
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. ARB/19/34

**CLAIMANTS' APPLICATION FOR PROVISIONAL MEASURES
AND EMERGENCY TEMPORARY RELIEF**

September 2, 2021

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

**APPLICATION FOR PROVISIONAL MEASURES
AND EMERGENCY TEMPORARY RELIEF**

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

**APPLICATION FOR PROVISIONAL MEASURES
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1. Claimants Amec Foster Wheeler USA Corporation (“AFWUSA”) and Process Consultants, Inc. (“PCI”), separately and as members of a contractual joint venture named FPJVC (collectively, “FPJVC” or “Claimants”), submit this urgent Application for Provisional Measures and Emergency Temporary Relief (the “Application”) pursuant to Article 47 of the Convention on Settlement of Investment Disputes (the “ICSID Convention”) and Rule 39(1) of the Rules of Procedure for Arbitration Proceedings (the “ICSID Rules”).

2. This Application seeks an order enjoining Respondent Colombia from enforcing, either locally or abroad, the decision of a Colombian administrative agency called the *Contraloría General de la República* of Colombia (the “CGR”) imposing damages of US\$811 million¹ against FPJVC on April 26, 2021, in Auto 749 (the “CGR Decision”). As set forth below, the CGR Decision was appealed by FPJVC and subsequently internally affirmed by the CGR’s appellate division on July 6, 2021. The CGR Decision is the result of a proceeding that was improperly initiated by the CGR against FPJVC – without a colorable claim of jurisdiction – in a transparent attempt to shift blame for alleged acts of mismanagement from those who actually managed a project involving the modernization and expansion of a State-owned oil refinery located in Cartagena, Colombia (the “Project”). In fact, the Project was actually managed by the Colombian State-owned enterprise that owned and operated the refinery, Refinería de Cartagena, S.A.S. (“Reficar”). This fiscal liability proceeding was, as described in FPJVC’s Request for Arbitration and in this Application, conducted in a flawed and highly partial manner, and in violation of the most basic norms of due process, that stripped FPJVC of its rights under Chapter 10 the United States-Colombia Trade Promotion Agreement (the “TPA” or “Treaty”), including the right to fair and equitable treatment.²

¹ The CGR found that Claimants, along with others, were jointly and severally liable for \$1,329 billion Colombian Pesos as a result of Reficar’s approval of a change order known as Change Control 2, and \$1,615 billion Colombian Pesos as a result of the approval of Change Control 3.

² Agreement Between the Government of the United States and the Government of the Republic of Colombia Trade Promotion Agreement, signed Nov. 22, 2006, Chapter 10. The TPA entered into force on May 15, 2012 (CL-001).

3. The CGR Decision adopts some of the unwarranted and baseless theories asserted from the outset of the proceeding, while also imposing liability based on newly advanced, but equally faulty theories that FPJVC was never afforded a realistic, or in significant instances, any, opportunity to address. The CGR has jurisdiction over matters of “fiscal liability” – that is, damage to the “national patrimony”, but only from acts of gross negligence or international misconduct by those with decision-making authority over the expenditure of State funds and assets. As discussed below, the CGR Decision, on its face, plainly deprives FPJVC of its bargained-for contractual protections and its rights under the Treaty in numerous ways, including:

- ignoring Colombian law that expressly limits the CGR’s jurisdiction to entities and individuals that have decision-making power (and have exercised such decision-making power) over State funds – which FPJVC never had – but applying that same law for the benefit of Colombian nationals to absolve them of potential liability;
- retroactively applying provisions of Colombian law governing “fiscal liability” proceedings, which were passed long after the CGR initiated proceedings against FPJVC, to manufacture a purported basis for jurisdiction over and liability against FPJVC in violation of well-established Colombian law and FPJVC’s rights;
- failing ever to allege, let alone establish, any specific conduct that would constitute fiscal liability on FPJVC’s part, while ignoring ample exculpatory and conclusive evidence offered by FPJVC and other independent sources and experts, as well as a finding by another Colombian agency that (1) actually considered and analyzed the evidence, (2) carefully described the Change Control process, including why additional investment in the Project was necessary, and (3) concluded based on the uncontroverted evidence that FPJVC lacked authority, which demonstrated that FPJVC was not liable;
- relying on a groundless damages methodology without a basis in law or economics, and failing to undertake an analysis even purporting to establish which party caused particular alleged damages against the State, but simply imposing all liability jointly and severally, in violation of the express requirements of the CGR’s organic statute;
- imposing liability on FPJVC for various “budget increases” above the Project’s original cost estimate. Such liability is not possible because: (1) the EPC Contractor’s contract is a reimbursable contract, meaning it was paid based on time and materials, as opposed to a fixed fee or “turnkey” basis, (2) FPJVC had no role in generating the original project estimates, (3) the CGR has failed to validate the estimate, and even admitted in its Decision that the Project’s costs were underestimated to begin with, (4) each budget increase was comprised of various separate cost items, and that Reficar – not FPJVC – expressly approved those increases, many of which derived solely from the expansion of the Project’s scope, and others of which resulted from factors beyond the control of any party to the

CGR proceeding, and (5) the budget increases were comprised of estimated cost increases, not the actual costs incurred for the cost items; and

- bringing what is, at most, a contractual dispute to the Colombian administrative law system based on a manufactured theory of jurisdiction over FPJVC, while simply disregarding the negotiated protections in the contract between Reficar and FPJVC that:



4. As described in detail below, FPJVC’s role, as expressly directed by Reficar, the actual project manager, was limited to consultation, assistance, and providing a limited number of personnel to work as secondees on Reficar’s team.

5. Once the CGR Decision was rendered, FPJVC appealed the ruling directly to the *Sala Fiscal Sancionatoria*, the Fiscal Sanctionable Section of the CGR (the “FSS”) that hears internal appeals. Though FPJVC’s appeal to the FSS temporarily suspended commencement of enforcement proceedings against FPJVC, the CGR granted FPJVC a mere five days to file its appeal and rejected FPJVC’s request for additional time.³ The CGR Decision is over 6,200 pages in length, and the record covers over four years of proceedings. Moreover, the CGR Decision, as rendered, is based, in significant part, on legal theories and damage methodologies different from those advanced by the CGR throughout the case, and previously undisclosed to FPJVC. The result was that FPJVC was required to review and analyze over 6,000 pages of the CGR’s findings based largely on its new theories, and file its appeal in less than two weeks. Then, less than two months after receiving FPJVC’s appeal, the CGR issued its second instance decision, this time 2,161 pages in length, formally rejecting FPJVC’s appeal and affirming the CGR Decision in its entirety by issuance of Auto – ORD-801119-158-021, dated July 6, 2021. In denying the appeal, the CGR simply adopted Auto 749’s unsubstantiated findings.

6. Following the rejection of FPJVC’s appeal, the CGR transferred the CGR Decision and its file to the Colombian Council of State for review on July 16, 2021, pursuant to the “automatic legality control” procedures established by Law 2080 of 2021, which was enacted only earlier this

³ FPJVC requested a 90-day extension of its filing deadline, noting that only having five days to respond was a gross violation of FPJVC’s due process rights. The Deputy Controller denied FPJVC’s extension request in its entirety. FPJVC eventually obtained a mere seven additional days to file its appeal because of an administrative error by the CGR when it failed to serve complete copies of the CGR Decision on the parties.

year. This newly minted review process was designed to have the Council of State evaluate whether the CGR Decision complies with Colombian law, and while doing so, any collection efforts are postponed until that proceeding has been concluded.

7. However, the Council of State recently refused to follow the automatic legality control procedures involving another unrelated CGR proceeding, stating that Law 2080 of 2021 might be unconstitutional. Nonetheless, Colombia took the position, in their Memorial on Preliminary Objections, that it would continue to honor the automatic stay provided to FPJVC by Law 2080 unless and until the Council of State ruled, in FPJVC's case, either that Law 2080 was unconstitutional or ruled on the merits adversely to FPJVC.⁴ It is FPJVC's understanding that as a result of the Council of State's rejection, the stay of Colombia's enforcement efforts was automatically lifted, and it may resume such efforts immediately.

8. On August 24, 2021, counsel for FPJVC wrote to counsel for Colombia, asking them to agree to either: (1) a stay of enforcement pending the resolution of this arbitration; (2) a temporary stay of enforcement while FPJVC's Application for *pendente lite* relief was heard, in order to allow this Application to be heard and decided in an orderly manner; or (3), at a minimum, a stay of enforcement until FPJVC could present its Application for the interim stay described in paragraph 8(b) above.

9. The following day, counsel for Colombia stated that they would consult with their client and revert. Not having heard a response by August 31, 2021, counsel for FPJVC wrote and requested a response by September 3, 2021. On September 1, 2021, counsel for Colombia sent a brief response refusing to agree to any stay at all, stating that "Colombia can only represent and provide assurances that it will continue to comply with its Constitution and laws, and that each of its organs will continue to act within the bounds of their competence." While that does not explain in any way why Colombia would not, or could not, agree to a stay, it appears clear that Colombia intends to begin immediate steps to enforce the CGR Decision. On the same day, the Council of State issued an order stating that it would refrain from carrying out its review proceedings under Law 2080 of 2021, based on its conclusion that Law 2080 was unconstitutional. FPJVC understands that the CGR Decision is now considered final and immediately enforceable under

⁴ See Colombia's Memorial on Preliminary Objections at § D(4)(e), including footnote 226.

Colombian law.⁵ If enforced before FPJVC can be heard in this arbitration, the CGR Decision will bring FPJVC's business to an abrupt end.⁶

10. Unless enforcement of the CGR Decision is enjoined, it will aggravate the *status quo* and effectively end FPJVC's entire business. The risk of irreparable harm is both imminent and urgent. Accordingly, Claimants ask for: (1) an order for provisional measures preventing Colombia from initiating any enforcement proceedings with respect to the disputed CGR Decision until the Tribunal has issued its final award on the merits; and (2) an order of emergency temporary relief restraining Colombia from initiating any enforcement proceedings with respect to the disputed CGR Decision until the Tribunal renders a decision on this Application.

11. As discussed in detail below, the requirements for granting provisional measures in ICSID arbitration are met here because: (1) the Tribunal has *prima facie* jurisdiction over this dispute; (2) FPJVC has established a *prima facie* right to the relief sought; (3) the measures are necessary because the harm cannot adequately be avoided by a later award of damages; (4) the matter is urgent because the threatened harm will likely occur long before the arbitral proceeding is concluded; and (5) the measures are proportional. For these reasons, as set forth in detail below, FPJVC requests that the Tribunal grant this Application in its entirety and award FPJVC any and all necessary relief to preserve the integrity of these proceedings until this matter has reached its conclusion.

II. INTRODUCTION

12. In 2009, Reficar, a Colombian State-owned enterprise, entered into a reimbursable cost contract with FPJVC to provide certain project management services in connection with the refurbishment of an oil refinery owned by the Republic (the "Contract").⁷

13. In 2010, in order to reduce costs and accommodate the demand of the engineering, procurement and construction ("EPC") contractor, CB&I,⁸ on the Project, Reficar directed a major

⁵ CWS-1, Cesar Torrente, ¶ 11.

⁶ CWS-2, Steve Conway, ¶ 12; CWS-3, Thomas Grell, ¶ 12.

⁷ The Contract contained various critical safeguards for FPJVC, including

⁸ Unless otherwise noted, "CB&I" collectively refers to Chicago Bridge & Iron Americas LTD, Chicago Bridge & Iron Company UK Limited, CBI Colombiana, S.A., all of whom were parties to the EPC contract with Reficar.

and material change in the scope of FPJVC’s work, as the Contract permitted it to do. That change – documented in correspondence, meeting minutes and a detailed Project evaluation commissioned by Reficar’s own parent company, Ecopetrol, S.A. (“Ecopetrol”) – resulted in all project management responsibility being retained by Reficar itself, and instead, FPJVC’s scope of work as directed by Reficar was limited to providing Reficar with support and recommendations. FPJVC never had the authority to direct the EPC contractor’s work or control the EPC contractor’s expenditures. Through the completion of the Project in 2016, FPJVC acted in accordance with that narrowed scope of work without objection or other direction from Reficar.

14. On March 10, 2017, the CGR issued Auto 382 (the “Opening Resolution”), commencing administrative proceedings and an investigation against various entities and individuals, including FPJVC, CB&I, the Ecopetrol Board of Directors, and various officers and directors of Reficar, for alleged acts of gross negligence or willful misconduct in the expenditure of the Republic’s funds in connection with the Project. On June 5, 2018, the CGR issued Auto 773 asserting charges comprising over 4,700 pages (the “CGR Charge”) alleging, in effect, that: (1) FPJVC was bound by the original text of the Contract with Reficar to manage the Project, without regard to Reficar’s express direction that it would solely manage the Project; (2) FPJVC breached the Contract by “inadequate management of and deficient support to the auditing, supervision, and control activities related to the execution of the [P]roject”⁹ and somehow not preventing increases in project costs and alleged execution delays; (3) FPJVC was, therefore, grossly negligent (the minimum standard for imposing fiscal liability under Colombian law) in managing State funds, even though FPJVC had no authority over such expenditures and the conduct alleged amounted, even on the face of the CGR Charge, at most to a breach of contract; and (4) FPJVC should be held jointly and severally liable for more than USD\$2.433 billion of alleged project cost overruns, even though the Republic, acting through Reficar, promised at the time of the investment that [REDACTED]

[REDACTED]

15. Although 4,751 pages in length, the CGR Charge failed to (1) adduce any proof that FPJVC was a “fiscal manager” or had any “decision-making authority”, (2) describe or document

⁹ CGR Charge at 3579-80, 3715 (C-001).

any wrongful actions or omissions by FPJVC, let alone acts constituting gross negligence, or (3) causally link any of FPJVC's conduct to any alleged losses, each of which is required under Colombian law. In that regard, the CGR's jurisdiction to bring fiscal liability proceedings against public officials or private parties is limited to those who have decision-making power over State funds and exercise such authority in a grossly negligent manner, but the CGR Charge did not include any specific allegations that FPJVC exercised such authority. In the same charging document, the CGR inexplicably elected not to proceed against the Board of Directors of Ecopetrol by finding that they lacked exclusive decision-making authority over the expenditure of funds on the Project, and that definitive decision-making authority was vested in Reficar. The CGR not only refused to apply that same legal standard to FPJVC, a foreign investor, it never specified what FPJVC had supposedly done that would result in any liability, let alone the specific conduct that would subject FPJVC to the CGR's jurisdiction.

16. Also absent from the CGR Charge was any rationale supporting the CGR's alleged "damages" against FPJVC. The CGR's methodology, in essence, sought to hold FPJVC strictly liable for various budget increases above the original project estimate or "Base Line" projections provided by EPC Contractor CB&I, and not FPJVC, without regard to: (1) which party, if any, had caused these budget increases, (2) the fact that the scope of the Project was consistently expanded by Reficar, resulting in many of those increases, (3) whether FPJVC was responsible for any of those increases, and (4) whether CB&I's Base Line projections were even accurate in the first place.¹⁰ The CGR also sought to impose this budgetary increase liability on FPJVC, even though the Contract was for consulting services only, not for the actual engineering, procurement and construction of the Project. In sum, the CGR sought to recoup allegedly excessive Project costs from FPJVC, an entity that never had any decision-making authority or management over the Project.

17. On April 26, 2021, the CGR issued the CGR Decision that blamed FPJVC for the budget increases and found it liable, jointly and severally with all other defendants, for US\$811 million in damages.

¹⁰ CWS-4, Colin Johnson, ¶¶ 34-42.

18. Like the CGR Charge, the CGR Decision does not present any evidence of the various elements of fiscal liability required to establish the CGR’s jurisdiction over FPJVC, let alone hold FPJVC responsible for any of the State’s purported damages. The CGR also failed to consider (or blatantly ignored) exculpatory evidence and arguments offered by FPJVC, including findings from an internal investigation conducted by an independent agency of the Colombian government, the Procuraduría General de la Nación (the “PGN”), that determined the Project’s alleged cost overruns and schedule delays could not be attributed to FPJVC. In fact, to justify its charges against FPJVC, the CGR relied on an alternate legal theory against FPJVC under a law passed in 2020, which removes the decision-making authority requirement; although the CGR Decision does not cite that statute, it sets out its terms *in haec verba*. Deviating from the “supervision and control” and “inefficient management” theories alleged in the CGR Charge, which at least tracked the law in effect at the time of the Contract and the CGR Charge, the CGR held FPJVC liable based upon its alleged actions as a “contributor” or consultant because FPJVC “prepared the scenarios and deliverables that were taken into consideration . . . by the members of the Reficar’s board of directors to make the decision to approve the increased investments in each change control.”¹¹

19. By categorizing FPJVC as a “contributor” the CGR’s new theory effectively concedes that FPJVC never had actual decision-making power over the Project’s funds – meaning that the CGR never had jurisdiction over FPJVC in the first place. Not only was this alternate legal theory never asserted against FPJVC in the underlying CGR Charge, it is based on the retroactive application of a Colombian statute passed only last year, apparently in response to the position taken in the CGR proceeding by FPJVC in defending itself.

20. The CGR Decision also relies on a fatally flawed damage theory advanced at the outset of the CGR proceedings that treats budget increases and claimed schedule delays (based on a set of initial and flawed estimates – the “Base Line” projections) as damages. Relying on that methodology, the CGR seeks to hold FPJVC and others strictly liable for these alleged damages without undertaking any causal – or, for that matter, any analysis.¹² At the same time, the CGR materially changed its calculation to compute FPJVC’s liability (i.e., US\$811 million in damages). As highlighted by FPJVC’s damages experts, the calculations applied by the CGR in its various

¹¹ The CGR Decision at 5190 (C-002). That conclusion is itself false.

¹² CWS-4, Colin Johnson, ¶¶ 47-53.

allegations and technical reports followed no acceptable theory of damages and make no sense.¹³ By way of example only, the CGR held FPJVC liable for alleged damages associated with Change Controls 2 and 3. These “damages” are alleged estimates of additional costs that resulted from expansion of the scope of the Project, were approved by Reficar itself, and resulted in a larger and more capable refinery. The CGR perversely used these additional costs as elements of the damages imposed on FPJVC, based on the net present value of those authorized capital expenditures.

21. On May 7, 2021, FPJVC did the best that it could to file its appeal directly to the CGR (the “Appeal”). The urgency was necessitated by the impossible five-day deadline imposed on FPJVC to respond to the voluminous 6,243-page CGR Decision and the CGR’s refusal to grant FPJVC’s extension request, once again depriving FPJVC of any right to defend itself. The Appeal only temporarily suspended the enforcement of the CGR Decision. Now that the CGR Decision is final, it has immediate effect under Colombian law and may be enforced at any time.¹⁴

22. The relief sought in this Application is necessary because FPJVC has no viable local substantive options in Colombia now that the Appeal has concluded.¹⁵ In other words, Colombia is free to attempt to enforce the CGR Decision, the subject of the very claims that Claimants bring in this arbitration.

23. Absent provisional relief, Colombia’s enforcement of the CGR Decision will cause immediate and irreparable harm to FPJVC. Colombia’s enforcement proceedings against FPJVC in multiple jurisdictions will strain the integrity of the ICSID arbitration and aggravate the *status quo*. [REDACTED]

24. In ICSID arbitrations, preventing such enforcement through provisional relief requires a showing that: (1) the tribunal has *prima facie* jurisdiction; (2) a *prima facie* establishment of the right to the relief sought; (3) the measures are necessary because the harm cannot adequately be

¹³ *Id.* at ¶¶ 60-63.

¹⁴ CWS-1, Cesar Torrente at ¶¶ 11, 12. As discussed by Mr. Torrente, though FPJVC could request a provisional stay of enforcement, these are seldomly granted, and the mere filing of the requested relief would not prevent enforcement of the CGR Decision while the request is pending unless FPJVC posted a bond in an amount that was sufficient to cover the payment of the integral value of the damage estimated in the CGR Decision, or 1.5 times the amount of the CGR Decision, depending on which Colombian law is applied. Accordingly, as Mr. Torrente concludes, this is not a legitimate option for Claimants. *Id.* at ¶¶ 21, 22.

¹⁵ *Id.* at ¶¶ 13, 14, 22.

avoided by an award of damages; (4) the matter is urgent because the threatened harm will likely occur before the arbitration concluded; and (5) the measures are proportional. Claimants satisfy each element.

25. *First*, this Tribunal has *prima facie* jurisdiction. Under the TPA, Colombia agreed to arbitrate investment disputes with U.S. companies, such as FPJVC, involving their investors and investments in Colombia. The dispute before this Tribunal concerns claims for breaches of the TPA with respect to FPJVC as an investor and its investment in Colombia. Colombia's consent and offer to arbitrate disputes in the TPA and FPJVC's acceptance of that offer through its submission to ICSID result in this arbitration and, as such, this Tribunal has *prima facie* jurisdiction to hear this dispute.

26. *Second*, Claimants have established their *prima facie* right to relief sought. ICSID tribunals have the authority to award provisional measures to protect the parties' rights, to preserve the *status quo*, and the non-aggravation of the dispute while also guaranteeing the right to an exclusive award for the dispute to the exclusion of any other remedy whether domestic or international, judicial, or administrative.

27. *Third*, provisional measures are necessary because, without them, Claimants will suffer irreparable harm. If Colombia is permitted to pursue enforcement proceedings against Claimants, Claimants' businesses will end, and the Tribunal will be incapable of restoring the *status quo* and preserving Claimants' business through an award at the conclusion of the arbitration.¹⁶ An offsetting award of damages by this Tribunal will be too little and too late.

28. *Fourth*, provisional measures are urgent because the threatened harm will occur long before this arbitration concludes. Under Colombian law, the resolution of the Appeal means that CGR Decision is immediately and fully enforceable. Colombia has refused to stay enforcement of the CGR Decision against FPJVC, even, on September 1, 2021, refusing FPJVC's request for a stay of enforcement proceedings for sufficient time to allow this Application to be heard in an orderly way,¹⁷ and has laid the groundwork for enforcement by formally requesting national and

¹⁶ CWS-2, Steve Conway at ¶ 12; CWS-3, Thomas Grell at ¶ 12.

¹⁷ See the August 24, 2021, Letter from Claimants' Counsel to Respondent's Counsel Requesting a Stay of Enforcement Proceedings, the August 31, 2021, Letter from Claimants' Counsel to Respondent's Counsel Requesting a Stay of Enforcement Proceedings, and the September 1, 2021, Letter to Claimants' Counsel from Respondent's Counsel Regarding Stay of Enforcement (C-003).

international cooperation from the relevant authorities in the U.S., the United Kingdom, and the Netherlands through the issuance of a document known as Auto 1356.¹⁸ Because Colombia has already taken steps to enforce the CGR Decision and is unwilling to agree not to seek enforcement action against FPJVC, the harm will likely occur even before this Tribunal rules on this Application. It is for this reason that Claimants also seek emergency temporary provisional measures as set forth herein.

29. *Finally*, the provisional measures sought are proportional. Colombia will not be prejudiced if the provisional measures are granted because, even if Colombia were ultimately to prevail on the merits, the worst-case scenario for Colombia is that it would suffer some delay in enforcing the CGR Decision. On the other hand, if the provisional measures are denied and Colombia proceeds to enforce the CGR Decision, a subsequent successful award on the merits will be meaningless for FPJVC because it will have been shut down and likely dissolved for long before the award.

30. Accordingly, Claimants respectfully request that this Tribunal issue an interim award that instructs Colombia to refrain from enforcing the CGR Decision until this arbitration has concluded to preserve the *status quo* and prevent the aggravation of this dispute, to ensure the parties' right to an exclusive remedy and to otherwise preserve the integrity of these proceedings. Claimants also respectfully request that this Tribunal award emergency temporary relief restraining Colombia from initiating [and/or continuing] any enforcement proceedings until the Tribunal has rendered a decision on this Application.

III. FACTUAL BACKGROUND AND CIRCUMSTANCES LEADING TO THIS REQUEST¹⁹

31. The CGR proceedings were conducted in a partial and discriminatory manner that constitute a denial of justice and violated FPJVC's right to fair and equitable treatment; charges against various Colombian officials were dismissed on grounds that the CGR refused to apply to FPJVC; exculpatory evidence that benefited FPJVC went ignored; and Colombian law was disregarded or misapplied to reach what seems like a foregone conclusion that FPJVC was a "fiscal

¹⁸ See Auto 1356 at 2 (C-004); see also CWS-1, Cesar Torrente at ¶ 11, n.7.

¹⁹ FPJVC submitted a detailed description of the factual background of this arbitration in its Request for Arbitration. Since that time, new events, discussed here, have transpired which are relevant to the Application and arbitration.

manager”, through gross negligence, of the misuse of public funds.²⁰ Indeed, the CGR never had jurisdiction over FPJVC in the first place. Simply put, the proceedings and the resultant US\$811 million decision against FPJVC violate FPJVC’s most basic rights, including its right to due process and rights under the TPA as an investor.

A. The Reficar Project.

32. The underlying dispute arose from the Contract between FPJVC and Reficar for the provision of services in connection with the Project.²¹ Reficar is wholly owned by Ecopetrol, which, in turn, is approximately 88% owned by Respondent. Respondent has, and at all relevant times had total control over both Reficar and Ecopetrol.²²

1. The Contract.

33. [REDACTED]

[REDACTED]

(a) [REDACTED]²³

(b) [REDACTED]²⁴ and

(c) [REDACTED]²⁵

34. Relying on those contractual safeguards, and the expectation of even-handed, fair and just treatment by Colombia, FPJVC decided to invest in Colombia and executed the Contract.

²⁰ [REDACTED]

²¹ Contract, without Appendices 1-7 and 9-29 (C-005).

²² As explained in the Request for Arbitration, Respondent 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.

²³ Contract, § 27 (C-005).

²⁴ *Id.* at § 10.

²⁵ *Id.*

2. FPJVC's Role on the Project, as Directed by Reficar.

35. The initial terms of the Contract contemplated that FPJVC would have project management responsibilities over the Project, if Reficar chose to delegate such responsibilities. Shortly after the Contract was executed, however, Reficar radically modified the contemplated scope of work by informing FPJVC that it would not have any authority over the Project's management. Reficar, instead, made itself as the lone decision-making authority over the entire Project and gave itself sole responsibility for managing the Project and its contractors. From the outset of the Project, FPJVC's responsibilities were reduced to consulting with Reficar's management and to seconding personnel to work as part of the Reficar Project Management Team ("PMT"). This role never afforded FPJVC the capacity to manage CB&I and make the decisions upon which the CGR would later base its jurisdiction, allegations, and liability findings against FPJVC in the CGR Charge and Decision.

36. The Contract expressly permitted Reficar to change the scope of FPJVC's work in this manner. Indeed, at the time that Reficar did so, FPJVC requested that the parties execute a formal amendment to the Contract. Reficar declined in writing to do so, assuring FPJVC that such a formal amendment was unnecessary, referencing Section 23 of the Contract that provides:

REFICAR shall have the right to request, and subsequently to order, FPJVC during the execution of the Services to make any change, modification, addition or elimination to, in or of the Services (hereinafter so called the "Change"), provided that said Change is within the general scope of the Services, does not constitute unrelated services and are technically practicable, taking into consideration the status of progress of the Services and the technical compatibility of the Change envisaged with the nature of the Services, according to that specified in this OFFER.²⁶

37. Unlike FPJVC, CB&I was heavily involved on the Project as the EPC contractor, as well as Ecopetrol and its Board of Directors. Ecopetrol and its Board of Directors worked with Reficar to make decisions about the Project and to approve the large increases in the Project's capital expenditures, reflected in various "Change Controls", that later formed the basis for the CGR's calculation of damages.

²⁶ *Id.* at § 23 (emphasis added) (C-005).

3. The Jacobs Report Confirms FPJVC’s Role and Lack of Decision-Making Authority; Concludes FPJVC is Not Liable for Claimed Project Delays and Costs.

38. It has been claimed that the Project experienced substantial cost overruns and delays compared to Reficar’s original project budget, which purportedly relied upon CB&I’s original estimate and schedule for the engineering, procurement and construction phases of the Project. As noted above, the EPC Contract was not for a fixed price, but was a fully reimbursable agreement to be paid on a time and materials basis. In fact, the EPC Contract was originally intended to be a lump-sum contract, but Reficar switched it to a reimbursable contract so that it could actively manage the Project and its costs. In that regard, Reficar also originally contemplated that FPJVC would be identified as its Project Management Consultant (“PMC”) in the EPC Contract with CB&I, but this too was changed. Reficar decided to not name FPJVC as its PMC, but instead, Reficar maintained all management and control over the Project, including control over CB&I, the EPC Contractor. Additionally, Ecopetrol, the corporate parent of Reficar, retained a well-known construction consultant, Jacobs Consultancy (“Jacobs”),²⁷ to independently investigate and issue reports tracking the progress of the Project, including identifying any delays or cost overruns and the reasons for them. Toward the end of the Project, at Ecopetrol’s request, 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 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.”²⁸ The Jacobs Report found that Reficar had elected to assume responsibility for management, budget, and administrative costs and expenses from the Project. The Jacobs Report has never been challenged by the CGR. To the contrary, its findings were later confirmed by the PGN, the Inspector General of Colombia.²⁹

²⁷ Jacobs is a well-known 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 AFWUSA. Notably, the Jacobs report was relied on by the PGN, which investigated the project for possible violations of Colombian law, and concluded that FPJVC had acted in accordance with its mandate.

²⁸ The Jacobs Report at 8 (C-006).

²⁹ See *supra*, Section II(E)

B. The CGR Initiates Proceedings Against FPJVC Without Jurisdiction.

39. On March 29, 2016, the CGR ordered an *Indagación Preliminar* (“Initial Investigation”) in connection with the Project. The Initial Investigation was meant to evaluate the Project and the parties involved in the Project, including Reficar, CB&I, FPJVC, and others.³⁰

40. Despite the lack of evidence of any fault on the part of FPJVC (as the Jacobs Report had previously found in 2015), let alone the requisite authority or gross negligence on the part of FPJVC, on March 10, 2017, the CGR issued the Opening Resolution to initiate the investigation of FPJVC, CB&I, the Ecopetrol Board of Directors, and Reficar’s directors and six of its officers, as well as others, for alleged acts and/or omissions in the expenditure of Colombia’s funds in connection with the Project.

41. On February 8, 2018, AFWUSA and PCI separately submitted an *exposición libre y espontánea* pursuant to the applicable Colombian law that governed the CGR proceedings, i.e., Law 610 of 2000 (“Law 610”).³¹ In that submission, AFWUSA and PCI described the structure of FPJVC and its members, the Contract and the performance of the same, the existence of the project management team, and described Reficar’s change in scope of the Contract, and further explained FPJVC’s lack of decision-making authority on the Project.

42. Nevertheless, on June 5, 2018, the CGR issued the charging document known as Auto 773 (i.e., the CGR Charge), which asserted that FPJVC, CB&I, and several officers and members of the Board of Directors of Reficar and Ecopetrol were jointly liable for the alleged economic damages suffered by Colombia in the form of lost profits for approximately US\$1.93 billion dollars and wasted costs for approximately US\$2.43 billion.³² These proceedings were improperly brought against FPJVC for a number of reasons.

³⁰ Notably, the CGR, in keeping with its statutory mandate, conducted annual audits of the Project. It never criticized FPJVC’s work on the Project in the course of any of those audits, let alone claim that FPJVC had a duty to supervise and control the work, although it must have reviewed the Contract in order to be able to perform them.

³¹ Specifically, Article 42 of Law 610 discusses these pleadings and says: “[any person] who has knowledge of the existence of an Initial Investigation or of the fiscal liability proceeding [against such person] and before there is a formal charge [against that person], he/she may request to the corresponding official to take a declaration, and in which it can appoint an attorney-in-fact to represent him/her during the proceeding. . .” **(CL-002)**.

³² The CGR ordered that the lost profits portion of the fiscal liability proceeding be conducted in a separate fiscal liability proceeding with the file number PRF-2017-00309_UCC-PRF-005-2017.

43. First, under Law 610, only “fiscal managers,” defined as “those who have decision-making power over State resources or public funds under their control,”³³ may be subject to fiscal liability proceedings, and only when, through fraudulent or grossly negligent conduct with respect to public funds, such “fiscal managers” cause economic harm to the Colombian State.³⁴ FPJVC does not fall within this definition of “fiscal manager” because it had no decision-making authority with respect to the Project’s expenditures.

44. The Colombian Constitution also 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 organization³⁵

45. Nevertheless, the CGR Charge alleged that FPJVC was a “fiscal manager.” The CGR Charge, however, failed to plead the elements required to show that FPJVC was a “fiscal manager” under Law 610, did not include any specific allegations related to fraudulent or grossly negligent conduct, and failed to articulate how FPJVC’s conduct caused the alleged harm. Instead, the CGR asserted purely conclusory allegations inferring wrongful conduct and causation based upon the fact that the Project was more costly than anticipated and experienced delays, essentially seeking

³³ Constitutional Court, Judgment C-832 of 2002 (CL-003).

³⁴ Article 5 of Law 610 states that the first element of fiscal liability is fraudulent or negligent conduct. (CL-002). Colombian courts, however, have conclusively interpreted the statute to mean fraudulent or *grossly* negligent conduct. *See, e.g.*, Constitutional Court, Judgment C-338 of 2014 (CL-003).

³⁵ Constitución Política de Colombia, Art. 267 (CL-004).

to impose strict liability upon FPJVC for all cost increases.³⁶ The CGR also did not identify specific economic damage to the State,³⁷ maintaining instead that Project budget increases that Reficar and Ecopetrol approved constituted such damage.³⁸

46. The CGR Charge relies on the fact that the Contract was never formally amended to change FPJVC's scope of work. As noted above, the scope of work was changed in accordance with the Contract itself, is fully documented, and neither Reficar, nor any other Colombian entity, complained that FPJVC was in any way failing to carry out its duties and responsibilities.

47. In short, therefore, even assuming that the CGR's theory that, despite the express language of the Contract, Reficar somehow lacked authority to modify the scope of FPJVC's work, is true, its theory of liability makes no sense. In effect, the CGR contends that FPJVC had the obligation to supervise the finances of the Project and those actually making those decision; that FPJVC had the right to force Reficar to allow it to exercise such control, despite Reficar's expressly retaining such control for itself; that FPJVC should have, in some unspecified way, forced Reficar to act in accordance with FPJVC's unwelcome directions; and that FPJVC is, therefore, responsible for the difference between the estimated costs provided by CB&I and the actual costs of the Project, based upon the notion that Reficar had been promised that the Project would be completed and delivered in accordance with those estimates. Even if there were the slightest merit to the premises of that argument – and there is not – it would amount, at most, to a simple breach of contract, and could not possibly amount to the gross negligence that is the minimum standard for the CGR to exercise its jurisdiction and impose liability. The fact that the CGR did precisely that constitutes a clear violation of Colombia's obligations under the TPA to provide fair and equitable treatment and due process, and to honor FPJVC's reasonable expectations, because no reasonable investor could have possibly foreseen the risk of such treatment. The fact that the CGR applied a different, and correct, standard to the prominent Colombian citizens on the Ecopetrol board only makes its violation of the treaty worse.

³⁶ CWS-4, Colin Johnson, at ¶¶ 25-33, 43-46.

³⁷ Under Article 5 of Law 610, the CGR is required to prove the following element of "fiscal responsibility": (1) Intentional or culpable conduct attributable to a person who carries out fiscal management; (2) Property damage to the State; and (3) A causal link between the previous two elements (**CL-002**).

³⁸ CWS-4, Colin Johnson, at ¶¶ 34-42.

48. As set out at paragraphs 86 through 88 of the Request for Arbitration, following the issuance of the CGR Charges, the Colombian press has widely disseminated the CGR’s sensationalized and inflammatory public statements regarding the Project and the CGR proceeding, and added its own damaging commentary. By way of example only, the leading newspaper “El Tiempo” has labeled this process as the “biggest fiscal trial in the history” of Colombia; the business magazine “Dinero” has reiterated the statement made by the CGR in its press release that “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”; and the magazine “Semana” posed the rhetorical question whether the Project – which provided Colombia with the [largest and] most modern petroleum refinery in all of South America – has been the biggest scandal of the century.³⁹ FPJVC submits that the CGR’s need to meet the expectations created by its media campaign, and the public pressure to do something dramatic about the non-existent but well-publicized “fraud” it was investigating, led to the remarkably shoddy decision at issue.⁴⁰

49. The CGR’s exercise of jurisdiction over FPJVC is a grave misapplication of Colombian law. Moreover, even if there were a colorable jurisdictional basis for the proceedings, although there was not, the CGR ignored the substantive protections, including mandatory ICC arbitration, a liability cap, and a waiver of consequential damages.⁴¹

C. The CGR Dismisses Prominent Colombian Nationals from the Proceedings but Refuses to Apply the Same Facts and Legal Standards to FPJVC, a Foreign Investor.

50. In the June 5, 2018 CGR Charge, the CGR dismissed the Ecopetrol Board of Directors, which is comprised of prominent Colombian nationals, on the ground that they did not qualify as “fiscal managers” under Law 610, even though those directors – unlike FPJVC – had, and exercised, decision-making authority for the Project. Specifically, in dismissing the Ecopetrol

³⁹ Request for Arbitration, ¶ 87.

⁴⁰ In *Glencore International A.G. v Republic of Colombia*, ICSID Case No. ARB/16/6, the Final Award granted the same relief sought in this arbitration – an award offsetting the CGR’s improper assessment of damages – and after summarizing a number of the Controller General’s inflammatory comments in the press, stated that her “public statements were reprehensible and ill-advised.” Although the award itself was not based on the bias shown in those statements because she had left office before the decision was made. Award of 25 August 2019, at ¶ 1358. (CL-005). It is unfortunate, to say the least, that the CGR has shown the same conduct here.

⁴¹ [REDACTED] (C-007).

Board of Directors, the CGR reasoned that the Ecopetrol Board of Directors' conduct did not constitute fiscal management pursuant to Law 610 because they lacked exclusive decision-making authority over the expenditure of funds on the Project, and that definitive decision-making authority was vested in Reficar (which necessarily implies, in and of itself, that FPJVC was also not a fiscal manager).⁴² The CGR then refused to apply that same legal standard applied in favor of the Ecopetrol directors, all prominent Colombian citizens, to FPJVC.

51. To be clear, there is no conceivable significant distinction between the Board's position and FPJVC's position. In its dismissal, the CGR found that Ecopetrol's Board only "provided advice and consultation to Reficar," and also finding that these acts do not equate to "decision-making authority."⁴³ On the other hand, the CGR faulted FPJVC for doing the same – providing advice and consultation, which is what Reficar directed it to do.⁴⁴ Despite performing precisely as directed, the CGR held FPJVC liable, applying inconsistent legal standards to Ecopetrol's Board and FPJVC. The only possible explanation for that distinction is discrimination against a foreign investor.

D. In October 2018, Colombia Makes Known Its Intent to Enforce the CGR Decision Against FPJVC's Assets Locally and Abroad.

52. On October 5, 2018, the CGR issued Auto 1356 relating to the proceedings.⁴⁵ Claimants, along with CB&I and Ecopetrol, were listed in Auto 1356 as "presuntos responsables fiscales."⁴⁶ The CGR requested the following international assistance in identifying assets:

3. ASUNTO A TRAMITAR

⁴² On pages 4361 – 4696 of the CGR Charge, the CGR carried out a thorough analysis with respect to the acts of each member of the Board of Directors of Ecopetrol in relation to the approval of each change control—1 to 4—based on which it decided to dismiss the claims against such members. The CGR considered that the Board Members did not perform acts that could be part of a fiscal investigation because they did not have responsibility for approving the change controls; such responsibility rested with Reficar's Board, not Ecopetrol's Board. The CGR concluded that Ecopetrol's Board members, either received the change controls when they were already approved by Reficar's Board—even if that was an ultra vires act of Reficar's Board or against the corporate structures in place for such Board, or they complied with their role by (i) admonishing the Reficar Board to comply with its corporate obligations and to increase the productivity of the project, or (ii) assisting Reficar in obtaining financing for the project and providing Reficar with high level advice and consultation. (C-001).

⁴³ See, e.g., excerpts from CGR Charge at 4361-4696, 6087 (C-001).

⁴⁴ See, e.g., Excerpt from CGR Charge at 3579-80, 3715 (C-001).

⁴⁵ See Auto 1356 at 1 (C-004).

⁴⁶ "Alleged Fiscally Responsible Parties" [English translation].

Tomando en cuenta que dentro del proceso de responsabilidad fiscal aparecen vinculadas unas personas jurídicas de origen extranjero, y habida cuenta la necesidad de realizar la búsqueda de bienes con el fin de implementar las medidas cautelares adecuadas a la proceso, se solicitó mediante el oficio SIGEDOC 20181E0031141 del 24 de abril de 2018, a la Unidad de Cooperación Nacional e Internacional para la Prevención, investigación e Incautación de Bienes, la colaboración para adelantar la búsqueda de bienes a nivel internacional de unos implicados en la presente actuación fiscal.

Por su parte, la de Cooperación Nacional e Internacional para la Prevención, Investigación e Incautación de Bienes, remitió a esta dependencia mediante los oficios 20181E0035800 y 20181E0037923, las solicitudes de asistencia judicial recíproca, con el fin de que se realice la traducción de las mismas, para el envío de estas a las respectivas autoridades centrales de los países requeridos.

De esta forma, tomando en cuenta lo anterior se ordenará la traducción del castellano al inglés de los siguientes documentos:

- SOLICITUD DE ASISTENCIA JUDICIAL RECÍPROCA, para “Office of international affairs Criminal Division Department of justice of USA”, de EE.UU., la cual obra en 11 folios (fls. 664 al 669 del cuaderno cuatro de las medidas cautelares).
- SOLICITUD DE ASISTENCIA JUDICIAL RECÍPROCA, para “Criminal Law Advisory Team”, del Reino Unido, la cual obra en 9 folios (fls. 671 al 679 del cuaderno cuatro de las medidas cautelares).
- SOLICITUD DE ASISTENCIA JUDICIAL RECÍPROCA, para “Office of international Legal Assistance in Criminal matters, Ministry Of Security and Justice Of Holanda”, de Holanda, la cual obra en 9 folios (fls. 680 al 688 del cuaderno cuatro de las medidas cautelares).⁴⁷

53. Although the CGR listed many respondents as “presuntos responsables fiscales,” it clearly was directed at FPJVC because the CGR requested reciprocal judicial assistance to identify assets in those countries where Claimants have an established presence. Auto 1356 demonstrates that this Application is not based on a hypothetical fear, but that Colombia intends to seek immediate enforcement of the CGR Decision. Colombia’s recent refusal to agree to suspend enforcement or freezing efforts confirms the reality of the present situation.

⁴⁷ See Auto 1356 at 8 (C-004).

E. In January 2020, an Investigation by a Separate and Autonomous Colombian Entity, the PGN, Concluded That FPJVC Had No Responsibility Over the Project and Served in a Support Role Only.

1. The PGN Decision Adopted the Jacobs Report.

54. On January 17, 2020, the PGN issued a decision (*i.e.*, Auto DEHP 007 *de* 2020) (the “PGN Decision”) which endorsed the Jacobs Report’s findings that FPJVC did not have decision-making authority over the disposition of State assets; it follows that FPJVC could not have been a fiscal manager. The PGN (In English, the “Inspector General’s Office”) is an independent Colombian public agency that hears and decides disciplinary actions against public servants and private parties, including private inspectors and or supervisors of public contracts.⁴⁸ The relationship between the CGR and the PGN is discussed in further detail below at Section E.2.

55. The PGN Decision confirmed and relied heavily on the Jacobs Report, noting that its author, Jacobs Consultancy “had full knowledge of what happened during the Project, which gives it an authoritative voice in its description of the difficulties experienced by the Project.”⁴⁹

56. In that regard, the PGN endorsed the conclusion of the Jacobs Report that FPJVC neither controlled nor directed the Project:

- “Para Jacobs, en su informe de octubre de 2015, la gestión de un contrato reembolsable como el que se escogió finalmente para contratar el EPC, requería de un extenso equipo de gestión de proyecto con más experiencia, por lo que REFICAR contrató al consultor FPJVC . . . pero no se le permitió que tomara toda la responsabilidad del proyecto, sino que se colocó en posiciones de apoyo, pero con personal inexperto de REFICAR en-puestos de control directo [C]on todo, se observó que en el proyecto de la Refinería de Cartagena las decisiones las tomaban directivos de REFICAR, sin experiencia en este tipo de proyectos, quienes quedaron sobrepasados tratando de manejar los cambios y desviaciones”⁵⁰
- “En todo caso, se reitera, los funcionarios de REFICAR y Ecopetrol no contaban con la experiencia necesaria para el gerenciamiento del proyecto, y dadas las implicaciones fiscales del mismo no podían tomar la decisión de entregar su control

⁴⁸ See CWS-1, Cesar Torrente, at ¶ 15, n. 18.

⁴⁹ Auto DEHP 007 *de* 2020 (the “PGN Decision”) at 154-55 (C-008).

⁵⁰ “In Jacobs’ view, as reflected in its October 2015 report, the management of a reimbursable contract like the one used to hire the EPC contractor, required an extensive and experienced project management team, thus, REFICAR hired the consultant FPJVC . . . but REFICAR did not allow [FPJVC] to assume responsibility over the project, rather, REFICAR placed it [FPJVC] in a support role but with unexperienced REFICAR personnel in positions of direct control [A]ll in all, Jacobs observed that REFICAR’s directors, who had no experience in this kind of project, made all the decisions in the Cartagena Refinery project, and were overwhelmed trying to manage the changes and deviations” *Id.* at 158 [English translation].

al PMC. Además, el hecho de no aceptar los nuevos pronósticos de CB&I, se constituyó en una de las herramientas de presión con las que contó REFICAR.”⁵¹

- **“Adicionalmente las políticas de la empresa no permitieron cederle el control del proyecto al consultor de gerenciamiento (Foster Wheeler) y aprovechar su experiencia, lo que hubiera agilizado la toma de decisiones dentro del proyecto.”**⁵²
- “Mediante correo electrónico de fecha 19 de septiembre de 2014, de Nicolás Isaksson para Robert Matis de CBII, aquel confirmó que REFICAR instruiría a FPJVC para aprobar el pago de todas las facturas de subcontratistas emitidas por CBI hasta por el 80% del valor del contrato que excediera el presupuesto de partida del subcontrato.”⁵³
- “En este escenario, el día 24 de febrero de 2014, se suscribieron así dos acuerdos de entendimiento, uno para CB&I Colombiana y otro para CB&I UK, conocidos como acuerdos MOU o MOA, a través de los cuales REFICAR convino con CBI hacerle pagos de facturación que no había sido aprobada por FPJVC”⁵⁴

57. The PGN’s conclusions and reliance on the Jacobs Report further establish that the Project’s alleged delays and cost overruns (including the approvals of certain Change Controls by Ecopetrol’s and Reficar’s Boards of Directors) could not be attributed to FPJVC because of Reficar’s decision to: (1) radically reduce the scope of FPJVC’s work on the Project, and (2) prevent FPJVC from acting as a traditional project manager and owner’s representative, but rather as a consultant that could only make certain suggestions and recommendations concerning the Project (some of which Reficar disregarded or bypassed). As a result, CB&I and Reficar – not

⁵¹ “In any case, as mentioned before, REFICAR’s and Ecopetrol’s officers lacked the necessary experience to manage the project, and given its financial implications for the government, such officers could not make the decision to hand over control to the PMC. In addition, not accepting new CB&I’s forecasts became one of REFICAR’s tools to apply pressure” *Id.* at 170 [English translation].

⁵² **“Additionally, the company’s [Reficar’s] policies did not allow it to delegate control of the project to the management consultant (Foster Wheeler) and to take advantage of its experience, which would have otherwise streamlined the decision-making process within the project.”** *Id.* at 172 [English translation] (emphasis added).

⁵³ “Through email dated September 19, 2014, sent by Nicolás Issaksson to Robert Matis from CB[&]I, the former confirmed that REFICAR would instruct FPJVC to approve the payment of all the subcontractors’ invoices issued by CB[&]I up to 80% of the contract’s value in excess of the initial budget for the subcontract.” *Id.* at 203 [English translation].

⁵⁴ “In this context, on February 24, 2014, two memorandums of understanding, known as MOUs or MOAs, were executed, one with respect to CB&I Colombiana and the other with respect to CB&I UK, through which REFICAR agreed with CB[&]I that it would make payments of invoices that had not been approved by FPJVC.” *Id.* at 216 [English translation].

FPJVC – were the decisionmakers during the course of the Project.⁵⁵ FPJVC was not a fiscal manager because it: (1) did not supervise, execute, or make any decisions regarding the funds expended on the Project, (2) did not manage, control, or direct CB&I’s activities or expenditures on the Project, and (3) could not have prevented the approvals of Change Controls 2, 3, and 4. And Reficar’s formation of the PMT itself – a fact that the CGR does not deny – proves that FPJVC’s role was modified.

58. The PGN Decision further establishes that there is no casual connection between any act by FPJVC and the alleged damage suffered by Colombia:

[R]especto a lo relacionado con los controles de cambio, se encuentra debidamente probado que los mismos no se generaron por la terquedad de los aquí investigados, sino por el contrario fue la respuesta a una proyección de presupuesto equivocada por parte de la empresa CB&I, que hacia (sic) imposible continuar con la ejecución de la obra si no se autorizaba el incremento del presupuesto inicial.⁵⁶

59. The PGN’s independent assessment of FPJVC’s involvement in the Project used the same criteria as the CGR, namely whether FPJVC had control or direction over the Project. Unlike the CGR, the PGN actually reviewed the evidence regarding fiscal liability and control of the Project and concluded that FPJVC did not have control or direction over the Project, which are essential elements under Law 610 to show “fiscal management.”

2. The CGR Improperly Disregarded the “Harmonious Collaboration” Principle Under Colombian Law by Ignoring the PGN Report.

60. It is crucial to understand the roles of the CGR and the PGN to appreciate the illegality of the CGR’s refusal to recognize the PGN Report. Under Colombian law, the CGR and the PGN are two separate and autonomous entities that do not depend on each other, have different scopes as to their competence and are the highest administrative authorities in their respective jurisdictions. Under the Constitution, public officers are bound to abide by the Constitution, and the decisions of the Supreme Court, the Council of State and the Constitutional Court.

⁵⁵ See Jacobs Report at 8, 19, section 4, section 6 (C-006).

⁵⁶ “Regarding the change orders [change controls], it has been properly proven that [the change controls] were not caused by the stubbornness of those investigated here [the respondents]; to the contrary, it was the result of a wrong budget estimate made by CB&I, which made it impossible to continue with the performance of the project, unless the increase of the initial budget was approved.” PGN Decision at 237 (C-008) [English translation] (emphasis added).

61. As noted above, the CGR and the PGN are both *organismos de control*, i.e., State authorities independent and autonomous from all other State branches. The CGR is in charge of fiscal control, which includes the surveillance of the adequate administration and management of public funds or goods and the power to initiate fiscal liability proceedings to recoup public resources in cases where there is damage against the State. On the other hand, the PGN is both: (1) the head of the “ministerio público” (whose function is to monitor compliance with law, to protect human rights, and to safeguard the public interest at all levels) and (2) in charge of investigating and prosecuting public officers’ infractions of law. Both the CGR and the PGN are the highest administrative authorities in their respective jurisdictions. Their decisions can only be challenged before the judiciary. Under Colombian law, the PGN, as head of the “ministerio público”, is viewed as a *prima facie* impartial and independent State entity. Under Article 113 of the Colombian Constitution, “the different organs of the State have separate functions, but they shall harmoniously collaborate for the realization of their goals” (the principle of “Harmonious Collaboration”).⁵⁷ By disregarding the PGN Decision and its carefully considered findings, the CGR Decision violated the “Harmonious Collaboration” principle, including FPJVC’s reasonable expectations that Colombia would, *inter alia*, treat its investment in a transparent, consistent, and predictable manner, in accordance with Colombian law, and refrain from arbitrary or unreasonable treatment in interpreting its own law.

F. In August 2020, FPJVC Filed – and the CGR Ignored – a Motion to Dismiss the CGR Proceeding Due to Lack of Jurisdiction and Has Exhausted its Challenges to the CGR’s Jurisdiction in Colombia.

62. From the time that it first received notice of the CGR Charge, FPJVC has challenged the CGR’s jurisdiction as a matter of Colombian law through the available avenues provided by the legal framework provided by the Colombian legal system. First, on October 8, 2018, FPJVC filed its challenge to the CGR’s jurisdiction, arguing that FPJVC did not fall within the Law 610 definition of “fiscal manager.”

63. On August 3, 2020, FPJVC filed a motion pursuant to Article 16 of Law 610⁵⁸ seeking to dismiss the fiscal liability proceeding as to FPJVC (“Article 16 Motion”). The Article 16

⁵⁷ Constitución Política de Colombia, Article 113 (CL-004).

⁵⁸ Article 16 was a procedural avenue for respondents to dismiss cases where the CGR has no jurisdiction, but Decree 403 removed Article 16 from the text of the statute, depriving respondents of a right to seek dismissal on these grounds. Article 16 of Law 610 stated: “Termination of the fiscal action. **It shall be grounds for dismissal of the**

Motion explains that FPJVC does not meet the definition of “fiscal manager” because it lacked decision-making authority for the Project. FPJVC also argued that the CGR should have used the same standard for FPJVC it used to dismiss some members of the Ecopetrol Board of Directors from the fiscal liability proceeding. Like those Colombian directors, FPJVC did not have decision-making authority in the Project, let alone power to implement measures to control costs prior to the approvals of any Change Control. The Article 16 Motion also relied on the PGN Decision. Though the CGR never actually ruled on the Article 16 Motion, the CGR denied it by operation of law when it issued the CGR Decision finding FPJVC fiscally liable for damages allegedly caused due to the approval of Change Controls 2 and 3.

G. Colombia Changes Law 610 in an Effort to Retroactively Create CGR Jurisdiction Over FPJVC.

64. As detailed above, the CGR plainly had no jurisdiction over FPJVC because, among other reasons, FPJVC was not a “fiscal manager” under Law 610. Two Colombian laws, which were issued long after FPJVC entered into the Contract with Reficar, were enacted to expand the definition of fiscal management under Law 610. In general terms, the changes in Colombian law expanded the CGR’s jurisdiction. Among them, the CGR now has the power not only to initiate *ex post facto* fiscal liability proceedings, but also to take “immediate action”⁵⁹ and undertake “preventative and concomitant” control⁶⁰ to ensure appropriate expenditure of public resources. Article 128 of Law 1474 of 2011 created 11 Deputy Investigators (“*contralores*”) throughout Colombia responsible for taking “immediate action” due to “imminent risk of loss or undue impact on public property or to establish the occurrence of facts constituting fiscal responsibility and to collect and secure evidence for the advance of the corresponding processes.”⁶¹ Accordingly, given the public nature of the Project, the CGR audited it every year and was fully aware of the Change Controls, yet did nothing at the time to take preventative measures to protect the public waste it

case, at any stage of the preliminary investigation or of the fiscal liability proceeding, if it is established that the fiscal liability could not have been initiated or continued due to the expiration of the proceedings or the applicable statute of limitation period has run; when it **has been shown that the fact [giving rise to the claim]** did not exist or it did not cause economic harm to the State or **does not constitute the exercise of fiscal management**; or when it has been shown that there is a ground that excludes fiscal liability or if it has been shown that the harm that is under investigation has been completely compensated.” (emphasis added) (CL-002).

⁵⁹ Article 128 of Law 1474 of 2011 (CL-006).

⁶⁰ Preamble to Decree 403 of 2020 (CL-007).

⁶¹ Article 128 of Law 1474 of 2011 (CL-006).

complains of now, even though it had the power to prevent any cost overruns under Colombian law.⁶² The changes in the law most relevant to Claimants are detailed further below.

65. Law 1474, which as noted above was enacted in 2011, sought to expand the definition of who may be considered fiscal managers; however, it still required proof of decision-making authority (it should be noted that the Deputy Controller has provided no evidence whatsoever of FPJVC’s decision-making authority, and to the contrary, it was provided with overwhelming evidence that at all times Reficar maintained such authority). Decreto Número 403 de 2020, issued by the President of the Republic of Colombia on March 16, 2020 (“Decree 403”), purports to expand the scope of fiscal management even further – in an apparent attempt to cover entities such as FPJVC.

66. Most significantly, Article 4 of Law 610’s definition of “fiscal manager” was expanded by Decree 403 as follows, with the former language on the left and the new language on the right:

<p>Artículo 4º. Objeto de la responsabilidad fiscal. La responsabilidad fiscal tiene por objeto el resarcimiento de los daños ocasionados al patrimonio público como consecuencia de la conducta dolosa o culposa de quienes realizan gestión fiscal mediante el pago de una indemnización pecuniaria que compense el perjuicio sufrido por la respectiva entidad estatal. Para el establecimiento de responsabilidad fiscal en cada caso, se tendrá en cuenta el cumplimiento de los principios rectores de la función administrativa y de la gestión fiscal.</p>	<p>Artículo 4º. Objeto de la responsabilidad fiscal. La responsabilidad fiscal tiene por objeto el resarcimiento de los daños ocasionados al patrimonio público como consecuencia de la conducta dolosa o gravemente culposa de quienes realizan gestión fiscal o de servidores públicos o particulares que participen, concurren, incidan o contribuyan directa o indirectamente en la producción de los mismos, mediante el pago de una indemnización pecuniaria que compense el perjuicio sufrido por la respectiva entidad estatal. Para el establecimiento de responsabilidad fiscal en cada caso, se tendrá en cuenta el cumplimiento de los principios rectores de la función administrativa y de la gestión fiscal.</p> <p>Parágrafo. La responsabilidad fiscal es autónoma e independiente y se entiende sin perjuicio de cualquier otra clase de responsabilidad”.⁶³</p>
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67. This amendment directly impacted FPJVC because, instead of generally applying to only “those who perform fiscal management,” Law 610 now purports to broadly apply to “public servants or private parties who participate, concur, influence or contribute directly or indirectly to the generation of such damages.” This amendment broadens the scope of “fiscal manager” in an

⁶² Law 1474 effectively conferred overarching “fiscal manager” status upon the CGR officials, yet the CGR took no steps to alter the course of events as they were unfolding. Either they are complicit in the alleged wrongdoing, or their failure to act is an admission that the management was appropriate under the circumstances.

⁶³ Textual comparison of Law 610 and Law 610, as amended by Decree 403 of 2020 (CL-007).

attempt to include entities like FPJVC and provides that consultants may be liable as fiscal managers, even if they lack decision-making authority with respect to the handling or management of public assets or resources.

68. Decree 403 also amended Article 5, which again broadens the applicability of the definition of “fiscal manager” to include in the elements of fiscal liability one who “participates, concurs, influences, or contributes directly or indirectly in the generation of the patrimonial damage to the State,” whereas before it only applied to a “person that performs fiscal management”:

<p>Artículo 5°. Elementos de la responsabilidad fiscal. La responsabilidad fiscal estará integrada por los siguientes elementos: - Una conducta dolosa o culposa atribuible a una persona que realiza gestión fiscal. - Un daño patrimonial al Estado. - Un nexo causal entre los dos elementos anteriores.</p>	<p>Artículo 5°. Elementos de la responsabilidad fiscal. La responsabilidad fiscal estará integrada por los siguientes elementos: - Una conducta dolosa o gravemente culposa atribuible a una persona que realiza gestión fiscal o de quien participe, concorra, incida o contribuya directa o indirectamente en la producción del daño patrimonial al Estado. - Un daño patrimonial al Estado. - Un nexo causal entre los dos elementos anteriores.⁶⁴</p>
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69. The Decree also amended Article 6, which defines “patrimonial damage”:

<p>Artículo 6°. Daño patrimonial al Estado. Para efectos de esta ley se entiende por daño patrimonial al Estado la lesión del patrimonio público, representada en el menoscabo, disminución, perjuicio, detrimento, pérdida, uso indebido o deterioro de los bienes o recursos públicos, o a los intereses patrimoniales del Estado, producida por una gestión fiscal antieconómica, ineficaz, ineficiente, inequitativa e inoportuna, que en términos generales, no se aplique al cumplimiento de los cometidos y de los fines esenciales del Estado, particularizados por el objetivo funcional y organizacional, programa o proyecto de los sujetos de vigilancia y control de las contralorías. Dicho daño podrá ocasionarse por acción u omisión de los servidores públicos o por la persona natural o jurídica de derecho privado, que en forma dolosa o culposa produzcan directamente o contribuyan al detrimento al patrimonio público. El texto subrayado fue declarado INEXEQUIBLE por la Corte Constitucional mediante Sentencia C-340 de 2000.</p>	<p>Artículo 6°. Daño patrimonial al Estado. Para efectos de esta ley se entiende por daño patrimonial al Estado la lesión del patrimonio público, representada en el menoscabo, disminución, perjuicio, detrimento, pérdida, o deterioro de los bienes o recursos públicos, o a los intereses patrimoniales del Estado, producida por una gestión fiscal antieconómica, ineficaz, ineficiente, e inoportuna, que en términos generales, no se aplique al cumplimiento de los cometidos y de los fines esenciales del Estado, particularizados por el objetivo funcional y organizacional, programa o proyecto de los sujetos de vigilancia y control de los órganos de control fiscal. Dicho daño podrá ocasionarse como consecuencia de la conducta dolosa o gravemente culposa de quienes realizan gestión fiscal o de servidores públicos o particulares que participen, concurren, incidan o contribuyan directa o indirectamente en la producción del mismo.⁶⁵</p>
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70. Again, this change vastly broadens the powers of the Colombian Government to bring a fiscal liability action against “private parties that participate, concur, influence, or contribute

⁶⁴ *Id.*

⁶⁵ *Id.*

directly or indirectly” to the “generation” of damages, and importantly, Decree 403 provides that consultants or “contributors” may be liable as fiscal managers even if they lack decision-making authority with respect to the handling or management of public assets or resources. In fact, these amendments to Colombian law makes it even clearer that the law applicable to FPJVC was limited to those exercising control over the expenditure of public funds; were that not the case, there would have been no reason to amend the law to attempt to cover FPJVC.

71. While Decree 403 and Law 1474 may contain expanded definitions of what constitutes fiscal management and who may be considered fiscal managers under Law 610, it is clear that neither was in effect at the time FPJVC entered into the Contract with Reficar. As such, it is completely improper and is a gross violation of Colombia’s obligations under the TPA and international law to have held FPJVC liable as fiscal managers without evidence of decision-making authority – the retroactive application of a statute is one of the clearest violations of a host country’s obligations towards its foreign investors.

H. The CGR’s April 26, 2021 Decision Against FPJVC.

1. The CGR’s Liability Analysis Continues to Violate FPJVC’s Due Process Rights.

72. On April 26, 2021, the Deputy Controller rendered the 6,243-page CGR Decision in a document known as Auto 749. FPJVC’s deadline to appeal the CGR Decision under Colombian law was a mere five days, which was an absurdity given the length and complexity of the CGR Decision. FPJVC immediately requested a 90-day extension of its filing deadline, noting that only five days to respond was a gross violation of FPJVC’s due process rights. The CGR denied FPJVC’s reasonable and necessary extension request, and granted no extension at all.⁶⁶ However, as a result of an administrative error by the CGR when it failed to serve complete copies of Auto 749 on the parties, FPJVC ultimately had another seven days to file its appeal – for a task of such magnitude, there is no meaningful difference between five and twelve days.

73. Like the CGR Charge and the underlying CGR proceedings before it, the CGR Decision is riddled with material deficiencies that effected grave violations to FPJVC’s due process rights. Substantively, the findings made against FPJVC by the Deputy Controller are

⁶⁶ FPJVC also filed a *tutela* with the Council of State requesting this extension, but the Council of State denied the request for relief.

based on an alleged breach of contractual obligations *vis-à-vis* Reficar under the Contract. The contractual guarantees limiting FPJVC's exposure were ignored by the CGR.⁶⁷ FPJVC invested in Colombia and executed the Contract based on these promises and in reliance on these contractual safeguards and on Colombian law to enforce them. The CGR Decision – and the CGR proceedings as a whole – render FPJVC's contractual rights meaningless and violate FPJVC's right to fair and equitable treatment and due process, deny it national treatment, and violate its reasonable expectations.

74. Significantly, after three years of consistently asserting that FPJVC's liability was related to its alleged grossly negligent acts as a "fiscal manager" under Law 610, the CGR switched gears. Because there was no evidence that FPJVC was ever a "fiscal manager", the CGR asserted that FPJVC was liable as a "contributor", in accordance with the broadened definitions of "fiscal manager" and "fiscal management" under Decree 403 of 2020. This new "contributor" theory advanced by the CGR is in effect a concession that FPJVC never had decision-making authority over the expenditure of public funds in connection with the Project, as required by Law 610. Decree 403 came into effect in March 2020, three years *after* the CGR commenced its investigation in March 2017, and almost two years *after* it issued formal charges against FPJVC and others in June 2018, but after FPJVC had challenged the CGR's jurisdiction on this ground. Though the CGR did not expressly state that it was applying the new definitions under Decree 403 to FPJVC in the fiscal liability proceedings, the CGR copied its amended language *in haec verba* in the CGR Decision and the retroactive application of Decree 403 was clearly the rationale for its decision.

75. The CGR's retroactive application of Articles 4, 5, and 6 of Law 610 (as amended by Decree 403) is a gross departure from applicable law and breaches the fundamental due process rights guaranteed by Colombia's constitution⁶⁸ because FPJVC relied on the prior version of Law 610 for its defense in the CGR proceedings. This retroactive application not only violates both long-established principles of international investment law, FPJVC's reasonable expectations regarding the law that would apply to its investment, and it also breaches Colombian Constitutional and statutory law, which prohibit giving substantive provisions retroactive effect.

⁶⁷ See *supra* part II(A)(1) of the Application.

⁶⁸ Constitución Política de Colombia, Articles 29 and 58 (CL-004).

2. The CGR's Revised Damages Analysis Further Violates FPJVC's Due Process Rights

76. As noted above, the CGR Decision found that FPJVC was jointly and severally liable for alleged damages in the amount of COP 2,945,409,783,732.43 (approximately US\$811 million at the current rate of exchange), based on a newly devised and fundamentally flawed damages methodology. The CGR's damages methodology does not meet the minimum requirements for a damages methodology in an investment treaty case, and suffers from multiple fundamental problems.⁶⁹

77. The CGR held that FPJVC, among other participants, was jointly and severally liable for gross negligence for the following amounts: (1) approximately US\$366,255,522 as a result of the approval of Change Control 2, and (2) approximately US\$445,122,990 as a result of the approval of Change Control 3. The errors in the CGR's damages methodology, and the impact it had on FPJVC's ability to defend itself, are briefly explained here.

78. First, the CGR did not even attempt a fundamental analysis to support its purported damages in the CGR Charge or the CGR Decision. Common practice requires, at a minimum: (1) a causal analysis to establish a link between the actions or inactions of those parties it identifies as responsible and the alleged damages resulting from those actions or inactions; and (2) a quantification of the damages that results from *each* of those specific actions or inactions.⁷⁰ The CGR did not meet either of those minimum requirements, and the CGR itself admits in its Decision that its damages model is non-standard and that it did not even attempt to describe a causal link between the alleged acts or omissions of the parties and the claimed resulting damages.⁷¹

79. Instead, the CGR's methodology treats any reduction in the financial value of the Project below what was originally expected (based on a set of initial and flawed Base Line

⁶⁹ CWS-4, Colin Johnson, ¶¶ 18-20.

⁷⁰ *Id.* at ¶ 20. Law 610 also requires this. Article 5 (prior to the Decree 403 amendment) states: "Fiscal responsibility shall consist of the following elements: (i) Intentional or culpable conduct attributable to a person who carries out fiscal management, (ii) Property damage to the State, (iii) A causal link between the previous two elements." (CL-002).

⁷¹ *Id.* at ¶ 21.

projections) to represent damages to the State, irrespective of the cause of such reduction, and jointly and severally attributes these damages to FPJVC and others.⁷²

80. In addition to lacking the requisite causal analysis and a breakdown of the quantification of damages to support such analysis, the CGR's methodology is defective because of: (1) the application of a meaningless concept of a "promise of value and profitability;" (2) the inappropriate use of a financial model based on Base Line projections – the foundation of the supposed promise – as a basis for the quantification of damages; (3) the inappropriate reliance on projections as a basis for the quantification of damages; (4) the admitted failure to undertake any causal analysis; (5) the failure to consider the scenarios available to the Board of Directors of Reficar at each Change Control; and (6) the exclusion of operating cashflows on the basis of "uncertainty."

81. First, regarding the "promise of value and profitability" raised by the CGR in its damages methodology, this is a concept that suggests that by approving additional capital expenditure ("CAPEX") investments, the approver (which, as noted above, does not include FPJVC) directly jeopardized both value and profitability. But this concept fails, *inter alia*, because it is based on the incorrect assumption that expected returns were not only expected, but guaranteed.⁷³

82. Second, the CGR referred to the Base Line projections (which were themselves only initial estimates) from the beginning of the Project as the basis for its "promise of value and profitability," by which it assesses the variations to the projections in order to determine the existence of damages.

83. Third, the CGR's quantification of damages relies on Base Line projections that look at events that occurred after the Base Line, as opposed to actual data available to it. In order to

⁷² *Id.* Each Change Control budget increase request is comprised of separate and distinct cost items, each with its own etiology. Change Control 2, for instance, includes such things as: (i) overcharges due to underestimated items and omissions in the initial estimates; (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. However, the CGR has not even identified these specific cost items let alone attempt to explain how FPJVC's conduct caused them or how they constitute damage to the State. Moreover, the amounts for these cost items were estimated costs to be incurred. The CGR has not gone back and determined the actual amounts incurred for these items.

⁷³ *Id.* at ¶¶ 25-33.

demonstrate the existence of damages by reference to alleged delays and additional costs, the CGR should have identified those costs or losses that were actually incurred, which it failed to do.⁷⁴

84. Fourth, the CGR failed to conduct any causal analysis to establish a link between the actions or inactions of those parties it identified as responsible in the Initial Investigation, the CGR Charge, and the CGR Decision, and the alleged damages that resulted from those actions or inactions. Indeed, the CGR Decision states that because there were several joint causes of damage produced by several contracting parties to the Project (including FPJVC), it was “evident” that there was a causal link with respect to those contracting parties.⁷⁵ For obvious reasons, doing so is imperative to a quantification of damages for wasted costs or loss of profits. Without this, as an example, a delay or loss clearly caused by another party would still be applied to a faultless party, as the CGR has done in this case.⁷⁶ In that regard, Law 610 expressly requires that damages be assessed on an individual basis.⁷⁷

85. Fifth, as part of the CGR’s consideration whether a particular action (e.g., continuing with the Project, approving additional investments and/or agreeing to a change of scope) was actually a cause of damage, the CGR assumes damage on the premise that, but for the decisions taken at each Change Control (which it variously attributes to the Reficar Board of Directors and FPJVC), the Project could have continued (and been completed) in accordance with the Base Line projections, thereby achieving its supposed “promise of value and profitability.”⁷⁸

86. Finally, though the CGR recognized that the operational phase of the Project would offer an opportunity for efficiencies which can be evaluated by means of profitability indicators, which would support the relevance of operating cashflows (which are directly linked to the investments made in the Project) to any financial or economic assessment, the CGR limits its assessment to the CAPEX investment period only in its quantification of damages for wasted costs due to “uncertainty” as to future cashflows.⁷⁹ That exclusion of evidence that would be considered

⁷⁴ *Id.* at ¶¶ 43-46.

⁷⁵ Excerpt from CGR Decision at 1203 (C-002).

⁷⁶ CWS-4, Colin Johnson, ¶¶ 47-53.

⁷⁷ Law 610, Article _ (CL-002).

⁷⁸ CWS-4, Colin Johnson, ¶¶ 54-59.

⁷⁹ *Id.* at ¶¶ 60-63.

by any valuation expert stands in sharp contrast to the edifice of speculation and guesswork that Colombia built to claim almost a billion dollars in damages from the foreign entities involved with the Project.⁸⁰

87. In *Glencore International A.G. v. Republic of Colombia*, the Final Award granted the Claimant an offsetting award equal to the amount assessed in a CGR proceeding, with interest, specifically because:

The determination of the existence and quantum of damages made by the Contraloría in its Decision is biased, contrary to basic principles of legal reasoning and financial logic, and incompatible with the standard of conduct which Colombia undertook to provide to protected Swiss investors under Art. 4(1) of the Treaty.⁸¹

88. The damage model followed by the CGR in *Glencore* was a model of clarity and consistency compared to the one at issue here. Just as in *Glencore*, the fatally flawed damage model followed by the CGR, by itself, calls for full relief to FPJVC under the TPA.

I. The CGR Refuses FPJVC’s Extension Request to Appeal the CGR Decision and Denies FPJVC’s Appeal of the CGR Decision.

89. On May 7, 2021, FPJVC filed the Appeal with the *Sala Fiscal Sancionatoria*, the FSS, which handles appeals from CGR decisions. FPJVC was afforded only five days to file its appeal, despite its request for an extension. The FSS is the last stop in the CGR’s internal appeal process. The FSS is made up of four Deputy Controllers and the officials of the office of the *Contralor General*.⁸² These officials are subordinate to the head of CGR.⁸³ Considering the composition of the FSS, the time constraints placed on FPJVC to defend itself, and the FSS’s subordination to the CGR, the FSS’s approval of the CGR Decision was a forgone conclusion.⁸⁴

90. Not surprisingly, on July 6, 2021, the FSS formally rejected FPJVC’s arguments on appeal and affirmed the CGR Decision in its entirety by issuing a decision known as of Auto – ORD-801119-158-021. In denying the Appeal, the FSS adopted the CGR’s findings in their entirety and determined that FPJVC’s due process rights under Colombian law were not violated

⁸⁰ *Id.* at ¶ 63.

⁸¹ Award of 25 August 2019, at ¶ 1475. (CL-005).

⁸² CWS-1, Cesar Torrente at ¶ 13.

⁸³ *Id.*

⁸⁴ *Id.*

by an appeal deadline of less than two weeks. Instead of explaining the legal theories or rationale in the CGR Decision, the FSS simply doubled down on the CGR’s “contributor” theory. Indeed, the FSS found that, even assuming that FPJVC did not have the authority to make final decisions or approve major expenditures of public funds, there was no evidence that the Contract was amended and, as such, FPJVC was ultimately responsible to direct the investments in the Project to “*feliz término*,”⁸⁵ holding FPJVC strictly liable for the Project’s budget increases. On its own terms, the CGR’s conclusion makes no sense – the scope of FPJVC’s work was changed and reduced, but even if it had not been, a finding that amounts, at most, to a breach of contract, cannot possibly be transformed into a finding of gross negligence, the minimal standard for imposing liability under Law 610.

J. Colombia’s Imminent Enforcement of the CGR Decision.

91. On August 24, 2021, Claimants wrote to Colombia to formally request that Respondent agree to cease any enforcement or freezing efforts against FPJVC’s assets until conclusion of this arbitration. On September 1, 2021, Respondent refused, signaling its intention to proceed with such enforcement.

IV. CLAIMANTS ARE ENTITLED TO PROVISIONAL MEASURES OF PROTECTION AND EMERGENCY TEMPORARY RELIEF

K. Claimants’ Rights to be Preserved: Preservation of Status Quo & Exclusive Recourse to ICSID Arbitration.

92. FPJVC seeks to protect the following rights through this Application: (1) its right to the preservation of the *status quo* and the non-aggravation of the dispute; and (2) its right to exclusive recourse to ICSID under Article 26 of the ICSID Convention, both well-established by ICSID tribunals, and in the jurisprudential literature.⁸⁶

⁸⁵ Excerpt from Auto – ORD-801119-158-021 (i.e., the Appeal Decision) at 1206 (C-009).

⁸⁶ See, e.g., *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on Provisional Measures, ¶ 192 (Apr. 30, 2015) (CL-008) (the rights capable of protection by provisional measures include: “(i) the procedural integrity of the arbitration; (ii) the preservation of the status quo and the non-aggravation of the dispute; (iii) equality of arms; and (iv) the exclusivity of the ICSID proceedings under Article 26 of the ICSID Convention.”); *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Order on Provisional Measures, ¶¶ 3.17-3.18 (Mar. 3, 2016) (CL-009) (same); see also *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Provisional Measures, ¶ 177 (Apr. 8, 2016) (CL-010) (“As a number of tribunals have found, the rights which may be protected include procedural rights, such as the preservation of the integrity of the proceedings and the preservation of the *status quo* and non-aggravation of the dispute.”); see, e.g., *Nova Group Investments, B.V. v. Romania*, ICSID Case No. ARB/16/19, Procedural Order No. 7 Concerning the Claimant Request for Provisional Measures, ¶¶ 234-237 (Mar. 29, 2017) (CL-011) (“the right to procedural integrity of this case, and the right to

1. First Right to be Preserved: Preservation of the Status Quo.

93. This Tribunal has the authority to issue provisional measures of protection to maintain the *status quo* and to preserve this Tribunal's ability to award effective relief upholding FPJVC's rights under the TPA.⁸⁷ The right to preservation of the *status quo* is based on the principle that "once a dispute is submitted to arbitration the parties should not take steps that might aggravate or extend their dispute or prejudice the execution of the award."⁸⁸

94. ICSID tribunals routinely grant provisional measures to protect this right by enjoining a party from initiating parallel proceedings that concern the same subject matter of the arbitration, because parallel proceedings undermine a tribunal's authority to fully adjudicate the dispute.⁸⁹ As explained by the ICSID tribunal in *Occidental*:

provisional measures ... have always been directed at the behavior of the parties to the dispute, whether they consisted of measures required to maintain – or restore – peace between them, or to prevent one party from initiating or pursuing parallel litigation, for example in the national courts, thereby directly undermining the international proceedings.⁹⁰

preservation of the status quo and non-aggravation of the dispute" are among the rights that "[n]umerous prior tribunals have found ... are self-standing rights capable of protection by provisional measures.").

⁸⁷ See, e.g., *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, ¶¶ 134-137 (Feb. 26, 2010) (CL-012) ("The existence of the right to the preservation of the *status quo* and the non-aggravation of the dispute is well-established..."); see also *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision Regarding Claimant's Application for Provisional Measures, ¶ 127 (July 31, 2009) (CL-013) (the right to the preservation of the *status quo* and the non-aggravation of the dispute are "well established since the case of the *Electricity Company of Sofia and Bulgaria*"); see, e.g., *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Procedural Order No. 9, ¶ 90 (July 8, 2014) (CL-014) (the ICSID tribunal considers that it is undisputed that the right to the preservation of the status quo and the non-aggravation of the dispute may find protection by way of provisional measures; within the ICSID framework, the right to the preservation of the status quo and the non-aggravation of the dispute is a self-standing right vested in any party to ICSID proceedings.).

⁸⁸ *Burlington Resources Inc. v. Republic of Ecuador, et al.*, ICSID Case No. ARB/08/5, Procedural Order No. 1, ¶ 62 (June 29, 2009) (CL-015).

⁸⁹ See, e.g., *Victor Pey Casado and President Allende Foundation v. Republic of Chile I*, ICSID Case No. ARB/98/2, Decision on Provisional Measures [Spanish], ¶¶ 67-76 (Sept. 25, 2001) (CL-016) (the tribunal notes that all parties involved in the dispute have an obligation to abstain from undertaking any or all acts which would have the effect of aggravating the situation or which would render the execution of the award more onerous.); see also *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order [on Provisional Measures], ¶ 45 (Sept. 6, 2005) (CL-017) (the right to non-aggravation of the dispute refers to actions which would make resolution of the dispute by the tribunal more difficult); *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No. 3, ¶¶ 7, 15 (Jan. 18, 2005) (CL-018) (same).

⁹⁰ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, ¶ 97 (Aug. 17, 2007) (CL-019).

95. As such, Claimants seek an order preventing Colombia from taking steps to enforce the disputed CGR Decision until this arbitration has concluded, as enforcement would certainly aggravate the dispute and impair Claimants' rights to effectively participate in this arbitration.⁹¹ It is for this reason as well that Claimants seek an emergency temporary order to similarly preserve the *status quo* until the Tribunal can hear and decide this Application.

2. Second Right to Be Preserved: Right to an Exclusive Award.

96. Claimants also seek to protect their rights to an exclusive remedy with respect to the subject matter of this arbitration a right that is similarly well recognized.⁹² Article 26 of the ICSID Convention provides, in part:

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.

97. As stated by the ICSID tribunal in *Tokios Tokelés v. Ukraine*, the right to exclusive remedy means a party may not seek any other recourse with respect to the subject matter of the arbitration, whether by way of domestic or international relief:

Among the rights that may be protected by provisional measures is the right guaranteed by Article 26 to have the ICSID arbitration be the exclusive remedy for the dispute to the exclusion of any other remedy, whether domestic or international, judicial or administrative.⁹³

98. Accordingly, Claimants request that the Tribunal enjoin Colombia from commencing any enforcement proceedings with respect to the CGR Decision or pursue any other recourse against Claimants that involves the subject matter of this dispute to preserve FPJVC's right to an exclusive remedy under the TPA.⁹⁴

⁹¹ *Id.* at ¶ 65 (“There is no doubt in the Tribunal's mind that the seizures [of Claimant's assets] are bound to aggravate the present dispute.”)

⁹² See, e.g., *Burlington*, ICSID Case No. ARB/08/5, Procedural Order No. 1, ¶ 57 (CL-015) (“The Tribunal has no doubt about the existence of a right to exclusivity susceptible of protection by way of provisional measures”); *CSOB v. Slovakia*, ICSID Case No. ARB/97/4, Procedural Order No. 4 (Jan. 11, 1999) (CL-020); *Tokios*, ICSID Case No. ARB/02/18, Procedural Order No. 3, ¶ 7 (CL-018); *Plama*, ICSID Case No. ARB/03/24, Order, ¶ 38 (CL-017).

⁹³ *Tokios*, ICSID Case No. ARB/02/18, Order No. 3, ¶ 7 (CL-018).

⁹⁴ See *Perenco Ecuador Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures, ¶ 61 (May 8, 2009) (CL-021) (finding that the parties may not

L. The Tribunal's Authority to Grant Provisional Measures.

99. The general principle providing for the granting of Provisional Measures was explained in *Tokios Tokelés v. Ukraine* as follows:

[P]arties to a dispute over which ICSID has jurisdiction must refrain from any measure capable of having a prejudicial effect on the rendering or implementation of an eventual ICSID award or decision, and in general refrain from any action of any kind which might aggravate or extend the dispute or render its resolution more difficult.⁹⁵

100. ICSID Article 47 sets forth this Tribunal's authority to issue provisional measures:

Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

101. Article 47 is supplemented by ICSID Arbitration Rule 39(1) which provides:

At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.

102. Although Article 47 uses the term "recommend", it is widely accepted that this term has the same force and effect as an "order." In *Perenco v. Ecuador*, for example, the tribunal reiterated this principle, stating that "[i]t is now generally accepted that provisional measures are tantamount to orders, and are binding in the party to which they are directed."⁹⁶

resort to domestic courts to enforce or resist any claim or right which forms part of the subject matter of the ICSID arbitration.).

⁹⁵ *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Order No. 1, ¶ 2 (July 1, 2003) (CL-022).

⁹⁶ *Perenco*, ICSID Case No. ARB/08/6, Decision on Provisional Measures, ¶ 74 (CL-021). See, e.g., *Occidental*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, ¶ 58 (CL-019) ("The Tribunal wishes to make clear for the avoidance of doubt that, although Article 47 of the ICSID Convention uses the word 'recommend', the Tribunal is, in fact, empowered to order provisional measures.") (emphasis in original); see also *City Oriente Limited v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, ¶ 52 (Nov. 19, 2007) (CL-023) ("[I]t is the Tribunal's conclusion that the word 'recommend' is equal in value to the word 'order.'"); see also *Tokios*, ICSID Case No. ARB/02/18, Order No. 1, ¶ 4 (CL-022) ("It is to be recalled that, according to a well-established principle laid down by the jurisprudence of the ICSID tribunals, provisional measures 'recommended' by an ICSID tribunal are legally compulsory; they are in effect 'ordered' by the tribunal, and the parties are under a legal obligation to comply with them.").

M. The Tribunal’s Authority to Grant Emergency Temporary Provisional Measures.

103. This Tribunal also has the authority to issue emergency temporary provisional measures pending resolution of Claimants’ Application. For example, in *Perenco v. Ecuador*, the claimant asked, *inter alia*, that the ICSID tribunal “issue immediately an order in the nature of a temporary restraint prohibiting Ecuador from undertaking any measures pending determination of the application for provisional measures.”⁹⁷ The ICSID tribunal granted Perenco’s emergency relief and “request[ed] the parties to refrain from initiating or continuing any action or adopting any measure which may, directly or indirectly, modify the *status quo* between the parties vis-à-vis the participation contracts, including any attempt to seize any asset of [Perenco], until it has had an opportunity to further hear from the parties on the question of provisional measures.”⁹⁸

104. In *City Oriente v. Ecuador*, the ICSID tribunal ordered that “pending a decision by the Tribunal on the provisional measures requested by Claimant ... both parties refrain from engaging in any conduct – including, without limitation, any act, resolution or decision – that may directly or indirectly affect or modify the legal situation existing as of such date,” and that “[i]f either party intends to take any measure that may violate the provisions set forth herein, prior notice must be served to the Tribunal, granting enough time so that the Tribunal may proceed as appropriate.”⁹⁹

N. The Requirements for Granting Provisional Measures Are Met Here.

105. The elements required to obtain an order for provisional measures are: (1) *prima facie* jurisdiction; (2) *prima facie* establishment of the right to the relief sought; (3) urgency; (4) imminent danger of serious prejudice (necessity); and (5) proportionality.¹⁰⁰ Claimants unequivocally satisfy each of these elements.

⁹⁷ *Perenco*, ICSID Case No. ARB/08/6, Decision on Provisional Measures, ¶¶ 23, 28 (CL-021).

⁹⁸ *Id.*

⁹⁹ *City Oriente*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, ¶ 13 (CL-023).

¹⁰⁰ See, e.g., *Lao Holdings N.V. v. The Government of the Lao People’s Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision of Claimant’s Amended Application for Provisional Measures, ¶ 12 (Sept. 17, 2013) (CL-024); see also *Sergie Paushok, et al. v. The Government of Mongolia*, UNCITRAL, Order on Interim Measures, ¶ 45 (Sept. 2, 2008) (CL-025).

1. This Tribunal has *Prima Face* Jurisdiction to Grant Provisional Measures.

106. It is well-established that a tribunal may grant provisional measures when there is a *prima facie* basis for its jurisdiction.¹⁰¹ As explained by the tribunal in *Millicom v. Senegal*:

[I]t is accepted practice for the Arbitral Tribunal to find that it holds at least *prima facie* jurisdiction to rule on the merits. This implies that the Arbitral Tribunal cannot and must not examine in depth the claims and arguments submitted on the merits of the case; it must confine itself to an initial analysis, i.e. “at first sight”. For this, it is necessary and sufficient that the facts alleged by the applicant establish this jurisdiction without it being necessary or possible at this stage to verify them and analyse them in depth.¹⁰²

107. It is of no consequence to this Application if Respondent challenges the Tribunal’s jurisdiction to decide this dispute, so long as Claimants have made a *prima facie* showing of jurisdiction.¹⁰³ Indeed, ICSID tribunals have granted requests for provisional measures even if they have yet to decide jurisdictional objections.¹⁰⁴

108. Here, Claimants make far more than a *prima facie* showing that the Tribunal has jurisdiction to consider and resolve this dispute. As set forth in the Request for Arbitration, Colombia 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.” Article 10.17.2 further provides that “[t]he consent under paragraph 1 and the submission of a claim to arbitration under this Section shall satisfy the requirement of: (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to this dispute”

¹⁰¹ See, e.g., *Burlington*, ICSID Case No. ARB/08/5, Procedural Order No. 1, ¶ 49 (CL-015); see also *Perenco*, ICSID Case No. ARB/08/6, Decision on Provisional Measures, ¶ 39 (CL-021).

¹⁰² *Millicom International Operations B.V. and Sentel GSM S.A. v. Republic of Senegal*, ICSID Case No. ARB/08/20, Decision on the Application of Provisional Measures, ¶ 42 (Dec. 9, 2009) (CL-026).

¹⁰³ See C. Schreuer, *The ICSID Convention: A Commentary* 771-74 (2d 2009) (CL-027).

¹⁰⁴ See, e.g., *Hydro*, ICSID Case No. ARB/15/28, Order on Provisional Measures, ¶ 3.7 (CL-009) (“It is not in issue that an ICSID tribunal may recommend provisional measures even where it is yet to decide the question of its jurisdiction”); *Perenco*, ICSID Case No. ARB/08/6, Decision on Provisional Measures, ¶ 53 (CL-021) (“It is clearly a contested matter about which both written and oral evidence will be required and it would be premature to embark on such an expedition at the stage of a request for interim measures, where the Tribunal only needs to decide whether there is *prima facie* jurisdiction.”); *Quiborax*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, ¶ 105 (CL-012).

109. Under Article 10.16.1(a) of the TPA, Claimants are qualified to commence this arbitration against Colombia if Colombia has: (1) breached any (or all) of the obligations identified under Section A of the TPA, and/or (2) breached an “investment agreement.” Specifically, Article 10.16.1(a) of the TPA provides, inter alia, that:

[i]n the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation: (a) the claimant¹⁰⁵, on its own behalf, may submit to arbitration under this Section a claim (i) that the respondent has breached (A) an obligation under Section A¹⁰⁶ . . . or (C) an investment agreement; and (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach

110. Article 10.28 defines “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.

111. This matter arises directly out of an “investment dispute,” specifically, FPJVC’s rights established under the TPA with respect to its investment in Colombia. Claimant FPJVC is a contractual joint venture and each of its members – Claimant Amec Foster Wheeler USA Corporation and Claimant Process Consultants, Inc. – are corporations organized under the laws of the State of Delaware, United States of America, so that Claimants are an “enterprise of a Party” within the meaning of the TPA.

¹⁰⁵ Article 10.28 of the TPA defines “claimant” as “an investor of a Party that is a party to an investment dispute with another Party”; “an investor of a Party” is defined as, inter alia, “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;” and “enterprise of a Party” is defined 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.” (CL-001)

¹⁰⁶ Section A of the TPA affords various rights and protections to Claimants, which include, for purposes of this Arbitration, National Treatment (Article 10.3), Most-Favored-Nation Treatment (Article 10.4), Minimum Standard of Treatment (Article 10.5), and Expropriation and Compensation (Article 10.7). (*Id.*).

112. Claimants contracted with Reficar, a Colombian State-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. 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.¹⁰⁷

113. The TPA requires Colombia to, among other things: (1) afford Claimants and their investment, in like circumstances, treatment no less favorable than that it accords its own investors or its investments; (2) treat Claimants in accordance with customary international law, including fair and equitable treatment, which expressly encompasses the obligation not to deny justice; (3) to not expropriate Claimants’ covered investment either directly or indirectly; and (4) afford Claimants and their investments treatment no less favorable than it affords to third parties and their investments. This dispute concerns Colombia’s violations of these obligations to Claimants under the TPA. While FPJVC need not show a likelihood of success on those claims at this point, the discussion above makes it clear that FPJVC has a strong case that its rights were violated and that it is likely to succeed on the merits of its claims. Indeed, the tribunal in *Glencore* granted claimant an award equal to the biased fiscal liability award previously paid by the claimant to the CGR.¹⁰⁸ Here, Claimants seek an offsetting award in the amount of the CGR Decision.

114. Additionally, the Contract is an “investment agreement,” as defined by the TPA, because Reficar is “a national authority of a Party.” It is wholly owned by Ecopetrol, a Colombian entity controlled by the Ministry of Mines and Energy. Indeed, the claim that FPJVC has harmed the national patrimony by breach of the Contract is an implicit admission that it is an investment

¹⁰⁷ The TPA provides, in the definitions that form a part of Article 10, that “investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include . . . (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts. . . .” Of course, the CGR contends that the Contract falls precisely within that definition.

¹⁰⁸ *Glencore*, ICSID Case No. ARB 16/6, Award, ¶ 1587 (Aug. 27, 2019) (CL-005).

agreement.¹⁰⁹ Therefore, Respondent's breach of the Contract, in addition to, and notwithstanding the above, entitles Claimants to submit a claim to arbitration under Article 10.16.1(a)(i)(C) of the TPA.¹¹⁰

115. Claimants consented to arbitration in accordance with the procedures set forth in Chapter 10 of the TPA when they submitted their Request for Arbitration. FPJVC has taken all necessary internal actions to authorize the commencement of this arbitration.¹¹¹ Claimants satisfy all jurisdictional requirements to bring this arbitration under the ICSID Convention and the ICSID Arbitration Rules as both the United States and Colombia are Contracting States to the ICSID Convention.¹¹² 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.

116. Claimants have satisfied all notice and time requirements to submit a claim to arbitration under the TPA. Six months have elapsed since the events giving rise to this claim. Less than three years have elapsed from the date on which the Claimants first acquired knowledge of the breaches, and the resulting damages from same, under Article 10.16.1 of the TPA. The Claimants and Respondent attempted, unsuccessfully, to resolve the dispute through consultation and negotiation and the required waiting period after submitting Claimants' notice of its intention to submit the claim to arbitration concluded prior to Claimants filing the Request for Arbitration.

¹⁰⁹ [REDACTED]

¹¹⁰ The Contract also comes with the Umbrella Clause of the Bilateral Investment Treaty between Switzerland and Colombia, which is incorporated into the TPA through its Most Favored Nation clause.

¹¹¹ Claimants' Power of Attorney, Waiver, and Authorization to Commence Arbitration (C-010).

¹¹² 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 Aug. 14, 1997; and that the United States signed the ICSID Convention on Aug. 27, 1965, with the Convention entering into force for the United States on Oct. 14, 1966).

2. Claimants Have *Prima Facie* Established the Right to the Relief Sought.

a. The Rights to an Exclusive Remedy and to the Preservation of the *Status Quo* are Recognized by ICSID Tribunals.

117. As stated previously, Claimants seek provisional measures to protect their rights to: (1) an exclusive remedy, and (2) the preservation of the *status quo* and the non-aggravation of the dispute. The standard for Claimants to obtain provisional measures is the showing of a “theoretical right.” As the ICSID tribunal discussed in the *Victor Pey Casado* Decision on Provisional Measures, requiring a claimant to demonstrate that the right to be preserved exists at this juncture could force a tribunal to prejudge the merits, at a time when it is not in the position to judge, and under hypotheses in which the evidence or proof of the existence of the right invoked could not be provided until later by means of the arbitration award on the merits.¹¹³

118. Notwithstanding, as set out above in Section III.A., ICSID tribunals have consistently ruled that they are empowered to issue provisional measures to preserve procedural rights relating to the fair and effective conduct of the arbitration, as well as to the parties’ rights to maintain the *status quo* and the non-aggravation of the dispute pending its resolution through a final award.¹¹⁴ It is likewise recognized, as detailed above, that the parties to an ICSID arbitration have a right to a single, exclusive remedy relating to the dispute pursuant to Article 26. This right that would be prejudiced by the enforcement of a domestic penalty in a parallel proceeding like the CGR proceedings in Colombia.

b. Claimants have Established a *Prima Facie* Case on the Merits.

119. ICSID tribunals typically do not consider the merits of the case when determining whether to grant provisional measures. The few tribunals that have considered the validity of the underlying allegations have required only that the claimant plead a facially plausible case.

120. In *Paushok*, for example, the UNCITRAL tribunal explained that it “need not go beyond whether a reasonable case has been made which, if the facts alleged are proven, might lead

¹¹³ *Victor*, ICSID Case No. ARB/98/2, Decision on Provisional Measures, ¶ 48 (CL-016).

¹¹⁴ See, e.g. *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Procedural Order No. 14 (Procedural Measures), ¶ 71 (Dec. 22, 2014) (CL-028) (“[i]t is well settled that provisional measures may be recommended to protect the rights to the *status quo* and to the non-aggravation of the dispute, which are self-standing rights vested in any party to the ICSID proceedings.”); see also *Quiborax*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, ¶¶ 134-136 (CL-012); *Occidental*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, ¶ 96 (CL-019).

the Tribunal to the conclusion that an award could be made in favor of the Claimants.”¹¹⁵ That is, “the Tribunal needs to decide only that the claims made are not, on their face, frivolous or obviously outside the competence of the Tribunal.”¹¹⁶ This is because “[t]o do otherwise would require the Tribunal to proceed to a determination of the facts and, in practice, to a hearing on the merits of the case, a lengthy and complicated process which would defeat the very purpose of interim measures.”¹¹⁷ Similarly, in *PNG SDP v. Papua New Guinea*, the ICSID tribunal considered the *prima facie* strength of the parties’ respective claims but cautioned “that analysis should not pre-judge the merits of the case.”¹¹⁸ The tribunal further concluded that “[i]n practice, the requirement to demonstrate the *prima facie* success on the merits will ordinarily lead to a rejection of a request for provisional measures only in rare circumstances, where the requesting party has failed to advance any credible basis for its claims.”¹¹⁹

121. Here, the factual and legal bases for the Application far exceed the establishment of Claimants’ *prima facie* case on the merits. The disputed CGR Charge and Decision against Claimants was the result of a deeply flawed process that violated Claimants’ right to due process every step of the way.

122. To begin with, the CGR’s exercise of jurisdiction and assertion of charges – and subsequent findings in the CGR Decision – against Claimants denied Claimants fair and equitable treatment and violates Article 10.5 of the TPA, which expressly encompasses protection from denial of justice.¹²⁰ Respondent, through the CGR, denied Claimants justice by, *inter alia*: (1) concluding that FPJVC was a “fiscal manager” under Article 3 of Law 610 and thereby asserting jurisdiction over FPJVC in a fiscal liability proceeding without any basis in fact or in law; (2) failing in the first instance to articulate (or attempt to articulate) viable or comprehensible –

¹¹⁵ *Paushok*, UNCITRAL, Order on Interim Measures, ¶ 55 (CL-025).

¹¹⁶ *Id.*; see also *City Oriente Limited v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/06/21, Decision on Revocation ¶ 20 (May 13, 2008) (CL-0029) (“the party requesting the measure need only prove that its claim has the appearance of good right, *fumus boni iuris*, or, in other words, the petitioner must prove that the rights invoked are plausible”).

¹¹⁷ *Paushok*, UNCITRAL, Order on Interim Measures, ¶ 55 (CL-025).

¹¹⁸ *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on Claimant Request for Provisional Measures, ¶ 120 (Jan. 21, 2015) (CL-030).

¹¹⁹ *Id.*

¹²⁰ See Request for Arbitration at Section V.A.

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, the PGN, and the CGR, in violation of the harmonious collaboration principle in Article 113 of the Colombian Constitution.¹²¹

123. Colombia frustrated FPJVC’s ability to defend itself by refusing to allow FPJVC more than five days to file its formal Appeal of the lengthy CGR Decision – which is over 6,200 pages, encompasses over four years of proceedings, and includes legal arguments and damage methodologies previously undisclosed to FPJVC – and now prepares to enforce it. As mentioned earlier, in the CGR Decision, the CGR, among other things: (1) still does not identify the elements of fiscal liability required to establish jurisdiction over FPJVC, nor does the CGR articulate viable or comprehensible theories of liability to hold FPJVC responsible for any of the State’s purported damages; (2) has retroactively applied Decree 403 to FPJVC’s fiscal liability proceeding, when FPJVC based its fiscal liability proceeding defenses on Law 610; and (3) materially revised its damages methodology and applied a fundamentally flawed damages quantification, leaving FPJVC unable to fully understand the CGR Decision and respond and defend itself accordingly.

124. Colombia has also breached the National Treatment standard under Article 10.3 of the TPA. For example, the CGR dismissed the Charges against members of the Ecopetrol Board of Directors, all of whom are Colombian nationals, on the grounds that those members did not qualify as “fiscal managers” under Law 610, despite their involvement in the Change Control approval process, participation on the team that supported Reficar, and significant authority and control over Project expenditures – all unlike FPJVC.¹²² Nonetheless, the CGR provided a detailed explanation as to why the directors were not fiscal managers, concluding that, because definitive decision-making authority was vested in Reficar, the directors were not within the CGR’s competence. The CGR refused to dismiss FPJVC on that same legal theory, offering only a conclusory statement

¹²¹ See *id.* at Section V.A.1; Claimants have further pleaded that Respondent failed to provide fair and equitable treatment to Claimants 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, including demonstrating bias at the outset of the investigation phase through negative media coverage of FPJVC. Claimants also pleaded that Respondent’s actions frustrated Claimant’s legitimate expectations and that their alleged damages improperly seek a double recovery. See *id.* at Section V.A.1-3.

¹²² *Id.* at ¶¶ 174-178.

that the cases were different. The result was that FPJVC, a foreign investor, was granted less favorable treatment than that accorded to Colombian nationals, and the company for which they worked, Ecopetrol, an investor in Reficar.¹²³

125. Colombia also deprived FPJVC of the fundamental protections in the Contract and indirectly expropriated its benefits in violation of Article 10.7 of the TPA.¹²⁴ As detailed above, the Contract specifically provided FPJVC two critical protections that Colombia ignored: [REDACTED]

[REDACTED]

[REDACTED] Claimants have also pleaded, *inter alia*, that Colombia’s violation of the Contract amounts to a violation of both the most favored nation guarantee in Article 10.4 and Article 10.16 of the TPA, which permits an investor to bring a claim for breach of an Investment Agreement, as defined by the TPA.¹²⁵

3. Provisional Measures are Necessary to Protect Claimants’ Right from Substantial or Irreparable Harm or Loss and to Preserve the Status Quo of this Arbitration.

126. Provisional measures are “necessary” when, in the absence of such measures, the requesting party would suffer “irreparable loss.”¹²⁶ Irreparable loss has been defined to mean, as described in *Perenco v. Ecuador*, “where action by one party may cause loss to the other which may not be capable of being made good by an eventual award of damages.”¹²⁷ This standard of necessity has been widely adopted by ICSID tribunals and, as explained in *Hyrdo v. Albania*, is embodied in Article 17A of the UNICTRAL Model Law, which requires the tribunal to be satisfied that:

Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially

¹²³ *Id.*

¹²⁴ *Id.* at ¶¶ 179-187.

¹²⁵ *Id.* at ¶¶ 188-205.

¹²⁶ *Perenco*, ICSID Case No. ARB/08/6, Decision on Provisional Measures, ¶ 43 (CL-021); *see also Burlington*, ICSID Case No. ARB/08/5, Procedural Order No. 1, ¶ 79 (CL-015) (“The Respondents are right in pointing out that a number of investment tribunals have required irreparable harm in the sense of harm not compensable by monetary damages.”).

¹²⁷ *Perenco*, ICSID Case No. ARB/08/6, Decision on Provisional Measures, ¶ 43 (CL-021).

outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted.¹²⁸

127. Similarly, the ICSID tribunal in *Occidental v. Ecuador* recognized the appropriateness of provisional measures to “avoid irreparable harm.”¹²⁹

128. Some ICSID tribunals, as in *City Oriente*, while also referring to Article 17A of the UNCITRAL Model Law, have explained that standard by placing emphasis on evaluating whether the harm avoided by the measures sought significantly will outweigh any harm suffered by the party enjoined, stating:

It is not so essential that provisional measures be necessary to prevent irreparable harm, but that the harm spared the petitioner by such measures must be significant and that it exceeds greatly the damage caused to the party affected thereby.¹³⁰

129. Similarly, in *Burlington*, the tribunal found it appropriate to adopt the standard of “harm not adequately reparable by an award of damages” while “also weigh[ing] the interests of both sides.”¹³¹

130. Furthermore, FPJVC also need not show that the irreparable harm is certain to occur. Instead, it is sufficient show only that there is a “material risk” that the harm will occur. As stated by the ICSID tribunal in *PNG SDP v. Papua New Guinea*:

The requirement of showing material risk does not, however, imply a showing of any particular percentage of likelihood, or probability, that the risk will materialize. The proper requirement is that the requesting party must establish the existence of a sufficient risk or threat that grave or serious harm will occur if provisional measures are not granted.¹³²

131. [REDACTED]

[REDACTED]

¹²⁸ *Hydro*, ICSID Case No. ARB/15/28, Order on Provisional Measures, ¶ 3.31 (CL-009); see also Article 17A(1)(a) of the UNCITRAL Model Law (CL-031).

¹²⁹ *Occidental*, ICSID Case No. ARB/06/11 Decision on Provisional Measures, ¶ 61 (CL-019).

¹³⁰ *City Oriente*, ICSID Case No. ARB/06/21, Decision on Revocation, ¶ 72 (CL-029).

¹³¹ *Burlington*, ICSID Case No. ARB/08/5, Procedural Order No. 1, ¶ 82 (CL-015).

¹³² *PNG*, ICSID Case No. ARB/13/33, Decision on Claimant Request for Provisional Measures, ¶ 111 (CL-030).

¹³³ CWS-2, Steve Conway at ¶ 12; CWS-3, Thomas Grell at ¶ 12.

judgment¹³⁷ against Chevron, the tribunal was prompted to “confirm and reissue” its previous order, and instructed Ecuador “to take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgment against [Chevron].”¹³⁸ The tribunal also required Ecuador “to inform [the] Tribunal . . . of all measures which the Respondent has taken for the implementation of [the] Interim Award.”¹³⁹

134. The ICSID tribunal in *Bayindir v. Pakistan* enjoined the Pakistan National Highway Authority (“NHA”), who sought a judgment from the Turkish courts, seeking to cash a US\$196 million bank guarantee that had been provided by the investor. Upon application for interim measures by the investor, the tribunal issued an order “recommend[ing] that Pakistan take whatever steps may be necessary to ensure that NHA does not enforce any final judgment it may obtain from Turkish courts with regard to the Mobilisation Advance.”¹⁴⁰

135. In *Merck v. Ecuador*, the claimant sought interim measures to prevent enforcement of a US\$150 million dollar judgment it claimed was the result of a denial of justice and various other breaches of the Bilateral Investment Treaty between the United States of America and Ecuador, including, *inter alia*, “fair and equitable treatment . . . full protection and security . . . and the prohibition of arbitrary or discriminatory measures.”¹⁴¹ The claimant, like FPJVC, argued that, without the interim measures, the judgment exposed it to “the immediate threat of losing its business in Ecuador.”¹⁴² The tribunal granted the provisional measures, instructing Ecuador to “ensure ... that all ... actions directed towards the enforcement of the judgements ... are suspended pending delivery by the Tribunal.”¹⁴³ In support of this ruling, the tribunal found that the threat

¹³⁷ The *Chevron* tribunal originally issued interim measures prior to the issuance of the Ecuadorian judgment, reasoning that “[i]f it were established that any judgment ... was a breach of an obligation [Ecuador] owed to the Claimants as a matter of international law ... any loss arising from the enforcement of such judgment (within and without Ecuador) may be losses for which [Ecuador] would be responsible to the Claimants under international law.” (CL-032).

¹³⁸ *Id.* at ¶ 16.i.

¹³⁹ *Id.* at ¶ 16.ii.

¹⁴⁰ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, ¶ 46 (Nov. 14, 2005) (CL-033).

¹⁴¹ *Merck Sharp & Dohme (I.A.) LLC v. The Republic of Ecuador*, PCA Case No. 2012-10, Decision on Interim Measures, ¶ 57 (Mar. 5, 2016) (CL-034).

¹⁴² *Id.* at ¶ 29.

¹⁴³ *Id.* at page 26 [The Order].

to claimant’s operation in Ecuador was enough to warrant protection, stating that “the consequences, if this worst-case scenario were to eventuate, would be severe enough that protection by way in interim measures is justified.”¹⁴⁴ Not only does FPJVC seek protection of its operations in Colombia from asset seizure, but it has a legitimate basis for protecting its business and assets abroad against the threat of enforcement by Colombia.

136. A similar result also occurred in *The Electricity Company of Sofia — Belgium v. Bulgaria*, a case heard by the Permanent Court of Justice (“PCJ”).¹⁴⁵ There, the PCJ ordered Bulgaria to ensure that, during the arbitration proceedings, no further steps would be taken in a local collection action brought by the Municipality of Sofia and that interim measures were necessary “to prevent . . . the performance of acts likely to prejudice . . . the respective rights which may result from the impending judgment.”¹⁴⁶

137. In sum, the actions of State judicial and quasi-judicial bodies in violation of the obligation not to breach treaty-imposed requirements to act in a fair and equitable manner and not to deny justice have often been the subject of awards against the state. As the tribunal summarized the law on this point in *Dan Cake (Portugual) S.A. v. Republic of Hungary*:

The violation of the obligation to treat the investor in a fair and equitable manner took the form of a denial of justice. Arbitral Tribunals have used, in order to characterize judicial decisions as denials of justice, various expressions which all perfectly fit the Metropolitan Court of Budapest’s 22 April 2008 decision: ‘administer[ing] justice in a seriously inadequate way,’ ‘clearly improper and discreditable,’ ‘[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety’ The International Court of Justice defined denial of justice as ‘a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.’ The decision of the Metropolitan Court of Budapest does shock a sense of juridical propriety.¹⁴⁷

¹⁴⁴ *Id.* at ¶ 71.

¹⁴⁵ See *The Electricity Company of Sofia and Bulgaria v. Bulgaria*, Order on the Request for the Indication of Interim Measures of Protection, 1939 P.C.I.J. (ser. A/B) No. 79 (Dec. 5, 1939). Available at http://www.worldcourts.com/pcij/eng/decisions/1939.12.05_electricity.htm.

¹⁴⁶ *Id.*

¹⁴⁷ ICSID Case No. ARB/12/9, Award on Jurisdiction ¶ 146 (Aug. 24, 2015). (CL-035).

138. Here, too, the actions of the CGR are similarly “shocking”, and FPJVC has established far more than a *prima facie* right to relief.

b. Tribunals Also Find Provisional Measures “Necessary” to Preserve a Party’s Contractual Rights in Order to Prevent Aggravation of the Dispute and Preserve the Status Quo.

139. ICSID tribunals do not require that a claimant show it is in danger of losing its entire operation for provisional measures to be necessary, although that is the case here. Indeed, ICSID tribunals have held that provisional measures are also “necessary” to preserve the contractual rights agreed upon by the parties – like the Contract between Reficar and FPJVC.

140. For example, the tribunal in *City Oriente* determined provisional measures were “necessary to preserve Claimant’s rights . . . to have the Contract performed pursuant to its original terms and conditions.”¹⁴⁸ There, the claimant, who had entered into a concession agreement with Ecuador for the production of hydrocarbons, alleged that a recently enacted Ecuadorian law (Law No. 2006-42 or “Law 42”) unilaterally modified the contract, requiring it to pay amounts not contemplated by the contract’s original terms. Specifically, Ecuador had enacted Law 42 mandating that all oil companies operating in Ecuador under oil production-sharing contracts pay at least 50% of the revenues obtained over a certain base price of oil. In October 2007, an Executive Decree set that percentage at 99% of revenues. Given the drastic ramifications of Law 42, the claimant commenced ICSID arbitration against Ecuador to protect its rights under the production sharing contracts.

141. After noting that the parties disagreed whether the law at issue actually modified the parties’ agreement, the tribunal determined that “pending a decision on this dispute, the principle that neither party may aggravate or extend the dispute or take justice into their own hands prevails.”¹⁴⁹ The tribunal ordered respondents “to continue to comply with . . . the Contract, as it was executed, and . . . to refrain from declaring its termination or otherwise modifying its content.”¹⁵⁰

¹⁴⁸ *City Oriente*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, ¶ 57 (CL-023).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

c. Tribunals Also Find Provisional Measures “Necessary” to Order the Discontinuance of Parallel Proceedings to Maintain the Status Quo and Prevent Aggravation of the ICSID Arbitration.

142. Tribunals have ordered the discontinuance of underlying, parallel proceedings when such proceedings risk aggravating the arbitration. For example, in both *Burlington Resources v. Ecuador* and *Perenco v. Ecuador*, investors, similar to the investors in *City Oriente*, sought relief in ICSID from Ecuadorian Law 42 and Ecuador’s attempts to seize investor assets to satisfy amounts due under the disputed law.

143. In *Burlington Resources*, for example, after the investor commenced the ICSID arbitration, Ecuador initiated proceedings to seize the claimant’s oil production. The tribunal in *Burlington* found that these oil seizures were “bound to aggravate the present dispute”¹⁵¹ and ultimately decided that interim measures were necessary to prevent “the destruction of an ongoing investment”¹⁵² and the “obvious economic risk that [the business] will cease operating altogether.”¹⁵³ Ecuador was then ordered to “discontinue the proceedings” against the investor and to the “refrain from any conduct that may lead to an aggravation of this dispute until the Award”¹⁵⁴

144. In *Perenco v. Ecuador*, Ecuador demanded that Perenco satisfy payments, worth US\$327 million, in compliance with Ecuadorian law 42 law or risk imminent seizure of its assets. In granting Perenco’s request for provisional measures, the tribunal concluded that “the seizure of Perenco’s assets ... would seriously aggravate the dispute between the parties and jeopardise the ability of Perenco [to perform under its contract].”¹⁵⁵ And given the particularly urgent nature of the dispute in *Perenco*, the tribunal also issued an emergency temporary provisional measures pending the resolution of the provisional measures application, specifically instructing “the parties to refrain from initiating or continuing any action or adopting any measure which may, directly or

¹⁵¹ *Burlington*, ICSID Case No. ARB/08/5, Procedural Order No. 1, ¶ 65 (CL-015).

¹⁵² *Id.* at ¶ 83.

¹⁵³ *Id.*

¹⁵⁴ *Id.* (see Order).

¹⁵⁵ Notably, Ecuador argued that provisional measures were not “necessary” because Perenco could “simply mak[e] the enhanced payments required by Law 42” along with challenging “the [enforcement notices] in the Ecuadorian courts.” The tribunal, however, rejected this argument, stating Ecuador’s “resort to that process violates Article 26” and that “Perenco would violate the Article if it were, in the domestic courts of Ecuador, to advance the arguments which it will rely on in this arbitration to challenge the recoverability of payments demanded....” (*Id.*)

indirectly, modify the status quo between the parties ... including any attempt to seize any asset of [Perenco] ... until it has had an opportunity to further hear from the parties on the question of provisional measures.”

145. As a final example, in *Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic*, the ICSID tribunal ordered the Slovak Republic to suspend bankruptcy proceedings then pending in its courts because those proceedings might include determinations relating to claims under a contract between the claimant, CSOB and the respondent, the Slovak Republic, and thus might “deal with matters under consideration by the Tribunal in the instant arbitration.”¹⁵⁶

d. Without Provisional Measures Claimants Will Suffer Irreparable Loss.

146. Absent provisional measures, the Claimants will undoubtedly suffer “irreparable loss.”

[REDACTED]

[REDACTED],¹⁵⁷ [REDACTED]

[REDACTED]

[REDACTED]zed.¹⁵⁸ [REDACTED]

[REDACTED]

[REDACTED]¹⁵⁹.

147. Without provisional measures, [REDACTED] and no award by the Tribunal will adequately compensate Claimants’ damages – which is the very definition of irreparable harm.¹⁶⁰ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁵⁶ *Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Procedural Order No. 4, (Jan. 11, 1999) (granting provisional measures to suspend judicial bankruptcy proceedings brought before Slovakian courts, insofar as the proceedings interfered in the dispute submitted to arbitration.) (CL-036).

¹⁵⁷ See CWS-2, Steve Conway at ¶ 10; CWS-3, Thomas Grell at ¶ 10.

¹⁵⁸ See CWS-2, Steve Conway at ¶ 11; CWS-3, Thomas Grell at ¶ 11.

¹⁵⁹ See CWS-2, Steve Conway at ¶ 12; CWS-3, Thomas Grell at ¶ 12.

¹⁶⁰ *Perenco*, ICSID Case No. ARB/08/6, Decision on Provisional Measures, ¶ _ (CL-021).

¹⁶¹ *Id.* at ¶ 60.

[REDACTED]

148. ICSID tribunals have also held that irreparable harm existed when the claimants were forced to pay *any* amounts they should not have otherwise been required to pay. For example, in *Alghanim v. Jordan*, the tribunal ordered the stay of ongoing Jordanian tax proceedings based on the mere threat that a fine or penalty could result in requiring claimants to pay amounts that the tribunal *may* later determine were improperly levied.¹⁶⁴ Here, of course, the CGR has rendered its decision, meaning that the irreparable harm to FPJVC is far more imminent than what occurred in *Alghanim v. Jordan*.

149. Without interim measures, FPJVC would also be stripped of their rights under the Contract. The Contract provided FPJVC two critical protections in which they relied upon when investing in Colombia: (1) [REDACTED]; and (2) [REDACTED].

[REDACTED]¹⁶⁵ These protections agreed to by Reficar, an entity owned by Colombia, were flouted by Colombia through the CGR proceeding, and are now in danger of being rendered completely worthless should Colombia collect on the US\$811 million dollar decision. [REDACTED]. To preserve the *status quo* and to prevent irreparable harm, interim measures are needed.

¹⁶² [REDACTED] (CL-024).

¹⁶³ *Id.* at ¶ 21.

¹⁶⁴ *Alghanim v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/13/38, Provisional Measures Order, ¶ 86 (Nov. 24, 2014) (CL-037).

¹⁶⁵ Contract, § 10.1 (C-005).

4. The Provisional Measures Are Urgently Required.

150. This matter is urgent because the question, as Professor Schreuer puts it, “cannot await the outcome of the award on the merits.”¹⁶⁶ A similar standard was provided by the *Biwater Gauff v. Tanzania* tribunal in its order on provisional measures:

In the Arbitral Tribunal’s view, the degree of ‘urgency’ which is required depends on the circumstances, including the requested provisional measures, and may be satisfied where a party can prove that there is a need to obtain the requested measures at a certain point in the procedure before the issuance of an award.¹⁶⁷

151. As described throughout this Application, measures are urgent to preserve the *status quo* and to protect the Parties’ right to an exclusive remedy. These rights will be immediately lost if Colombia proceeds to enforce the CGR Decision before this Tribunal reaches its determination on the merits of Claimants’ underlying claims. As the tribunal stated in *Burlington Resources v. Ecuador*, “[i]ndeed, when the measures are intended to protect against the aggravation of the dispute during the proceedings, the urgency requirement is fulfilled by definition.”¹⁶⁸

a. FPJVC Has No Other Viable Option to Prevent Colombia From Commencing Recognition or Enforcement Proceedings Prior to Any Final Decision by This Tribunal.

152. The threat of harm to FPJVC is imminent. Under Colombian procedures, the CGR Decision is final and enforceable with immediate effect.¹⁶⁹ FPJVC has exhausted all viable options to prevent the enforcement of the CGR Decision, and these efforts have been unsuccessful. To the extent any local remedies to prevent enforcement of the CGR Decision remain pending or unresolved, these matters will only, at most, temporarily suspend the enforcement of the CGR Decision.¹⁷⁰ Once the Appeal was summarily denied,¹⁷¹ the CGR Decision became fully enforceable and nothing, under Colombian law, will prevent Colombia from immediately taking steps to commence enforcement proceedings in Colombia or in any foreign jurisdiction.¹⁷²

¹⁶⁶ Christoph Schreuer, “The ICSID Convention: A Commentary” 775 (2d. 2009) (CL-027).

¹⁶⁷ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 1, ¶ 76 (Mar. 31, 2006) (CL-038).

¹⁶⁸ *Burlington*, ICSID Case No. ARB/08/5, Procedural Order No. 1, ¶ 74 (CL-015).

¹⁶⁹ CWS-1, Cesar Torrente at ¶ 11.

¹⁷⁰ *Id.* at ¶¶ 13, 14, 22.

¹⁷¹ *Id.* at ¶ 13.

¹⁷² *Id.* at ¶¶ 18,19.

153. Indeed, FPJVC has requested that Colombia agree to either a stay of enforcement of the CGR Decision pending the resolution of this arbitration or, at a minimum, a temporary stay of enforcement until this Application could be decided. However, as previously discussed, Colombia has refused to a stay, and is certain to immediately commence enforcement proceedings in Colombia, and in any foreign jurisdiction in which FPJVC has assets, now that the CGR Decision is final.¹⁷³ In fact, under Colombian law, the CGR is required to immediately take any and all actions necessary to completely satisfy the US\$811 million CGR Decision and it may commence the Colombian proceedings simultaneously with any similar proceedings initiated abroad. Thus, because the CGR Decision has become final, the Tribunal can reasonably expect Colombia to commence enforcement actions immediately.¹⁷⁴

154. In Colombia, the enforcement proceedings will be initiated by the Deputy Comptroller of the CGR and the subject of these proceedings will be limited to ascertaining the extent of Claimants' ability to satisfy the Decision without consideration of any defenses FPJVC may have to the CGR Decision's enforcement.¹⁷⁵ Thus, the Tribunal can similarly expect Colombia to begin its collection efforts imminently now that the CGR Decision has been affirmed – and certainly long before Tribunal renders its final award on the merits.¹⁷⁶

b. The Mere Threat That Colombia May Initiate Recognition or Enforcement Proceedings Warrants Urgent Relief.

155. The mere threat of recognition or enforcement proceedings, by itself, warrants urgent relief. Under similar circumstances, the tribunal in *City Oriente* determined that urgent relief was warranted, stating:

[T]he passing of the provisional measures is indeed urgent, precisely to keep the enforced collection or termination proceedings from being started, as this operates as a pressuring mechanism, aggravates and extends the dispute and, by itself, impairs the rights which Claimant seeks to protect through this arbitration. Furthermore, where, as is the case here, the issue is to protect the jurisdictional powers of the tribunal and the integrity of the arbitration and the

¹⁷³ *Id.* at ¶¶ 11, 12.

¹⁷⁴ *Id.* at ¶¶ 32, 33.

¹⁷⁵ *Id.* at ¶¶ 8 n.3-n.4, 33.

¹⁷⁶ *Id.* at ¶¶ 11, 33.

final award, then the urgency requirement is met by the very own nature of the issue.¹⁷⁷

156. Given the urgency of that matter, the *City Oriente* tribunal ordered emergency temporary provisional measures pending the resolution of the provisional measures application.¹⁷⁸ The same rationale should be applied here and, specifically, the Tribunal should order emergency temporary provisional measures directing Respondent not to take any further steps to enforce the CGR Decision in order to ensure that enforcement does not occur before the Tribunal rules on this Application.

5. The Provisional Measures Are Proportional.

157. The Tribunal is “called upon to weigh the balance of inconvenience in the imposition of interim measures upon the parties.”¹⁷⁹ The provisional measures sought herein are certainly proportional, given that Respondent would suffer little to no harm.

158. At most, Respondent will have to wait for the conclusion of these ICSID proceedings before enforcing the CGR Decision, assuming that it could somehow prevail on the merits. Substantial time has already elapsed prior to the commencement of the proceedings, and any harm dealt to Colombia would simply be the passing of more time until it can enforce the CGR Decision. This harm, if any, pales in comparison to the harm that Claimants would endure – [REDACTED] [REDACTED] Moreover, because the CGR Decision is joint and severable, the CGR will be free to pursue the other respondents, none of whom has sought similar relief.

159. A similar rationale was applied in *Alghanim v. Jordan* where, as mentioned above, the tribunal granted the claimant’s request for provisional measures and stayed *ongoing* Jordanian tax proceedings. There, the only potential prejudice identified by the respondent was a delay in prosecuting its claims against the claimants while awaiting the conclusion of the ICSID arbitration. The majority, however, found that there could “be no prejudice in a suspension of the [proceedings] as against the Respondents that cannot be compensated by additional interest.”¹⁸⁰ The majority concluded that, because the potential harm to the claimant was the imposition of an unlawful tax,

¹⁷⁷ *City Oriente*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, ¶ 69 (CL-023).

¹⁷⁸ *Id.* at ¶¶ 13, 19.

¹⁷⁹ *Paushok*, UNCITRAL, Order on Interim Measures, ¶ 79 (CL-025).

¹⁸⁰ *Alghanim*, ICSID Case No. ARB/13/38, Provisional Measures Order, ¶ 89 (CL-037).

“the harm that would be occasioned to Claimants in the event that the order were not granted outweighs the delay that will be occasioned to Respondent in the prosecution of its claim against them”¹⁸¹

160. Unlike in *Alghanim v. Jordan*, Claimants are not seeking to enjoin the underlying proceeding, because it has already concluded. Instead, the remedy Claimants seek is to suspend Colombia’s enforcement of the CGR Decision that was a byproduct of the proceedings that, as Claimants contend, was conducted in an unlawful and unjust manner that deprived FPJVC of its due process rights and violated the TPA. No rights of Colombia will be negatively impacted or lost if this Tribunal ordered Colombia to suspend enforcement of the CGR Decision against Claimants or, at most, the harm to Colombia could be compensated by an award of additional interest. [REDACTED]

[REDACTED] It is for these reasons that Claimants also seek emergency temporary relief prohibiting Respondent from taking any such steps to enforce the CGR Decision pending the Tribunal’s decision on this Application.

V. REQUESTS FOR RELIEF

161. For the reasons set forth herein, Claimants respectfully seek the following emergency temporary provisional measures:

- (1) That Respondent, including its courts, its executive branch, and any administrative agency, including the CGR, refrain from taking any measures of recognition or enforcement of the CGR Decision discussed herein, pending the Tribunal’s determination of this Application; and
- (2) Respondent, its courts, its executive branch, and any administrative agency, including the CGR, shall suspend any and all recognition or enforcement proceedings or actions directed towards the recognition and/or enforcement of the CGR Decision discussed herein pending the Tribunal’s determination of this Application.

162. Claimants also respectfully request that the Tribunal order the following provisional measures:

¹⁸¹ *Id.* at ¶ 91.

- (1) That Respondent, its courts, its executive branch, and any administrative agency, including the CGR, refrain from taking any measures of enforcement of the CGR Decision discussed herein until this arbitration has concluded;
- (2) Respondent, its courts, its executive branch, and any administrative agency, including the CGR, shall suspend all enforcement proceedings or actions directed towards the enforcement of the CGR Decision mentioned herein until this arbitration has concluded;
- (3) That Respondent shall communicate this Order without delay to the CGR, and any other authority with jurisdiction to enforce the CGR Decision discussed herein, and inform such authority that the CGR Decision is not enforceable pending the outcome of this arbitration;
- (4) That Respondent refrain from taking any action that would aggravate or exacerbate this dispute, threaten the integrity of this arbitration or frustrate the effectiveness of any award from this Tribunal;
- (5) Respondent shall promptly inform the Tribunal of the action that it has taken in compliance with this Order; and
- (6) Granting Claimants such other and further relief as the Tribunal deems just and equitable.

Dated: September 2, 2021

Respectfully submitted,

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