 26, 2018) (“The ILC Articles are the relevant rules on attribution that are widely considered to reflect international law. They concern the responsibility of States for their internationally wrongful acts, given the existence of a primary rule establishing an obligation.”); *Jan de Nul*, ICSID Case No. ARB/04/13, Award, ¶ 156 (“The ILC Articles have been embodied in Resolution A/56/83 adopted by the General Assembly of the United Nations on 28 January 2002. This resolution is considered as a statement of customary international law on the question of attribution for purposes of asserting the responsibility of a State towards another State, which is applicable by analogy to the responsibility of States towards private parties.”).

213. Article 31 of the ILC, entitled “Reparation,” provides as follows:

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

See also Unión Fenosa Gas, S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/14/4, Award, § 10.95 (Aug. 31, 2018) (“It follows that *any compensation to be awarded by this Tribunal is to be decided by applying principles of customary international law, namely ‘full reparation’* to wipe out, as far as possible, the consequences of the Respondent’s international wrongs under the general principle long established in the PCIJ’s judgment in *Chorsów Factory* (1928), *as also confirmed by Articles 31 and 36 of the ILC Articles on State Responsibility*”) (emphasis added); *Caratube International Oil Company LLP and Devincti Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, ¶ 1083 (Sept. 27, 2017) (“*The Tribunal further agrees that, in case of an unlawful expropriation, the ILC Articles provide for the full reparation standard, meaning that this Tribunal must determine an amount of damages that will, ‘as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed’*”) (emphasis added).

214. “[A]rbitral Tribunals have long recognised that difficulty in assessing damages in general and moral damages in particular should not stop them from awarding damages where the existence of damage is certain.” *Moral Damages in International Investment Arbitration*, Spain Arbitration Review, Revista del Club Español del Arbitraje, Marc Allepuz.

215. As the CGR proceeding moves forward, the existing substantial damages suffered by FPJVC will increase. Moreover, if the CGR proceeding progresses to an award of damages against FPJVC, as seems virtually certain, despite the lack of any basis therefor, FPJVC will be entitled, *inter alia*, to an offsetting award of damages equal to all amounts assessed by the CGR.

VII. RELIEF REQUESTED

216. Claimants hereby request that the Arbitral Tribunal to be constituted in this case issue a final award:

- (a) declaring that Colombia has breached its obligations under the TPA;
- (b) ordering that Colombia pay Claimants:
 1. damages for the economic and reputational harm it has suffered, including an offsetting award equal to any amounts awarded in the CGR proceeding;

2. Claimants' costs and attorneys' fees incurred in connection with responding to the CGR's charges;
 3. Claimants' costs of arbitration or other proceedings, including all counsel fees and costs, professional fees, arbitration costs, and disbursements;
 4. pre- and post- award compound interest at a commercially reasonable rate to be fixed by the tribunal;
- (c) enjoining any attempt by the CGR or any other arm of the Colombian state to seize, attach, or enjoin any assets of Claimants in Colombia or elsewhere; and
- (d) granting such other and further relief as the Tribunal may deem just and appropriate.

217. Claimants reserve their rights to amend this Request for Arbitration and assert any additional or further claims or relief.

[Remainder of page intentionally left blank.]

VIII. REQUIRED COPIES AND LODGING FEE

218. In accordance with Rule 4(1) of the Institution Rules, this original Request of Arbitration is accompanied by five additional signed copies thereof, including all exhibits; one additional hard copy for the opposing party identified herein; and seven electronic devices (USBs) containing copies of this Request for Arbitration and its exhibits. Further, according to the 1 July 2017 Schedule of Fees, evidence of payment of the non-refundable lodging fee of twenty-five thousand dollars (US\$ 25,000) is enclosed.⁹⁶

Dated: December 6, 2019

Respectfully submitted,

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Attorneys for Claimants

⁹⁶ Wire Transfer Confirmation for ICSID Lodging Fee is attached hereto as Exhibit C-5.

Amec Foster Wheeler USA Corporation, Process Consultants, Inc., and Joint Venture Foster Wheeler USA Corporation and Process Consultants, Inc. v. The Republic of Colombia

REQUEST FOR ARBITRATION

INDEX OF EXHIBITS

Exhibit No. ⁹⁷	Description
C-1	The Contract, without Appendices 1-7 and 9-29
C-2	The Jacobs Report (English only)
C-3	Claimants' Power of Attorney, Waiver, and Authorization to Commence Arbitration
C-4	Notice of Intent dated December 26, 2018 (English only)
C-5	Wire Transfer Confirmation for ICSID Lodging Fee (US\$ 25,000)
CL-1	Chapter 10 of the United States-Colombia Trade Promotion Agreement

⁹⁷ "C" is for Claimants' fact exhibits and "CL" is for Claimants' legal authority.