INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the annulment proceeding between

GLENCORE INTERNATIONAL AG & CI PRODECO SA
(Claimants / Respondents on Annulment)
-v-
REPUBLIC OF COLOMBIA
(Respondent / Applicant on Annulment)

ICSID CASE NO ARB/16/6

DECISION ON ANNULMENT

Members of the ad hoc Committee

Sir Christopher Greenwood, GBE, CMG, QC, *President*
Ms Bertha Cooper-Rousseau, Member of the *ad hoc* Committee
Professor Doug Jones, AO, Member of the *ad hoc* Committee

Secretary of the ad hoc Committee
Ms Alicia Martín Blanco

Assistant to the President
Ms Rosalind Elphick

Date of dispatch to the Parties: 22 September 2021

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TABLE OF SELECTED ABBREVIATIONS AND DEFINED TERMS

AAE-[#]	Applicant's Exhibit
AAL-[#]	Applicant's Legal Authority
C-Mem. on Ann.	Respondents on Annulment's Counter-Memorial dated 12 June 2020
Annulment Hearing	Hearing on Annulment held 6 November 2020
Mem. on Ann.	Applicant's Memorial on Annulment dated 10 April 2020
Rej. on Ann.	Respondents on Annulment's Rejoinder dated 9 October 2020
Reply on Ann.	Applicant's Reply dated 7 August 2020
Annulment Applicant's SoC	Applicant' Statement of Costs dated 24 November 2020
Annulment Respondents' SoC	Respondents on Annulment's Statement of Costs dated 24 November 2020
Applicant	Republic of Colombia
Application	Application for Annulment filed on 23 December 2019
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
Award	*Glencore International A.G. and C.I. Prodeco S.A. v. the Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019
BIT	Agreement between the Swiss Confederation and the Republic of Colombia on the Promotion and Reciprocal Protection of Investments, signed on 17 May 2006, which entered into force on 6 October 2009
C-[#]	Respondents on Annulment Exhibit from the underlying arbitration

CL-[#]	Respondents on Annulment Legal Authority from the underlying arbitration
Committee	Sir Christopher Greenwood, Ms Bertha Cooper-Rousseau and Professor Doug Jones
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
R-[#]	Applicant's Exhibit from the underlying arbitration
RAE-[#]	Respondents on Annulment Exhibit
RAL-[#]	Respondents on Annulment Legal Authority
RL-[#]	Applicant's Legal Authority from the underlying arbitration
Respondents on Annulment	Glencore International A.G. and C.I. Prodeco S.A.
Tr. [page:line] [Speaker(s)]	Transcript of the Hearing before the Committee
Tribunal Tr., Day [#][page:line] [Speaker(s)]	Transcript of the Hearing before the Tribunal
Tribunal	Arbitral tribunal that rendered the Award (Professor Juan Fernández-Armesto, Mr Oscar M. Garibaldi and Mr J. Christopher Thomas)

I. INTRODUCTION AND PARTIES

1. This proceeding concerns an Application for Annulment (the "**Application**") of the award rendered on 27 August 2019 in *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia* (ICSID Case No. ARB/16/6) (the "**Award**").

2. The Applicant for Annulment is the Republic of Colombia ("**Colombia**"), the Respondent in the proceedings before the Tribunal. The Respondents on Annulment, and Claimants before the Tribunal, are Glencore International A.G. ("**Glencore**"), a company incorporated under the laws of, and having its seat in, Switzerland, and C.I. Prodeco S.A. ("**Prodeco**"), a company incorporated under the laws of Colombia and a wholly-owned subsidiary of Glencore.

3. The proceedings before the Tribunal had been instituted by Glencore and Prodeco under the Agreement between the Swiss Confederation and the Republic of Colombia on the Promotion and Reciprocal Protection of Investments, signed on 17 May 2006 and entering into force on 6 October 2009 (the "**BIT**"), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, dated 14 October 1966, which entered into force between Colombia and Switzerland on 6 October 2009 (the "**ICSID Convention**").

4. In the Award, the Tribunal held (a) that it possessed jurisdiction; (b) that Glencore and Prodeco had been the victims of an unreasonable measure contrary to Article 4(1) of the BIT and had been subjected to unfair and inequitable treatment contrary to Article 4(2) of the BIT. The Tribunal ordered Colombia to restore to Glencore and Prodeco the sum of USD 19,100,000 plus costs of USD 625,000 and defence expenses of USD 1,692,900.

5. Colombia seeks annulment of the Award pursuant to Article 52 of the ICSID Convention on the grounds that (i) the Tribunal manifestly exceeded its powers (Article 52(1)(b) of the ICSID Convention); (ii) there was a serious departure from a fundamental rule of procedure (Article 52(1)(d) of the ICSID Convention); and (iii) the Award failed to state the reasons on which it was based (Article 52(1)(e) of the ICSID Convention).

6. Colombia maintains that the Tribunal erred in two important respects (each of which involves all three of the grounds invoked under Article 52): first, by excluding critical documents relating to allegations of corruption (the "**Documents Issue**"), and, secondly, by rejecting Colombia's argument that Glencore and Prodeco's investment was illegal and thus fell outside the scope of the BIT (the "**Illegality Issue**"). While the two issues are closely related, as will be seen, Colombia maintains that they are discrete and, in particular, that the Committee would be justified in finding in favour of Colombia on the Illegality Issue and annulling the Award even if it rejected Colombia's arguments on the Documents Issue.

7. The factual background is set out in greater detail in paras. 135 to 545 of the Award and those parts relevant to the annulment proceedings are summarized below (paras. 31-62).

II. PROCEDURAL HISTORY

8. On 23 December 2019, ICSID received the Application for annulment filed by the Republic of Colombia and dated 23 December 2019. The Application contained a request under Article 52(5) of the ICSID Convention and Rule 54 of the ICSID Rules of Procedure for Arbitration Proceedings (the "**ICSID Arbitration Rules**") for the stay of enforcement of the Award pending a decision on the Application (the "**Stay Request**").

9. On 30 December 2019, pursuant to Rule 50(2) of the ICSID Arbitration Rules, the Secretary-General of ICSID notified the Parties that ICSID had registered the Application. On the same date, in accordance with Arbitration Rule 54(2), the Secretary-General informed the Parties that the enforcement of the Award had been provisionally stayed.

10. By letter dated 6 March 2020, in accordance with Rules 6 and 53 of the ICSID Arbitration Rules, the Parties were notified that Sir Christopher Greenwood, a national of the United Kingdom of Great Britain and Northern Ireland, and designated as President of the Committee, Ms Bertha Cooper-Rousseau, a national of The Bahamas, and Professor Doug Jones, a national of Australia and Ireland, had accepted their appointments by the Chairman of the ICSID Administrative Council, and that the *ad hoc* Committee was therefore deemed to have been constituted, and the annulment proceeding to have begun, as of that date. On

the same date, the Parties were notified that Ms Alicia Martín Blanco, Legal Counsel, ICSID, would serve as Secretary of the *ad hoc* Committee.

11. In response to a question by the Committee, on 20 and 26 March 2020, the Parties confirmed their agreement that the Respondents on Annulment would not oppose Colombia's Stay Request in exchange for an accelerated timetable for these proceedings.

12. On 10 April 2020, the Committee informed the Parties that, without prejudice to the agreement of the Parties on the procedural calendar, and given the time difference between the various geographical locations of counsel and the Committee members, the Committee had decided to separate the first session from the preliminary procedural consultation of the President with the Parties.

13. In accordance with ICSID Arbitration Rules 53 and 13(1), the Committee held its first session on 20 April 2020 by videoconference.

14. On 20 April 2020, the President inquired whether the Parties would agree to the appointment of Ms Rosalind Anne Elphick, a national of South Africa and Ireland, as an assistant to the President in this case. On 23 and 24 April 2020, the Parties confirmed that they had no objection to the appointment of Ms Elphick as an assistant to the President, or to the terms of her appointment. Ms Elphick's appointment was confirmed by the President on 22 May 2020.

15. On 10 April 2020, Colombia filed its Memorial on Annulment (the "**Annulment Memorial**" or "**Mem. on Ann.**"), along with Exhibits AAE-1 to AAE-35, Legal Authorities AAL-1 to AAL-100, and several exhibits and legal authorities from the underlying arbitration.

16. In accordance with ICSID Arbitration Rules 53 and 20(1), on 27 April 2020, the President of the Committee held a preliminary procedural consultation with the Parties by videoconference.

17. On 28 April 2020, the Committee issued Procedural Order No. 1 recording the agreements of the Parties and the Committee's decisions on procedural matters. Procedural Order No. 1 provided, *inter alia*, that the applicable Arbitration Rules would be those in force from 10 April 2006, that the procedural languages would be English and Spanish, and that the

place of the proceeding would be Washington, D.C., United States of America. Regarding the Stay Request, Procedural Order No. 1 established as follows:

> *The Parties agreed that the Respondents on Annulment would not oppose the Applicant's request for a stay of enforcement of the Award in exchange for the accelerated timetable in Annex A. The Committee finds that these circumstances require that enforcement be stayed in accordance with Article 52(5) of the ICSID Convention, and therefore decides to continue the stay of enforcement that had been provisionally in place pursuant to the second sentence of Article 52(5).*

18. On 12 June 2020, Glencore and Prodeco filed their Counter-Memorial on Annulment (the "**Annulment Counter-Memorial**" or "**C-Mem. on Ann.**"), accompanied by Exhibit RAE-1, Legal Authorities RAL-1 to RAL-28, and several exhibits and legal authorities from the underlying arbitration.

19. On 7 August 2020, Colombia filed its Reply on Annulment (the "**Annulment Reply**" or "**Reply on Ann.**"), along with Exhibits AAE-36 to AAE-37, Legal Authorities AAL-101 to AAL-133, and several exhibits and legal authorities from the underlying arbitration.

20. On 21 August 2020, the Committee consulted with the Parties regarding the possibility of holding the hearing by video link.

21. On 3 September 2020, the Parties informed the Committee that they did not have any objection to holding the hearing on annulment by videoconference. On the same day, the Committee confirmed that the hearing would be held by videoconference rather than in person.

22. On 9 September 2020, Colombia wrote to inform the Committee "*of a recent development relevant to the annulment proceeding*". Colombia noted that it was not bringing this information to the attention of the Committee in order to request leave to introduce new evidence within the meaning of Section 15.3 of Procedural Order No. 2, although it reserved its right to do so if and when appropriate.

23. On 15 September 2020, the Committee referred to the Applicant's communication of 9 September, noted that the Republic of Colombia had made no request to admit any new material to the record of the annulment proceedings, and therefore considered that no action was required at that stage.

24. On 9 October 2020, Glencore and Prodeco filed their Rejoinder on Annulment (the "**Annulment Rejoinder**" or "**Rej. on Ann.**") accompanied by Exhibit RAE-2, Legal Authorities RAL-29 to RAL-38, and several exhibits from the underlying arbitration.

25. On 26 October 2020, the Committee informed the Parties that the pre-hearing organizational meeting had been cancelled following the Parties' agreement that it was not necessary.

26. On 2 November 2020, the Committee issued Procedural Order No. 2 concerning the organization of the hearing on annulment ("**Annulment Hearing**").

27. The Annulment Hearing was held on 6 November 2020 by videoconference. The list of participants was as follows:

Committee:	
Sir Christopher Greenwood	President of the Committee
Ms Bertha Cooper-Rousseau	Member of the Committee
Professor Doug Jones	Member of the Committee
Assistant to the President:	
Ms Rosalind Anne Elphick	Assistant to the President
ICSID Secretariat:	
Ms Alicia Martín Blanco	Secretary of the Committee
For Colombia:	
Professor Eduardo Silva Romero	Dechert LLP
Mr José Manuel García Represa	Dechert LLP
Mr Juan Felipe Merizalde Urdaneta	Dechert LLP
Mr Amir Ardelan Farhadi	Dechert LLP
Dr Camilo Gómez Alzate	*Agencia Nacional de Defensa Jurídica del Estado*
Ms Ana María Ordoñez Puentes	*Agencia Nacional de Defensa Jurídica del Estado*
Ms Elizabeth Prado Lopez	*Agencia Nacional de Defensa Jurídica del Estado*
Mr Andres Felipe Esteban Tovar	*Agencia Nacional de Defensa Jurídica del Estado*
Mr Giovanny Andrés Vega	*Agencia Nacional de Defensa Jurídica del Estado*
For Glencore and Prodeco:	
Mr Nigel Blackaby	Freshfields Bruckhaus Deringer US LLP
Mr Elliot Friedman	Freshfields Bruckhaus Deringer US LLP
Ms Jessica Moscoso	Freshfields Bruckhaus Deringer US LLP
Ms Paige von Mehren	Freshfields Bruckhaus Deringer US LLP

Ms Elvira Sihvola	Freshfields Bruckhaus Deringer US LLP
Mr Gustavo Topalian	Dechamps International Law
Mr José Manuel Álvarez Zárate	Álvarez Zárate & Asociados
Mr Oscar Eduardo Gómez	C.I. Prodeco S.A.
Ms Natalia Anaya	C.I. Prodeco S.A.
Mr Jader Yubran	C.I. Prodeco S.A.
Court Reporter:	
Ms Claire Hill	English court reporter

28. The Parties submitted their agreed corrections to the transcript on 18 November 2020.

29. On 24 November 2020, the Parties filed their respective statements on costs.

30. The proceeding was closed on 1 June 2021.

III. THE BACKGROUND TO THE APPLICATION

A. SUMMARY OF THE FACTUAL BACKGROUND

(1) The Mining Contract

31. The background to the case before the Tribunal concerned the contracts between Prodeco and the relevant Colombian State entities for coal mining at the Calenturitas mine, "*one of the largest thermal coal mines in Colombia*".[1] The Colombian entity with which Prodeco contracted changed over time due to changes in Colombian law. In 1989 Prodeco concluded a contract (the "**Mining Contract**") with Carbones de Colombia SA ("**Carbocol**"),[2] a State-owned company to which the Colombian Ministry of Mines and Energy had granted mineral rights.[3] In 1993 Carbocol became the Empresa Colombiana de Carbón Ltda. ("**Ecocarbón**"),[4] which was later succeeded by the Empresa Nacional Minera Ltda., Minercol Ltda. ("**Minercol**").[5] In 2004 the Colombian Ministry of Mines

1 Award, para. 142.
2 Award, para. 145.
3 Award, para. 141.
4 Award, para. 155.
5 Award, para. 159.

and Energy designated the Instituto Colombiano de Geología y Minería ("**Ingeominas**")[6] as Minercol's successor. In 1995 Prodeco was acquired by Glencore.[7]

32. Under the original terms of the Mining Contract, Prodeco obtained the right to carry out the extraction, processing, transport, and sale of up to three million tonnes of coal per year ("**MTA**") for a period of 30 years.[8] In return, Prodeco agreed to pay compensation to Carbocol, the calculation of which was based on two elements:

    a. A royalty of 5 per cent for each tonne of coal sold, to increase progressively up to 7.6 per cent for the fifth year of production and beyond (the "**Base Royalty**");[9]

    b. and a "*supplementary compensation*", calculated as a percentage of Prodeco's revenue and a fixed amount per tonne of coal sold.[10] The supplementary compensation was payable only if the price of coal rose above USD 40 per tonne, at which point it was determined, based on the market price of Colombian thermal coal as it was in 1989, that Prodeco would be in receipt of "*extraordinary profits*".[11]

33. The basis for calculating the remuneration payable by Prodeco was changed by the third (the "**Third Amendment**") and sixth (the "**Sixth Amendment**") amendments to the Mining Contract, executed in 2001 and 2005 respectively. By the Third Amendment it was agreed that the Base Royalty rate was to increase by 1 per cent for every 1 MTA increase in production beyond 3 MTA.[12] The term "*supplementary compensation*" was changed to "*Gross Income Compensation*" ("**GIC**"), though in substance it remained the same.[13]

34. The Mining Contract was also altered to explain how the royalties and GIC payments should be calculated when the coal volume exported consisted of coal from the Calenturitas Mine blended with coal from other mines ("**Blended Coal**").[14] This was necessary to

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6 Award, para. 169.

7 Award, para. 157.

8 Award, paras. 146-148.

9 Award, paras. 149.

10 Award, para. 149.

11 Award, para. 149.

12 Award, para. 163.

13 Award, para. 164.

14 Award, para. 179.

account for the expansion of Glencore's mining operations to the La Jagua coal project. Developments connected with the La Jagua project played an important part in the proceedings before the Tribunal and are discussed in greater detail at paras. 43-48, below.

35. These amendments also clarified the "*reference price*" for calculating the royalties and GIC payments due: for coal exported exclusively from the Calenturitas Mine, the reference price would be the higher of (i) the weighted average free on board ("**FOB**") Colombian port price for Colombian steam coal for the respective week as published in the ICR, adjusted for calorific value, and (ii) the actual sale price; for the export of Blended Coal, the reference price would simply be the FOB Colombian port price for Colombian steam coal, for the respective week as published in the ICR, adjusted for calorific value.[15]

36. The Calenturitas mine commenced production in 2004.[16] At approximately the same time, Ingeominas created a *Comité de Contratación Minera* (the "**Contracting Committee**") comprising the Secretary-General of Ingeominas, the *Director del Servicio Minero*, two sub-directors and the *Asesor de la Dirección General*. The Contracting Committee became responsible for making recommendations to the *Director del Servicio Minero* regarding any proposed amendments to the Mining Contract.[17]

37. In 2006, Prodeco realised that by diverting a section of the Calenturitas river that ran through the Calenturitas Mine it would be able significantly to increase the amount of exploitable resources accessible to it. It submitted these projections to Ingeominas in November 2006 in its Long-term *Programa de Trabajos e Inversiones* (the "**2006 PTI**"), which provided for the mining of an additional 60 MT of coal over the lifetime of the mine and an increase of the capacity of the Calenturitas Mine from 2.9 MTA to 10 MTA from 2010 onwards.[18]

38. A further amendment to the Mining Contract (the "**Seventh Amendment**"), concluded between Ingeominas and Prodeco on 15 February 2007 following lengthy negotiations, extended the lifetime of the Mining Contract by fifteen years and increased the production

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15 Award, paras. 180, 195.

16 Award, para. 171.

17 Award, paras. 172-175.

18 Award, paras. 183-185, 193.

levels expected. The basic system for quantifying the compensation to Colombia was left unchanged but clarified to provide that the royalties and GIC would be paid within ten days of the shipment of the coal but would be subject to a quarterly adjustment "*based on the definitive prices*".[19] The meaning of the term "*definitive prices*" became important in connection with the negotiation of the **Eighth Amendment** which was at the heart of the proceedings before the Tribunal.

(2) The Eighth Amendment

(a) Initiation of Negotiations

39. Six months after the conclusion of the Seventh Amendment, Prodeco approached Ingeominas about a further change to the Mining Contract. Prodeco maintained that the existing compensation scheme compromised the potential expansion and even threatened the viability of the mining project, because inflation had led to a considerable increase in production costs while the reference price of USD 40 per tonne, on which the GIC was based, had not been altered. Prodeco therefore proposed that Colombia agree to a reduction in the compensation per tonne of coal sold in return for an increase in overall production. With the increased production levels achieved thereby, Prodeco argued that the new compensation scheme would, over the lifetime of the mine, generate much higher revenues for the State than it stood to gain under the previous regime.[20]

40. The initial Ingeominas reaction was unfavourable and the *Subdirector de Fiscalización y Ordenamiento Minero*, Mr Edward Franco, advised that the proposed amendment would not be in Colombia's interests.[21] Nevertheless, the contracting parties continued to discuss Prodeco's proposal.[22] A key figure in these negotiations was Mr Mario Ballesteros, who was Director General of Ingeominas from 2 March 2007 to 7 September 2010.

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19 Award, paras. 193-196.

20 Award, paras. 202-204, 209-211.

21 Award, para. 207.

22 Award, paras. 201-211.

(b) The Pricing Dispute

41. The negotiations took place against the backdrop of two other developments. First, in July 2008 Prodeco raised a question about the way in which the term "*definitive price*" in the Seventh Amendment was to be interpreted. Until that date the parties to the Mining Contract and the Seventh Amendment had proceeded on the basis that the definitive price was the higher of the FOB price in the week when the coal was shipped and the actual sale price obtained by Prodeco. According to Prodeco, however, this formula failed to take account of drastic changes in the market.[23] Prodeco maintained that the relevant contractual provisions could also be interpreted as meaning that the definitive price was the actual sale price, as evidenced in Prodeco's invoices to its customers and that this was the correct, as well as the fairer, interpretation. In August and September 2008 Prodeco held meetings with the Minister of Mines and Energy. The Tribunal held that the evidence before it showed that "*the Minister agreed that it would be fair and reasonable for the royalties to be calculated using the actual price received by Prodeco*".[24]

42. Prodeco informed Ingeominas that, with effect from 30 September 2008, it would adjust all payments to Colombia by reference to the actual sale price it received and did so when it made its next payment, reducing the amount paid by USD 6 million.[25] Ingeominas countered that Prodeco was not entitled to take this step unilaterally and threatened a declaration of caducity of the Mining Contract if payment at the original level was not made.[26] Although Colombia asked the Tribunal to conclude that Prodeco had manufactured the dispute over the definitive price to coerce Colombia into agreeing to the proposed amendment to the Mining Contract, the Tribunal rejected the suggestion that Prodeco had fabricated the dispute by pursuing a request despite knowing that it was not entitled to the rights claimed.[27]

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23 Award, paras. 214-215.

24 Award, para. 217.

25 Award, paras. 221-224.

26 Award, paras. 222-225.

27 Award, paras. 218-220.

(c) The La Jagua Mine and the Three Hectares Contract

43. Secondly, an issue arose regarding the La Jagua mine. The La Jagua mine was located some twenty kilometres east of the Calenturitas mine. Prodeco had acquired three companies – *Carbones de la Jagua S.A.* ("**CDJ**"), acquired in 2005, *Consorcio Minero Unido S.A*. in 2006 and *Carbones El Tesoro* in 2007 (jointly, the "**Prodeco Affiliates**")[28] – which held mining rights at La Jagua. The Prodeco Affiliates wished to consolidate their mining activities at La Jagua. However, located in a small gap between the La Jagua coal mining titles held by the Prodeco Affiliates was a 3-hectare area of land over which no concession existed at the time.[29] Given its location, this small area was extremely valuable to the Prodeco Affiliates. If Prodeco did not acquire the mining rights to the area, Prodeco's joint operations and the rational development of the La Jagua mine would be severely affected.[30] Both Parties accept that the development of La Jagua was critical to any increase in production at Calenturitas, because coal from La Jagua was blended with coal from Calenturitas and shipped together with it.[31]

44. The value of the 3-hectares had also been noticed by Mr Maldonado, a former employee of the Ministry of Mines and of Ingeominas's predecessors. In 2006 he had applied to Ingeominas for a mining concession in respect of the area, but his application had been formally rejected in 2007.[32] Ingeominas's decision in that respect was based on a March 2007 report which had determined that the site technically overlapped with other concessions and would be too small for a stand-alone mining operation.[33] In June 2008, however, Ingeominas reversed its finding that the 3-hectare concession would overlap with other concessions in the area and, in the result, decided to award Mr Maldonado and his partner, Mr César García, the 3-hectares concession.[34] That decision was formalized with

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28 Award, para. 178.

29 Award, para. 235.

30 Award, para. 687; C-Mem. on Ann., p. 19, para. 38(a).

31 Tribunal Tr., Day 2, p. 317:8-14 (Professor Silva Romero).

32 Award, paras. 234-236.

33 Award, para. 236.

34 Award, para. 239.

the execution of a mining concession contract in favour of Messrs Maldonado and García on 16 October 2008 (the "**3ha Contract**").[35]

45. Shortly thereafter, in December 2008, Mr Maldonado and his partner approached Prodeco with an offer to sell the 3-hectares concession to it for USD 11 million.[36]

46. Prodeco and its affiliates strongly opposed the 3ha Contract as contrary to the national interest, irregular and a misuse of insider information. They formally opposed Mr Maldonado's application in March 2008, and appealed to Ingeominas for its reconsideration of the Prodeco Affiliates' objections in July 2008.[37] In the months between August and November 2008, the Prodeco Affiliates communicated their complaints in writing to a range of Colombian authorities, including the *Procurador General de la Nación,* the *Ministro de Minas y Energía,* the *Ministro de la Presidencia*, the *Contraloría*, and the *Jefe del Registro Minero Nacional.*[38] Prodeco continued to complain even after the conclusion of the 3ha Contract, by filing a citizen suit against the parties to it, including Ingeominas, and by requesting disciplinary action against the Ingeominas officials involved in its execution.[39]

47. The Tribunal found that, by March 2009, the Prodeco Affiliates were frustrated by the inaction of the Colombian authorities.[40] In a final complaint communicated to the *Ministro de la Presidencia*, Prodeco warned that, unless a solution was found to the situation created by the grant of the 3-hectare title, it would have no option other than to enter into direct negotiations with Messrs Maldonado and García.[41] When it received no response, Prodeco decided to pursue that option.[42] Ultimately, CDJ purchased the concession title from Messrs Maldonado and García on 4 May 2009, at a cost of USD 1.75 million (the "**Assignment Contract**").[43]

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35 Award, para. 245.

36 Award, para. 247.

37 Award, paras. 238-239.

38 Award, paras. 241-244.

39 Award, paras. 240-246.

40 Award, paras. 248-249.

41 Award, para. 248.

42 Award, para. 249.

43 Award, para. 250.

48. Messrs Maldonado and García submitted the contract for sale (the "**Assignment Contract**") to Ingeominas for approval, which was granted by Mr Ballesteros on 8 May 2009.[44] However, the document which they submitted made no mention of the price paid.[45] CDJ paid the purchase price in two separate payments as requested by Messrs Maldonado and García.[46] The Tribunal found that CDJ made the tax withholding required by Colombian law,[47] recorded the sum paid in its audited financial statement,[48] and declared to Ingeominas both the contract and the price paid.[49] The Tribunal also found that, even after conclusion of the Assignment Contract, Prodeco continued to complain about the grant of the 3-hectare concession to Messrs Maldonado and García[50] and that, in June 2011, a new Minister of Mines announced that he had ordered formal investigations into irregularities within Ingeominas.[51]

(d) The Conclusion of the Eighth Amendment

49. On 21 May 2009 Prodeco and Ingeominas concluded an *Acuerdo de Compromiso* (the "**Commitment to Negotiate**") in respect of the proposed changes to the Mining Contract, after which formal negotiations took place between June and December 2009. Prodeco paid the USD 6 million difference between the definitive price as it claimed it should be understood and the definitive price as Ingeominas maintained the Mining Contract required.[52] The negotiations are described in detail in paras. 266-322 of the Award and culminated in the execution of the Eighth Amendment on 22 January 2010. The terms of the Eighth Amendment are analysed at paras. 323-350 of the Award. For present purposes it is sufficient to note that it established a new formula for the calculation of royalties and the GIC which involved a reduction in the amount payable per tonne to Colombia while

44 Award, paras. 251-252.
45 Award, para. 251.
46 Award, paras. 253-254.
47 Award, para. 255.
48 Award, para. 256.
49 Award, para. 256.
50 Award, paras. 257-258.
51 Award, para. 259.
52 Award, paras. 262-265.

Colombia would benefit from an increase in production which should lead to an increase in the overall level of compensation.

50. In March 2009 Glencore sold Prodeco to the Australian company Xstrata[53] subject to a call option which allowed Glencore to repurchase Prodeco. In March 2010 Glencore exercised the option and repurchased Prodeco.[54]

(3) The Contraloría Proceedings

51. In October 2010 the *Contraloría General de la República* (the "***Contraloría***"), a Colombian administrative agency, opened an investigation into alleged corrupt practices in Ingeominas.[55] This included an investigation into the conclusion of the Eighth Amendment. In March 2011 the team conducting the investigation reported that Prodeco had failed to establish that the mining project would have been unviable without the Eighth Amendment, that there had been no juridical, technical or financial reasons to modify the Mining Contract, that Ingeominas had failed properly to analyse the impact of the Eighth Amendment and that the Amendment had been detrimental to Colombia because it had reduced revenue from the Mining Contract.[56] This Report was not disclosed to Prodeco until August 2012.[57]

52. Following receipt of the report, in May 2011 the *Contraloría* instituted a Fiscal Liability Proceeding (an administrative proceeding) against Prodeco and Mr José Fernando Ceballos, who was the Ingeominas *Director del Servicio Minero* and had signed the Eighth Amendment on behalf of Ingeominas.[58] Although the procedure before the *Contraloría* is an administrative, and not a judicial, one, Colombian law requires that the procedure respect principles of due process. Prodeco and Mr Ceballos were invited to submit evidence and were represented by counsel. The proceedings, which involved the *Contraloría* taking depositions from various current and former Ingeominas officials, was

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53 Award, para. 230.

54 Award, para. 360.

55 Award, paras. 398-409. The status and workings of the *Contraloría* are explained in paras. 388-397 of the Award.

56 Award, para. 406.

57 Award, para. 409.

58 Award, para. 410.

later extended to include Mr Ballesteros and various other officials.[59] It culminated in the *Contraloría* issuing an *Auto de imputación de responsibilidad fiscal* (the "***Auto de Imputación***") which formally charged Prodeco, Mr Ceballos and Mr Ballesteros.[60] The *Auto de Imputación,* which was adopted in August 2013 stated that the Eighth Amendment had caused damage to the Colombian State and accused Prodeco of wilfully causing that damage.[61]

53. The *Contraloría* issued its decision regarding these charges on 30 April 2015. The *Contraloría* found Prodeco, Mr Ballesteros, Mr Ceballos and the Minister of Mines at the time that the Eighth Amendment was signed had incurred fiscal liability and sentenced them to pay, jointly and severally, COP 60 billion (approximately USD 25 million) in compensation for the damage to the State. The decision largely endorsed the allegations in the *Auto de Imputación*.[62]

54. Prodeco took various steps to appeal or otherwise quash the decision.[63] None of these had been successful by the time of the Award. On 19 January 2016 Prodeco paid, under protest, USD 19.1 million.[64]

55. In March 2012 the Colombian authorities initiated proceedings to annul the Mining Contract before the *Tribunal Administrativo de Cundinamarca*. At the time that the Award in the present proceedings was issued, the *Tribunal Administrativo* had not given a decision.[65]

56. Notwithstanding the various proceedings, the Eighth Amendment was applied on a provisional basis and Prodeco made payment of royalties in accordance with its terms.[66]

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59 Award, paras. 410-458.

60 Two other officials were the subject of lesser charges.

61 Award, paras. 459-466.

62 Award, paras. 487-506.

63 Award, paras. 507-524.

64 Award, paras. 525-526.

65 Award, paras. 527-535.

66 Award, para. 545.

B. GLENCORE'S CLAIM BEFORE THE TRIBUNAL AND COLOMBIA'S RESPONSE

57. Glencore and Prodeco first raised the existence of a potential dispute under the BIT in a letter of 18 September 2013 addressed to the President of Colombia.[67] That was followed by a formal notification of dispute on 28 August 2015,[68] which initiated the six-month consultation period provided for in Article 11 of the BIT. Following the expiry of that period, Glencore and Prodeco submitted their Request for Arbitration on 4 March 2016.

58. The relief sought by Glencore and Prodeco is set out at para. 547 of the Award. In summary, they sought a declaration that Colombia had breached Articles 4(1), 4(2) and 10(2) of the BIT, repayment of the USD 19.1 million which they had paid under protest (see para. 54, above), cessation of the existing proceedings and an assurance that new proceedings would not be instituted and, should proceedings not be terminated, forward looking damages.

59. Colombia argued that the Tribunal lacked jurisdiction and that the claims were inadmissible. Although Colombia challenged the jurisdiction of the Tribunal on several grounds, a central pillar of its case was that the investment made in connection with the Eighth Amendment was unlawful and thus fell outside the BIT. Colombia maintained that Articles 2 and 4(1) of the BIT excluded investments made in violation of the law of the host State and that an investment procured by corruption, fraud or deceit was an instance of an investment which was tainted by illegality.

60. According to Colombia, the Eighth Amendment was procured by corruption, misrepresentation and the concealment of important information from Ingeominas. At the heart of this argument was an allegation that Prodeco, through its affiliate CDJ, had paid an exorbitant sum for the concession to three hectares of land in order to obtain the agreement of Mr Ballesteros, then the Director General of Ingeominas, to the Eighth Amendment to the Mining Contract which introduced changes seriously detrimental to Colombia. Colombia's case was that the price paid – USD 1.75 million – bore no relation to the value of the land and was an indirect bribe to Mr Ballesteros. Almost immediately after the conclusion of the Assignment Contract and its approval by Ingeominas (to which,

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67 Tribunal's Procedural Order No. 2, 4 November 2017 ("**PO2**"), paras. 16-17 (**AAE-1**).

68 Award, para. 536; PO2, note 67, above, at para. 18 (**AAE-1**).

Colombia argued, the details of the Assignment Contract were never revealed), Mr Ballesteros approved the adoption of the Commitment to Negotiate (see para. 49, above) in spite of the recommendation by the Sub-Director that that the terms proposed by Prodeco were unfavourable to Colombia (see paras. 39-40, above).

61. Colombia maintained that the terms were so clearly detrimental that only corruption, and the concealment of relevant information, could have caused Ingeominas to accept them. According to Colombia, Prodeco falsely affirmed that it was economically unfeasible to produce beyond 8 MTA when Prodeco's internal documents proved contemporaneous plans to increase production up to 10 MTA between 2010 and 2019. Colombia alleged that the payment which Prodeco had made to Mr Maldonado and Mr Garcia for the three hectare concession had been a thinly concealed bribe to secure the consent of Mr Ballesteros to the Eighth Amendment. On the basis of such influence peddling and misrepresentations, Colombia alleged, Prodeco and the State executed the Eighth Amendment on 22 January 2010.[69] The Investment had thus been unlawful and fell outside the protection of the BIT.

62. Glencore and Prodeco denied the allegations of corruption and gave a very different account of the circumstances surrounding the three hectare concession (see paras. 46-47, above). They maintained that the concession had been improperly granted to Mr Maldonado and Mr García but, despite Prodeco's complaints, had not been reversed, leaving Prodeco no choice but to buy the concession through its affiliate CDJ. They pointed to the fact that Prodeco had been open about the purchase of the three hectare concession and the price which it had paid and argued that there was no evidence that any part of the price paid had been passed on to Mr Ballesteros. Their analysis of what had happened was that, like other mining concerns in Colombia, they had been the victim of "*greenmail*", whereby a person was able to obtain a concession to a small area of land which had to be bought out at an exorbitant price in order to unlock the potential of the concessions to the surrounding area.

[69] Application, para. 18(iii).

C. THE TRIBUNAL'S DECISIONS REGARDING THE PRODUCTION AND EXCLUSION OF DOCUMENTS

63. Colombia's Application for Annulment is premised, in large part, on procedural decisions of the Tribunal concerning the production of documents and the marshalling of evidence. Colombia submits that it was wrongly prevented from admitting into evidence certain documents allegedly pertaining to the conclusion of the three hectare contract and thus to the legality of Prodeco's investment.[70] The impugned decisions are Procedural Order No. 2 of 4 November 2017 ("**PO2**"),[71] Procedural Order No. 4 of 24 April 2018 ("**PO4**"),[72] and Procedural Order No. 6 of 31 July 2018 ("**PO6**").[73] The record is a complicated one and it is necessary to set it out in some detail before considering the Parties' arguments regarding the application for annulment.

(1) Colombia's First Attempt to Introduce Documents Seized from Glencore and Prodeco

64. Colombia was represented in the arbitration proceedings by the *Agencia Nacional de Defensa Jurídica del Estado* (the "**ANDJE**").

65. On 7 June 2017, the ANDJE requested a one-month extension of the deadline (of 3 July 2017) set for the submission of its Counter-Memorial.[74] That request was premised on the administrative reorganization of the ANDJE and health issues affecting counsel for Colombia.[75] On 12 June 2017, the Tribunal granted a two-week filing extension to Colombia.[76]

66. On 13 June 2017, the ANDJE signed an agreement with the *Superintendencia de Industria y Comercio* (the "**SIC**"), the administrative agency which enforces antitrust law in

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70 Award, para. 74.

71 PO2, note 67, above (**AAE-1**).

72 Tribunal's Procedural Order No. 4, 24 April 2018 ("**PO4**") (**AAE-9**).

73 Tribunal's Procedural Order No. 6, 31 July 2018 ("**PO6**") (**AAE-10**).

74 Award, paras. 70-71.

75 Award, para. 71.

76 Award, para.72.

Colombia, that the agencies would cooperate to exchange between them information relevant to the legal defence of Colombia (the "**Cooperation Agreement**").[77]

67. At an unspecified date in June or July of 2017, the SIC delivered to the ANDJE certain documents it had seized from Prodeco in the context of an antitrust investigation relating to Prodeco's seaport.[78] These documents included emails downloaded by SIC from the computers of a number of Prodeco's managers (the "**Disputed SIC Documents**")[79] during a search of Prodeco's offices which the SIC had conducted in August 2014.[80]

68. On 17 July 2017 Colombia filed its Objections to Jurisdiction and Admissibility and Counter-Memorial.[81] The exhibits attached to the Counter-Memorial included forty-one internal Prodeco documents which were part of the Disputed SIC Documents and were described as having been "*recently discovered*".

69. By a letter to the Tribunal dated 26 July 2017, Glencore and Prodeco expressed their concern that Colombia's Counter-Memorial submission included "*41 private and internal email chains exchanged between* [Prodeco's] *management and their in-house and external counsel*", the contents of which were, according to Glencore and Prodeco, privileged.[82] They requested an order that Colombia reveal how the ANDJE had obtained these documents, and the timing of that acquisition.[83] Glencore and Prodeco further requested an order "*declaring inadmissible all documents irregularly obtained or produced by Colombia in breach of its duty of good faith and rules of privilege, and an order striking*

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77 Award, para. 73.

78 Award, para. 74.

79 The Tribunal was not always consistent in its use of terms to describe the various documents whose production was contested. In PO2 it referred to the 41 documents as "*the Disputed Documents*". However, in PO4 it refers to those documents as "*the Excluded Documents*" and uses the term "*the Disputed Documents*" to refer to a much larger collection of documents for which privilege was claimed (see paras. 111-123, below). The Committee has retained the term "*Disputed Documents*" for this latter collection but has used the term "*Disputed SIC Documents*" to refer to the 41 documents which were the subject of PO2. As will be seen (paras. 95-151, below), there was an overlap between these categories in that some of the Disputed SIC Documents were later part of the larger category of Disputed Documents considered in PO4 and in PO6.

80 Award, para. 74.

81 Award, para. 76.

82 Letter from Claimants to the Tribunal, 26 July 2017 ("**Claimants letter of 26 July 2017**"), p. 1 (**C-275**).

83 Claimants' letter of 26 July 2017, note 82, above, at p. 7 (**C-275**).

out any statements in Colombia's Counter-Memorial and/or witness statements and expert report that relied on such documents" (the "**First Application**").[84]

70. On 3 August 2017, Colombia wrote to the Tribunal to explain that the Disputed SIC Documents had been legally obtained by the SIC in the context of a lawful audit of Prodeco's acitivities, to argue that the documents were not privileged and to request that the Tribunal "*reject Claimants' petition outright*".[85]

71. Glencore and Prodeco responded by letter of 22 August 2017, slightly amending their initial request for relief.[86] On 11 September 2017, Colombia filed a rejoinder letter, reiterating its initial request.[87]

72. On 10 September 2017, the ANDJE filed a criminal complaint with the office of the *Fiscalía General de la Nación* (the "**FGN**"), based on the Disputed SIC Documents (the "**Criminal Complaint**").[88] The Criminal Complaint was aimed at certain named persons who were involved in the execution of the Eighth Amendment, reporting that they "*may have*" committed the crimes of bribery, conclusion of a contract lacking legal requirements, conspiracy to commit a crime, and undue interest of a public servant in the conclusion of contracts.[89] It also requested the deposition of two Prodeco employees, including one of Prodeco's in-house counsel.

73. On 20 September 2017, Glencore and Prodeco submitted a letter to the Tribunal to address the Criminal Complaint, amongst other issues.[90] They requested, in addition to the exclusion of the Disputed SIC Documents, an order that Colombia "*refrain from harassing or intimidating Claimants, their current and former employees, their current and former counsel, and their witnesses, through the conduct of the criminal investigations arising from the ANDJE's Complaint*" (the "**Second Application**").[91] On 2 October 2017,

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84 Claimants' letter of 26 July 2017, note 82, above, at p. 8 (**C-275**); Award, paras. 24, 77.

85 Letter from Colombia to the Tribunal, 3 August 2017, p. 2 (**C-276**); Award, paras. 25, 78.

86 Award, para. 79.

87 Award, para. 26.

88 PO2, note 67, above, at para. 30 (**AAE-1**); Award, para. 80.

89 PO2, note 67, above, at para. 31 (**AAE-1**); Award, para. 81.

90 Award, para. 27.

91 PO2, note 67, above, at para. 7 (**AAE-1**).

Colombia wrote to the Tribunal to request that it reject Glencore and Prodeco's Second Application.[92]

74. These exchanges were the first round in a series of procedural disputes which the Tribunal addressed in three separate stages. Since the three Procedural Orders (the "**POs**") in question are central to the Application for Annulment, it is necessary to set out the issues considered in each Order and the decisions taken by the Tribunal in some detail.

(2) Procedural Order No. 2 (4 November 2017)

75. The principal issue which confronted the Tribunal when it adopted PO2 was whether Colombia could introduce into the record the documents seized from Prodeco's offices by the SIC in 2014. By the time the Tribunal issued PO2, certain matters were common ground between the Parties.

76. First, the documents had been seized on 4 August 2014 by one Colombian agency, the SIC, as part of an investigation into allegedly anti-competitive practices prohibited by Colombian law which were distinct from the matters in issue in the proceedings before the Tribunal.[93]

77. Secondly, although counsel for Glencore and Prodeco has emphasized the coercive nature of this seizure,[94] the Tribunal held that "[i]*t is common ground between the Parties that the Disputed Documents were legally obtained by the SIC in the course of an antitrust investigation against Prodeco*".[95]

78. Thirdly, the documents were handed by the SIC to the ANDJE, which was responsible for the conduct of the arbitration proceedings, pursuant to the Cooperation Agreement signed

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92 PO2, note 67, above, at para. 8 (**AAE-1**).

93 PO2, note 67, above, at paras. 19-20, 44, 54 (**AAE-1**).

94 Before the Committee, counsel for Glencore and Prodeco referred to "*internal privileged emails of the Claimants acquired from servers seized during a dawn raid in an entirely unrelated competition investigation*" (Tr. p. 79:1-3 (Mr Blackaby)). Since the "*raid*" started at 10:37 am (Minutes of the Meeting between the SIC and Prodeco of 4 August 2014, signed by representatives of the SIC and Prodeco (**R-205**)), the reference to a "*dawn raid*" must be taken as an instance of forensic hyperbole.

95 PO2, note 67, above, at para. 54 (**AAE-1**).

on 13 June 2017.[96] The Parties did not agree then – and do not agree now – whether the transfer of the documents by the SIC to ANDJE was lawful under Colombian law.

79. With regard to the law applicable to whether the documents could lawfully be placed on the record by Colombia, the Tribunal noted that the Parties based their arguments on international law and, alternatively, on Colombian law.[97] The Tribunal then held that:

> *This approach is consistent with the BIT and the ICSID Convention: while the Colombia-Switzerland BIT has no provision regarding the applicable substantive law, Article 42(1) of the ICSID Convention establishes that, in the absence of an agreement, the Tribunal shall apply the law of the Contracting State party to the dispute and such rules of international law as may be applicable. And Article 44 of the Convention provides that "any question of procedure […] which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties", shall be decided by the Tribunal.*[98]

80. The Tribunal held that it would apply international law and "*confirm its findings by applying municipal law*".[99]

81. The Tribunal defined the issue before it as "*whether it is fair to admit into the record of this arbitration documents lawfully obtained by a State's administrative antitrust agency in the course of an antitrust/unfair competition investigation*".[100]

82. The Tribunal decided that it had to uphold the principle that each Party had an obligation to arbitrate fairly and in good faith, and to respect the equality of arms. It considered that the rule that the equality of arms must be respected applied to "*the marshalling of evidence*" and that:

> *… arbitration tribunals are authorized to exclude from evidence documents for compelling reasons of "fairness or equality of the Parties".*[101]

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96 PO2, note 67, above, at para. 28 (**AAE-1**).

97 PO2, note 67, above, at para. 50 (**AAE-1**).

98 PO2, note 67, above, at para. 51 (**AAE-1**).

99 PO2, note 67, above, at para. 52 (**AAE-1**).

100 PO2, note 67, above, at para. 59 (**AAE-1**).

101 PO2, note 67, above, at para. 65 (**AAE-1**).

83. The Tribunal decided that it should exclude the disputed documents "*for reasons of fairness and equality of arms*".[102] It justified that decision as follows:

> *If the Tribunal were to allow the Disputed Documents, such decision would upset the balance between the Parties and their equality of arms. Claimants are private companies, while respondent is a sovereign State, which by law enjoys wide-ranging powers to investigate and sanction by itself administrative misbehavior. Through the exercise of these powers Respondent is capable of legally forcing evidence from Claimants. But such evidence can only be used for the purpose for which it was coerced: to further the administrative investigation, which may result in an administrative sanction.*
>
> *If the disputed documents were admissible as evidence, so would evidence coming from other administrative agencies, such as the tax authorities. And if governments were allowed to submit in investment arbitrations all evidence seized by their administrative bodies or agencies in unrelated administrative procedures, this would create an incentive to start administrative investigations once the investor announces the existence of a dispute.*[103]

84. The Tribunal concluded, with regard to international law:

> *<u>In summary</u>, the duty to arbitrate in good faith and the principle of equality of arms preclude a State from coercing evidence through its own administrative powers and to marshal it thereafter in an investment arbitration.*[104]

Importantly, however, the Tribunal continued:

> *The proper procedure to obtain evidence from the counterparty is through the agreed upon document production exercise. Not having been obtained through such procedure, the Disputed Documents should be excluded from the record of this arbitration.*[105]

85. The Tribunal added, in a footnote, that:

> *… the Tribunal's decision does not affect the right or duty of a State or its civil servants to denounce criminal behavior to the proper judicial*

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[102] PO2, note 67, above, at para. 67 (**AAE-1**).

[103] PO2, note 67, above, at paras. 68-69 (**AAE-1**).

[104] PO2, note 67, above, at para. 70 (**AAE-1**).

[105] PO2, note 67, above, at para. 70 (**AAE-1**).

> *authorities, nor the use of documents seized in the course of administrative procedures to support such complaints.*[106]

86. The Tribunal then considered Colombian law.[107] It held that:

> *By handing over the Disputed Documents to ANDJE, even if in compliance with the Agreement* [of 13 June 2017] *the SIC may have incurred in a* desviación de poder*: legally using its investigative powers for an (additional) purpose different from that for which they were granted.*[108]

87. The Tribunal concluded that "[m]*unicipal law thus would appear to confirm the conclusion reached by the Tribunal under international law*".[109]

88. The effect of PO2 was that Colombia was not entitled to introduce the Disputed SIC Documents into the record with the Counter-Memorial. Nevertheless, the Tribunal left open two other ways in which the Seized Documents might be admitted into the record.

89. First, it held that Colombia could seek production of the Disputed SIC Documents through an amended document production process (giving the Parties an opportunity to file new requests for document production that would "*supersede and replace*" the Parties' original requests, still pending before the Tribunal), during which any dispute about whether or not a document was protected by legal or settlement privilege could be determined.[110]

90. The Tribunal also specified that, in asserting legal or settlement privilege over a requested document, the requested Party could opt either to identify the document in a "*Privilege Log*" or to deliver the document to the requesting Party with the privileged information redacted.[111] The Tribunal set out the details of the amended document production phase in paragraphs 117 to 146 of PO2. Drawing on the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration, 2010 (the "**IBA Rules**"), the Tribunal laid down criteria and procedural requirements for document production in some detail, requiring the production of Redfern schedules in which requests for production and

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106 PO2, note 67, above, at footnote 64 (**AAE-1**).

107 PO2, note 67, above, at paras. 71-74 (**AAE-1**).

108 PO2, note 67, above, at para. 73 (**AAE-1**).

109 PO2, note 67, above, at para. 74 (**AAE-1**).

110 PO2, note 67, above, at para.113 (**AAE-1**).

111 PO2, note 67, above, at para. 129 (**AAE-1**).

opposition based on, for example, legal or settlement privilege could be made.[112] The annex to the Procedural Order set out an amended timetable (subsequently agreed between the Parties[113]) to be followed with regard to the new phase of document production.[114]

91. Secondly. the Tribunal held that the rules which it had established "*regarding the admissibility of evidence obtained from Claimants in the course of Colombia's administrative investigation … do not apply per se with regard to evidence obtained in judicial criminal proceedings*".[115] It distinguished between an investigation by "*an administrative agency which initiates an investigation and uses its powers to coerce the production of evidence from citizens*" and "*an independent judicial authority, which investigates crimes in the public interest and marshals evidence into the criminal record*".[116]

92. It then identified the following dilemma:

> *Although the Arbitral Tribunal is not bound by the findings of fact or conclusions of law of the Colombian criminal courts, the criminal investigation may well result in evidence or findings which are relevant to this investment arbitration. Consequently, it may well happen that, in the course of the criminal investigation, decisions are adopted or evidence is marshalled which any of the Parties may wish to submit to the investment arbitration tribunal. The question is how to do so, while preserving the basic principles of fairness, good faith and equality of arms.*[117]

93. On that basis the Tribunal adopted the following regime:

> *decisions of criminal courts: decisions adopted by Colombian criminal courts, which could potentially impact the present procedure, may be freely marshalled by the Parties, subject to the rule established in para. 17 (3) of Procedural Order No. 1;*[118]

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112 PO2, note 67, above, at para. 127 (**AAE-1**).

113 Award, para. 30.

114 PO2, note 67, above, at pp. 31-32 (**AAE-1**).

115 PO2, note 67, above, at para. 87 (**AAE-1**).

116 PO2, note 67, above, at para. 87 (**AAE-1**).

117 PO2, note 67, above, at para. 88 (**AAE-1**).

118 Para. 17.3 of the Tribunal's Procedural Order No. 1 of 4 November 2016 concerned the timing of filing and precluded late filing without the permission of the Tribunal (**AAE-6**).

> *criminal evidence:* *the situation is more complex as regards evidence, and the Tribunal has not been sufficiently briefed on this question – the particular decision may well depend on a document-by-document analysis. Consequently, as a precautionary measure, the Tribunal finds that any Party that intends to submit evidence gathered from a criminal procedure in Colombia, shall first ask permission from the Arbitral Tribunal (briefly describing the evidence to enable the Tribunal to consider its relevance, but not submitting the evidence itself). The Tribunal will issue a decision, after hearing the counterparty.*[119]

94. Colombia could therefore apply to submit "*evidence gathered from a criminal procedure in Colombia*".[120] The Tribunal, however, recognized that both Parties agreed that "*communications of any type between Claimants and their designated external counsel for the purpose of seeking or providing legal advice*" were privileged and had to be subjected to a "*carved out regime*".[121] The Tribunal considered that it was "*of paramount importance for the integrity of these* [ie the arbitral] *proceedings*" that if such documents came into the hands of Colombian authorities in the course of the criminal investigation appropriate measures were put in place to ensure that Colombia's counsel in the arbitration and the officials of ANDJE did not see those documents [122] and invited Colombia to set out, within fifteen days, the measures which it intended to take.[123]

(3) The Steps taken by the Parties following Procedural Order No. 2

95. On 14 November 2017, Colombia wrote to the Tribunal expressing its "*serious concerns*" about PO2 and reserving all of its rights.[124] It complained that, by excluding the Disputed SIC Documents, the Tribunal had manifestly exceeded its powers, failed to state the reasons on which its decision was based and seriously departed from a fundamental rule of procedure.[125] Colombia maintained that the documents which had been excluded by the

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[119] PO2, note 67, above, at para. 89 (**AAE-1**).

[120] PO2, note 67, above, at para. 89 (**AAE-1**).

[121] PO2, note 67, above, at para. 90 (**AAE-1**).

[122] PO2, note 67, above, at para. 92 (**AAE-1**).

[123] PO2, note 67, above, at para. 94 (**AAE-1**).

[124] Letter from Colombia to the Tribunal, 14 November 2017 ("*Colombia's letter of 14 November 2017*"), p. 1 (**C-283/R-275**).

[125] Colombia's letter of 14 November 2017, note 124, above, at p. 2 (**C-283/R-275**).

Tribunal in PO2 had lawfully been obtained[126] and that the SIC had acted in accordance with its duty in handing them to the ANDJE.[127] Nevertheless, Colombia stated that it would comply "*under protest*" with the directions in PO2.[128] In particular, the letter set out the measures which Colombia proposed to take to ensure that Colombia's counsel and the ANDJE did not see any documents which were gathered in the course of the criminal investigation and were properly the subject of legal privilege. Those measures included the appointment of an independent counsel to review whether those documents were "*communications of any type between Claimants and their designated external counsel for the purpose of seeking or providing legal advice*".[129] The independent counsel was Mr Camilo Enciso, a former *Secretario de Transparencia* of the Presidency of Colombia.[130]

96. On 16 November 2017 Colombia filed a revised Counter-Memorial which omitted any reference to the Disputed SIC Documents and did not append any of them as exhibits.[131]

97. In accordance with the procedure laid down by PO2, on 14 December 2017 the Parties submitted their respective requests for production of documents for decision by the Tribunal. [132] Colombia made thirty-nine requests for production.[133]

98. On 4 January 2018, the Tribunal issued Procedural Order No. 3 ("**PO3**"), accepting twenty-three out of Colombia's thirty-nine requests, although it narrowed down several of them.[134]

99. On 5 February 2018, Glencore and Prodeco produced to Colombia a total of 366 documents, stating that they had "*undertaken a reasonable review of their files in good faith, and have identified and produced non-privileged documents in their possession,*

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126 Colombia's letter of 14 November 2017, note 124, above, at p. 2 (**C-283/R-275**).

127 Colombia's letter of 14 November 2017, note 124, above, at p. 3 (**C-283/R-275**).

128 Colombia's letter of 14 November 2017, note 124, above, at p. 4 (**C-283/R-275**).

129 Colombia's letter of 14 November 2017, note 124, above, at p. 5 (**C-283/R-275**), quoting PO2, note 67, above, at para. 90 (**AAE-1**).

130 Colombia's letter of 14 November 2017, note 124, above, at p. 5 (**C-283/R-275**).

131 Award, para. 32.

132 Award, para. 33.

133 Award, para. 94.

134 Tribunal's Procedural Order No. 3, 4 January 2018 ("**PO3**") (**AAE-8**); Award, para. 99.

custody and control pursuant to the Tribunal's orders" (the "**Produced Documents**").[135] Glencore and Prodeco, however, claimed "*legal or settlement privilege*" in relation to 159 documents.[136] Certain of the Produced Documents were delivered to Colombia in redacted form (the "**Redacted Documents**").[137] In addition, Glencore produced a Privilege Log (the "**Privilege Log**"), identifying the date, the issuer, the recipient and a summary description of the documents which it had identified as responsive to Colombia's requests which had been withheld by Glencore on the basis that they were subject to legal or settlement privilege (the "**Privilege Log Documents**"). The Privilege Log Documents and the Redacted Documents will be referred to as the "**Disputed Documents**".[138]

100. Colombia objected to the assertions of privilege. On 23 February 2018, Colombia wrote to the Tribunal to protest that Glencore and Prodeco had disregarded the procedural directions set out in PO2 by raising the issue of privilege only after the Tribunal's decision in PO3 and not at the exchange of their respective Redfern Schedules on 7 December 2017, by which stage, according to Colombia, Glencore and Prodeco had "*waived any right to assert privilege*".[139] In any event, Colombia added, there was no entitlement to privilege.[140] According to Colombia, none of the Redacted Documents and only 18 out of the 159 Privilege Log Documents were sent or received by Prodeco's external counsel.[141] As such, only these 18 documents could be construed as privileged under international legal standards.[142] The remainder were, for the most part, sent or received by Prodeco's in-house counsel - Ms Natalia Anaya and Ms María Margarita (Paca) Zuleta.[143] According to Colombia, settlement privilege "*does not exist*" and only "*communications with outside counsel are protected*" by legal privilege under International Law or Colombian Law.[144]

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135 Letter from Claimants to Colombia, 5 February 2018 ("*Claimants' letter of 5 February 2018*"), p. 1 (**R-283**).

136 Claimants' letter of 5 February 2018, note 135, above, at p. 1 and Annex 1 (**R-283**).

137 Letter from Claimants to ICSID, 2 March 2018 ("*Claimants' letter of 2 March 2018*"), pp. 2-3 (**R-277**); PO6, note 73, above, at para. 46 (**AAE-10**).

138 *See*, however, note 79, above.

139 Letter from Colombia to ICSID, 23 February 2018 ("*Colombia's letter of 23 February 2018*"), p. 3 (**R-272**).

140 Colombia's letter of 23 February 2018, note 139, above, at p. 3 (**R-272**).

141 Colombia's letter of 23 February 2018, note 139, above, at p. 9 (**R-272**).

142 Colombia's letter of 23 February 2018, note 139, above, at p. 12 (**R-272**).

143 Colombia's letter of 23 February 2018, note 139, above, at p. 11 (**R-272**).

144 Colombia's letter of 23 February 2018, note 139, above, at p. 11 (**R-272**).

Glencore and Prodeco could not, therefore, have had any expectation of confidentiality in respect of the majority of the documents.[145] Accordingly, Colombia requested an order instructing Glencore and Prodeco to produce "*within 48 hours*" (1) un-redacted copies of the Redacted Documents; and (2) the Privilege Log Documents, "*redacting only in those documents exchanged with external counsel the relevant portions where legal advice was sought or given*".[146]

101. On 2 March 2018, Glencore and Prodeco wrote to the Tribunal in response, stating that they had fully complied with PO3 and requesting that the Tribunal dismiss Colombia's application.[147] They contended that Colombia had not challenged any specific entries in the Privilege Log. They maintained that it was international law which determined whether or not a document was privileged and that the decision in *Vito Gallo*[148] established that under international law privilege extended to communications with in-house legal counsel for the purpose of seeking or receiving legal advice.[149] Glencore and Prodeco stated that "[c]*onsistent with this approach, Claimants have produced 35 documents setting out communications with in-house counsel that were not prepared for the purpose of obtaining or providing legal advice*".[150] They added:

> *Perusal of the individual entries in the privilege log will confirm that Claimants only asserted privilege over documents or communications created for the purpose seeking or receiving* legal advice*, not those merely related to Prodeco's general operations. The specific matter in respect of which the legal advice was sought or received is also identified in the privilege log.*[151]

The letter also challenged Colombia's assertion that legal privilege did not attach, under Colombian law, to communications with in-house counsel.[152]

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145 Colombia's letter of 23 February 2018, note 139, above, at p. 11 (**R-272**).

146 Colombia's letter of 23 February 2018, note 139, above, at p. 14 (**R-272**).

147 Claimants' letter of 2 March 2018, note 137, above, at p. 2 (**R-277**); Award, paras. 37, 104.

148 *Vito G Gallo v. The Government of Canada*, Procedural Order No. 3 of 8 April 2009 ("*Vito Gallo*") (**RL-129**).

149 Claimants' letter of 2 March 2018, note 137, above, at p. 5 (**R-277**).

150 Claimants' letter of 2 March 2018, note 137, above, at p. 5 (**R-277**).

151 Claimants' letter of 2 March 2018, note 137, above, at p. 5 (**R-277**).

152 Claimants' letter of 2 March 2018, note 137, above, at p. 6 (**R-277**).

102. On 6 March 2018, the Tribunal wrote to the Parties to instruct that

> *The challenge to any Redacted Document or to any Privilege Log Documents must be done on a document-by-document basis. Thus, the Tribunal cannot entertain Colombia's general Request for Relief either for all the Redacted Documents or for all the Privilege Log Documents.*
>
> *In order to solve this incident in the quickest and most efficient way possible, the Tribunal suggests that the Parties confer and try to reach an agreement on any disputed document. If, having made the appropriate good faith efforts to find a solution, it cannot be reached, the Tribunal will gladly solve any requests on a document-by-document basis.*
>
> *Under no circumstances shall this incident serve as an excuse to delay the hearing scheduled for May 28 – June 4, 2018.*[153]

103. By a letter to the Tribunal dated 9 March 2018, Colombia reiterated its protest that Glencore and Prodeco had "*openly disregarded*" the procedural directions and timetable set forth by PO2, adding that the Tribunal had, by its communication of 6 March 2018 "*implicitly accepted Claimants' belated privilege objections without stating any reason*".[154] In addition, Colombia argued that at least two of Colombia's arguments in its communication of 2 March 2018 did not require the Tribunal to rule on a "*document-by-document basis*". In particular, according to Colombia, a decision on a document-by-document basis was not required in order to rule that Glencore and Prodeco had failed to comply with the Tribunal's established timetable for raising objections to production requests, set out in PO2, and that documents sent or received by in-house counsel were not privileged.[155]

104. With regard to communications between Prodeco and its in-house counsel, Colombia further contended that any privilege to which Prodeco might have been entitled had been waived when it permitted those counsel to give evidence in proceedings before the Colombian courts.[156]

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153 Email from the Tribunal to the Parties, 6 March 2018 ("*Tribunal's email of 6 March 2018*") (**AAE-26**); Award, paras. 38, 105.

154 Letter from Colombia to ICSID, 9 March 2018 ("*Colombia's letter of 9 March 2018*"), p. 1 (**R-273**).

155 Colombia's letter of 9 March 2018, note 154, above, at p. 1 (**R-273**); Award, para. 106.

156 Colombia's letter of 9 March 2018, note 154, above, at p. 3 (**R-273**).

105. Colombia also informed the Tribunal that the ANDJE had recently learned that the FGN[157] had obtained copies of the files in possession of the SIC "*in the context of a domestic criminal investigation into the illegalities surrounding the Eighth Amendment*"[158] and that, in accordance with Colombia's letter of 14 November 2017,[159] neither Colombia's counsel nor the ANDJE had seen these files. However, referring to para. 89 of PO2, Colombia requested "*the Tribunal's instructions to gather the evidence collected by the General Prosecutor and marshal it into the record*".[160] This issue was distinct from the dispute regarding privilege and was eventually dealt with by the Tribunal in PO6; it is considered in paras. 143-151, below.

106. Colombia added that it understood that "*the Tribunal is adamant not to postpone the hearing scheduled for 28 May – 4 June 2018*" (the "**Arbitration Hearing**"), and stated that Colombia itself would also "*oppose any request that the Hearing be rescheduled*".[161]

107. Glencore and Prodeco responded by letter on 12 March 2018.[162] They maintained that Colombia had mischaracterized the Tribunal's communication of 6 March 2018, which had not upheld the claim of privilege but merely established the procedure by which that claim was to be resolved.[163]

108. Also on 12 March 2018, Colombia sent to Glencore and Prodeco its comments on the items in the Privilege Log.[164]

109. On 17 March 2018, the Tribunal wrote to the Parties stating that it had taken no decision with regard to the claim of privilege and reiterating that, if the Parties were unable to reach agreement on the individual documents, the Tribunal was ready to "*adjudicate the issue on a document-by-document basis*".[165]

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157 See para. 72, above.

158 Colombia's letter of 9 March 2018, note 154, above, at pp. 4-5 (**R-273**).

159 Colombia's letter of 14 November 2017, note 124, above (**C-283/R-275**); see para. 95, above.

160 Colombia's letter of 9 March 2018, note 154, above, at p. 5 (**R-273**).

161 Colombia's letter of 9 March 2018, note 154, above, at p. 4 (**R-273**).

162 Letter from Claimants to ICSID, 12 March 2018 ("*Claimants' letter of 12 March 2018*") (**AAE-28**).

163 Claimants' letter of 12 March 2018, note 162, above, at p. 1 (**AAE-28**).

164 Letter from Colombia to Claimants, 12 March 2018 (**AAE-27**).

165 Email from the Tribunal to the Parties, 17 March 2018 ("*Tribunal's email of 17 March 2018*") (**AAE-11**).

110. By letter of 27 March 2018, Colombia informed the Tribunal that the Parties had been unable to agree with regard to the production of the Redacted and Privilege Log documents, and requesting that the Tribunal order Glencore and Prodeco to produce the Disputed Documents.[166] Colombia maintained that Glencore and Prodeco had refused its request to identify which of the documents in the Privilege Log were among the Disputed SIC Documents and that this refusal had impeded the process of document production.[167] Colombia attached to the letter an annex comprising the privilege log with two additional columns containing Colombia's document-by-document response to the assertion of privilege and Glencore and Prodeco's replies.[168]

(4) Procedural Order No. 4 (24 April 2018)

111. The Tribunal ruled on the privilege dispute in its Procedural Order No. 4 of 24 April 2018. Having summarised the Parties' arguments, the Tribunal identified three issues which it had to decide:

> - *Whether Claimants failed to follow the appropriate proceedings [sic] for filing their Privilege Log;*
>
> - *Whether attorney client privilege extends to in-house counsel; and*
>
> - *Whether Claimants properly asserted settlement privilege over the Disputed Documents.*[169]

112. The Tribunal concluded that the law applicable to these questions was international law:

> *The Parties have based their pleadings first on international law,*[170] *and alternatively on municipal law. This approach is consistent with the BIT and the ICSID Convention: while the Colombia-Switzerland BIT has no provision regarding the applicable substantive law, Article 42(1) of the ICSID Convention establishes that, in the absence of an agreement, the*

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166 Letter from Colombia to ICSID, 27 March 2018 ("*Colombia's letter of 27 March 2018*") (**RAE-2**).

167 Colombia's letter of 27 March 2018, note 166, above, at p. 1 (**RAE-2**).

168 Colombia's letter of 27 March 2018, note 166, above, at Annex A (**RAE-2**).

169 PO4, note 72, above, at para. 35 (**AAE-9**).

170 Citing Claimants' letter of 2 March 2018, note 137, above (**R-277**) and Colombia's letter of 23 February 2018, note 139, above (**R-272**).

> *Tribunal shall apply the law of the Contracting State party to the dispute and such rules of international law as may be applicable.*[171]

113. The Tribunal went on to agree with the view expressed by the *Vito Gallo*[172] tribunal that "*domestic legal concepts of solicitor-client privilege are recognized and protected by international law*".[173] It also held that the concept of settlement privilege was protected by international law.[174]

114. In addition, the Tribunal referred to Article 44 of the ICSID Convention, under which "*any question of procedure … which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties*" are to be decided by the tribunal,[175] and the IBA Rules.[176]

115. The Tribunal considered that Glencore and Prodeco had not complied with PO2 in the timing of their assertion of privilege but that this failure had not deprived Colombia of its procedural rights or prevented a full presentation of the Parties' different positions on the issues requiring resolution.[177] It therefore rejected Colombia's argument that the claim of privilege should be dismissed *in limine*.[178]

116. With regard to the question whether international law treated communications with in-house legal counsel for the purpose of seeking or receiving legal advice as privileged, the Tribunal considered that whether or not lawyer-client communications were privileged depended not on the status of the lawyer but on whether the communication in question met four conditions: (i) that the document was drafted by a lawyer acting in their capacity as a lawyer; (ii) that a solicitor-client relationship based on trust existed between the lawyer and the client; (iii) that the document had been elaborated for the purpose of obtaining or giving legal advice; and (iv) that the lawyer and the client, when giving and obtaining the

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171 PO4, note 72, above, at para. 37 (**AAE-9**).

172 See *Vito Gallo*, note 148, above, at para. 41 (**RL-129**).

173 PO4, note 72, above, at para. 38 (**AAE-9**).

174 PO4, note 72, above, at para. 39 (**AAE-9**).

175 PO4, note 72, above, at para. 40 (**AAE-9**).

176 PO4, note 72, above, at para. 41 (**AAE-9**).

177 PO4, note 72, above, at para. 46 (**AAE-9**).

178 PO4, note 72, above, at para. 47 (**AAE-9**).

legal advice, must have acted with the expectation that the advice would be kept confidential in a contentious situation.[179]

117. The Tribunal noted that no distinction between in-house and external counsel was mentioned either in *Vito Gallo* or in the IBA Rules and cited the decision in *Reineccius v. Bank for International Settlements* that privilege extended to "*the legal communications … between an attorney (whether in-house or outside) and those who are afforded his or her professional advice for the purposes of making or in contemplation of that* decision".[180] The Tribunal concluded that international law made no such distinction, so long as the documents in question met the conditions set out in the preceding paragraph. It concluded that "[t]*o rule otherwise would imply an unwarranted discrimination towards parties that choose to be represented in investment arbitration, or that seek advice on matters that may become relevant in investment arbitration, by in-house counsel*".[181]

118. The Tribunal went on to consider the position under Colombian law, noting the different conclusions drawn by the Parties from the authorities put before it, and concluded that it would have reached the same conclusion that communications meeting the four conditions were protected under Colombian law whether they were with in-house or external counsel.[182]

119. In light of its conclusions on international law and Colombian law, the Tribunal held that:

> *… it is reasonable to presume that when consulted with a view to obtaining legal advice and then when providing such advice, Claimants' in-house counsel acted with the expectation that legal privilege would be protected. Respondent has not presented any evidence to prove otherwise.*[183]

120. The Tribunal also rejected Colombia's argument that privilege had been waived. While accepting that a client could "*waive the professional secrecy privilege of their in-house or outside counsel*",[184] it held that there had been no such waiver in the present case, either

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179 PO4, note 72, above, at para. 54 (**AAE-9**).

180 *Reineccius v. Bank for International Settlements*, Procedural Order No. 6 of 11 June 2002, UNRIAA vol. XXIII, p. 180 ("*Reineccius*").

181 PO4, note 72, above, at para. 55 (**AAE-9**).

182 PO4, note 72, above, at paras. 57-63 (**AAE-9**).

183 PO4, note 72, above, at para. 67 (**AAE-9**).

184 PO4, note 72, above, at para. 68 (**AAE-9**).

by Prodeco's act of requesting privileged documents from Colombia[185] or permitting its in-house counsel to testify, since they did not disclose legal advice.[186]

121. The Tribunal upheld the principle of settlement privilege. It noted that settlement privilege had not been claimed in respect of any document for which legal privilege was not also asserted.[187] It held, however, that, given there was a theoretical possibility that settlement privilege might exist in relation to a document for which legal privilege was inapplicable, it was appropriate to rule on the claim of settlement privilege.[188] The Tribunal considered that settlement privilege had properly been asserted.[189] It is unnecessary, however, for the Committee to consider that aspect of the Tribunal's ruling.

122. Accordingly, the Tribunal directed lead counsel for Glencore and Prodeco:

> *To submit by April 27, 2018 an affidavit identifying that each of the Disputed Documents meets all the foregoing Requirements, and*
>
> *To produce by the same date, in unredacted form, any and all Disputed Documents that do not meet the Requirements.*[190]

123. Additionally, the Arbitral Tribunal established a cut-off date for introducing further evidence or filing further submissions in this proceeding, stating that:

> *After May 11, 2018 no new submissions and no additional evidence shall be admitted into the file, except as provided in the following paragraph.*
>
> *If in exceptional circumstances and for unexpected reasons any of the Parties considers that it is of paramount importance that an exception to the rule be made, it shall file a motion, asking for authorization, stating the grounds therefor, and without attaching the new submission or evidence. After hearing the other Party the Tribunal will decide. Any submission made or evidence marshalled in breach of this provision will be disregarded.*[191]

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185 PO4, note 72, above, at para. 72 (**AAE-9**).

186 PO4, note 72, above, at para. 73 (**AAE-9**).

187 PO4, note 72, above, at para. 77 (**AAE-9**), citing the Claimants' letter of 2 March 2018, note 137, above, at p. 11 (**R-277**).

188 PO4, note 72, above, at para. 78 (**AAE-9**).

189 PO4, note 72, above, at paras. 83-91 (**AAE-9**).

190 PO4, note 72, above, at para. 95 (**AAE-9**). The deadline was later extended.

191 PO4, note 72, above, at paras. 98-99 (**AAE-9**).

(5) Developments following Procedural Order No. 4

(a) The Claim of Privilege

124. On 30 April 2018, lead counsel for Glencore and Prodeco (Mr Nigel Blackaby, QC) submitted an affidavit in which he stated:

> *Pursuant to Procedural Order no. 4 dated 24 April 2018, and the Tribunal's communication on 27 April 2018, I confirm that I have reviewed all the Disputed Documents over which Claimants* [i.e. Glencore and Prodeco] *have asserted privilege, as identified in the Privilege Log attached to the Claimants' letter of 5 February 2018 (**Privilege Log**).*
>
> *I confirm that each of the Disputed Documents over which the Claimants have asserted privilege fulfils the Requirements set out in paragraph 54 of Procedural Order No. 4, with the exception of … two documents.*[192]

125. The affidavit then gave brief details of two documents which were annexed to the affidavit. The Committee is not clear whether these documents were later relied on by Colombia, nor if they were among the Disputed SIC Documents.

126. By letter dated 7 May 2018, Colombia wrote to Glencore and Prodeco to state that it had identified twenty-four of the Disputed Documents which, in its view, ought to have been produced by Glencore in response to the Tribunal's instructions in PO3. These documents, according to Colombia, (i) were responsive to its production requests as approved, in narrowed terms, by PO3; and (ii) were not covered by the requirements, established by the Tribunal in PO4, for the application of legal or settlement privilege.[193] Colombia accordingly requested the production of these documents by Glencore. The twenty-four documents that were the subject of this request were detailed in a list attached as "Annex A" to Colombia's letter (the "**Annex A Documents**"). It appears that all twenty-four documents were among the forty-one Disputed SIC Documents.[194]

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[192] Affidavit of Mr Nigel Blackaby QC, 30 April 2018, paras. 3-4. The Affidavit, which formed part of the record before the Tribunal, was not produced in the annulment proceedings but both Parties referred to it at the hearing before the Committee and the Committee therefore considers it appropriate to quote it in the Decision.

[193] Letter from Colombia to ICSID, 11 May 2018 ("*Colombia's letter of 11 May 2018*"), p. 41 (**AAE-12**).

[194] Colombia's letter of 11 May 2018, note 193, above, at p. 9, note 1 (**AAE-12**).

127. On 10 May 2018 Glencore and Prodeco wrote to refuse Colombia's request.[195] In this communication they stated that:

> *... only 6 of the 24 Excluded Documents now requested were actually included in Claimants' Privilege Log. One of the documents requested has already been disclosed. Claimants did not assert privilege in respect of the remaining documents because production was not required. The documents were not responsive to Colombia's document requests as narrowed by the Tribunal in Procedural Order No 3. Consequently, Claimants* [Glencore] *did not produce them and did not need to decide if it was necessary to assert privilege over them.*[196]

128. On 11 May 2018, Colombia wrote to refer the matter to the Tribunal. By its letter, to which the above correspondence between the Parties was attached, Colombia requested that the Tribunal review the Annex A Documents and Colombia's reasons, as detailed therein, as to why these should be produced by Glencore.[197] As before, Colombia argued that these documents were both responsive to its document production requests, and were not protected by either legal or settlement privilege, and as such ought to have been produced by Glencore. Colombia asserted that Glencore's refusal to produce the requested documents on the grounds that "*[t]he documents were not responsive to Colombia's document requests*" was "*disingenuous*" given that:

> [w]*hen preparing its request for production of documents, Colombia was already aware of the existence of categories of documents (such as the Disputed Documents) that were material and relevant for its case and, thus, framed its requests in such a manner as to cover such Documents.*[198]

129. Accordingly, Colombia asked the Tribunal to order Glencore to produce the documents listed in its Annex A, and to admit them into the record.[199] Annex A took the form of a Redfern Schedule in which Colombia set out its arguments as to why each document was responsive to one of Colombia's requests and was not entitled to legal or settlement privilege. Glencore and Prodeco's response to these arguments was set out in the final

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195 Colombia's letter of 11 May 2018, note 193, above, at p. 7 (**AAE-12**).

196 Colombia's letter of 11 May 2018, note 193, above, at p. 7 (**AAE-12**).

197 Colombia's letter of 11 May 2018, note 193, above, at p. 5 (**AAE-12**); Award, paras. 54, 125.

198 Colombia's letter of 11 May 2018, note 193, above, at p. 4 (**AAE-12**).

199 Award, para. 54.

column of the Schedule. In the alternative, Colombia indicated that it would not object to the Tribunal appointing a conflicts counsel (i.e. a privilege inspector) to analyse the documents.[200]

130. On 14 May 2018, Glencore and Prodeco filed their response to Colombia's 11 May request and asked the Tribunal to reject Colombia's request to admit the Annex A Documents on the basis that, in each case, the document requested was either privileged or not responsive to the requests made by Colombia on 14 December 2017 (see para. 97, above) and dealt with by the Tribunal in PO3.[201]

131. On 15 May 2018, Colombia wrote to the Tribunal elaborating on its 11 May request concerning the Annex A Documents.[202] Glencore and Prodeco responded to this communication by a letter to the Tribunal dated 17 May 2018, reiterating their request that the Tribunal reject Colombia's request to submit the Annex A documents into the record and opposing Colombia's alternative proposal that the matter be referred to a conflicts counsel.[203]

(b) The FGN Documents

132. In paragraph 89 of PO2 (para. 93, above), the Tribunal required that if a Party wished to put into the record "*evidence gathered from a criminal procedure in Colombia*", it should seek the permission of the Tribunal.

133. As already stated (para. 105, above), in its letter of 9 March 2018, Colombia sought the "*Tribunal's instructions to gather the evidence collected by the General Prosecutor* [the FGN] *and marshal it into the record*".[204]

134. In their letter of 12 March 2018, Glencore and Prodeco protested against Colombia's attempt to introduce the documents seized by the SIC on the basis that they were now in

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200 Award, para. 54.

201 Letter from Claimants to ICSID, 14 May 2018 ("*Claimants' letter of 14 May 2018*") (**AAE-33**); Award, para. 55.

202 Letter from Colombia to ICSID, 15 May 2018 ("*Colombia's letter of 15 May 2018*") (**AAE-34**); Award, paras. 56, 128.

203 Letter from Claimants to ICSID, 17 May 2018 ("*Claimants' letter of 17 May 2018*") (**AAE-35**); Award, paras. 56, 129.

204 Colombia's letter of 9 March 2018, note 154, above, at p. 4 (**R-273**).

the possession of the FGN.[205] They demanded that the documents be reviewed by Mr Enciso, in accordance with Colombia's letter of 14 November 2017 so as to exclude the documents referred to in PO2 and that Colombia provide the Tribunal and themselves with a detailed log of these documents.

135. The Tribunal addressed this matter in its letter of 17 March 2018, in which it directed that:

> *All documents collected by the General Prosecutor which Respondent might wish to marshal into the record of this proceeding should be delivered to Mr. Enciso, Respondent's designated special counsel. Mr. Enciso should exclude from the documents received any Confidential Attorney Communications (PO 2, para. 94; Respondent's letter of November 14, 2017). The Tribunal recommends that Mr. Enciso keep a written record of his filtering process.*
>
> *Once so filtered, the documents may be handed to Respondent's counsel (Dechert), who will then be free to make a document-by-document application pursuant to para. 89(2) of PO2. Any such application shall identify the document by its date, names of sender and recipient, and subject-matter, and specify whether the document refers or contains legal advice of any kind and whether it is one of the Disputed Documents (as this term is used in PO 2). The application shall not include the document in question.*
>
> *The Tribunal will issue a decision, after hearing Claimant.*[206]

136. In accordance with the Tribunal's instructions, on 5 April 2018, Counsel for Colombia sent a memorandum to Mr Enciso, informing him of the Tribunal's procedural directions to gather and filter the evidence collected by FGN, and providing him "*with a list of key-words that would enable him to perform searches in the vast amount of information gathered*".[207]

137. Thereafter, by its letter dated 11 May 2018, Colombia requested that the Tribunal admit into the record certain documents, specified in Annex C of the letter, which had been

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[205] Claimants' letter of 12 March 2018, note 162, above, at pp. 2-4 (**AAE-28**).

[206] Tribunal's email of 17 March 2018, note 165, above (**AAE-11**).

[207] Colombia's letter of 11 May 2018, note 193, above, at p. 2 (**AAE-12**).

gathered by the FGN and filtered by Mr Enciso in accordance with the Tribunal's directions (the "**FGN Documents**").[208]

138. On 14 May 2018, Glencore filed its response to Colombia's 11 May request and asked the Tribunal to deny the application to admit the FGN Documents.[209] Glencore stated that these did not amount to evidence garnered by the Colombian criminal courts and that Colombia had failed to demonstrate their relevance to the Parties' dispute.[210]

139. Also on 14 May 2018, the Tribunal and the Parties held the pre-hearing conference call, in which Colombia agreed to provide Glencore with the FGN Documents.[211] It was further agreed that Glencore would submit their comments on Colombia's request to submit the FGN documents to the Tribunal by 17 May 2018, and that, given the "*time sensitive nature of the Parties' requests*" the Tribunal would issue a decision on the FGN documents by 18 May, with a "*full decision and reasoning*" to follow afterwards.[212]

140. On 15 May 2018, Colombia wrote to the Tribunal elaborating on its 11 May request concerning the FGN Documents.[213] It argued that, under the Colombian Constitution, the FGN is defined as an independent organ of the "*judicial branch*" and that its functions are akin to those of the *jueces de instrucción* (*juges d'instruction*) in the Spanish and French criminal systems. Colombia added that the FGN could also fall within the definition of an "*Independent Prosecutor*" set out in PO2.[214] Glencore and Prodeco responded to this communication by a letter to the Tribunal dated 17 May 2018, requesting that the Tribunal reject Colombia's request to submit the FGN documents into the record.[215]

(6) The Tribunal's Letter of 18 May 2018 and Procedural Order No. 6

141. On 18 May 2018, the Tribunal wrote to the Parties regarding the Annex A Documents, the FGN Documents and a document which Glencore and Prodeco had applied to include in

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208 Colombia's letter of 11 May 2018, note 193, above, at p. 2 (**AAE-12**); Application, para. 72.

209 Claimants' letter of 14 May 2018, note 201, above (**AAE-33**); Award, para. 55.

210 Claimants' letter of 14 May 2018, note 201, above (**AAE-33**); Award, para. 55, 126.

211 Award, para. 127.

212 Award, para. 127.

213 Colombia's letter of 15 May 2018, note 202, above (**AAE-34**).

214 Colombia's letter of 15 May 2018, note 202, above at p. 4 (**AAE-34**).

215 Claimants' letter of 17 May 2018, note 203, above (**AAE-35**); Award, paras. 56, 129.

the record. In view of the fact that the Arbitration Hearing was due to start in ten days' time, the Tribunal gave its decision on the requests and stated that a reasoned decision would follow at a later date. The Tribunal stated that:

> *The Arbitral Tribunal has decided not to admit into the record any of the documents requested by the Parties for the following reasons:*
>
> *1. Claimants' petition to admit the technical report identified in its email of May 11, 2018 is belated since Claimants were the last to file a main submission.*
>
> *2. Respondent's petition to admit the FGN Documents: the FGN Documents did not make it into the record through Document Production and are not part of a formal* acusación *in a Colombian criminal court proceeding. Thus, the Tribunal sees no reason to admit them into the record.*
>
> *3. Respondent's petition to admit Annex A Documents: there are two types of documents that Respondent wishes the Tribunal to admit into the record:*
>
> *a. documents that Claimants' counsel has confirmed are subject to privilege and*
>
> *b. documents which – according to Claimants' counsel – are not responsive to the Tribunal's decisions in PO3.*
>
> *It falls within the responsibility of Claimants' counsel to determine which documents are responsive to Respondent's petitions (as narrowed down by the Tribunal) and which are subject to privilege. The Tribunal has no reason to second guess these decisions.*
>
> *A full decision will follow in the next days.*[216]

142. The Tribunal set out its reasons in Procedural Order No. 6 on 31 July 2018.

143. With regard to the FGN Documents, the Tribunal held that:

> *Based on the Tribunal's ruling in PO No. 2, three conditions must be satisfied cumulatively in order for evidence from criminal proceedings to be admissible:*

[216] Award, para. 130.

- *The evidence must be "gathered" or "marshaled" in the course of a criminal proceeding (i)* [citing PO2, para. 89]*;*

- *Evidence must not be privileged (ii)* [citing PO2, para. 92]*;*

- *Evidence must be relevant and material to this arbitration (iii)* [citing PO2, para. 88].[217]

144. The Tribunal recalled that in PO2:

> *… the Tribunal distinguished between documents procured by an administrative agency and documents "obtained", "gathered" or "marshaled" in judicial criminal proceedings, i.e. evidence obtained by prosecutors or judges that would become the basis of a formal indictment.*[218]

145. The Tribunal found that:

> *The FGN Documents do not meet this standard. They were not "gathered", "obtained" or "marshaled" by the FGN in the course of investigative or prosecutorial activities: the SIC simply delivered these documents to the FGN at ANDJE's behest.*[219]

146. The Tribunal held that to allow in documents seized by the SIC which the Tribunal had excluded in PO2 merely because they had been handed to the FGN "*would contradict the Tribunal's analysis and decision in PO 2*".[220]

147. In addition, the Tribunal observed that criminal complaints in Colombia go through four separate phases. It held that:

> *In any case, the criminal proceeding launched by ANDJE's complaint is still in the preliminary stage, and the FGN Documents are not part of a formal* acusación *in a Colombian criminal court proceeding. The Complaint has – as far as the Tribunal is aware – not passed the First Phase,* Indagación*, and has not resulted in any indictment, which would eventually trigger the Second Phase:* Investigación*, let alone an* imputación

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217 PO6, note 73, above, at para. 99 (**AAE-10**).

218 PO6, note 73, above, at para. 101 (**AAE-10**).

219 PO6, note 73, above, at para. 102 (**AAE-10**).

220 PO6, note 73, above, at para. 103 (**AAE-10**).

> *and later* acusación *of any person. Thus, the FGN documents have not yet given rise to a formal indictment, and may never do so.*[221]

148. The Tribunal therefore concluded that the first requirement was not met[222] and rejected Colombia's request to introduce the documents into the record.

149. The Tribunal also rejected the request to include the Annex A Documents from the trove of documents seized by the SIC. The Tribunal noted that Colombia had argued that, notwithstanding the submissions of Glencore and Prodeco, these documents were not privileged and were responsive to Colombia's requests.

150. The Tribunal held that:

> *It falls within the responsibility of Claimants' counsel to determine which documents are responsive to Respondent's requests (as narrowed down by the Tribunal* [in PO3]*) and which are subject to privilege. Equally, it falls within the responsibility of Respondent's counsel to determine which documents are responsive to Claimants' requests and which are subject to privilege.*
>
> *Claimants' lead legal counsel, aware of his responsibilities, and prompted by the Tribunal, has filed an affidavit declaring that all the documents included in Claimants' Privilege Log meet the Requirements of para. 54 of PO No. 4 regarding Confidential Attorney Communications and Settlement Privilege. Claimants produced to Respondent the two only documents which did not fulfill the Requirements.*
>
> *Claimants' counsel has made its assessment of the responsiveness and privilege of the Excluded Documents. Respondent has not provided sufficient grounds to make the Tribunal doubt the correctness or good faith of that assessment.*[223]

151. Finally, the Tribunal noted that, if either Party wished to suggest that the Tribunal draw "*adverse inferences based on the counterparty's decision regarding responsiveness and privilege of ordered documents*", it should make detailed allegations to that effect in its post-hearing brief.[224]

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[221] PO6, note 73, above, at para. 104 (**AAE-10**).

[222] PO6, note 73, above, at paras. 101, 106 (**AAE-10**).

[223] PO6, note 73, above, at paras. 111-113 (**AAE-10**).

[224] PO6, note 73, above, at para. 114 (**AAE-10**).

(7) Document R-100

152. One of the documents originally seized by the SIC and which was also included in both the Annex A Documents and the FGN Documents did eventually find its way into the record. This was an email chain, part of which had been submitted by Colombia with the original Counter-Memorial that was later withdrawn.[225] After discussion at the hearing before the Tribunal, Glencore and Prodeco agreed to waive the privilege which they had asserted in respect of this document provided that the whole email chain was admitted into the record.[226]

153. That came about as follows. On Day 2 of the Arbitration Hearing, the President of the Tribunal raised the question whether there was any evidence which suggested a relationship between Mr Maldonado and Mr Ballesteros, a matter which he suggested was central to the allegation that the payment for the three hectare concession caused Mr Ballesteros to accept the Eighth Amendment.[227] Counsel for Colombia replied that the evidence which the Tribunal had not seen established the link between the three hectare concession and the Eighth Amendment, although he added that "*it doesn't establish a relationship between Maldonado and Ballesteros*".[228] He then added that:

> *There is an email that shows, pursuant to our submission, that the Eighth Amendment was possible because the 3-hectares Contract pleased Ballesteros.*[229]

154. The Tribunal requested clarification as to whether the document referenced by counsel for Colombia in this statement was the document originally submitted by Colombia with its Counter-Memorial as exhibit R-54, and a discussion followed about whether there were any "*other documents*".[230] In response it was confirmed by counsel for Colombia that:

> *That will be the only document.*[231]

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225 The partial email chain was Document **R-54**. Award, para. 658.

226 It became Document **R-100**. Award, para. 659.

227 Tribunal Tr., Day 2, p. 363:5-364:16 (President Fernández-Armesto).

228 Tribunal Tr., Day 2, p. 365:8-12 (Professor Silva Romero).

229 Tribunal Tr., Day 2, p. 366:20-22 (Professor Silva Romero).

230 Tribunal Tr., Day 2, p. 372:12-17.

231 Tribunal Tr., Day 2, p. 373:2-3 (Professor Silva Romero).

155. Colombia had specifically raised R-54 in its letter to the Tribunal dated 11 May 2018, addressing its request for the production of the Annex A documents.[232] At that time it described the content of the document as follows:

> *By way of illustration, the Disputed Document formerly submitted as exhibit R-54 is responsive to Colombia's request No. 9 ("*Documents reflecting any link between the assignment of the 3ha Contract (R-97) and the Commitment to Negotiate (C-91)*"). In this chain of emails, Mr. Nagle shared his views with Prodeco's management on how Prodeco had secured Mr. Ballesteros' support in the negotiations that led to the execution of the Commitment to Negotiate and, later, to the Eighth Amendment. But Claimants refuse to produce this document, even though it does not comply cumulatively with the Requirements. In fact, while Mr. Nagle replied to an email by Natalia Anaya, such email was not "*elaborated for the purpose of obtaining or giving legal advice*" (Requirement No. 3). Instead, Ms Anaya's email simply provided Prodeco's management team with an account of a conversation that she had with Ms. Marcela Estrada (then member of Ingeominas' legal department). For the same reason, exhibit* ***R-54*** *is not a document "*drafted by a lawyer acting in his or her capacity as lawyer*" (Requirement No. 1). Neither can Claimants claim that a solicitor-client relationship based on trust existed (Requirement No. 2), nor that Ms. Anaya and Mr. Nagle had an expectation that this document would be kept confidential in a contentious situation (Requirement No. 4). In addition, in no way does* ***R-54*** *disclose Claimants' settlement position in regard to the interpretation of "definitive price" under the Seventh Amendment. Claimants implicitly admit that* ***R-54*** *is not privileged when they assert that they are claiming privilege over a "*broader email chain*," which may contain legal advice sought or given by Prodeco's in-house counsel. Claimants, however, cannot assert legal privilege by extension over the Document identified by Colombia if such document, in itself, does not cumulatively comply with the Requirements. In any case, Claimants could have produced redacted versions of this chain of emails. But they did not.*[233]

156. In response to the allegations made at the oral hearing, counsel for Glencore and Prodeco maintained that "*R-54 is an incomplete e-mail chain*" and that the "*complete chain is R-100*".[234] He added that

> *We have no objection to the document going in effectively on two conditions. One is that we have the complete chain. We don't have the cut-off chain of 54, which is an incomplete conversation, that that is fully incorporated*

[232] Colombia's letter of 11 May 2018, note 193, above (**AAE-12**).

[233] Colombia's letter of 11 May 2018, note 193, above, at pp. 3-4 (**AAE-12**).

[234] Tribunal Tr., Day 2, p. 373:17-18 (Mr Blackaby).

> *within the full e-mail chain, which is--which was R-100, on the understanding that our submission of that document into the record does not constitute a broader waiver of privilege with regard to the other privileged documents in respect of which we assert it since it contains the opinion of Ms. Anaya with regard to certain issues. In particular, that was the discussion about the escrow account. You will recall the discussion about the dispute on Amendment 7, with regard to whether or not the fact that we believe the clear language of the text permitted us to make a certain calculation, and there was a dispute because we had been performing it in another way, then a middle was an escrow account. That was a point of hot debate and in the middle of that discussion effectively we--this is when that e-mail exchange took place.[…] and a second condition, because it was not a document that was on the record for purposes of the arbitration yesterday when we gave our opening speech, so the other condition would be obviously that we be allowed to address that document in the same way as we would have been able to address that document in our opening speech.*[235]

157. Following this exchange, The Tribunal requested that the Parties agree that the email in question, which seemed a highly relevant document, be introduced into the record.[236] Both Parties agreed to the request, and it was further agreed to include the complete email chain in which the email was inserted as Document R-100.[237]

158. Colombia asserts that "*[t]his was the only document obtained in the 2014 SIC investigation that was admitted into the record*".[238] That is not, however, the case as one of these documents had earlier been provided by Glencore and Prodeco during the document production phase.[239]

D. THE AWARD

159. In the *dispositif* of the Award, the Tribunal ruled that it:

> *Dismisses Respondent's Illegality Objection, Fork in the Road Objection, and Inadmissibility Objection, upholds Respondent's Umbrella Clause*

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235 Tribunal Tr., Day 2, pp. 374:4-375:11 (Mr Blackaby).

236 Tribunal Tr., Day 2, pp. 376:15-378:6; Award, para. 659.

237 Tribunal Tr., Day 2, p. 378:3-15 (President Fernández-Armesto); Award, para. 659.

238 Mem. on Ann., para. 96.

239 See Colombia's letter of 11 May 2018, note 193, above, at p. 7 (**AAE-12**), quoted at para. 127, above. It is not possible for the Committee to determine whether any of the other documents produced by Glencore and Prodeco, e.g. the two documents in respect of which Mr Blackaby stated that the requirements of privilege were not met (para. 124, above) were among the Disputed SIC Documents.

Objection, and declares that the Centre has jurisdiction and the Tribunal is competent to adjudicate claims grounded on breach of Arts. 4(1) and 4(2) of the Treaty.

Declares that that the Contraloría's *conduct in calculating the damage allegedly suffered by the Republic of Colombia as a result of the execution of the Eighth Amendment constitutes (i) an unreasonable measure which has impaired Claimants' investment in Colombia in breach of Art. 4(1) of the Treaty and (ii) a breach of fair and equitable treatment, in violation of Art. 4(2) of the Treaty.*

Orders the Republic of Colombia to restitute to C.I. Prodeco S.A. the Fiscal Liability Amount in the sum of USD 19,100,000.

Orders the Republic of Colombia to pay interest over the amount established in para. 3 from 19 January 2016 until the date of actual payment, at the rate of LIBOR for six-month deposits plus a margin of 2%, capitalised semi-annually.

Declares that the payment of restitution and interest awarded to Prodeco in accordance with this Award must be neutral as regards Colombian taxes, with the consequences set forth in para. 1630 of this Award, and orders the Republic of Colombia to indemnify Prodeco with respect to any Colombian taxes in breach of such principle.

Orders the Republic of Colombia to reimburse Claimants (i) the Costs of the Proceedings (net of any final reimbursements by ICSID) and (ii) USD 1,692,900 as Defense Expenses, plus interest on both amounts at a rate of LIBOR for six-month deposits with a margin of 2%, capitalised semi-annually from the date of this award until the date of actual payment.

Dismisses all other claims, objections and defences.[240]

160. The reasoning of the Tribunal which led it to these conclusions runs to over 300 pages. For present purposes, however, it is necessary to consider only two parts of that reasoning. First, the Tribunal repeated in the Award the reasons which had led it to make the decisions contained in PO2, PO3, PO4 and PO6.[241] As the Committee has already discussed those

[240] Award, para. 1687.

[241] Award, paras. 68-134.

Procedural Orders and their reasoning in some detail (see paras. 63-151, above), it is unnecessary to analyse these parts of the Award as well.

161. Secondly, the Tribunal considered at length and then rejected Colombia's argument that the investment had been made in breach of Colombian law and was therefore outside the scope of the BIT with the result that the Tribunal lacked jurisdiction (the "**Illegality Objection**").[242] Colombia's case on annulment is bound up with the way in which the Tribunal approached and decided the Illegality Objection so that it is necessary for the Committee to set out the Tribunal's reasoning in detail before examining whether the Award is subject to annulment.

162. There were two strands to the Illegality Objection: (a) the allegation that Glencore and Prodeco had procured the Eighth Amendment by corruption, on the basis that the payment to Mr Maldonado had also benefitted Mr Ballesteros; and (b) that the Eighth Amendment was not concluded in accordance with the requirements of Colombian law regarding the operations of Ingeominas and that Prodeco was guilty of bad faith, misrepresentation and concealment in the negotiations.

163. The Tribunal began by setting out what it held were the proven facts in connection with these allegations. It found that the three-hectare area was located in the middle of the concessions held by the Prodeco Affiliates[243] and that:

> *It seems that the three-hectare gap was the result of clerical errors in the mapping of the concessions granted in the 1990s and 2000s. While it remains uncertain whether these errors were accidental or intentional, it should be noted that Mr. Maldonado worked in Carbocol and in the subsequent mining agencies from 1988 through 2002 and was accordingly in a position to obtain insider information on the three-hectare gap.*[244]

164. In November 2006 Mr Maldonado (who was by then a former employee of the Ministry of Mines and of Carbocol, the predecessor of Ingeominas) and Mr García applied to Ingeominas for the grant of a concession contract for the three-hectare area.[245] In March

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242 Award, paras. 553-860.

243 See the sketch map at para. 596 of the Award.

244 Award, para. 597.

245 Award, para. 596.

2007, Ingeominas concluded that such a contract would overlap with existing concessions and that the area was too small for a stand-alone concession. It therefore rejected the application.[246] Mr Maldonado subsequently challenged this decision in May 2007 but nothing happened until April 2008.[247]

165. In early 2008, the Prodeco Affiliates obtained from Ingeominas agreement for integrated operations on the La Jagua site. The existence of the three-hectare gap, however, threatened the viability of integrated operations. The Prodeco Affiliates therefore petitioned Ingeominas either to correct the errors which had created the three-hectare gap or reject the Maldonado request for a separate contract for that area.[248] In June 2008, however, Ingeominas changed its assessment of the Maldonado request, found that the three-hectare area did not overlap with other concessions and revoked its rejection of Mr Maldonado's application.[249] A request for reconsideration by the Prodeco Affiliates was rejected in August 2008.[250]

166. The Tribunal then found that Prodeco complained to various Colombian authorities about the proposed grant to Messrs Maldonado and Garcia of a concession for the three-hectare area. It held that, between August and October 2008, the Prodeco Affiliates complained to: the *Procurador General de la Nación*, the *Ministro de la Presidencia*, the *Contraloría*, the Ministry of Mines and Energy and the *Jefe del Registro Minero Nacional*.[251] The Tribunal observed that:

> *Respondent has not provided evidence of any reaction from any of the Colombian authorities to whom Prodeco complained. There is also no written record of any of these authorities taking any action to rectify the situation.*[252]

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246 Award, para. 598.

247 Award, para. 600.

248 Award, para. 601.

249 Award, para. 602.

250 Award, para. 603.

251 Award, paras. 605-608.

252 Award, para. 610.

167. The three-hectare contract was granted to Mr Maldonado and Mr Garcia on 16 October 2008[253] and Prodeco and its Affiliates continued to complain thereafter.[254] The Tribunal found, however, that Prodeco was left with the choice of either buying out the three-hectare concession from Mr Maldonado and Mr García or "*to mine around the area, which would imply losing up to 11 million tonnes of coal*".[255] Prodeco made a further complaint to the *Ministro de la Presidencia* in March 2009 but, having received no answer,[256] it bought the three-hectare concession for USD 1.75 million in May 2009.[257]

168. The Tribunal found that CDJ had made the payment in Colombian currency to accounts with Colombian banks, had made the tax withholding required by Colombian law and had reflected the payment in its audited accounts. In February 2010 CDJ had informed Ingeominas of the price paid.[258] The Tribunal also found that Prodeco had continued to raise the question whether the grant of a concession to Mr Maldonado and Mr García had been irregular after it had bought out their rights.[259]

169. Following a change of government in Colombia in August 2010, the new Minister of Mines and Energy gave a press conference at which he referred to the way in which "[c]*ertain well-connected individuals had been able to register mining licenses in small strategic areas, in order to 'greenmail' owners of adjacent mining exploitations*".[260] The Tribunal observed that:

> *It is noteworthy that during this press conference Minister Rodado used a PowerPoint presentation in which Prodeco's three-hectare concession was clearly visible, and that in his public statement there is no allegation that Prodeco had bribed any public official or had otherwise engaged in improper conduct. To the contrary, he explicitly stated that most mining companies working in Colombia were responsible enterprises. At that time,*

253 Award, para. 611.
254 Award, para. 612.
255 Award, para. 616.
256 Award, paras. 617-618.
257 Award, para. 250.
258 Award, paras. 622-624.
259 Award, paras. 625-626.
260 Award, para. 627.

> *criticism was directed at the former Ingeominas employees who had granted the irregular mining contracts.*[261]

170. Nor was there any suggestion of corruption on the part of Prodeco in the Fiscal Liability proceeding (see para. 52, above) and there was no reference to the three-hectare contract in the files of the *Contraloría*.[262] Similarly, no suggestion of corruption on the part of Prodeco or Glencore was made during the Procedure for Contractual Annulment (see para. 55, above).[263] The first such suggestion appeared in September 2017, when the ANDJE filed a criminal complaint to the FGN against unnamed officers of Prodeco and Glencore and against various named Ingeominas officials (see para. 72, above).[264]

171. After reviewing the procedural history regarding the Disputed SIC Documents and the contents of Document R-100 (see paras. 152-157, above),[265] the Tribunal set out its decision on the allegations of corruption.[266] It began by making clear that it regarded the allegation as one of the utmost gravity:

> *Corruption is morally odious: the proper governance of public affairs and the correct assignment of public goods is substituted by favour and arbitrariness. Corruption is also economically deleterious: it restrains economic development and subdues nations into under-development and poverty, as bribes enriching well-connected civil servants or politicians are financed via inflated prices paid or reductions in income suffered by the poorest citizens. Scarce public funds are misdirected by enriching privileged individuals, at the expense of the common good.*
>
> *The Tribunal agrees with Respondent that, provided that there are* prima facie *grounds for suspecting malfeasance, an international arbitration tribunal has the duty to investigate the facts, even* sua sponte*, and to take appropriate measures under the applicable principles of law.*[267]

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261 Award, para. 628.

262 Award, paras. 630-632.

263 Award, para. 633.

264 Award, paras. 634-637.

265 Award, paras. 639-661.

266 Award, paras. 662-747.

267 Award, paras. 663-664.

172. The Tribunal held that an investment made in breach of Colombian law would not be within the scope of the BIT, with the result that the Tribunal would lack jurisdiction.[268] According to the Tribunal:

> *... if Claimants have bribed Mr Ballesteros, disguising the corrupt payment as the consideration for the acquisition of the 3ha Contract, the necessary consequence will be the loss of international law protection.*[269]

173. The question, therefore, was whether corruption had been proved.[270] The Tribunal considered that the burden of proving that Mr Ballesteros had been bribed was on Colombia and the standard of proof was the preponderance of the evidence.[271]

174. With regard to the criminal proceedings in Colombia, the Tribunal held that:

> *The Criminal Complaint and this procedure operate in different legal spheres, are subject to diverging standards of proof, and may reach conflicting results. The fact that the Colombian criminal system has not punished (in fact, in accordance with the available record, has not even investigated) the alleged corrupt practices surrounding the Eighth Amendment, does not preclude a hypothetical finding by this Tribunal that corruption has occurred. And* vice-versa.[272]

> *That said, the conclusions of the justice system at the municipal level, or absence thereof, which have a much higher capacity of investigation than this Arbitral Tribunal, is one of the various elements that must be considered when evaluating the available evidence.*[273]

175. The Tribunal then considered six "*red flags*" which Colombia suggested proved that there had been corruption.

(1) The Payment to Mr Maldonado and Mr García

176. The Tribunal noted the size of the payment but held that the transaction had to be viewed in its proper context.[274] It pointed to the fact that, although he had referred to the three-

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268 Award, para. 665.

269 Award, para. 666.

270 Award, para. 667.

271 Award, paras. 668-670.

272 Award, para. 673.

273 Award, para. 674.

274 Award, paras. 678-679.

hectare contract as an example of "*greenmail*", the Minister of Mines had made no suggestion that Prodeco or Glencore had behaved in a corrupt fashion,[275] to Prodeco's repeated complaints about the grant to Mr Maldonado and Mr García and the lack of any response from the Colombian authorities.[276] The Tribunal concluded that:

> *The Tribunal does not see any illegality or impropriety in the transaction. It is true that Prodeco yielded to greenmail - but it was a greenmail caused by Ingeominas' inappropriate registration of the 3ha contract in favour of Mr. Maldonado, and the Colombian authorities' unwillingness or inability to react, notwithstanding repeated warnings and complaints.*
>
> *Finally, the Tribunal notes that Prodeco's behaviour is exactly the opposite to that normally adopted in cases of bribery. Corruption requires secrecy. In this case, Prodeco announced* urbi et orbi *that it was being subjected to greenmail and requested assistance from the public administration. When the authorities offered no support, Prodeco informed* ex ante *not less than the* Ministro de la Presidencia *that it was being forced to buy the 3ha Contract.*[277]

(2) The fact that Mr Maldonado was a Former Employee of Minercol and Carbocol

177. Colombia had argued that the fact that Mr Maldonado was a former official of the predecessors of Ingeominas showed that he was "*closely connected*"[278] with Mr Ballesteros. However, the Tribunal found that:

> *Colombia has failed to marshal any evidence suggesting that there was any connection, let alone a close one, between Mr Maldonado, or his associate Mr García, and Mr Ballesteros. They worked at different agencies, in different locations, with a time gap of five years.*[279]

(3) The Timing of the Payments

178. The agreement assigning the three-hectare concession was executed on 4 May 2009, the Commitment to Negotiate (see para. 49, above) was concluded between Prodeco and Ingeominas on 21 May 2009 and the Eighth Amendment was executed on 22 January

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275 Award, para. 680; see also para. 169, above.

276 Award, paras. 681-683.

277 Award, paras. 684-685.

278 Award, para. 688.

279 Award, para. 691.

2010.[280] The Tribunal did not find this timetable suspicious. On the contrary, it concluded that "*the evidence shows that the date of the Assignment Agreement* [i.e. the contract for purchase of the three hectare concession] *was triggered by the fact that Prodeco's mining activities were fast approaching the 3ha strip. There is no evidence linking the Assignment Agreement with the Commitment to Negotiate*".[281]

(4) The Alleged Concealment of the Transaction

179. The Tribunal rejected Colombia's allegation that Glencore and Prodeco had attempted to conceal the transaction. It had been a lawyer acting for Mr Maldonado and Mr García, not Prodeco, who had removed the price from the contract documents when sending them to Ingeominas for approval and there had been no obligation to disclose the price in the request for approval. Moreover, CDJ had been frank in its disclosure of the price it had paid, both in its dealings with Ingeominas and in its accounts, and had withheld the required amount of tax.[282]

(5) Alleged Restriction of Knowledge of the Payment to Top Management

180. With regard to Colombia's allegation that Prodeco's decision to confine knowledge of the purchase of the three-hectare concession to a small group of top management, the Tribunal held that this restriction had applied only during the period of contract negotiation and was standard practice. Once the agreement had been concluded, there had been no secrecy.[283]

(6) Disregard of Mandatory Regulations

181. While primarily about the second strand in Colombia's argument (see para. 162, above), Colombia also invoked the alleged failure to follow mandatory requirements on the part of Ingeominas before approving the Eighth Amendment as evidence of corruption on the part of Glencore and Prodeco. The Tribunal concluded, however, that "*Director Ballesteros did not disregard any mandatory regulation in the way that he handled the negotiation and*

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[280] Award, paras. 695-696.

[281] Award, para. 730; see also Award, paras. 728-729.

[282] Award, paras. 697-700.

[283] Award, paras. 701-703; see also Award, para. 685.

approval of the Eighth Amendment".[284] The Tribunal considered that the fact that the procedure for annulment of the Eighth Amendment (see para. 55, above) did not refer to any alleged failure to respect mandatory requirements by Ingeominas reinforced this conclusion.[285]

(7) Destination of the Payments

182. The Tribunal also considered, as a possible additional "*red flag*", Colombia's suggestion that Glencore and Prodeco had failed to provide any details of the destination to which they had transferred the USD 1.75 million. The Tribunal held that Glencore and Prodeco had in fact provided evidence both of the accounts into which the money had been paid and the withholding of tax as required by Colombian law.[286] The Tribunal thus concluded that, far from being a "*red flag*", this evidence amounted to a "*green flag*".[287]

183. Weighing the evidence overall, the Tribunal concluded that:

> *If Prodeco's intention had been to corrupt Ingeominas, it would not have filed multiple administrative appeals to prevent the grant of the 3ha contract, it would not have repeatedly complained to the highest Colombian authorities, and it would not have made the payments on-shore, subject to the mandatory tax withholding.*
>
> *The Tribunal's conclusion is confirmed by the fact that the Colombian criminal prosecutor and the Colombian criminal courts, which have a much higher capacity for investigation than this Arbitral Tribunal, have not initiated an investigation into the alleged corrupt practices surrounding the Eighth Amendment either* in tempore insuspecto *or even after the start of this arbitration.*[288]

184. Finally, the Tribunal considered in detail[289] the effects of Document R-100. Colombia had relied, in particular, on one part of this email chain. On 7 May 2009, Natalia Anaya (one of Prodeco's team of in-house lawyers) had emailed Gary Nagle (then CEO of Prodeco)

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284 Award, para. 718. The analysis which led to this conclusion is set out at paras. 704-717 of the Award.

285 Award, para. 719.

286 Award, paras. 720-722.

287 Award, para. 734.

288 Award, paras. 737-738.

289 Award, paras. 739-747.

and three other senior officials of Prodeco that "*Marcela Estrada* [an official of Ingeominas] *confirmed today that she agreed with Ballesteros that they will accept our proposal for the trust and with that they will end the caducity process*". The reference to "*the trust*" was a reference to a proposal from Prodeco that the USD 6 million which Prodeco had withheld as part of the pricing dispute (see para. 42, above) be paid into an escrow account in order to avoid caducity proceedings. Later that day, Mr Nagle replied to Ms Anaya "[o]*f course he now supports us, we have bought the 3has*". There followed further emails up to and including an email from Ms Anaya dated 15 May 2009 regarding meetings with Ingeominas.[290]

185. The Tribunal quoted at some length from the testimony of Mr Nagle, who had been cross-examined about this email chain.[291] The Tribunal held that Mr Nagle's explanation, in his testimony, of the words "[o]*f course he now supports us, we have bought the 3has*" was convincing:

> *Respondent construes these words to be an acknowledgement that Prodeco had bribed Mr Ballesteros through the purchase of the 3ha Contract. Mr. Nagle's construction is totally different. He explains that Prodeco had been writing to various Ministries and authorities within the Colombian public administration, complaining that Ingeominas' decision to grant the 3ha Contract to Messrs. Maldonado and García was highly irregular and requesting that steps be taken to undo such decision. Eventually, Prodeco gave in, and decided to acquire the 3ha Contract. In that context, Mr. Nagle thought that Mr. Ballesteros would be relieved that Prodeco had "solved" the situation by yielding to the greenmail.*
>
> *The Tribunal finds Mr. Nagle's explanation of his words convincing. Such construction is also confirmed by the following messages in the R-100 email chain: Mr. Nagle's assumption that Mr. Ballesteros would be satisfied proved totally wrong. Ms. Anaya, an employee of Prodeco, held a meeting at Ingeominas a week later and was told that Mr. Ballesteros was not happy at all with the execution of the 3ha Contract, because the matter had reached President Uribe, and the President was not satisfied at all as to how the problem had been solved.*
>
> *Summing up, Doc. R-100, and particularly Mr. Nagle's email of 7 May 2009, do not undermine the conclusion reached by the Arbitral Tribunal*

[290] Award, paras. 654-657.

[291] Award, para. 742.

> *that Respondent has failed to marshal any evidence proving that Prodeco corrupted Ingeominas' Director Ballesteros in order to procure the Eighth Amendment.*[292]

186. The Tribunal also dismissed the separate argument, forming the second strand of the Illegality Objection, that Prodeco had negotiated in bad faith with regard to the Eighth Amendment.[293] After analysing at length the evidence advanced by both Parties, the Tribunal concluded that the evidence did not sustain the argument that Glencore and Prodeco had negotiated in bad faith. The Tribunal rejected the allegations that the companies had already developed plans for the expansion of production and had concealed material information from Colombia.

187. The Tribunal finished its discussion by holding that:

> *In conclusion, the Tribunal finds that Respondent has failed to prove its accusations that Prodeco acquired the 3ha Contract as a means to bribe Mr Ballesteros into executing the Eighth Amendment or that it misrepresented the economic situation of the project and deliberately and in bad faith withheld material information from Ingeominas in order to secure the Eighth Amendment.*
>
> *Consequently, the Tribunal dismisses Respondent's Illegality Objection.*[294]

IV. THE GROUNDS FOR ANNULMENT

188. Article 52(1) of the ICSID Convention provides that:

> *Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:*
>
> *(a) that the Tribunal was not properly constituted;*
>
> *(b) that the Tribunal has manifestly exceeded its powers;*
>
> *(c) that there was corruption on the part of a Member of the Tribunal;*

[292] Award, paras. 745-747.

[293] Award, paras. 748-858.

[294] Award, paras. 859-860.

> *(d) that there has been a serious departure from a fundamental rule of procedure; or*
>
> *(e) that the award has failed to state the reasons on which it is based.*

189. Colombia asserts that:

> *The Award contains fatal flaws that warrant its entire annulment.*
>
> *Most alarmingly, the Tribunal knowingly disregarded clear evidence of corruption and illegality orchestrated by Claimants. This is particularly surprising and disquieting in light of the prevailing consensus in the international community of the need to combat and condemn the scourge of corruption in all its forms. This Award, the likes of which have been annulled by municipal courts for lack of serious consideration of corruption allegations, cannot be allowed to stand in the ICSID system.*[295]

190. Specifically, Colombia maintains that the Tribunal ignored two instances of corruption and illegality on the part of Glencore and Prodeco. First, Colombia alleges that the Tribunal closed its eyes to evidence that Glencore and Prodeco (with the Prodeco Affiliates) had paid Messrs Maldonado and García a grossly excessive price (USD 1.75 million) for the 3-hectare concession as an indirect bribe to Mr Ballesteros, who was then the Director of Ingeominas, in order to secure his agreement to the negotiation of the Eighth Amendment to the Mining Contract. Secondly, Colombia maintains that, quite apart from the corruption of Mr Ballesteros, Glencore and Prodeco concealed the true capacity of the Calenturitas mine and their intentions regarding output in order to obtain a system compensation for Colombia which was significantly more favourable for them and which was to the disadvantage of Colombia.

191. Colombia seeks annulment of the Award for manifest excess of power (Article 52(1)(b) of the ICSID Convention), serious departure from a fundamental rule of procedure (Article 52(1)(d) of the ICSID Convention), and failure to state reasons (Article 52(1)(e) of the ICSID Convention). These three grounds for annulment are each invoked in respect of two distinct aspects of the Tribunal's behaviour.

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[295] Application, paras. 2-3.

(1) The Documents Issue

192. First, Colombia maintains that the Tribunal erred in excluding from the record documents which, it maintains, would have proved that Glencore and Prodeco had corrupted Mr Ballesteros and that they had concealed and misrepresented the true position in order to obtain the agreement of Ingeominas to the Eighth Amendment. The documents in question fall into three categories.

(1) the forty-one documents which had been seized by the SIC from Prodeco in 2014 (the "**Disputed SIC Documents**") which Colombia had sought to introduce as annexes to its Counter-Memorial but which it was barred from doing by PO2.[296] Twenty-four of these documents were subsequently listed as the Annex A Documents in Colombia's letter to the Tribunal of 7 May 2018.[297] It appears that at least one of the forty-one documents was disclosed voluntarily (para. 127, above) and one (which became Document R-100, see paras. 152-158, above) was introduced into the record at the hearing;

(2) the documents for which Glencore and Prodeco maintained a claim of legal privilege on the basis of communications with Prodeco's in-house legal counsel,[298] in respect of which the Tribunal allowed the claim of privilege in PO4 and PO6. Some of these documents were part of the Disputed SIC Documents;

(3) the FGN documents which were taken from the files of the FGN and filtered by Mr Enciso,[299] which the Tribunal excluded by PO6. Some of the FGN documents were also Annex A documents.

(2) The Illegality Issue

193. Secondly, Colombia maintains that, even if the Tribunal did not err in excluding the documents referred to above, it nevertheless manifestly exceeded its powers, committed a serious departure from a fundamental rule of procedure and failed to state its reasons when

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[296] See paras. 64-94, above.

[297] Colombia's letter of 11 May 2018, note 193, above (**AAE-12**), p. 41. See paras. 124-131, 141-151, above.

[298] See paras. 95-123, above.

[299] See paras. 132-151, above.

it ruled against Colombia's objection that the investment was unlawful under Colombian law and thus outside the scope of the BIT.

V. THE STANDARD ON ANNULMENT

194. The Committee will begin by considering the standard to be applied by an *ad hoc* committee in an application for annulment. It will then (Part VI) consider the Documents Issue (see para. 192, above) before turning (Part VII) to the Illegality Issue (see para. 193, above).

A. The Positions of the Parties

195. The Parties are in broad agreement about the principal features of the standard to be applied by an *ad hoc* committee in annulment proceedings. Thus, they agree that:

(1) an award may be annulled only if one of the five conditions in Article 52 has been met;

(2) an annulment proceeding is not an appeal;

(3) the purpose of annulment proceedings is to protect the integrity of the arbitration, not to determine whether the tribunal was right or wrong in its findings of fact or decisions on law;

(4) that for an award to be subject to annulment under Article 52(1)(b) of the ICSID Convention, it is necessary to establish that the Tribunal exceeded its powers and that the excess of power was "*manifest*";

(5) that for an award to be subject to annulment under Article 52(1)(d) of the ICSID Convention, the Tribunal must have departed from a rule of procedure of a "*fundamenta*l" character and that the departure must have been serious; and

(6) that Article 52(1)(e) of the ICSID Convention is concerned not with whether a tribunal's reasons are convincing but whether they satisfactorily explain the decision at which the tribunal arrived and address each question put to the tribunal.

196. The Parties take very different views, however, both about the nuances of these propositions on which there is apparent agreement and about other aspects of the standard to be applied.

(1) Colombia[300]

197. Colombia maintains that Article 52 of the ICSID Convention should not be restrictively interpreted. The purpose of annulment proceedings extends beyond what is needed to protect the interests of the parties to a particular arbitration and safeguards the public interest in the integrity and quality of the arbitral process, preventing an unprecedented award from serving as a green light to further irregular awards by other tribunals.[301] According to Colombia, there is no presumption of the validity of the award and no special burden or standard of proof.[302]

198. Colombia accepts that annulment is not an appeal but maintains that it is not a superficial exercise.

> *Where the award reflects a complex legal and factual background, a review of that background is required. Moreover, … certain grounds for annulment necessitate a particularly searching review.*[303]

199. Colombia rejects the assertion that procedural orders are not pertinent to annulment proceedings. It submits that annulment committees will "*obviously*" be required to refer directly to procedural orders in cases where these are the "*instruments of that breach*" alleged.[304] Moreover, where the defect giving rise to grounds for annulment in a procedural order has been "*incorporated into the award*", the procedural order itself can rightly form the basis for the annulment of the award.[305]

200. With regard to Article 52(1)(b) Colombia argues that a tribunal commits an excess of power if it purports to exercise a jurisdiction which it does not have, fails to apply the applicable

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300 Application, paras. 22-37; Mem. on Ann., paras. 108-169; Reply on Ann., paras. 43-81.

301 Mem. on Ann., para. 110; Reply on Ann., para. 47.

302 Reply on Ann., paras. 49-50.

303 Mem. on Ann., para. 112, citing *Duke Energy International v. Republic of Peru* (ICSID Case No. ARB/03/28), Decision on Annulment of 1 March 2011, para. 85 ("*Duke*") (**AAL-14**). See also Reply on Ann., para. 51.

304 Tr. p. 161:18-24 (Professor Silva Romero).

305 Tr. p. 162:6-11 (Professor Silva Romero).

law, commits a fundamental error in its application of the applicable law, or makes egregious errors of fact or weighs the evidence irrationally.[306] In particular, it contends that a tribunal which acts *ex aequo et bono* without the consent of the parties exceeds its powers.[307] Colombia also maintains that a gross misapplication or misinterpretation of the applicable law amounts to a failure to apply the law[308] and justifies annulment as a manifest excess of power:

> *... if a tribunal distills a hitherto unknown rule from a given legal order, it would be within the remit of an* ad hoc *committee to inquire into whether or not the tribunal is actually applying the law it claims to be applying. This is a logical imperative. Otherwise, a tribunal would be free to define, from whole cloth, putative legal principles and attribute them to whatever legal order happened to be applicable.*[309]

201. According to Colombia, the requirement that the excess be "*manifest*" relates not to the gravity of the excess but to whether or not it can readily be determined.[310] The requirement that it be manifest does not, however, prevent an *ad hoc* committee from inquiring into the facts of the case to check whether the tribunal could come to the conclusion which it reached.[311]

202. On annulment for serious departure from a fundamental rule of procedure, under Article 52(1)(d) of the ICSID Convention, Colombia maintains that the proper treatment of

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306 Mem. on Ann., para. 119; Reply on Ann., para. 72; Tr. p. 19:16-20 (Professor Silva Romero).

307 Mem. on Ann., paras. 124-126.

308 Mem. on Ann., paras. 127-128, citing the decisions on annulment in *Hussein Nouman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7), Decision of 5 June 2007, para. 86 ("*Soufraki*") (**AAL-2**); *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16), Decision of 29 June 2010, para. 164 (**AAL-9**); *Caratube International Oil Co. LLP v. Republic of Kazakhstan* (ICSID Case No. ARB/08/12) Decision of 21 February 2014, para. 81 ("*Caratube*") (**RL-184**); *Victor Pey Casado and Foundation President Allende v. Republic of Chile* (ICSID Case No. ARB/98/2) Decision on Annulment of 18 December 2012, para. 67 ("*Pey Casado*") (**AAL-34**); *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7) Decision of 21 March 2007, para. 47 ("*MTD*") (**AAL-28**) and *Iberdrola Energía, S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5) Decision of 13 January 2015, para. 97 (**AAL-20**).

309 Mem. on Ann., para. 129.

310 Reply on Ann., paras. 63-66.

311 Reply on Ann., para. 68, citing *Duke*, note 303, above, at para. 99 (**AAL-14**).

evidence is a fundamental rule of procedure.[312] That rule includes the right of a party to submit evidence to the tribunal.[313] Colombia also refers to the right of a party to be heard.

203. To constitute a serious departure, "*the fundamental rule must have been flouted in a meaningful way that deprived the rule of its intended effect*".[314] However, Colombia maintains that an applicant for annulment is not required to establish that the departure had a determinative effect on the outcome of the case but only that it could potentially have affected the outcome.[315] In Colombia's view, modelled after *Churchill Mining v. Indonesia,* "*the injury is inherent in the due process violation*".[316] Colombia submits that this approach is appropriate to the ICSID annulment mechanism's object and purpose of "*ensuring the fundamental integrity of the ICSID system*".[317] Moreover, Colombia asserts that it would be a highly speculative exercise to "*attempt to divine the outcome*" of a case but for a fundamental procedural breach.[318]

204. With regard to Article 52(1)(e), Colombia accepts that an *ad hoc* committee is not entitled to annul an award merely because it finds the reasoning unconvincing.[319] However, it maintains that the reasoning must constitute a chain which enables the parties to understand why the tribunal reached the conclusion on a particular question. That chain would be broken if no reasons were provided, if the reasons were frivolous or manifestly irrelevant or if the tribunal gave incoherent or contradictory reasons.[320] If a tribunal were to apply an inapplicable legal framework, for example, Colombia submits that it would have offered reasoning that was so manifestly irrelevant as to constitute a failure to state reasons.[321]

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312 Mem. on Ann., para. 145.

313 Mem. on Ann., para. 147.

314 Mem. on Ann., para. 152.

315 Mem. on Ann., paras. 154-157.

316 Tr. p. 26:8-10 (Professor Silva Romero), referring to *Churchill Mining Plc and Planet Mining Pty Ltd v. Republic of Indonesia* (ICSID Cases Nos. ARB/12/14 and ARB/12/40), Decision on Annulment of 18 March 2019, para. 204 ("*Churchill*") (**AAL-48**).

317 Tr. p. 26:10-12 (Professor Silva Romero).

318 Tr. p. 26:13-16 (Professor Silva Romero), citing *TECO Guatemala Holdings LLC v. Republic of Guatemala* (ICSID Case No. ARB/10/23), Decision on Annulment of 5 April 2016, para. 85 ("*TECO*") (**AAL-47**).

319 Mem. on Ann., para. 163.

320 Mem. on Ann., paras. 165-168.

321 Tr. p. 46:5-13 (Professor Silva Romero).

(2) Glencore and Prodeco

205. Glencore and Prodeco take as the starting point in analysing Article 52 of the ICSID Convention that annulment is an "*extraordinary remedy*".

> *Consistent with this design, annulment is reserved for "unusual and important cases", in which "egregious violations of certain basic principles" threaten the very legitimacy of the decision-making process. Any grievance falling short of this exceptionally high standard cannot be a ground for annulment.*[322]

206. They argue that Colombia's approach of a "*searching review*" would transform annulment into an appeal,[323] and cite the *Daimler* case:

> *If [an ad hoc committee] were to undertake a careful and detailed analysis of the respective submissions of the parties before the Tribunal … and annul the award on the ground that its understanding of facts or interpretation of law or appreciation of evidence is different from that of the tribunal, it will cross the line that separates annulment from appeal.*[324]

207. Glencore and Prodeco maintain that Article 52 of the ICSID Convention should be interpreted neither restrictively nor expansively but in line with the object and purpose and the text of the provision.[325] They contend that an applicant for annulment bears a heavy burden but deny that this has anything to do with a burden of proof.[326]

208. They argue that:

> *… in determining whether a tribunal has manifestly exceeded its powers: (i) an* ad hoc *committee cannot second-guess a tribunal's assessment of the evidence; (ii) an award cannot be annulled on the ground that a tribunal*

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322 C-Mem. on Ann., para. 48, citing *Poštová Banka, A.S. and ISTROKAPITAL SE v. Hellenic Republic* (ICSID Case No. ARB/13/8), Decision on Partial Annulment of 29 September 2016, para. 127 (**RAL-128**); *CDC Group plc v. Republic of the Seychelles* (ICSID Case No. ARB/02/14), Decision on Annulment of 29 June 2005, para. 34 ("*CDC*") (**RAL-7**) and *Tulip Real Estate and Development Netherlands BV v. Republic of Turkey* (ICSID Case No. ARB/11/28), Decision on Annulment of 30 December 2015, para. 39 (**RAL-17**).

323 C-Mem. on Ann., para. 50.

324 *Daimler Financial Services A.G. v. Republic of Argentina* (ICSID Case No. ARB/05/1) Decision on Annulment of 7 January 2015, para. 186 ("*Daimler*") (**RAL-16**).

325 Rej. on Ann., para. 15.

326 Rej. on Ann., para. 16.

> *made a mistake of fact, regardless of how serious that error is alleged to be; and (iii) an error of law is not an excess of powers.*[327]

209. Accordingly, Glencore and Prodeco submit that annulment proceedings cannot lawfully revisit a tribunal's rulings on the admissibility or probative value of evidence, as Colombia's Application urges the Committee to do.[328] An annulment of an Award for procedural orders on evidentiary issues, as such, "*would be unheard of*".[329] Indeed, Glencore and Prodeco assert that, having "*searched the decided cases*", they were unable to find a single instance of an award being annulled for a decision in a procedural order.[330]

210. Glencore and Prodeco maintain that the number of rules of procedure which have the fundamental character required by Article 52(1)(d) of the ICSID Convention is limited, that it does not include the rules on burden of proof,[331] or the rule of "*liberal admissibility of evidence*" advanced by Colombia.[332] They also contend that even a serious departure from a fundamental rule of procedure warrants annulment only if it would have determined the outcome of the case.[333]

211. With regard to Article 52(1)(e) of the ICSID Convention, Glencore and Prodeco maintain that "[t]*his ground for annulment only concerns the complete absence of reasons, not the quality or correctness of those reasons … to rise to the level of annullable error, a failure to state reasons must relate to a point that is essential to a tribunal's decision*".[334] For "*routine*" procedural orders, in particular, Glencore and Prodeco challenge the suggestion that detailed reasons are necessary.[335] Again relying on the *Daimler* decision, they argue that "*when considering alleged contradictions* ad hoc *committees should 'prefer an*

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327 Rej. on Ann., para. 60; C-Mem. on Ann., Section V.A.

328 Tr. p. 78:16-21 (Mr Blackaby), p. 117:20-23 (Mr Friedman).

329 Tr. p. 117:23-24 (Mr Friedman).

330 Tr. p. 117:24-118:1 (Mr Friedman).

331 Rej. on Ann., para. 23.

332 Rej. On Ann., para. 25; C-Mem. on Ann., paras. 60, 62, 66.

333 Rej. on Ann., para. 21, citing *OI European Group B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/25), Decision on Annulment of 6 December 2018, paras. 248-249 ("*OI European Group*") (**RAL-21**).

334 Rej. on Ann., para. 95.

335 Tr. p. 140:16-19 (Mr Friedman).

interpretation which confirms an award's consistency as opposed to its alleged inner contradictions"".[336]

B. THE ANALYSIS OF THE COMMITTEE

(1) The Nature of Annulment and the Powers of an Ad Hoc Committee

212. The text of Article 52(1) of the ICSID Convention and the decisions of past *ad hoc* committees establish that there are four general principles regarding the nature of annulment proceedings and the power of an *ad hoc* committee which are pertinent to the present case.

213. First, as the *ad hoc* Committee in MTD Equity and MTD Chile v. Republic of Chile put it:

> *Under Article 52 of the ICSID Convention, an annulment proceeding is not an appeal, still less a retrial; it is a form of review on specified and limited grounds which take as their premise the record before the Tribunal.*[337]

214. The *ad hoc* Committee in *Soufraki* went on to analyse this role of an *ad hoc* committee as the safeguard of the integrity of the proceedings in greater detail.

> *In the view of the ad hoc Committee, the object and purpose of an ICSID annulment proceeding may be described as the control of the fundamental integrity of the ICSID arbitral process in all its facets. An ad hoc committee is empowered to verify (i)* the integrity of the tribunal – *its proper constitution (Article 52(1)(a)) and the absence of corruption on the part of any member thereof (Article 52(1)(c)); (ii)* the integrity of the procedure – *which means firstly that the tribunal must respect the boundaries fixed by the ICSID Convention and the Parties' consent, and not manifestly exceed the powers granted to it as far as its jurisdiction, the applicable law and the questions raised are concerned (Article 52(1)(b)), and secondly, that it should not commit a serious departure from a fundamental rule of procedure (Article 52(1)(d)); and (iii)* the integrity of the award – *meaning that the reasoning presented in the award should be coherent and not contradictory, so as to be understandable by the Parties and must reasonably support the solution adopted by the tribunal (Article 52(1)(e)). Integrity of the dispute settlement mechanism, integrity of the process of*

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336 Rej. on Ann., para. 97, citing *Daimler*, note 324, above, at para. 78 (**RAL-16**).

337 *MTD*, note 308, above, at para. 31 (**AAL-28**). See also *Soufraki*, note 308, above, at para. 20 (**AAL-2**).

> *dispute settlement and integrity of solution of the dispute are the basic interrelated goals projected in the ICSID annulment mechanism.*[338]

215. Secondly, as the *Soufraki* Committee also explained –

> *Article 52 of the ICSID Convention must be read in accordance with the principles of treaty interpretation forming part of general international law, which principles insist on neither restrictive nor extensive interpretation, but rather on interpretation in accordance with the object and purpose of the treaty.*[339]

The reference to principles of treaty interpretation is to the principles laid down in Articles 31 to 33 of the Vienna Convention on the Law of Treaties, 1969. The Vienna Convention is not, as such, applicable to the ICSID Convention, which predates it. Nevertheless, the provisions of the Vienna Convention on treaty interpretation are generally regarded as declaratory of customary international law and thus applicable to the interpretation of any treaty.

216. Thirdly, it is clear from the text of Article 52 that an award may be annulled only on one or more of the five grounds set out in Article 52. An *ad hoc* committee is not entitled to range beyond those five grounds. Its function is not to consider whether or not it agrees with the reasoning or the conclusions of the tribunal but only to determine whether or not one or more of the five grounds has been made out.

217. Lastly, it is important to bear in mind that Article 52(3) of the ICSID Convention states that an *ad hoc* committee "*shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1)*". The fact that the Convention speaks of a committee having the *authority* to annul indicates that, even where an *ad hoc* committee determines that one of the grounds for annulment is made out, the Committee has a discretion whether or not to annul the award.[340] That discretion is by no means unlimited

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338 *Soufraki,* note 308, above, at para. 23 (**AAL-2**) (emphasis in original).

339 *Soufraki*, note 308, above, at para. 21 (**AAL-2**).

340 See *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on Annulment of 3 December 1992, para. 1.20 (**AAL-35**); *Maritime International Nominees Establishment v. Republic of Guinea* (ICSID Case No. ARB/84/4), Decision on Partial Annulment of 22 December 1989, paras. 4.09-4.10 ("*MINE*") (**AAL-7**); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment of 3 July 2002, para. 66 ("*Vivendi I*") (**CL-99**).

and must take account of all relevant circumstances, including the gravity of the circumstances which constitute the ground for annulment and whether or not they had – or could have had – a material effect upon the outcome of the case,[341] as well as the importance of the finality of the award and the overall question of fairness to both Parties.

218. These principles have been repeated by numerous other *ad hoc* committees[342] and can be regarded as well established. They are not in issue between the Parties in the present proceedings.

219. An application under Article 52 of the ICSID Convention can be brought only with regard to an award, not a prior decision or procedural order of a tribunal.[343] Nevertheless, it is open to an applicant on annulment to contend that the award is tainted by a prior procedural decision or procedural order which entails a serious departure from a fundamental rule of procedure or a manifest excess of power, or that there has been a failure to state reasons for a ruling. Moreover, in the present case, the decisions taken by the Tribunal in the three Procedural Orders which are at the heart of Colombia's Application are carefully recorded in the text of the Award itself.[344] The Committee therefore concludes that the Application is a perfectly proper application to annul the Award, although Colombia – as it is entitled to do – refers at length to the three Procedural Orders in its attempt to show that the Award is tainted by annullable error and the Committee will follow the same course in examining whether the Tribunal committed an annullable error.

(2) Serious Departure from a Fundamental Rule of Procedure

220. Article 52(1)(d) of the ICSID Convention provides that an *ad hoc* committee may annul an award on the ground that "*there has been a serious departure from a fundamental rule of procedure*". It is clear from this language that not every procedural default can provide

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See also Schreuer and others, *The ICSID Convention: A Commentary*, Cambridge University Press, 2nd ed., 2009 ("*Schreuer*"), Article 52, paras. 466-485 (**AAL-1**).

341 This question is considered in greater depth in paras. 222-227, below.

342 *See, e.g.*, *EDF International S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23), Decision on Annulment of 5 February 2016, paras. 61-73 ("*EDF*") (**AAL-4**); *TECO*, note 318, above, at para. 73 (**AAL-47**); *CEAC Holdings Ltd. v. Montenegro* (ICSID Case No. ARB/14/08), Decision on Annulment of 1 May 2018, para. 84 ("*CEAC*") (**AAL-3**).

343 Schreuer, note 340, above, at Article 52, para. 61 (**AAL-1**).

344 Award, paras. 68-134.

grounds for annulment. For an *ad hoc* committee to annul an award under this provision, it must identify the rule of procedure from which the Tribunal allegedly departed and be satisfied (a) that this rule was of fundamental importance;[345] and (b) that the departure was serious.

221. With regard to the first requirement, the Committee does not consider it necessary or appropriate to set out a list of those procedural rules which fall into the category of "*fundamental*" rules of procedure, but it has no doubt that the rules of natural justice, including the right of a party to present its case, the right of a party to be heard and the right to equal treatment, fall into that category.

222. On the second requirement, the Committee agrees with the observation of the *MINE* Committee that:

> *In order to constitute a ground for annulment the departure from a "fundamental rule of procedure" must be serious. The Committee considers that this establishes both quantitative and qualitative criteria: the departure must be substantial and be such as to deprive a party of the benefit or protection which the rule was intended to provide.*[346]

223. It also shares the view of the Committee in *Pey Casado* that:

> *The applicant is not required to show that the result would have been different, that it would have won the case, if the rule had been respected. The Committee notes in fact that in Wena, the committee stated that the applicant must demonstrate 'the impact that the issue may have had on the award'. The Committee agrees that this is precisely how the seriousness of the departure must be analyzed.*[347]

The Committee is, therefore, not persuaded by the suggestion, in Wena that "*the violation ... must have caused the Tribunal to reach a result substantially different from what it*

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345 *EDF*, note 342, above, at para. 199 (**AAL-4)**, discussing, *inter alia*, a difference between the Spanish text of the Convention and the English and French texts and concluding that, in accordance with the principle stated in Article 33 of the Vienna Convention on the Law of Treaties, 1969, the meaning which best reconciles the three authentic texts of the ICSID Convention is that only a serious departure from a fundamental rule of procedure affords grounds for annulment. See also *MINE*, note 340, above, at paras. 5.05 to 5.06 (**AAL-7**).

346 *MINE*, note 340, above, at para. 5.05 (**AAL-7**).

347 *Pey Casado*, note 308, above, at para. 78 (**AAL-34**), citing *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment of 5 February 2002, at para. 61 ("*Wena*") (**AAL-41**). See also *Orascom TMT Investments S.à.r.l. v. People's Democratic Republic of Algeria* (ICSID Case No. ARB/12/35), Decision on Annulment of 17 September 2020, paras. 142-143 ("*Orascom*") (**AAL-134**).

would have awarded had [the relevant procedural] *rule been observed*".[348] It shares the view of the TECO Committee that:

> *Requiring an applicant to show that it would have won the case or that the result of the case would have been different if the rule of procedure had been respected is a highly speculative exercise. An annulment committee cannot determine with any degree of certainty whether any of these results would have occurred without placing itself in the shoes of a tribunal, something which is not within its powers to do. What a committee can determine however is whether the tribunal's compliance with a rule of procedure could potentially have affected the award.*[349]

224. The Committee is therefore unable to accept the suggestion, advanced by Glencore and Prodeco, that Colombia must show that the eventual outcome of the case *would* have been different had it not been for the alleged departure from a fundamental rule of procedure.[350] It is sufficient for Colombia to establish that it *could* have been different.[351]

225. Nor, however, can the Committee accept Colombia's argument that "*the injury is inherent in the due process violation*".[352] That argument is based upon the decision of the *ad hoc* committee in *Churchill Mining v. Indonesia*.[353] It is, however, important to see the statements of the *Churchill* committee in their context. The committee in that case stated, in the passage relied on by Colombia, that:

> *... where there has been a grave violation of a fundamental rule of procedure, including denial of a reasonably full opportunity to be heard, the injury is inherent in the due process violation without the need to demonstrate that the outcome of the case would have been different otherwise.*[354]

But in an earlier passage, the *Churchill* committee had said:

> *The test turns on the fundamental nature of the rule of procedure and the seriousness of its violation. A grave violation of a fundamental rule is likely*

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348 *Wena,* note 347, above, at para. 58 (**AAL-41**). See also *OI European Group,* note 333, above, para. 248 (**RAL-21**).

349 *TECO,* note 318, above, at para. 85 (**AAL-47**).

350 C-Mem. on Ann., paras. 53, 55.

351 *See, e.g.*, *CEAC*, note 342, above, at para. 93 (**AAL-3**).

352 Tr. p. 26:9-10 (Professor Silva Romero).

353 *Churchill*, note 316, above, at para. 204 (**AAL-48**).

354 *Churchill*, note 316, above, at para. 204 (**AAL-48**).

> *to more or less automatically result in an injury inasmuch as such party is deprived of the due process protections which the rule is intended to provide.*[355]

226. If a tribunal heard argument and evidence from only one party before giving its decision, it would be no answer to say that this violation of the rule of equality of arms could have made no difference to the outcome on the ground that the other party's case was wholly lacking in merit. If, however, a party has been heard but particular items of evidence have been excluded, the possible effects of the exclusion are relevant both to whether there has been a departure from a fundamental rule of procedure and, if so, whether that departure is to be regarded as serious.

227. Colombia has also argued that the Committee "*must take as a given*" that the exclusion of the illegality documents affected the outcome of the proceedings,[356] since the Committee has not seen the documents which were excluded by the Tribunal. The Tribunal will return to this matter later (see paras. 364-370, below), when it examines the application of Article 52(1)(d) to the facts of the present case.

(3) Manifest Excess of Power

228. Article 52(1)(b) provides that an *ad hoc* committee may annul an award on the ground that "*the Tribunal has manifestly exceeded its powers*". The paragraph lays down two requirements, both of which must be met if an Award is to be annulled on this ground. First, the tribunal must have exceeded its powers and, secondly, that excess of power must be "*manifest*". The most obvious instance of an excess of power by a tribunal is the decision of an issue which falls outside the jurisdiction of the tribunal under the ICSID Convention or the relevant BIT (or other instrument conferring jurisdiction) but the term has also been held to include the failure by a tribunal to exercise a jurisdiction which it possesses.[357]

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355 *Churchill*, note 316, above, at para. 180 (**AAL-48**).

356 Tr. p. 26:21-22 (Professor Silva Romero).

357 *See, e.g.*, *Vivendi I*, note 340, above, at para. 86 (**CL-99**).

229. The requirement that the excess of powers be "*manifest*" refers to how readily apparent the excess is, rather than to its gravity. In the words of one leading commentary on the ICSID Convention:

> *In accordance with its dictionary meaning, "manifest" may mean "plain", "clear", "obvious", "evident" and easily understood or recognized by the mind. Therefore, the manifest nature of an excess of powers is not necessarily an indication of its gravity. Rather, it relates to the ease with which it is perceived. ... An excess of powers is manifest if it can be discerned with little effort and without deeper analysis.*[358]

This view has been endorsed in several decisions of *ad hoc* committees. Thus, in *Wena Hotels Ltd*. v. *Egypt*, the committee stated that:

> *The excess of power must be self-evident rather than the product of elaborate interpretations one way or the other. When the latter happens the excess of power is no longer manifest*.[359]

Similarly, the committee in *CDC Group v. Seychelles* stated:

> *As interpreted by various ad hoc committees, the term "manifest" means clear or "self-evident". Thus, even if a Tribunal exceeds its powers, the excess must be plain on its face for annulment to be an available remedy. Any excess apparent in a Tribunal's conduct, if susceptible of argument "one way or the other" is not manifest. As one commentator has put it, "If the issue is debatable or requires examination of the materials on which the tribunal's decision is based, the tribunal's determination is conclusive".*[360]

230. Nevertheless, the Committee agrees with the observation of the committee in *EDF v. Argentina* that:

> *While the Committee agrees that an excess of powers will be manifest only if it can readily be discerned, it considers that this does not mean that the excess must, as it were, leap out of the page on a first reading of the Award. The reasoning in a case may be so complex that a degree of inquiry and analysis is required before it is clear precisely what the tribunal has decided. In such a case, the need for such inquiry and analysis will not prevent an excess of powers from being "manifest".* [361]

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358 Schreuer, note 340, above, at Article 52, para. 135 (**AAL-1**).

359 *Wena*, note 347, above, at para. 25 (**AAL-41**).

360 *CDC*, note 322, above, at para. 41 (**RAL-7**).

361 *EDF*, note 342, above, at para. 193 (**AAL-4)**.

231. Decisions of *ad hoc* committees in other cases have made clear that it is also an excess of power for a tribunal to fail to apply the law applicable to the case or to the particular issue in the case.[362] That situation must, however, be distinguished from the case where a tribunal has misapplied the applicable law, since annulment proceedings are not an appeal.

232. Colombia suggests that there are cases in which the misapplication of the law is such that it must be treated as a failure to apply the law.[363] Glencore and Prodeco disagree.[364] The Committee considers that there are circumstances in which misinterpretation or misapplication of the law can be so gross that it amounts to a failure to apply that law. That must, however, be clearly distinguished from cases of ordinary error and must amount, in the words of the *AES* committee, to "*a failure to apply the proper law* in toto".[365] The Committee considers that the standard is, therefore, a very high one in the sense that only the most serious cases of misinterpretation or misapplication will fall within the concept of a manifest excess of powers.[366] It is certainly not enough that the committee considers that the interpretation or application of the law was wrong.

233. The Parties also differ over whether what Colombia describes as "*egregious errors of fact or … an irrational assessment of the evidence*" on the part of the tribunal can amount to a manifest excess of power.[367] The Committee considers that the assessment of the evidence is a matter for the tribunal and not one which can normally be revisited by an *ad hoc* committee. While an *ad hoc* committee is not entirely excluded from any role in reviewing a tribunal's assessment of the evidence and the findings which it bases upon that assessment (see paras. 406-408, below), its role is a very limited one.

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362 *Soufraki*, note 308, above, at para. 45 (**AAL-2**); *EDF*, note 342, above, at para. 191 (**AAL-4)**.

363 Mem. on Ann., para. 123.

364 C-Mem. on Ann., para. 83.

365 *AES Summit Generation Ltd. v. Republic of Hungary* (ICSID Case No. ARB/07/22), Decision on Annulment of 29 June 2012, paras. 33-35 (**AAL-23**).

366 See *Caratube*, note 308, above at para. 81 (**RL-184**); and *Ioan Micula, Viorel Micula and others v. Romania* (ICSID Case No. ARB/05/20), Decision on Annulment of 26 February 2016, para. 130 (**AAL-19**), both of which refer to a "*high*" standard.

367 Mem. on Ann., paras. 131-132; compare C-Mem. on Ann., paras. 80-81.

(4) Failure to State Reasons

234. The provision of Article 52(1)(e) that an award may be annulled if it "*fails to state the reasons on which it is based*" is closely tied to the provision of Article 48(3), which requires that "*the award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based*".

235. The requirement to state reasons is an important one but it is equally important that an *ad hoc* committee is not drawn into using Article 52(1)(e) as a means for conducting an appeal. The point was very clearly made by the *Vivendi I* Committee in the following passage:

> *A greater source of concern is perhaps the ground of "failure to state reasons," which is not qualified by any such phrase as "manifestly" or "serious." However, it is well accepted both in the cases and the literature that Article 52(1)(e) concerns a failure to state any reasons with respect to all or part of an award, not the failure to state correct or convincing reasons. It bears reiterating that an* ad hoc *committee is not a court of appeal. Provided that the reasons given by a tribunal can be followed and relate to the issues that were before the tribunal, their correctness is beside the point in terms of Article 52(1)(e). Moreover, reasons may be stated succinctly or at length, and different legal traditions differ in their modes of expressing reasons. Tribunals must be allowed a degree of discretion as to the way in which they express their reasoning.*
>
> *In the Committee's view, annulment under Article 52(1)(e) should only occur in a clear case. This entails two conditions: first, the failure to state reasons must leave the decision on a particular point essentially lacking in any expressed rationale; and second, that point must itself be necessary to the tribunal's decision. It is frequently said that contradictory reasons cancel each other out, and indeed, if reasons are genuinely contradictory so they might. However, tribunals must often struggle to balance conflicting considerations, and an* ad hoc *committee should be careful not to discern contradiction when what is actually expressed in a tribunal's reasons could more truly be said to be but a reflection of such conflicting considerations.*[368]

236. The Committee therefore agrees with the observation of the EDF committee that "*Article 52(1)(e) empowers a Committee to annul an award if there has been a* failure *to state the*

[368] *Vivendi I*, note 340, above, at paras. 64-65 (**CL-99**).

reasons on which the award is based; it does not entitle a Committee to annul an award because it finds the reasoning unconvincing".[369]

237. Two further observations regarding Article 52(1)(e) of the ICSID Convention are appropriate. First, a tribunal is required to answer each "*question*" put to it and to give reasons which enable a reader to discern how it reached that answer. It is not, however, required to respond to every aspect of each argument advanced by a party with regard to a particular question. As the *Enron* committee put it:

> *This requires the tribunal to state its pertinent findings of fact, its pertinent findings as to the applicable legal principles, and its conclusions in respect of the application of the law to the facts. If the tribunal has done this, the award will not be annulled on the basis that the tribunal could have given more detailed reasons and analysis for its findings of fact or law, or that the tribunal did not expressly state its evaluation in respect to each individual item of evidence or each individual legal authority or legal provision relied upon by the parties, or did not expressly state a view on every single legal and factual issue raised by the parties in the course of the proceedings. The tribunal is required to state reasons for its decision, but not necessarily reasons for its reasons.*[370]

238. Secondly, the Committee notes Colombia's argument that an award may be annulled if the reasons given are "*frivolous*" or "*manifestly irrelevant*".[371] The Committee accepts that if the reasons are manifestly irrelevant to the issue to be decided, then they will not be reasons for the decision. It considers, however, that an *ad hoc* committee must proceed with very great caution in this regard since allegations that reasons are irrelevant, and even more that they are "*frivolous*" can easily become an invitation to annul an award on the basis that the committee disagrees with the reasons given. To accept that invitation would be to convert annulment proceedings into an appeal.[372] While the Committee accepts that there might be a case in which an award could be annulled because the reasons given were frivolous or manifestly irrelevant, the threshold is a very high one indeed. In particular, a reason is not

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369 *EDF*, note 342, above, at para. 195 (**AAL-4**) (emphasis in original); see also *TECO*, note 318, above, at para. 87 (**AAL-47**). See also *Orascom*, note 347, above, at paras. 164-165, 170 (**AAL-134**).

370 *Enron Creditors Recovery Corp. and Ponderosa Assets, LP v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on Annulment of 30 July 2010, para. 222 (**AAL-26**).

371 Mem. on Ann., para. 166.

372 *Orascom*, note 347, above, at para. 165 (**AAL-134**).

"*frivolous*" because many – including an *ad hoc* committee – consider it wrong; to justify annulment, it must be such that no reasonable tribunal could possibly take it seriously. Moreover, an award cannot be annulled because one of the reasons given is frivolous or manifestly irrelevant, so long as the remaining reasons are a coherent explanation of the decision reached.

VI. THE DOCUMENTS ISSUE

A. THE POSITIONS OF THE PARTIES

(1) Colombia

239. Colombia first challenges the Tribunal's decision in PO2 not to admit into the record the Disputed SIC Documents and its subsequent decisions regarding Glencore and Prodeco's assertion of privilege (PO4 and PO6) and the FGN documents (PO6).

240. Colombia maintains that the Tribunal manifestly exceeded its powers through a failure to apply the law; that it seriously infringed Colombia's fundamental procedural right to be heard, on all of its evidence; and that it failed to provide coherent or logical reasoning to justify its decision.[373] Colombia argues that these errors were committed in the procedural decisions which the Tribunal took in the relevant procedural orders and that they were incorporated into, and have "*tainted*" the Award, which should therefore be annulled in its entirety.[374]

241. For Colombia, these failings are rendered the more serious because the evidence which the Tribunal excluded was, in Colombia's view, relevant to allegations of corruption which a tribunal has a duty to investigate with particular rigour.

(a) Procedural Order No. 2

(i) Manifest Excess of Power

242. Colombia asserts that the Tribunal manifestly exceeded its powers by disregarding the proper legal framework for assessing the admissibility of evidence, and, in the alternative,

[373] Mem. on Ann., para. 207.

[374] Mem. on Ann., para. 208.

that it committed such gross and egregious misapplications of the law as to amount to a failure to apply the applicable law.[375] More specifically, Colombia argues that the Tribunal erred: (i) in its choice of law to govern the Parties' dispute over the admissibility of the Disputed SIC Documents; (ii) in its misapplication of Colombian law; and (iii) in its failure to apply, or egregious misapplication of international law.[376]

243. According to Colombia, the ICSID Convention and Rules establish that procedural issues – such as the admissibility of evidence – are to be governed by international law in the absence of an express *renvoi* to municipal law agreed upon by the parties or mandated by the rules of international law.[377] As such, Colombia argues, the Tribunal's reference to Colombian municipal law in PO2 was highly irregular. In addition, the Tribunal's reasoning, in purported justification of its reference to municipal law, constituted an "*obvious misapplication*" of Article 42(1) of the ICSID Convention, which, according to Colombia, has "*nothing to do with*" the law applicable to procedural issues.[378] To add to this, Colombia argues that in its misguided application of Colombian law, the Tribunal grossly misinterpreted the notion of "*desviación de poder*", which had been briefed by neither Party.[379] Had the Tribunal conducted a "*proper analysis*", Colombia submits, it would have concluded that the ANDJE was authorised to request the Disputed Documents from the SIC, and that the SIC was legally required to turn these over to the ANDJE upon the latter's request.[380]

244. Colombia acknowledges that the Tribunal did at least profess to apply international law, and that it made reference to certain international law concepts such as "*equality of arms*" and "*good faith*"[381] but maintains that this was mere window-dressing.[382] Colombia argues that an analysis of PO2 in fact reveals a complete failure to apply "*anything resembling*

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375 Mem. on Ann., para. 217.

376 Mem. on Ann., para. 218.

377 Mem. on Ann., para. 223.

378 Mem. on Ann., paras. 220-226, 285.

379 Mem. on Ann., para. 252.

380 Mem. on Ann., para. 255.

381 Mem. on Ann., paras. 235-237.

382 Mem. on Ann., paras. 235-237.

international law".[383] According to Colombia, the Tribunal's reasoning was both circular and lacking in the methodological imperatives of an application of international law.[384] Instead of engaging with the legal norms which traditionally govern admissibility under international law, the Tribunal made the "*unprecedented*" decision to apply its own subjective notion of "*fairness*".[385] As such, Colombia considers that PO2 constitutes an *ex aequo et bono* ruling which the Tribunal was not empowered to make.[386] Even if the decision to apply the standard of "*fairness*" is not considered a failure to apply international law, Colombia maintains, the Tribunal's departure from the accepted tenets of international law was so egregious as to "*constitute, in practice, the non-application of the proper law*".[387]

(ii) Serious Departure from Fundamental Rules of Procedure

245. Colombia submits that the Tribunal's decision in PO2 constituted a serious departure from Colombia's fundamental procedural rights to be heard and to adduce lawfully obtained evidence in its defence. Whereas Colombia accepts that Rule 34(1) of the ICSID Rules gives tribunals the discretion to exclude evidence, it submits that the exercise of that discretion must nevertheless be "*informed somehow*".[388] In this respect the Applicant cites the principle that "*no evidence should be excluded* a limine".[389] As a consequence of this rule, Colombia argues that, except in a very narrow set of exceptional circumstances (evidence obtained illegally or which is subject to legal privilege), any evidence produced by the parties should "*automatically*" be admitted.[390]

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383 Mem. on Ann., para. 231.

384 Mem. on Ann., paras. 235-237.

385 Application, para. 46; Mem. on Ann., para. 232; Tr. pp. 17:3-5 and 16: 20-22 (Professor Silva Romero).

386 Application, para. 52; Mem. on Ann., para. 235; Tr. p. 17:3-5 (Professor Silva Romero).

387 Mem. on Ann., para. 239.

388 Tr. p. 165:22-24 (Mr Farhadi).

389 Mem. on Ann., paras. 174-175, citing from H. Lauterpacht, *The So-called Anglo-American and Continental Schools of Thoughts in International Law*, British Yearbook of International Law, Vol. 12, 1931, p. 42 (**AAL-59**).

390 Reply on Ann., para. 90, note 149 citing *Preparation of the Rules of Court*, PCIJ, Series D, No. 2, 1922, p. 210 (**AAL-106**) ("*M. Anzilotti:* [...] *the Court ha[s] accepted the principle that any evidence produced by the parties should be admitted automatically*."); Reply on Ann., paras. 92-93; Mem. on Ann., paras. 200-201.

246. According to the Applicant, this "*rule of liberal admissibility of evidence*" derives from the right to be heard,[391] a fundamental procedural right, and is itself "*best classified*" as a general principle of international law within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice ("**ICJ**").[392] In support of this proposition, Colombia submits various legal authorities, which, it claims, show that the liberal admissibility rule has been "*universally embraced*" by legal scholars and in the practice of international courts and tribunals for over a century.[393] Despite its status and relevance to the matter under consideration in PO2, however, the liberal admissibility rule was completely ignored by the Tribunal.[394]

247. Separately, and in addition to its failure to apply the liberal admissibility rule, Colombia submits that the Tribunal seriously departed from Colombia's fundamental right to be heard by its application of the Colombian law principle "*desviación de poder*".[395]

248. Colombia maintains that the decision to exclude the Disputed SIC Documents had a profound effect on the course of the arbitration. Had they been admitted, Colombia asserts, the Tribunal would "*have had no other choice*" but to find that Glencore and Prodeco's investment was unlawful and thus outside the protection of the BIT.[396] Colombia maintains that the emails "*uncontrovertibly demonstrate* [Glencore and Prodeco's] *corrupting of Mr Ballesteros*" and, further, provided proof of their "*calculated efforts to misrepresent the economic and technical rationale for a further amendment to the Mining Contract*" so as to "*wrongly induce*" Ingeominas to accept the Eighth Amendment.[397] As such, Colombia argues, it cannot be denied that the Tribunal's departures from fundamental rules of procedure were "*serious*" within the meaning of Article 52(1)(d) of the ICSID Convention.[398] In any event, Colombia adds, the Committee is not required to determine

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391 Colombia's Opening Statement, 6 November 2020 ("*Colombia's Opening Statement before the Committee*"), slide 14 (**AAE-38**), referring to *Orascom,* above, note 347, at paras. 138, 144 (**AAL-134**); Reply on Ann., para. 94; Tr. pp. 15:13-15, 17:1-3, 11-15 (Professor Silva Romero).

392 Mem. on Ann., para. 174.

393 Mem. on Ann., paras. 173-187; Reply on Ann., para. 90, note 146.

394 Mem. on Ann., para. 241.

395 Mem. on Ann., para. 252.

396 Application, para. 40.

397 Application., para. 40.

398 Mem. on Ann., paras. 276-280.

that the departure from a fundamental rule of procedure would have been outcome determinative in order for it to be "*serious*", given that the injury is inherent in the due process violation.[399] Moreover, as a practical matter, Colombia argues that "*it is entirely unclear*" how it "*could even go about establishing*" that the Disputed SIC Documents would have been outcome-determinative, given their exclusion.[400]

(iii) Failure to State Reasons

249. Finally, Colombia asserts that the Tribunal failed to state reasons to justify its decision in PO2.[401] According to the Applicant, the Tribunal's scant reasoning was "*not only frivolous and contradictory, but also incoherent*". By way of example, the reference to Article 42(1) of the ICSID Convention in the Tribunal's analysis of applicable law is said to be frivolous in that it is "*manifestly irrelevant*" and "*cannot logically explain the decision*" of the Tribunal.[402] Moreover, as above, Colombia argues that the Tribunal failed to "*even acknowledge*" Colombia's invocation of the rule of liberal admissibility of evidence and ignored the legal authorities cited by Colombia in support of its application. As such, according to Colombia, its decision to exclude the Disputed Documents is "*insufficient from a logical point of view to justify the tribunal's conclusion*".[403] In support of this assertion, Colombia recalls the finding in *CEAC* that "*in order to give a fully reasoned award, a tribunal is required to answer every 'question' put to it*", and not just provide reasoning for the final outcome.[404]

(b) Procedural Order No. 4

250. Colombia accepts that in PO2 the Tribunal left open two ways in which the Disputed SIC Documents might nevertheless become part of the record in the case: first, through the normal document production process and, secondly, if they came to form part of the record in criminal proceedings in the Colombian courts and were not legally privileged. Colombia

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399 Colombia's Opening Statement before the Committee, note 391, above, slide 21 (**AAE-38**), referring to *Churchill,* note 316, above, at para. 204 (**AAL-48**).

400 Reply on Ann., para. 57.

401 Mem. on Ann., para. 238.

402 Mem. on Ann., para. 285.

403 Mem. on Ann., para. 287.

404 Mem. on Ann., para. 287.

asserts, however, that having seemed to leave the door ajar in this way, the Tribunal slammed it shut with its decisions in PO4 and PO6.[405]

251. Colombia claims that the Tribunal's decision in PO2 to give each Party the opportunity to file new document production requests gave it "*some hope*" that the Tribunal would cure the effect of its decision to exclude the Disputed SIC Documents in PO2.[406] According to Colombia, it was for this reason that it duly complied with the procedure established by PO2 for a new phase of document production requests,[407] so as to obtain from Glencore and Prodeco the Disputed SIC Documents "*already in Colombia's possession*".[408]

252. In response to Colombia's document production requests, Colombia claims that Glencore and Prodeco put up a further "*roadblock*" to the discovery of the Disputed SIC Documents by asserting privilege over documents which "*manifestly did not enjoy any such privilege*", including all correspondence involving in-house counsel.[409] According to Colombia, legal privilege does not apply to communications with in-house counsel and, even if it did, "*it did not apply to the documents over which* [Glencore and Prodeco] *had asserted it*".[410]

253. Nevertheless, Colombia claims that it "*continued to navigate the Tribunal's procedural labyrinth*" by bringing these issues to the Tribunal for their resolution in PO4.[411] Colombia asserts further that, in its appeals to the Tribunal, it "*expressly*" requested to have the privileged nature of Disputed Disclosure Documents ruled on by the Tribunal itself, or by a conflict counsel (privilege inspector), on a document-by-document basis.[412]

254. Colombia asserts, however, that having seemed to leave the door open to the admission of the Disputed SIC Documents through the "*proper procedure*", the Tribunal slammed this door shut with its decision in PO4 (and, later, PO6).[413] Not only did the Tribunal rule against Colombia on the issue of the applicable law, Colombia submits that it went on to

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405 Tr. pp. 23:21-25:9 (Professor Silva Romero).

406 Mem. on Ann., para. 293.

407 Tr. p. 24:5-7 (Professor Silva Romero).

408 Tr. p. 24:7-9 (Professor Silva Romero).

409 Mem. on Ann., paras. 295-296; Tr. p. 24:9-14 (Professor Silva Romero).

410 Tr. p. 62:18-19 (Professor Silva Romero); Mem. on Ann., para. 298.

411 Tr. p. 24:15-16 (Professor Silva Romero).

412 Tr. pp. 24:16-19, 67:24-68:2 (Professor Silva Romero).

413 Tr. p. 24:22-23 (Professor Silva Romero); Mem. on Ann., para. 323.

add "*insult to injury*" by refusing its request for an independent assessment of the privileged nature of the Privilege Log Documents.[414] Its decision in this regard, in Colombia's view, was flawed by a manifest excess of power, serious departures from a fundamental rule of procedure and a failure to give reasons.

(i) Manifest Excess of Power

255. According to Colombia, the Tribunal failed to apply the applicable law to the question of whether or not in-house legal communications were subject to legal privilege.[415]

256. Colombia asserts that Colombian law ought to have governed the Tribunal's decision. According to Colombia, the existence of privilege requires, "*at a minimum, ascertaining the expectations of the parties to the communication at the time it was made*".[416] In the circumstances of the present case, Colombia submits, the expectations of Prodeco's executives' in-house communications in Colombia would have been set by Colombian law.[417] On this basis, international law, which according to Colombia is the law applicable to questions of procedure, mandates a *renvoi* to the municipal law of the State in which the relevant legal advice was given. Despite this, Colombia asserts that the Tribunal made its assessment based on its assessment of international law, making reference to Colombian law only as an afterthought. [418]

257. Secondly, Colombia definitively asserts that Colombian law does *not* extend privilege to communication with in-house counsel.[419] As such, according to the Applicant, the Tribunal's analysis of Colombia's domestic law shows that it "*manifestly and egregiously misunderstood the basic authorities*" cited by Colombia.[420] Moreover, the Tribunal failed to refer to a single source that explicitly supported its contention that Colombian law recognizes as legally privileged communications with in-house lawyers.[421]

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414 Mem. on Ann., para. 300.

415 Mem. on Ann., paras. 303-314; Reply on Ann., para. 229; Tr. pp. 20:24-21:8 (Professor Silva Romero).

416 Reply on Ann., para. 233.

417 Reply on Ann., para. 233.

418 Mem. on Ann., para. 312; Reply on Ann., para. 233.

419 Mem. on Ann., paras. 312-313; Reply on Ann., para. 233; Tr. pp. 20:24-21:3 (Professor Silva Romero).

420 Mem. on Ann., para. 314; Reply on Ann., para. 233.

421 Mem. on Ann., para. 312.

258. Thirdly, even in its "*purported application*" of international law Colombia asserts that the Tribunal egregiously misapplied the law.[422] Colombia considers that the Tribunal seriously erred in its determination that in-house counsel privilege is protected by "*a general principle of law within the meaning of Article 38 of the Statute of the International Court of Justice*".[423]

259. Colombia argues that the Tribunal did not actually engage in an analysis of the existence of a relevant general principle of law.[424] Had it done so, Colombia submits, it would have determined that the practice of States in their treatment of in-house counsel communications varies widely, making it impossible to discern a principle of general application.[425] Rather, the Tribunal simply applied the *Vito Gallo* criteria.[426] Colombia claims on this basis that the Tribunal essentially "*found no other legal justification than to quote themselves*" given that the Tribunal members in the present case overlapped by two-thirds with that in *Vito Gallo,* "*including the same president*".[427] Colombia concludes as such that the Tribunal not only chose the wrong law to govern the question before it, but that it did not even apply the law it had wrongly identified as applicable.[428] The "*hallmarks of an analysis of international law*" being so absent from the Tribunal's decision, Colombia submits, "*that it cannot be said that the Tribunal objectively applied international law in the circumstances*".[429]

260. Colombia concludes that the Tribunal's failures in these respects constitute a manifest excess of powers since "*it amounts to effective disregard of the applicable law*" and "*is of*

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422 Reply on Ann., para. 234; Tr. p. 21:8-10.

423 Reply on Ann., para. 234, referring to PO4, note 72, above, at para. 38 (**AAE-9**).

424 Tr. pp. 64:15-24, 65:17-25-66:1 (Professor Silva Romero).

425 Mem. on Ann., para. 310; Reply on Ann., para. 234; Tr. p. 66:1-10 (Professor Silva Romero), referring to *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. European Commission*, ECJ, Judgment of 14 September 2010, paras. 72, 74 ("*Akzo*") (**RL-116**).

426 Tr. p. 65:2-11 (Professor Silva Romero), referring to PO4, note 72, above, at paras. 38, 51, 53-54 (**AAE-9**); and *Vito Gallo*, note 148, above (**RL-129**).

427 Tr. p. 65:11-15 (Professor Silva Romero).

428 Tr. pp. 21:8-10, 66:11-16 (Professor Silva Romero).

429 Tr. p. 66:16-19 (Professor Silva Romero); Reply on Ann., para. 234.

such a nature or degree as to constitute objectively (regardless of the Tribunal's actual or presumed intentions) its effective non- application".[430]

(ii) Serious Departure from a Fundamental Rule of Procedure

261. Colombia argues that the Tribunal's decision to rely upon an affidavit from Glencore and Prodeco's counsel to determine which documents met the criteria for legal privilege, rather than referring the question to an impartial third party (which Colombia refers to as a "*conflict counsel*" but is more commonly known as a "*privilege inspector*") ignored Colombia's fundamental rights to equal treatment, to be heard and to submit evidence in its defence, constituting a further annullable error.[431]

262. Colombia recalls that the documents over which Glencore and Prodeco had asserted privilege were also within Colombia's possession as a result of their seizure by the SIC.[432] As such, Colombia was just as qualified as Glencore and Prodeco's counsel to assess whether or not they complied with the Tribunal's definition of legal privilege.[433] Colombia argues that, in these circumstances, a privilege inspector should have been appointed to resolve the matter.[434] Colombia maintains that, as neither side was neutral or objective, and both had access to the evidence at issue, either both or neither of the Parties should have been involved in the privilege assessment ordered by the Tribunal.[435] By allowing the matter to be determined by an affidavit from counsel for Glencore and Prodeco, the Tribunal violated Colombia's fundamental right to be heard and its right to equality of arms, as well as depriving Colombia of critical evidence.[436]

(iii) Failure to State Reasons

263. Colombia also maintains that the Tribunal failed properly to state the reasons for its decision. It maintains that the Tribunal misunderstood the plain meaning of the authority

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430 Mem. on Ann., para. 314.

431 Tr. p. 25:19-24 (Professor Silva Romero).

432 Tr. p. 21:19-20 (Professor Silva Romero); Mem. on Ann., para. 300.

433 Tr. pp. 62:17-22, 67:6-10 (Professor Silva Romero).

434 Tr. p. 67:22-24 (Professor Silva Romero).

435 Tr. p. 68:9-13 (Professor Silva Romero).

436 Tr. pp. 25:19-24, 68:14-18 (Professor Silva Romero); Mem. on Ann., paras. 315-316.

on Colombian law to which it referred.[437] Additionally, Colombia asserts, as an instance of "*frivolous*" reasoning, that "*the Tribunal effectively cited a lack of judicial and administrative precedent as an affirmative indication of the existence of a rule of law*".[438]

264. Colombia submits that the Tribunal did not explain its reasoning as to why it refused to examine the privilege issue on a document-by-document basis.[439] Colombia refutes the suggestion that PO4 was a mere routine procedural decision on document production which, in the result, did not require detailed reasoning.[440] According to Colombia, in the unusual circumstance where both Parties had access to the documents at issue, it was an abdication of the Tribunal's duty to answer all questions posed to it when it delegated the task of the document-by-document assessment of privilege to one of the Parties to the dispute.[441] By deferring to Glencore and Prodeco's assessment on privilege, therefore, Colombia claims that the Tribunal "*essentially ignored 159 questions posed to it, namely, whether or not each of the documents in question was subject to privilege*".[442]

265. Finally, Colombia argues that the Tribunal's reasoning in PO4 was "*contradictory*" to its decision in PO2.[443] Whereas in PO2 the Tribunal excluded the Disputed SIC Documents on the premise that it would "*establish the 'proper procedure' for allowing a fair chance for them to be admitted onto the record*", it failed to establish any such objective and proper procedure in PO4.[444]

(c) Procedural Order No. 6

266. Colombia argues that, in its PO2 the Tribunal promised that Colombia could marshal into the record evidence gathered by law enforcement authorities in the context of criminal proceedings, but that it "*broke that promise*" in PO6.[445] Colombia submits that, in that

[437] Mem. on Ann., para. 320; Reply on Ann., para. 252.
[438] Mem. on Ann., para. 320.
[439] Mem. on Ann., para. 321.
[440] Reply on Ann., para. 253.
[441] Reply on Ann., para. 254.
[442] Mem. on Ann., para. 321; Reply on Ann., para. 256.
[443] Mem. on Ann., para. 322.
[444] Reply on Ann., para. 257.
[445] Application, para. 70.

decision, "*the Tribunal, once more, issued a contradictory ruling by inventing new legal rules*" to exclude the Disputed Documents.[446]

(i) Manifest Excess of Power

267. Colombia asserts that the Tribunal did not apply "any *law at all*" in Procedural Order No. 6.[447] Colombia maintains that the Tribunal did not even "*attempt to explain what law (if any) it was applying*" to reach its decision.[448] In the place of the "*habitual*" section on applicable law, Colombia asserts that the Tribunal instead included a section entitled "*Applicable Provisions*" wherein it simply cited the relevant paragraphs of PO2.[449] According to Colombia, the Tribunal then went on to interpret its own *obiter dictum* in order to attempt to "*distil a legal 'standard' from the penumbrae of the word 'gathered'*".[450] In so doing, Colombia asserts that the Tribunal failed "*even to consider, let alone apply*" the law.[451]

(ii) Serious Departure from a Fundamental Rule of Procedure

268. Colombia asserts that the Tribunal seriously departed from a fundamental rule of procedure in PO6 by excluding the FGN Documents and the Annex A Documents, these being "*relevant, non-privileged, and lawfully obtained*".[452] It submits that the Tribunal's decision in this regard denied Colombia its fundamental right to be heard and its concomitant right to produce evidence in its defence.[453]

269. Colombia asserts that the Tribunal's decision on the criteria for admissibility in PO6 differed from the criteria it had itself set out in PO2. Colombia complains that the Tribunal's decision to exclude the FGN Documents on the grounds that these were "*not part of a formal acusación in a Colombian criminal court proceeding*" imported a

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446 Application, para. 46.

447 Mem. on Ann., para. 342.

448 Mem. on Ann., para. 342.

449 Mem. on Ann., para. 342.

450 Mem. on Ann., para. 342.

451 Mem. on Ann., para. 342.

452 Mem. on Ann., para. 343 (emphasis added).

453 Mem. on Ann., para. 343.

requirement that had never been stipulated by the Tribunal.[454] Colombia characterises that requirement as "*simply another invention designed to exclude the* [Disputed] *Documents*".[455] According to Colombia, no rule exists under either international law or Colombian law "*which would support such test to exclude evidence and, tellingly, the Tribunal simply provided no reasons or support for its conclusion*".[456]

270. As to the Annex A documents "*allegedly subject to privilege*", Colombia repeats the complaints it had made about PO4. In particular, Colombia notes that the Tribunal expressly rejected Colombia's request that these documents be admitted on the ground that it was not its role to "*second guess*" the determination of counsel for Glencore and Prodeco that documents were privileged. In this regard Colombia argues that

> *… if the Tribunal did not want to believe Colombia – who had the documents, or Mr Enciso, an independent conflict counsel retained by Colombia –, it should have requested that a Tribunal-appointed conflict counsel review these documents as requested by Colombia. Again, the Tribunal instead decided that Claimants' word was enough, thereby leaving no door open to Colombia to produce documents that Colombia knew were not privileged*.[457]

271. Colombia asserts that the Tribunal seriously departed from a fundamental rule of procedure in PO6 by excluding the FGN Documents and the Annex A Documents. According to Colombia the Tribunal "*refus*[ed] *to abide by its own prior ruling, and instead impos*[ed] *unforeseeable byzantine requirements on Colombia*" with respect to document production, thereby "*act*[ing] *so arbitrarily as to offend 'rules of natural justice*".[458]

(iii) Failure to State Reasons

272. Finally, Colombia submits that the Tribunal failed to state reasons for its decision not to admit the FGN Documents.[459] Colombia claims that the Tribunal did not provide "*a single*

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454 Application, para. 73.

455 Application, para. 73.

456 Application, para. 73.

457 Application, para. 74.

458 Mem. on Ann., para. 343.

459 Mem. on Ann., para. 344.

authority" for its decision to impose the requirement that "*the evidence must be 'gathered' or 'marshaled' in the course of a criminal proceeding*" in order to be submitted before the Tribunal.[460] According to Colombia this is because no such rule exists under either international law or Colombian law.[461]

273. Colombia asserts further that the Tribunal's reasoning simply "*cannot be followed* '*from Point A to Point B*'".[462] It characterises PO6 as not just lacking a "*logical chain of reasoning*," but as "*devoid of any chain of reasoning at all*".[463] The Tribunal, according to Colombia, "*simply provided no reasons or support for its conclusion*".[464]

(2) Glencore and Prodeco

274. Glencore and Prodeco reject all of the challenges based upon the Tribunal's decisions on the admission and exclusion of evidence. For them, a tribunal's decisions on such matters are ones which fall wholly outside the scope of the annulment process. While accepting that corruption is an issue of the utmost gravity, they argue that Colombia's allegation of corruption was without any foundation and warn that the principles by which an arbitration should be conducted cannot be discarded merely because a respondent State chooses to make an allegation of corruption.

(a) Procedural Order No. 2

(i) Manifest Excess of Power

275. Glencore and Prodeco refute the assertion that the Tribunal manifestly exceeded its powers by its failure to apply the law in PO2, responding to each of the excesses alleged by Colombia in turn.

276. On the issue of the Tribunal's choice of law, Glencore asserts that, within the bounds of due process, the Tribunal has "*absolute discretion*" over issues of evidence, and thus "*is*

460 Mem. on Ann., para. 344; Reply on Ann., para. 258.

461 Application, para. 73.

462 Reply on Ann., para. 258.

463 Mem. on Ann., para. 344.

464 Application, para. 73; Mem. on Ann., para. 344.

not bound to follow one rule or another in making evidentiary determinations".[465] Nevertheless, Glencore argues that Colombia's assertion that the Tribunal did not apply international law to this issue is "*demonstrably false*".[466] The decision in Procedural Order No. 2 "*made clear*" that the Tribunal chose international law to govern the Parties' dispute, and looked to Colombian law only to confirm its conclusions.[467]

277. Similarly, in relation to Colombia's assertion that the Tribunal manifestly exceeded its powers in PO2, Glencore and Prodeco submit that "[a]*ll Colombia does here is claim that the Tribunal made mistakes of Colombian law*". They assert that even if the Tribunal made mistakes in relation to Colombian law (which they deny), such errors of law are not an excess of power and are no basis for annulment.[468] In any event, Glencore and Prodeco add, given that the Tribunal's reference to Colombian law was carried out only to confirm the Tribunal's application of international law, "*it had no bearing on the outcome of the proceeding*" and therefore cannot constitute an excess of power.[469]

278. As regards Colombia's assertion that the Tribunal "*failed to apply anything resembling international law*", Glencore and Prodeco counter that Colombia's case is in essence one that the Tribunal committed "*an error of law*".[470] According to Glencore and Prodeco, however, the erroneous application of the law is not a manifest excess of powers.[471] Indeed, the drafters of the ICSID Convention rejected a proposal to include "*incorrect application of the law*" as a ground for annulment.[472] According to Glencore, an excess of power for failure to apply the applicable law is applicable only if there has been a failure to apply the law *in toto.*[473] Glencore submits that this criterion is clearly not met by PO2, which applied the "*international legal principles of fairness, good faith and equality of arms*".[474]

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465 C-Mem. on Ann., para. 89.

466 C-Mem. on Ann., para. 89.

467 C-Mem. on Ann., para. 89; Tr. p. 135:6-8 (Mr Blackaby).

468 C-Mem. on Ann., para. 96.

469 C-Mem. on Ann., para. 96.

470 C-Mem. on Ann., para. 91.

471 C-Mem. on Ann., paras. 83, 91.

472 C-Mem. on Ann., para. 83, referring to A. Parra, *The History of ICSID*, Oxford University Press, 2012, p. 87 (**RAL-14**).

473 C-Mem. on Ann., para. 85.

474 C-Mem. on Ann., para. 94.

279. Furthermore, Glencore and Prodeco maintain that, as a matter of logic, the Tribunal cannot have manifestly exceeded its powers when it reached a decision that was consistent with the very international law rule that Colombia says should have been applied.[475] Glencore asserts in this regard that whereas the documents were lawfully obtained by the SIC for the purposes of its antitrust investigation, these were transferred to the ANDJE for use in this arbitration in violation of both international and Colombian law. In other words, the Disputed SIC Documents "*had not been lawfully obtained for the purpose of use in this arbitration*".[476] As such, even under the liberal admissibility rule as formulated by Colombia, the Disputed SIC Documents fell to be excluded as illegally obtained evidence.[477]

(ii) Serious Departure from a Fundamental Rule of Procedure

280. Glencore and Prodeco deny the assertion that the Tribunal seriously departed from a fundamental procedural rule by its decision in PO2. They maintain that Colombia has failed to show that any of the criteria for the application of Article 52(1)(d) of the ICSID Convention have been met.[478]

281. First, Glencore and Prodeco contend that Colombia has failed to identify an applicable - let alone fundamental - procedural rule which was violated by the decision in PO2.[479] According to them, the liberal admissibility rule cited by Colombia either "*does not exist*", or at least "*does not exist in the absolute form that Colombia urges*".[480] Glencore and Prodeco assert that the sources which Colombia cites in support of its "*liberal admissibility*" rule have been misconstrued. Properly understood, these stand for the uncontroversial proposition that international tribunals are not bound by the rules of evidence that shape proceedings in national courts, and are free to adopt flexible procedures to deal with evidence.[481] However, the fact that tribunals are not bound to follow strict

475 Tr. p. 132:4-7 (Mr Friedman).

476 Tr. p. 130:15-17 (Mr Friedman).

477 Tr. p. 130:17-18 (Mr Friedman).

478 C-Mem. on Ann., para. 55; Tr. p. 119:10-16 (Mr Friedman).

479 Tr. p. 120:12-15 (Mr Friedman).

480 C-Mem. on Ann., para. 57; Tr. p. 129:9-13 (Mr Friedman).

481 C-Mem. on Ann., para. 62; Tr. p. 120:16-21 (Mr Friedman).

rules of evidence from municipal legal systems does not support the proposition that they are "prohibited *from excluding evidence under appropriate circumstances*".[482] Moreover, Glencore and Prodeco criticise the legal authorities relied upon by Colombia as "*almost exclusively*" relying on rules applicable to inter-State cases where "*the parties have equal powers to obtain evidence*". Such cases, they maintain, are readily distinguishable from investor-State litigation in which only one party – the State – has at its disposal coercive powers for obtaining evidence.[483]

282. Glencore and Prodeco also contend that the existence of a limit on the Tribunal's discretion to determine admissibility would contradict the terms of Rule 34(1) of the ICSID Rules. Under this provision, ICSID tribunals are granted "*full discretion*" in considering the admissibility of evidence.[484] As such, they must be taken to be empowered to decide that certain evidence is inadmissible.[485] According to Glencore and Prodeco, tribunals "*need*" to have the ability to exclude documents, "*to protect the integrity of the proceeding and* safeguard *principles of due process*".[486] If, on the other hand, ICSID tribunals were bound to admit "*virtually all evidence sought to be introduced, lest [they] run afoul of denying a party the right to be heard*", Rule 34(1) would have no purpose.[487] From this they conclude that Rule 34(1) "*displaces any claimed international law rule of 'liberal admissibility' that* requires *Tribunals to admit all evidence*".[488]

283. Secondly, even if, *arguendo,* the general admissibility rule *did* exist, and even if it could be construed as a fundamental procedural right, Glencore and Prodeco submit that Colombia would still need to establish that the Tribunal's decision amounted to a serious departure from the rule in order to bring it within the scope of Article 52(1)(d) of the ICSID

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482 C-Mem. on Ann., para. 62; Tr. p. 125:10-13 (Mr Friedman).

483 Tr. pp. 121:19-122:6 (Mr Friedman).

484 Tr. p. 120:2-6 (Mr Friedman); C-Mem. on Ann., para. 61, citing *ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV, ConocoPhillips Gulf of Paria BV and ConocoPhillips Company v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30), Award of 8 March 2019, para. 264 (**RAL-24**); *El Paso Energy International Company v. Argentine Republic* (ICSID Case No. ARB/03/15) Decision on Annulment of 22 September 2014, para. 191 (**RAL-15**).

485 C-Mem. on Ann., para. 60.

486 C-Mem. on Ann., para. 62 (emphasis in original).

487 Tr. pp. 120:23-121:1, 121:7-8 (Mr Friedman).

488 C-Mem. on Ann., para. 61 (emphasis in original).

Convention.[489] In this respect, they argue that "*we heard nothing from Colombia*".[490] According to Glencore and Prodeco, as outlined above in paragraph 279, the Tribunal's decision to exclude documents that were illegally obtained was entirely consistent with the liberal admissibility rule, as formulated by Colombia.[491] If indeed the general admissibility rule existed, it would not exist "*in a vacuum*" and, as such, it would have to be reconciled with other fundamental rules of procedure.[492] In this case, Glencore and Prodeco submit that the principle of liberal admissibility would have had to be weighed against the principles of equality of arms and fundamental fairness, which "*were pulling in the opposite direction*".[493] The reasonable exercise of the Tribunal's discretion in this regard, they contend, cannot constitute a basis for annulment.[494] Moreover, as long as a tribunal respects the rules of due process in its decisions on admissibility "*then the substance of its decision cannot be subject to annulment review*".[495] According to Glencore and Prodeco, PO2 "*respected the parties' due process rights in full*".[496] Although, on the one hand, the Tribunal excluded the Disputed SIC Documents to preserve equality between the Parties, on the other, it protected Colombia's right to request the admission of the documents via the proper procedure for the production of evidence.[497]

284. Thirdly, Glencore and Prodeco maintain that the claimed violation must "*at least*" have had the "*potential to affect the outcome of the arbitration*".[498] According to them, however, that condition cannot be satisfied by PO2, insofar as it left the introduction of the evidence at issue open through other, "*appropriate*" channels.[499] As such, the Tribunal's decision to

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489 Tr. p. 129:16-17 (Mr Friedman).

490 Tr. p. 129:25 (Mr Friedman).

491 Tr. p. 130:11-18 (Mr Friedman).

492 Tr. p. 128:12-19 (Mr Friedman).

493 Tr. p. 129:1-2 (Mr Friedman).

494 Tr. p. 127:2-3, 18-21 (Mr Friedman).

495 C-Mem. on Ann., para. 62; Tr. p. 127:15-18 (Mr Friedman), referring to *Bernhard von Pezold v. Republic of Zimbabwe* (ICSID Case No. ARB/10/15), Decision on Annulment of 21 November 2018, para. 253 ("*Bernhard von Pezold*") (**RAL-20**).

496 C-Mem. on Ann., para. 69.

497 C-Mem. on Ann., paras. 64, 69; Tr. pp. 130:24-131:9 (Mr Friedman).

498 C-Mem. on Ann., para. 55; Tr. p. 136:8-11 (Mr Friedman).

499 Tr. p. 136:13-18 (Mr Friedman).

exclude the Disputed SIC Documents in PO2 "*did not have and could not have had any impact on the outcome of the dispute*".[500]

285. Finally, as to the issue of the Tribunal's application of the *desviación de poder* principle, Glencore and Prodeco submit that both sides had argued whether Colombia's use of the Disputed SIC Documents complied with Colombian law, and, as such, "*Colombia had the ability to address the principle of* desviación de poder *in its submissions and it chose not to do so*".[501] In any event, Glencore and Prodeco add, the Tribunal made clear that it was looking to Colombian law, including the concept of *desviación de poder*, merely to "*confirm*" the decision that it had already reached under international law.[502] The Tribunal's analysis of *desviación de poder* therefore could not have had the potential to affect the outcome, and therefore "*cannot, by definition*" be taken to have violated Article 52(1)(d) of the ICSID Convention.[503]

(iii) Failure to State Reasons

286. Glencore and Prodeco argue that the Tribunal provided "*clear, straightforward, coherent reasons*" for its decision in PO2.[504] They contend that, properly understood, Colombia's claim is not that the Tribunal failed to state reasons or stated contradictory reasons, but that the Tribunal adopted the *wrong* reasons, which is "*not a basis for annulment*".[505] By way of example, Glencore and Prodeco refer to Colombia's complaint that the Tribunal wrongly relied on ICSID Convention Article 42(1) in its reasoning. They make the argument that Colombia's case in this regard is "*not an allegation that reasons are missing; it is a claim that the Tribunal made an error of law*", which cannot form the basis of a violation of Article 52(1)(e) of the ICSID Convention.[506]

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500 Tr. p. 136:19-21 (Mr Friedman).

501 C-Mem. on Ann., para. 68.

502 C-Mem. on Ann., para. 68, referring to PO2, note 67, above, at para. 52 (**AAE-1**).

503 C-Mem. on Ann., para. 68.

504 C-Mem. on Ann., paras. 116-120.

505 C-Mem. on Ann., para. 115.

506 C-Mem. on Ann., para. 121.

287. Glencore and Prodeco deny that the Tribunal was obliged to address every argument made by Colombia.[507] They distinguish between the arguments raised by the Parties, on the one hand, and the issue that the Tribunal is asked to decide.[508] In this respect Glencore invokes the decision of the *ad* hoc committee in CEAC as establishing the principle that, although a tribunal is indeed required to answer every question put to it, it is "*not, however, required to deal explicitly with every detail of every argument advanced by the Parties or to refer to every authority which they invoke*".[509] In this case the Tribunal was asked to determine the admissibility of the Disputed SIC Documents. That was the question put to it, and it was answered by PO2, which was "*all that* [the Tribunal] *was required to do*".[510]

(b) Procedural Order No. 4

(i) Manifest Excess of Power

288. On the matter of the applicability of international law in the test for privilege, Glencore and Prodeco submit that, despite Colombia's assertion that domestic law applies, during the arbitration, Colombia itself made international law arguments in relation to the matter;[511] and that the Tribunal also based its decision on its assessment that "*Colombian law likewise protects professional secrecy of in-house counsel*".[512]

289. In response to Colombia's argument that the Tribunal erred in its assessment of the test for legal professional privilege under international law, Glencore and Prodeco note that the Tribunal "*established the relevant criteria for determining whether a document is privileged under international law*" by reference to the factors listed in *Vito Gallo* which, they maintain, is frequently cited by other tribunals.[513] In addition, they assert that

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507 Tr. p. 132:8-9 (Mr Friedman).

508 Tr. p. 132:12-19 (Mr Friedman).

509 Tr. p. 132:12-16 (Mr Friedman), citing *CEAC*, note 342, above, at para. 98 (**AAL-3**).

510 Tr. p. 132:18-19 (Mr Friedman).

511 Tr. p. 97:2-15 (Mr Blackaby).

512 Tr. p. 98:17-18 (Mr Blackaby).

513 Tr. p. 137:17-23 (Mr Friedman), referring to PO4, note 72, above, at para. 54 (**AAE-9**), citing *Vito Gallo*, note 148, above, at para. 47 (**RL-129**); Tr. P. 188:18-21 (Mr Blackaby); Glencore and Prodeco Reply Presentation before the Committee, 6 November 2020 (**RAE-4**), citing *Carlos Rios and Francisco Javier Rios v. Republic of Chile* (ICSID Case No. ARB/17/16), Procedural Order No. 7 of 4 October 2018, note 10; *Global Telecom Holding SAE v. Canada*, ICSID Case No. ARB/16/16, Procedural Order No. 5, Decision on Outstanding Issues of Legal Privilege of 13 December 2018, pp. 27-28; *Gramercy Funds Management LLC and Gramercy Peru Holdings*

Colombia's complaint as to the Tribunal's reasoning in this regard amounts to no more than a disagreement with the Tribunal's substantive legal decision on whether or not certain documents were privileged, which disagreement is not the appropriate basis for an annulment.[514] They highlight the determinations of other international tribunals that in-house counsel communications are subject to professional privilege, and assert that there can be no manifest excess of powers when the underlying issue is subject to more than one interpretation.[515]

290. Glencore and Prodeco recall their argument that the Tribunal enjoys "*absolute discretion*" over evidentiary matters, and that the Committee has no power to review those evidentiary rulings.[516] If a tribunal's application of one privilege rule or another were subject to annulment committee review, they argue, then so too would all procedural and evidentiary rulings made by a tribunal, including, for instance, decisions on Redfern Schedules.[517] As such, the scope for the Committee's oversight is limited, such that "[a]*bsent a fundamental denial of due process, none of those issues are the proper subject of annulment review*".[518]

(ii) Serious Departure from a Fundamental Rule of Procedure

291. Glencore and Prodeco deny that Colombia's due process rights were ignored in the assessment of whether each of the Disputed Documents met the requirements for legal privilege set out in PO4. They assert that the submission of a sworn affidavit, as required by the Tribunal, is normal and sufficient under the applicable procedural rules.[519] They maintain that "[y]*ou may agree with that practice, or you may disagree … but it is not an annullable error*".[520]

LLC v. Republic of Peru (UNCITRAL), Procedural Order No. 3 (On Document Production) of 12 July 2018, para. 24; *Lone Pine Resources Inc v. Government of Canada* (UNCITRAL) Procedural Order on Witheld and Redacted Documentation of 24 February 2017, para. 5; *William Ralph Clayton et al v. Government of Canada* (PCA Case No. 2009-04), Procedural Order No. 12 of 2 May 2012, para. 21.

514 Tr. p. 137:25-138:5 (Mr Friedman).

515 Tr. p. 140:3-7 (Mr Friedman), relying on *Daimler*, note 324, above, at para. 187 (**RAL-16**).

516 C-Mem. on Ann., para. 97.

517 C-Mem. on Ann., para. 97.

518 C-Mem. on Ann., para. 97.

519 Rej. on Ann., para. 57; Tr. p. 104:13-18 (Mr Blackaby).

520 Tr. p. 138:22-24 (Mr Friedman).

292. Glencore and Prodeco submit further that the fact that the Tribunal refused to order the production of the Disputed SIC Documents was not a violation of Colombia's right to be heard. They argue that Colombia had no right to be heard on the content of privileged documents, and that Colombia was able to access all of the evidence to which it was entitled – namely the "*non-privileged documents*" – in accordance with the supplementary document production phase that the Tribunal ordered.[521]

293. According to Glencore and Prodeco, moreover, the fact that different national legal systems take different approaches to in-house counsel privilege demonstrates that any rule on the subject cannot be "*fundamental*".[522] A tribunal's resolution of discovery disputes and privilege determinations, according to the Respondents on Annulment, are far from the kind of minimal standards and fundamental rules of procedure that Article 52(1)(d) is intended to safeguard.[523] If it were otherwise, then every ruling on a privilege log could be subject to annulment committee review.[524] That is not, and cannot be, the proper function of review in the ICSID system. [525]

(iii) Failure to State Reasons

294. As to Colombia's assertion that the Tribunal failed to give reasons, Glencore and Prodeco assert that Colombia has failed to explain why detailed reasons are even required for "*routine procedural orders on which privilege rules may apply*".[526]

295. Moreover, they maintain that "[n]*o independent observer*" could look at PO4 and conclude that the Tribunal failed to state reasons.[527] Responding to the argument that the Tribunal misunderstood Colombia's legal authority cited in order to conclude that in-house legal counsel communications are privileged, Glencore and Prodeco submit that Colombia's disagreement is with the Tribunal's *finding*, rather than a failure to state reasons.[528]

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521 C-Mem. on Ann., para. 71.
522 C-Mem. on Ann., para. 72.
523 C-Mem. on Ann., para. 72.
524 C-Mem. on Ann., para. 72.
525 C-Mem. on Ann., para. 72.
526 Tr. p. 140:17-19 (Mr Friedman).
527 Tr. p. 140:12-16 (Mr Friedman).
528 C-Mem. on Ann., para. 126.

296. Finally, Glencore and Prodeco deny that there was any contradiction between the Tribunal's decision in PO2 and PO4. They contend that the decision to permit a new document production process did not "*impose a waiver of privilege*" over the documentation sought through that process.[529]

(c) Procedural Order No. 6

(i) Manifest Excess of Power

297. Glencore and Prodeco deny that the Tribunal manifestly exceeded its powers by its decision in PO6. In that decision, they submit, the Tribunal referred to the principles it had set out in PO2, in which the Tribunal had ruled on the applicable law and addressed various related issues.[530] In both procedural orders the Tribunal addressed Colombia's improper attempts to introduce the Disputed SIC Documents into the record.[531] The assertion that the Tribunal failed to apply the law, in excess of its powers, is as devoid of merit with regard to PO6 as it is with PO2.[532]

298. Responding to the assertion that the Tribunal failed to apply the applicable law governing privilege, Glencore and Prodeco reiterate their position that the Tribunal is given absolute discretion – within the bounds of due process – over issues of evidence.[533] In the result, they contend, the Tribunal's application of one privilege rule or another is not subject to annulment review.[534]

299. As to the assertion that the Tribunal misapplied Colombian law, Glencore and Prodeco respond that an error of law, even if shown to exist, is not a basis for annulment.[535]

(ii) Serious Departure from a Fundamental Rule of Procedure

300. Nor, according to Glencore and Prodeco, did the Tribunal seriously depart from a fundamental rule of procedure in PO6 by excluding the FGN Documents. By that decision,

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529 C-Mem. on Ann., para. 129.
530 C-Mem. on Ann., para. 100.
531 C-Mem. on Ann., para. 100.
532 C-Mem. on Ann., para. 100.
533 C-Mem. on Ann., para. 97.
534 C-Mem. on Ann., para. 97.
535 C-Mem. on Ann., para. 98.

Glencore and Prodeco reason, the Tribunal simply applied the standards that it had already set out in PO2.[536] They maintain that, in making its argument, Colombia "*does not even attempt to identify a rule of procedure from which the Tribunal departed, much less that the rule is fundamental and the departure serious*", and that, as the party seeking annulment, Colombia bears the burden of demonstrating that the Award must be annulled under Article 52(1)(d),[537] which it has failed to do.[538]

301. Finally, Glencore and Prodeco assert that the Tribunal did not need to cite legal authority in reaching routine procedural decisions on admissibility of evidence, but that in any event the Tribunal "*did apply legal principles*" by referring to the principles set out in its PO2.[539] Colombia's "*real*" complaint is that "*the Tribunal erred in the application of that law*", which is not a proper ground for annulment.[540]

(iii) Failure to State Reasons

302. Glencore and Prodeco argue that PO6 stated "*clear reasons*" for the decision to exclude the FGN Documents, which "*is all that Article 52(1)(e) requires*".[541] Responding to Colombia's submission that the Tribunal had failed to cite any legal authority in justification of its decision in PO6, Glencore and Prodeco refute the very notion that a tribunal is required cite legal authority when issuing evidentiary determinations, citing Arbitration Rule 34(1) in support of their position.[542]

B. THE ANALYSIS OF THE COMMITTEE

(1) General Observations

303. Colombia's complaint regarding the exclusion of the illegality documents concerns three separate, but closely related, steps taken by the Tribunal:

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536 C-Mem. on Ann., para. 75.

537 C-Mem. on Ann., para. 75, citing *Bernhard von Pezold*, note 495, above, at para. 238 (**RAL-20**).

538 C-Mem. on Ann., para. 75.

539 Tr. p. 141:9-13 (Mr Friedman).

540 Tr. p. 141:19-22 (Mr Friedman).

541 C-Mem. on Ann., para. 130.

542 C-Mem. on Ann., para. 130.

PO2, adopted on 4 November 2017, by which the Tribunal ruled that Colombia was not to introduce the disputed documents seized by the SIC into the record. Although the Tribunal ruled that Colombia was not entitled to submit these documents with its Counter-Memorial, it provided for a new round of document production which permitted Colombia to request the production of the excluded documents;

PO4, adopted on 24 April 2018, by which the Tribunal, holding that legal privilege extended to communications with both in-house lawyers and outside counsel and finding no evidence that Glencore or Prodeco had waived any legal or settlement privilege, rejected Colombia' request to introduce the disputed documents by way of document production, provided that counsel for Glencore and Prodeco submitted an affidavit confirming that each of the documents in respect of which privilege was claimed met all of the requirements identified by the Tribunal. The subsequent affidavit stated that all but two of the documents in respect of which privilege had been claimed met the requirements set out by the Tribunal; and

PO6, adopted on 31 July 2018, by which the Tribunal confirmed, and gave reasons for, its decision (originally given in a letter of 18 May 2018) rejecting Colombia's request to introduce the remaining disputed documents as evidence of criminal conduct.

304. Annulment is, of course, available only with regard to the Award itself; there is no scope under Article 52 of the ICSID Convention for an application to annul a Procedural Order or a Decision. Nevertheless, as the Committee has already explained (see para. 219, above), procedural decisions are, in effect, incorporated into the Award. If the Tribunal did indeed manifestly exceed its powers or commit a serious departure from a fundamental rule of procedure in one of its procedural decisions, or if it failed adequately to state the reasons for its decisions, then that would be a ground for annulment.

305. In the present case, the Tribunal recited at some length in the Award the earlier procedural decisions which it had taken (see para. 219, above). Before the Committee, Colombia was critical of the Tribunal's behaviour in this regard. Colombia argues that the space which the Tribunal devoted in the Award to what the Tribunal described as "*certain procedural incidents*" "*can only be explained as an ex post facto attempt to cure what the Tribunal*

had done, drafted not for the parties but for you, members of the Committee".[543] The Committee does not agree with this criticism. It was both logical and helpful for the Tribunal to incorporate into the Award an account of its decisions on the admission or exclusion of documents, particularly in view of the fact that Colombia had made clear in correspondence its view that those decisions amounted to errors which would render an award annullable under Article 52 of the ICSID Convention.[544] There is nothing in the relevant portions of the Award to suggest that the Tribunal "*massaged*" the reasons given in the Procedural Orders for its decisions regarding the Disputed Documents. On the contrary, the Award recites or summarises those decisions; any difference between these parts of the Award and the Procedural Orders is due to the fact that the Tribunal in its Award was able to add reference to the events which followed the adoption of those Orders.

306. Colombia maintains that, by denying it the opportunity to rely upon the Disputed Documents in the arbitration proceedings, the Tribunal committed a serious violation of a fundamental rule of procedure, manifestly exceeded its powers and failed to state reasons for its decision. These are separate grounds for annulment and Colombia maintains that, even if the Committee finds that there was no serious departure from a fundamental rule of procedure, it should still annul the Award if another ground of annulment is made out.[545] Nevertheless, the three grounds are closely related and the allegation that there was a serious departure from a fundamental rule of procedure lies at the heart of the case.

307. In addition, while it is necessary to begin by examining each Order separately, it is important not to lose sight of two overarching considerations. First, it is the combined effect of the three Orders in excluding documents on which Colombia wished to rely which is alleged to constitute the annullable error. Secondly, the context is an allegation by Colombia of corruption and illegality on the part of Glencore and Prodeco and their officials. That is an allegation of the utmost gravity which, had the Tribunal accepted it, would have led to a finding that the Tribunal lacked jurisdiction.

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543 Tr. p. 25:12-18 (Professor Silva Romero).

544 See, for example, Colombia's letter of 14 November 2017, note 124, above (**C-283/R-275**) expressing its views on PO2, note 67, above (**AAE-1**).

545 Tr. pp. 162:23-163:5 (Professor Silva Romero).

308. The Committee notes the Tribunal's comments about corruption being "*morally odious*" and emphasising the importance of a rigorous investigation of corruption allegations (see para. 171, above). The Committee agrees. A tribunal faced with allegations of corruption has a duty to investigate those allegations with rigour.

(2) Procedural Order No. 2: The Initial Decision to Exclude the Documents obtained by the SIC

309. As has already been summarized (see paras. 239-249, above), Colombia maintains that PO2 contains several serious irregularities which went on to taint the Award. There is considerable overlap between these different alleged irregularities; in substance, Colombia makes three main points:

(a) The Tribunal failed properly to identify the applicable law, since it should have applied international law and not Colombian law;[546]

(b) Its conclusions about Colombian law were based upon a misunderstanding of a principle which neither party had argued;[547]

(c) The Tribunal did not apply the applicable law, since it ignored the rules of international law, especially the rule of "*liberal admissibility of evidence*", and substituted its own *ex aequo et bono* concept of fairness. In doing so it manifestly exceeded its powers and was guilty of a serious departure from a fundamental rule of procedure since it denied Colombia the opportunity to present its case.[548]

310. The Committee does not accept that the Tribunal erred in its identification of the applicable law. It agrees with Colombia that the issue of admissibility of evidence is governed by international law but so did the Tribunal, which held that international law was the applicable law[549] and went on to rule that the disputed documents were inadmissible as a matter of international law.[550] The purely secondary role played by Colombian law is illustrated by the fact that the Tribunal devoted twenty-four paragraphs of PO2 to a

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546 Reply on Ann. para. 205.

547 Tr. pp. 58:6-8, 59:19-25 (Professor Silva Romero).

548 Tr. p. 17:1-5 (Professor Silva Romero).

549 PO2, note 67, above, at para. 52 (**AAE-1**).

550 PO2, note 67, above, at paras. 57-70 (**AAE-1**).

consideration of international law but only four to Colombian law and that its conclusion was merely that Colombian law "*would appear to confirm the conclusion reached by the Tribunal under international law*".[551] The fact that the Tribunal confirmed its conclusions by reference to Colombian law in no way alters the fact that it treated international law as the basis for its decision to exclude the disputed documents.

311. That makes it unnecessary to consider whether the Tribunal erred in its findings regarding Colombian law. The Committee sees no basis on which to conclude that the Tribunal made such an error but, even if it did, that error was confined to a law which the Tribunal considered only so as to confirm a finding which it had reached by reference to international law. In those circumstances, such an error would not come anywhere near constituting either a manifest excess of power or a serious departure from a fundamental rule of procedure. Nor would it affect the reasoning of the Tribunal in such a way as to amount to a failure to state reasons.

312. With regard to Colombia's argument that the Tribunal egregiously misapplied international law, the Committee recalls that the threshold is a high one and that an error by itself is not enough.[552] Colombia's criticism of the Tribunal for referring to Article 42(1) of the ICSID Convention – on the ground that this provision deals with the substantive law applicable to the resolution of the underlying dispute and not the law to be applied to questions of procedure – does not begin to cross that threshold. While Colombia may be correct about the scope of Article 42(1), the matter is open to argument either way. Moreover, even if the Tribunal was incorrect in its interpretation and application of the provision, it made no difference to the outcome, since the choice of applicable law by the Tribunal was no different from that suggested by both Parties.

313. Turning to Colombia's argument that the Tribunal substituted its own subjective judgment for the rules of international law, the Committee sees two strands to this argument. First, Colombia maintains that the Tribunal disregarded what it describes as the rule of liberal admissibility of evidence. Secondly, Colombia contends that, notwithstanding its references to the equality of arms, the Tribunal did not apply a rule of law but only a

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551 PO2, note 67, above, at para. 74 (**AAE-1**).

552 See para. 232, above.

subjective concept of fairness, thus deciding the question of admissibility on an *ex aequo et bono* basis, something it had no jurisdiction to do.

314. Colombia maintains that the technical rules on admissibility of evidence found in different systems of national law have no place in international law. It relies, *inter alia*, on the award of the Mexico-United States General Claims Commission in *Parker v. United Mexican States*, which includes the following statement:

> *For the future guidance of the respective Agents, the Commission announces that, however appropriate may be the technical rules of evidence obtaining in the jurisdiction of either the United States or Mexico as applied to the conduct of trials in their municipal courts, they have no place in regulating the admissibility of and in the weighing of evidence before this international tribunal. There are many reasons why such technical rules have no application here, among them being that this Commission is without power to summon witnesses or issue processes for the taking of depositions with which municipal tribunals are usually clothed. The Commission expressly decides that municipal restrictive rules of adjective law or of evidence cannot be here introduced and given effect by clothing them in such phrases as "universal principles of law", or "the general theory of law", and the like. On the contrary, the greatest liberality will obtain in the admission of evidence before this Commission with the view of discovering the whole truth with respect to each claim submitted.*[553]

315. It is certainly the case that international tribunals have considered themselves not to be bound by the restrictive rules on admissibility of evidence frequently found in municipal legal systems and have not considered themselves as under a duty to exclude evidence which would not be admissible in the legal systems of the States appearing before them. Nevertheless, the fact that international tribunals have rejected the application of restrictive rules taken from national law does not mean that there is a rule of international law that requires an international tribunal to admit all of the evidence which a party wishes to submit. The passage from *Parker*, quoted above is a rejection of the technical rules of national law (particularly in the common law countries) and a recognition that an international tribunal *may* admit a much wider range of evidence, not an espousal of a general rule that an international tribunal *must* admit whatever a party puts before it.

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[553] *William A. Parker (U.S.A.) v. United Mexican States*, General Claims Commission, Decision of 31 March 1926, Reports of International Arbitral Awards, Vol. IV, p. 39(**AAL-66**).

316. Even Colombia accepts that there are limits to the supposed rule of liberal admissibility, since it maintains that this rule does not require the admission of evidence which has been illegally obtained or which is covered by legal privilege (a concept which, according to Colombia, applies only to correspondence with external counsel and not with in-house lawyers).

317. The Committee considers that even with these qualifications, Colombia's argument goes too far. First, it ignores the broad discretion which the ICSID Convention and Arbitration Rules accord a tribunal. Thus, Article 44 of the Convention provides that:

> *Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.*

Rule 34, paragraph 1, of the ICSID Arbitration Rules provides that:

> *The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.*

318. An ICSID tribunal is thus entrusted with a broad discretion regarding the admissibility of evidence which a party wishes to put before it. The Committee agrees with Colombia that this discretion is not unlimited and that it is to be exercised reasonably but does not accept that it is limited to excluding illegally obtained evidence or evidence protected by legal privilege.

319. At the most basic level, the power of the Tribunal to control the procedure and timetable of the proceedings extends to a power to exclude late-filed evidence, evidence which has not been translated as required and evidence which in other respects does not comply with procedural directives given by the tribunal.

320. More importantly, an ICSID tribunal is required to ensure that fundamental rules of procedure are complied with. That duty includes ensuring the equality of arms. Indeed, it is well established that the fundamental rules of procedure, a serious departure from which

is a ground for annulment, include "*the principle of equal treatment of the parties*".[554] It follows that, in exercising its discretion under Arbitration Rule 34(1), a tribunal must have regard to whether the admission or exclusion of evidence would affect the equality of the parties.

321. In this respect a highly material factor in investor-State arbitration is that one party, the State, has powers of compulsion not possessed by the other party, the investor. That is one of the factors which distinguishes investor-State arbitration from both purely commercial arbitration and State-to-State arbitration.

322. This was a central issue before the Tribunal in the present case. Colombia wished to submit with its Counter-Memorial documents which had come into its possession as a result of the exercise by Colombia of State powers to compel Prodeco to surrender to the SIC documents taken from its servers by SIC officials. Glencore and Prodeco, on the other hand, had no such power to compel any Colombian agency to surrender to them documents held by the State.

323. The Tribunal recognized the inequality to which that situation gave rise and held that it was entitled to exclude the disputed documents in order to prevent such inequality.[555] It is important, however, to recall that the Tribunal did not rule out all possibility of the documents being admitted into the record. On the contrary, it provided for a further round of document production in which Colombia could seek production of the disputed documents and the question whether or not any of those documents were covered by legal or settlement privilege (which Colombia accepts would be a reason for their exclusion) could be argued and decided. In addition, it provided for the possibility of their introduction into the arbitration proceedings if they came to form part of the record in criminal proceedings before a Colombian court.[556]

324. The Committee sees no error, let alone an annullable error, in the way the Tribunal dealt with matters in PO2. Contrary to what Colombia suggests, there is no rigid rule of

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[554] *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 Annulment of 29 May 2019, para. 164 (**RAL-26**).

[555] PO2, note 67, above, at paras. 68-69 (**AAE-1**), quoted at para. 83, above.

[556] See paras. 88-94, above.

international law requiring a tribunal to admit any documents not covered by privilege or obtained by unlawful means. Instead, an ICSID tribunal has a discretion with regard to the admission of evidence and a duty, in the exercise of that discretion, to take into account the need to maintain equality between the parties, one of the most fundamental rules of due process. As the committee in *CEAC v. Montenegro* explained "[i]*t is, of course, a rule of the utmost importance that each party must be given an equal opportunity to put evidence before a tribunal*".[557] Colombia quoted this passage in support of its argument that the Tribunal had erred by excluding the evidence which Colombia had obtained through the SIC's use of coercive powers.[558] The Committee, however, sees the passage from *CEAC* as supporting the Tribunal's decision that, where only one party could obtain information by coercive means, to admit evidence thus obtained simply because that party was in possession of that evidence would be contrary to the principle of equality of arms.

325. The Committee considers that it was well within the bounds of the Tribunal's discretion for it to determine that documents obtained by Colombia by the use of compulsory powers (albeit wielded lawfully), for a different purpose and which did not form part of the record in criminal proceedings in Colombia, should not be admitted outside the normal document production process.

326. The references to fairness by the Tribunal in PO2 are not an indication of the abandonment of rules in favour of an *ex aequo et bono* approach. The Committee accepts that an ICSID tribunal is not entitled to decide a case (or procedural issues ancillary to a decision on the outcome of the case) on an *ex aequo et bono* basis unless the parties so agree.[559] What the Tribunal was doing, however, was not setting aside the rules of procedure but applying them. Fairness is central to the rule of equality of arms, so it is unsurprising to find the

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[557] *CEAC*, note 342, above, at para. 110 (**AAL-3**).

[558] Mem. on Ann., para. 147.

[559] In the words of the ICSID Secretariat Updated Background paper on Annulment of 5 May 2016 (**AAL-24**), para. 93:

> Ad hoc *Committees agree that a Tribunal's complete failure to apply the proper law or acting* ex aequo et bono *without agreement of the parties to do so as required by the ICSID Convention could constitute a manifest excess of powers.*

See also *MTD,* note 308, above, at para. 44 (**AAL-28**).

Tribunal referring to it, and an appreciation by the Tribunal of what is fair to each Party is an essential element of the exercise of the discretion vested in it by Arbitration Rule 34.

327. Three other matters require brief reference in passing. First, Colombia draws attention to the fact that the Tribunal, in paragraphs 16 to 18 and paragraph 19 of PO2, referred to the fact that the seizure of the disputed documents took place between the service on Colombia of the first and second notices of dispute. The Committee considers that this reference is simply part of the Tribunal's account of the factual background; there is no indication that it affected the Tribunal's decision and the Tribunal makes clear that the documents were not seized for the purpose of using them in possible future arbitration proceedings.[560]

328. Secondly, Colombia maintains that it would be ridiculous if one State agency could not seek assistance from another. That is doubtless true but the Tribunal's decision does not suggest otherwise. What the Tribunal dealt with in PO2 was not the propriety of the ANDJE seeking assistance from the SIC but the narrower question of whether documents coercively obtained by the SIC for one purpose could be used for the different purpose of advancing Colombia's case in the entirely separate arbitration proceedings. There is no suggestion that the ANDJE could not have sought and obtained other assistance from the SIC or any other State agency.

329. Lastly, Colombia suggests that the Tribunal wrongly reversed the burden of proof. The Committee does not agree. Under normal principles, it was for Colombia to prove that Glencore and Prodeco had acted unlawfully. PO2 does not change that position.[561] It was, of course, for Glencore and Prodeco to establish that any document was privileged but PO2 does not reverse the burden of proof on that either; the Tribunal deferred that question to the extended production process.

330. The Committee thus concludes that PO2 involved no departure – let alone a serious departure – from any fundamental rule of procedure and no excess of power on the part of the Tribunal.

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[560] PO2, note 67, above, at para. 62 (**AAE-1**).

[561] The Tribunal reiterated that point at paras. 668-670 of the Award.

331. Nor is the Committee persuaded by Colombia's argument that the Award should be annulled for failure to state reasons. The Tribunal's reasons for its decisions in PO2 are clearly stated and easy to follow. There is nothing incoherent or contradictory about them. They address in detail the question which the Tribunal was required to answer and are in no sense "*frivolous*" or irrelevant. Colombia may not find those reasons convincing but that is not a reason for annulment under Article 52(1)(e) of the ICSID Convention.

(3) Procedural Order No. 4 and its Aftermath: The Tribunal's Ruling on Privilege and its Application

332. Colombia criticises the Tribunal's decisions on Glencore and Prodeco's assertion of privilege on two grounds. First, it contends that the Tribunal was wrong to hold that privilege applied to communications between the companies and their in-house legal counsel and maintains that such privilege extends only to communications with independent external counsel. Secondly, Colombia argues that the Tribunal erred in permitting counsel for the companies to certify whether or not individual documents met the criteria for legal privilege and should have appointed a privilege inspector (referred to by Colombia as a "*conflict counsel*") to carry out this task.

(a) The Decision that Communications with In-House Counsel are to be Treated in the Same Way as Communications with External Counsel

333. With regard to the first argument, Colombia maintains that the Tribunal did not apply the applicable law. While Colombia accepts that the procedure before the Tribunal is governed by public international law, it argues that, on the issue of privilege, international law requires a *renvoi* to the law of the country within which the legal communication is situated. In Colombia's view, such a *renvoi* is required because the central question in determining whether or not a document is privileged is whether those who created or requested that document had a reasonable expectation of confidentiality. That expectation could only be derived from, and shaped by, the law of the State in which the document was created. In the present case, Prodeco's lawyers were Colombian nationals working in Colombia and all of the communications in question took place in Colombia. The Tribunal, it is said, therefore committed an annullable error when it decided to apply public international law rather than Colombian law.

334. The Committee can see the force of Colombia's argument that the expectations which underlie the concept of legal privilege are shaped by the relevant local law. In the end, however, it is not persuaded that the Tribunal committed an annullable error regarding the applicable law.

335. First, although Colombia presents what happened as a failure to apply the applicable law, the Committee does not accept that that is the case. The Tribunal rightly identified international law as the law governing the procedure before an ICSID tribunal. That was also the position of both Parties.[562] Colombia's complaint is that the Tribunal did not accept that international law contains a *renvoi* to national law on questions of legal privilege. Whether or not international law does indeed require such a *renvoi* is a question about the content of international law. Even if the Tribunal was wrong (which the Committee does not accept) to hold that international law did not require a *renvoi* to national law, it would have been guilty of a misinterpretation or misapplication of the applicable law, rather than a failure to apply that law at all.

336. Secondly, again assuming, *arguendo*, that the Tribunal erred in its decision about the supposed *renvoi*, the Committee does not consider that this error would have been so egregious as to be equivalent to a failure to apply the applicable law, and only an error on such a scale could be a basis for annulment (see para. 232, above). Colombia has adduced no authority in support of its contention that international law requires a *renvoi* to national law where legal privilege is being asserted. Indeed, the only authorities directly in point, the decisions in *Vito Gallo*[563] and *Reineccius*[564] support the contrary proposition.

337. Thirdly, the Committee does not accept that the Tribunal erred in deciding the question by reference to international law. Colombia's argument rests purely on three propositions: that legal privilege must depend upon the expectations of those concerned at the time that the relevant documents were created, that those expectations are determined by the national law of the country in which the relevant activities took place, and that international law

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[562] As indicated above (paras. 242-244), Colombia criticises PO2 on the ground that the Tribunal did not apply international law exclusively but also considered Colombian law.

[563] *Vito Gallo*, note 148, above, at para. 41 (**RL-129**). It should be noted, however, that the decision in that case was in part motivated by the provision of Article 1131(1) of the North American Free Trade Agreement ("NAFTA"), which is not applicable here.

[564] *Reineccius*, note 180, above.

must therefore, as a matter of logic defer to that national law in order to decide whether the documents in question are privileged.

338. The first proposition can be accepted up to a point; legal privilege is indeed closely bound up with the expectations of those who seek or give legal advice, although it should also be recognized that legal privilege serves community interests which may be distinct from those of the client and lawyer.

339. The second proposition is less straightforward. It assumes that the relevant activities all take place in one country. Especially given the nature of international investment, that may not be the case. A manager from State A responsible for an investment in State B may well take advice by email from a lawyer (whether in-house or external) in State C. It is true that that was not what happened in the present case, where everything that was done took place in Colombia and the lawyers were qualified in, and regulated by the law of, Colombia. However, a search for the approach taken by international law to questions of privilege cannot be wholly case-specific.

340. The really problematic proposition, however, is the third one. To assume that international law defers to national law not only overlooks the limitations on the first two propositions, it also ignores the essentially international character of ICSID arbitration and the fact that an ICSID tribunal must ensure equality of arms in litigation between inherently unequal parties – the State and the investor. The Committee has already considered the significance of the fact that the State has available to it coercive powers which the investor lacks (see paras. 320-330, above). There is also the consideration that national law may treat issues of confidentiality differently when considering the relationship between the State and its legal advisers, where issues of official secrecy may be material, and communications between a private party and its counsel.[565]

341. The Committee is not called upon to provide answers to these questions. It is enough to note that they suggest that it is by no means self-evident that international law should, or does, require a *renvoi* to national law on issues of privilege. In these circumstances, and given that the only authorities produced which address the subject hold that privilege is

[565] See, e.g., *Vito Gallo*, note 148, above (**RL-129**), where the State's claim was based on concepts of Cabinet confidence under national law.

determined by international law with no requirement of a *renvoi*, the Committee considers that the decision of the Tribunal that international law did not require it to apply Colombian law cannot be regarded as an egregious misinterpretation or misapplication of the applicable law.

342. In passing, it should be noted that the Tribunal reinforced its decision by reference to Colombian law.[566] Colombia criticises the analysis of Colombian law as based upon a misreading of the one authority referred to by the Tribunal. The Committee considers that this authority (an interview with two Colombian lawyers) is equivocal. It cannot, therefore, conclude that the Tribunal was guilty of an obvious error. More importantly, even if it was so guilty, that error related only to a law to which the Tribunal referred to confirm the decision which it had already arrived at by the application of international law.

343. Colombia also advances a separate basis for challenging the Tribunal's decision. Accepting, *arguendo*, that the question whether privilege attached to communications with in-house counsel falls to be determined by reference to international law, Colombia argues that the Tribunal erred in finding that communications with in-house counsel are privileged under international law. Colombia relies on the fact that the question is treated so differently by different national legal systems. In this context, Colombia refers in particular to the rejection by the Court of Justice of the European Union of the concept that communications with in-house counsel are entitled to privilege.[567]

344. The Committee accepts that practice regarding whether privilege extends to communications with in-house counsel varies considerably between States. The question before the Committee, however, is not whether there is an international law rule which provides for privilege in those circumstances but whether the Tribunal's conclusion that such a rule exists was one which amounted to so gross a misapplication or misinterpretation of international law that it should be regarded as an annullable failure to apply international law at all.

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566 PO4, note 72, above, at paras. 57-63 (**AAE-9**).

567 *Akzo*, note 425, above, at para. 74 (**RL-116**).

345. In that respect, the Committee recalls that the *Vito Gallo* tribunal[568] drew no distinction between communications with in-house lawyers and those with external counsel and that the *Reineccius* ruling[569] expressly stated that privilege must be applied to both types of communication. The Tribunal's ruling in PO4 cannot, therefore be considered unprecedented.

346. Moreover, the Tribunal, recognizing that the matter was not wholly settled, gave a coherent and persuasive explanation for its decision when it held that to treat communications with in-house counsel differently would be to "*imply an unwarranted discrimination towards parties that choose to be represented in investment arbitration, or that seek advice on matters that may become relevant in investment arbitration, by in-house counsel*".[570] This explanation has a particular resonance in the context of investor-State arbitration because States regularly take advice from their own government lawyers (even if they later choose, as here, to be represented in part by external counsel). If government lawyers, as in-house counsel, are excluded from the ambit of legal privilege, then the respondent State may end up being treated markedly less favourably than the investor.

347. In these circumstances, the Committee concludes that the Tribunal's decision in PO4 that privilege extended to communications with counsel irrespective of whether the counsel in question were in-house or external cannot be regarded as an egregious misinterpretation or misapplication of international law. The application to annul the award on this ground for manifest excess of power is therefore rejected.

348. Nor can the Committee accept Colombia's argument that the Tribunal was guilty of a serious departure from a fundamental rule of procedure. The fundamental rule of procedure on which Colombia relies is the right to be heard and, in particular, the aspect of that right which permits a party to submit evidence in support of its case. But, as the

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568 *Vito Gallo,* note 148, above, para. 47 (**RL-129**). Colombia draws attention to the fact that two of the members of the Tribunal in the present case (the President and Mr Thomas) were also members of the *Vito Gallo* tribunal. The Committee does not attach any significance to that fact. Mr Thomas was appointed by Colombia and the President by agreement of the Parties. Moreover, neither Party has shown any hesitation in citing before the Tribunal cases in which members of the Tribunal were involved or in citing before the Committee cases in which members of the Committee were involved.

569 *Reineccius*, note 180, above.

570 PO4, note 72, above, at para. 55 (**AAE-9**).

Committee has already held, the right to submit evidence is not unqualified. Both Parties recognize that it excludes evidence which is privileged. Colombia's argument is thus no more than a restatement of its argument on manifest excess of power. If, as the Committee has held, the Tribunal did not exceed its powers in determining that privilege under international law extends to communications with in-house counsel, then the application of that ruling cannot, in itself, be a departure from the right to be heard.

349. Finally, the Committee concludes that the Tribunal did not fail to state the reasons for its decision. Its decision is explained in a coherent way and without contradiction. The Committee will, however, consider below one aspect of this argument by Colombia, namely that the Tribunal declined to address each of the 159 documents separately.[571] That argument goes to the application of the decision in PO4 rather than to the issue of principle decided in that PO.

(b) The Tribunal's Decision not to Admit the Annex A Documents

350. In PO4 the Tribunal set out the conditions which it considered that a document had to meet in order to qualify for legal privilege. Those conditions were:

> - *The document has to be drafted by a lawyer acting in his or her capacity as lawyer;*
>
> - *A solicitor-client relationship based on trust must exist as between the lawyer (in-house or external legal advisor) and the client;*
>
> - *The document has to be elaborated for the purpose of obtaining or giving legal advice;*
>
> - *The lawyer and the client, when giving and obtaining legal advice, must have acted with the expectation that the advice would be kept confidential in a contentious situation.*[572]

351. Colombia does not contest these criteria. It contends, however, that the Tribunal committed an annullable error when it directed that the lead counsel for Glencore and Prodeco should submit an affidavit indicating which of the documents in respect of which

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[571] Mem. on Ann., para. 321.

[572] PO4, note 72, above, at para. 54 (**AAE-9**), quoting *Vito Gallo*, note 148, above, at para. 47 (**RL-129**).

they claimed privilege met those criteria,[573] and when the Tribunal subsequently decided, in respect of the Annex A documents, that:

> *It falls within the responsibility of Claimants' counsel to determine which documents are responsive to Respondent's petitions (as narrowed down by the Tribunal) and which are subject to privilege. The Tribunal has no reason to second guess these decisions.*[574]

352. Colombia complains that no reasons were given for this decision. While the letter of 18 May 2018 is brief, that is hardly surprising in view of the urgency of the matter. The correspondence between the Parties on this issue had concluded only on the previous day and the hearing was due to start in ten days' time.[575] The letter ended by stating that the Tribunal would give its reasons at a later date. This it did in PO6, paragraphs 108-114. While the reasons given there are succinct, the Committee considers that they are sufficient to meet the requirements of Article 52(1)(e) of the ICSID Convention in that they enable the reader to follow the Tribunal and understand the conclusion at which it arrived.

353. Colombia's more substantial complaints are that the Tribunal committed a serious departure from a fundamental rule of procedure and manifestly exceeded its powers by declining to "*second guess*" the decisions of Glencore and Prodeco's counsel regarding whether the Annex A documents were responsive and whether they were privileged.

354. Colombia emphasizes three features of the situation which confronted the Tribunal and which it argues were different from those which normally exist when a dispute regarding privilege and responsiveness arises. First, it points to the fact that the documents were already in the possession of Colombia and that there was, therefore, no more reason for the Tribunal to accept Glencore and Prodeco's view than to accept Colombia's. Secondly, with regard to whether the documents sought were responsive to the requests made, Colombia argues that, having already seen the documents in question, it had formulated its requests specifically with a view to obtaining production of those documents, so that there could be no justification for holding that they were not responsive. Finally, the dispute regarding the incorporation of the documents into the record of the proceedings arose in

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573 PO4, note 72, above, at para. 95 (**AAE-9**).

574 Letter from the Tribunal, 18 May 2018, reproduced at Award, para. 130.

575 See paras. 140 to 141, above.

the context of allegations of corruption and, according to Colombia, it was therefore necessary that the claims that documents were privileged or not responsive be subjected to scrutiny. According to Colombia, the Tribunal had the power to conduct that scrutiny by ordering that the claims be reviewed by a privilege inspector or decided by the Tribunal itself and it should not have declined to "*second guess*" the views of Glencore and Prodeco's counsel. Its failure to use that power was, Colombia maintains, both a manifest excess of power and a serious departure from a fundamental rule of procedure.

355. The Committee considers that it is useful to recall the situation which faced the Tribunal in May 2018, when this issue was presented to it. First, the hearings were due to start on 28 May 2018. The Tribunal had made clear that it did not wish to postpone them[576] and Colombia had stated that it would oppose any request for a postponement.[577] In the correspondence of May 2018 neither Party suggested that the hearing be postponed. Secondly, of the 24 documents listed in Annex A (all of which were among the Disputed SIC Documents which Colombia had sought to introduce into the record with its original Counter-Memorial), one had already been disclosed, legal privilege had been asserted in respect of six, while the remainder were said by Glencore and Prodeco not to be responsive to the requests of Colombia "*as narrowed by the Tribunal in Procedural Order No. 3*".

356. Annex A, in the form in which it was attached to Colombia's letter to the Tribunal of 11 May 2018, resembled a Redfern schedule. Each row began by identifying a document by reference to the number it had been given when attached to the original text of the Counter-Memorial. The next column identified the request (in Colombia's document production request which had been considered by the Tribunal in its PO3) to which Colombia claimed the document was responsive. The schedule then identified the date of the document, the person by whom it was sent and the recipients.[578] In the following columns, Colombia indicated why it did not consider the document in question was covered by either legal or settlement privilege. In a final column, Glencore and Prodeco explained why they considered the document to be privileged (in the case of the six documents in respect of

[576] Tribunal's email of 6 March 2018, note 153, above (**AAE-26**); see para. 102, above.

[577] Colombia's letter of 9 March 2018, note 154, above (**R-273**); see para. 106, above.

[578] Except for certain spreadsheets which had been attached to an expert report submitted by Colombia.

which privilege was asserted) or stated (in the case of the remaining documents) that they were not responsive.

357. The Committee considers that different issues arise with regard to the documents said by Glencore and Prodeco to be non-responsive and those for which privilege was claimed. The Committee will therefore examine the two categories separately, beginning with the documents for which privilege was asserted. Although Annex A refers to both legal privilege and settlement privilege, Glencore and Prodeco stated (in the final column of the schedule) that settlement privilege was invoked only with regard to what was then Document R-54. That document was later disclosed at the hearing (see para. 152, above), where it entered the record as Document R-100.

358. It is not unusual for a tribunal to accept a certificate from the leading counsel of a party that a particular document is subject to legal privilege (although the Committee appreciates that this practice involves assumptions regarding supervision by a national court of local ethical duties which is not always present in international commercial or investor-state arbitration). While tribunals frequently refer such disputes to a privilege inspector, there is no rule of procedure, let alone a fundamental one, which requires that, whenever there is a dispute concerning such issues, a tribunal should appoint a privilege inspector or conduct its own investigation into the responsiveness of a particular document.

359. Nor does the fact that Colombia had already seen the documents by itself persuade the Committee that the Tribunal should have acted in a different manner. The whole point of the decision in PO2 (which the Committee has found involved no annullable error) was that Colombia, having obtained the Disputed SIC Documents through the intervention of a State agency in the context of an entirely different investigation, should not benefit from that fact in the context of the arbitration proceedings but instead seek the production of the documents through the normal means. To hold that the "*normal means*" should be set aside and a different procedure adopted merely because Colombia had seen the documents would be completely counter to the principle underlying that decision.

360. Nevertheless, the fact that the documents were sought for the purpose of establishing a case of corruption on the part of the investor puts the dispute regarding privilege in a different

light. As both the Tribunal[579] and the Committee[580] have made clear, "*corruption is morally odious*" and a tribunal has a duty to investigate claims of corruption with rigour. It is arguable that this duty requires that the use of the certification procedure, though acceptable in other circumstances, should give way to a more searching inquiry, either involving the use of a privilege inspector or the scrutiny of the documents by the tribunal itself.

361. In the present case, a further cause for concern is that the one document for which privilege was claimed that was later disclosed, namely what became Document R-100, does not appear to meet the requirements for legal privilege as those were set out in PO4.

362. R-100 is a chain of emails (see paras. 184 to 185, above). Most of the emails were from Ms Natalia Anaya, one of Prodeco's in-house counsel, to Mr Nagle and other members of Prodeco's senior management. They report on meetings which Ms Anaya had with various officials of Ingeominas. There are very brief replies from Mr Nagle. Ms Anaya does not give legal advice, nor does Mr Nagle request it. In the last email in the chain, dated 15 May 2009, Ms Anaya reports a conversation with Carlos Gustavo Arrieta (Prodeco's external counsel) in the following terms:

> *I asked Carlos Gustavo to come with me to the meeting on Monday, but he is busy all day. Anyhow, he told me that he will make all efforts to try to change some meetings in order to go to Ingeominas, but he will confirm on Monday. He said that he believes that more than legal pressure, it is required political pressure through Claudia Jimenez or Mateo Restrepo.*[581]

363. In their comments in Annex A, Glencore and Prodeco stated that "*Ms Anaya also conveys to management the advice of Prodeco's external counsel, Carlos Gustavo Arrieta, on the issues relating to royalties and caducity addressed in the email chain*". The only part of the email chain in which the views of Mr Arrieta are discussed is the passage quoted in the preceding paragraph. The Committee does not consider that that passage conveys legal advice, nor is there any part of the email chain which seeks legal advice. Nor is the claim to settlement privilege in respect of R-100 easy to accept, as the email chain records

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579 Award, paras. 663-664; see also para. 171, above.

580 See para. 308, above.

581 Email from Natalia Anaya to Gary Nagle and others, 15 May 2009, p. 3 (**R-100**).

positions taken by Ingeominas and does not set out confidential details about the negotiating position of Glencore and Prodeco.

364. In these circumstances, it is perhaps surprising that the Tribunal did not subject to closer scrutiny the claim to legal privilege for the other five Annex A documents in respect of which that privilege was claimed. Whether the failure to do so amounted to a departure from a fundamental rule of procedure, however, is more debatable. In the end, the Committee considers that it is unnecessary to take a decision on that question, because it has concluded that, even if there was such a departure, it was not a serious one because Colombia has not shown that the exclusion of those five documents could have affected the outcome of the proceedings.

365. There are two reasons for that conclusion. First, the allegation that Glencore and Prodeco obtained Mr Ballesteros's agreement to the Eighth Amendment by corruption turns, as the President of the Tribunal pointed out at the hearing, on the establishment of a link between the payment to Mr Maldonado and Mr Garcia for the 3-hectare concession and the acts of Mr Ballesteros. When this issue was discussed at the hearing, counsel for Colombia, who had seen all of the documents for which privilege was claimed, only put forward R-100 as proof of that link. The transcript records him as accepting that this was the only document which went to that issue (see para. 154, above). Document R-100 was then admitted, put to Mr Nagle in cross-examination, and considered at length by the Tribunal (see paras. 184 to 185, above). The Tribunal's conclusion was that it did not establish that there had been corruption. Since Document R-100 was the document which Colombia considered was the evidence of the link between the 3-hectare payment and the decision by Mr Ballesteros, there is no basis on which the Committee could conclude that this link could have been established by the other five Annex A documents for which Glencore and Prodeco claimed legal privilege.

366. Colombia complains that the Tribunal failed properly to analyse R-100 and the testimony of Mr Nagle. However, a tribunal's assessment of the evidence can seldom, if ever, justify annulment of an award. The Tribunal considered the documentary evidence in detail and it had the benefit (which the Committee has not had) of seeing and hearing Mr Nagle's testimony under cross-examination. The Committee does not accept that the Tribunal erred

in its assessment of that evidence but, even if it had done so, the error would not have been ground for annulment.

367. Secondly, the Tribunal concluded (see para. 183, above) that the fact that there had been no prosecution of Prodeco or any of its officials and that no formal criminal investigation into them had even been opened confirmed its finding that corruption had not been established. That is particularly important, because the body responsible for opening such a formal investigation, the FGN, had been in possession of all the Disputed SIC Documents since September 2017. This point was put to counsel for Colombia at the hearing and his reply was that "[a]*n investigation takes time*".[582] The Committee has sympathy with this observation. Nevertheless the fact remains that a public prosecutor, possessed of documents which Colombia maintains constitute clear evidence of corruption, had not even opened a formal investigation into the company accused of that corruption eight months after it came into possession of those documents.

368. The importance of this consideration is reinforced by the letter which Colombia addressed to the Committee on 9 September 2020. In that letter, Colombia informed the Committee that "*pursuant to the criminal complaint filed by the ANDJE in September 2017 … concerning the events surrounding the execution of the Eighth Amendment to the Mining Contract between Ingeominas and Prodeco*", the FGN had "*formally indicted two former Ingeominas civil servants, Mr. Mario Ballesteros and Mr. Fernando Ceballos Arrollave, with the charge of undue interest in the execution of a contract*". That indictment was made in August 2020, i.e. almost three years after the ANDJE had given the FGN the Disputed SIC Documents. There had been no prosecution or even formal investigation of Prodeco or its officials and Colombia accepts that the charges against Mr Ballesteros and Mr Ceballos are broader than allegations relating to the 3-hectare contract.[583]

369. Like the Tribunal, the Committee recognizes that the standard of proof in a criminal case is different from that in an international arbitration. Nevertheless, the absence of any action against Prodeco or any of its officials (past or present) based upon the Disputed SIC

[582] Tribunal Tr., Day 2, p. 364:17-18 (Professor Silva Romero).

[583] Tr. p. 176:16-19 (Professor Silva Romero).

Documents suggests that those documents are not the evidence of corruption on the part of Prodeco which Colombia contends.

370. Moreover, these two considerations have to be evaluated in the context of the Tribunal's findings regarding the repeated complaints by Prodeco about the grant of the 3-hectare concession to Messrs Maldonado and García, the fact that the payment was made openly to them after deduction of tax and declared by Prodeco and the statement by the Minister which suggested a different explanation of the 3-hectare transaction. In light of all of these factors, the Committee concludes that it has not been established that, had the Tribunal handled the question of privilege differently, the outcome of the case could have been different.

371. One further matter needs brief attention. Before the Committee, Colombia raises the argument that privilege does not apply where a party communicates with its lawyer with regard to a future criminal act in which the lawyer is complicit.[584] Colombia suggests that this was an additional reason why the Tribunal should have rejected, or at least scrutinised more carefully, the claim of privilege. However, the argument does not appear to have been raised before the Tribunal and does not feature in the relevant columns of Annex A. It cannot therefore constitute a basis on which the Award could be annulled.

372. The Committee thus concludes that the Tribunal's handling of the privilege claim in respect of the Annex A documents did not entail a serious departure from a fundamental rule of procedure. Since the Tribunal had the power to regulate the procedure before it and the admissibility of evidence, in the absence of such a serious departure, the Tribunal cannot be said manifestly to have exceeded its powers.

373. Turning to the question of whether the Tribunal should have taken a different approach to the issue of responsiveness, the Committee notes that it is normally left to each party in an arbitration to determine which documents in its possession are or are not responsive to a request for production. It is rare for such decisions to be subjected to the scrutiny of the tribunal.

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[584] Reply on Ann., para. 35, note 46, citing the decision of the United States Supreme Court in *United States v. Zoilin*, 491 U.S. 554, 21 June 1989 (**AAL-101**). See also Tr. pp. 170-172 (Mr García Represa).

374. In the present case, Annex A contained very little on the issue of responsiveness. In each instance, Colombia merely asserted that the document was responsive and indicated the request to which it was said to be responsive as those requests had been set out during the document production phase which led up to PO3. Those requests had, however, been narrowed down by the Tribunal in PO3, so the issue was whether they were responsive to the requests as thus refined. Colombia maintained that:

> *When preparing its request for production of documents, Colombia was already aware of the existence of categories of documents (such as the Disputed Documents) that were material and relevant for its case and, thus, framed its requests in such a manner as to cover such Documents.*[585]

As it has already said, with regard to the documents for which privilege was claimed (see para. 359, above), to attach decisive weight to the fact that the Annex A Documents had already been seen by Colombia would defeat the purpose of PO2.

375. Moreover, Colombia made no attempt to show how the documents which it sought fell within the scope of the requests as they had been narrowed by the Tribunal in PO3. For example, in PO3 the Tribunal narrowed Request No. 12 to:

> *Documents prepared and/or reviewed by Management between 23/03/2008 and 25/01/2010 for use in discussions with Ingeominas in support of Prodeco's proposals to amend the Mining Contract, including calculations, scenarios, or economic models.*[586]

Yet Colombia's description of documents R-121 and R-122, which it maintained were responsive to Request No. 12, spoke of them as accounts by Ms Anaya of conversations with Mr Espinosa (an adviser to Ingeominas).

376. In these circumstances, the Committee considers entirely understandable the Tribunal's decision that:

> *Claimants' counsel has made its assessment of the responsiveness ... of the Excluded Documents. Respondent has not provided sufficient grounds to make the Tribunal doubt the correctness or good faith of that assessment.*[587]

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585 Colombia's letter of 11 May 2018, note 193, above, at p. 4 (**AAE-12**).

586 Tribunal's Procedural Order No. 3, 4 January 2018, Annex B, p. 28 (**AAE-36**).

587 PO6, note 73, above, at para. 113 (**AAE-10**).

377. In addition, the considerations set out in paras. 365-370, above, are also applicable here. The Committee thus rejects the arguments that the Tribunal committed a serious departure from a fundamental rule of procedure or a manifest excess of power in its approach to the responsiveness question.

(4) Procedural Order No. 6: The Exclusion of the FGN Documents

378. The Tribunal's letter of 18 May 2018 and PO6 also rejected Colombia's request to introduce into the record the documents held by the FGN which had been "*filtered*" by Mr Enciso. These FGN Documents were all taken from the Disputed SIC Documents and overlapped with the Annex A Documents but did not include everything which appeared in Annex A while including documents which were not part of Annex A. The Tribunal declined Colombia's request on the ground that the FGN Documents had not been marshalled in the course of investigative or prosecutorial activities as required by PO2.

379. The Tribunal distinguished between several different phases of criminal proceedings under Colombian law: the initial *Indagación* in which the FGN investigates the facts which have come to its attention by a complaint; the *Investigación*, which begins with a formal *imputación* or indictment, and the *Juicio* of three successive hearings leading to a final judgment.[588] The Tribunal held that:

> *... the criminal proceeding launched by ANDJE's Complaint is still in the preliminary stage, and the FGN Documents are not part of a formal* acusación *in a Colombian criminal court proceeding. The Complaint has – as far as the Tribunal is aware – not passed the First Phase,* Indagación*, and has not resulted in any indictment, which would eventually trigger the Second Phase:* Investigación *...*[589]

380. Colombia objects that the requirement that the FGN's inquiry must have proceeded to a later stage had not been mentioned in PO2. However, in PO2 the Tribunal made clear that it had not yet been fully briefed on the issue of incorporation into the record of documents marshalled in a criminal investigation. The Committee considers that it was clear that the Tribunal intended to reach a decision only after full briefing.

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588 PO6, note 73, above, at paras. 53-55 (**AAE-10**).

589 PO6, note 73, above, at para. 104 (**AAE-10**).

381. Colombia also emphasizes the status of the FGN as an independent prosecuting authority under Colombian law. The Committee accepts that the FGN has that status and does not see anything in the Award or PO6 which is inconsistent with an acceptance of that status. However, the fact that the FGN is an independent authority does not alter the fact that its inquiries had not progressed beyond the most preliminary stage.

382. The Committee can see nothing which begins to approach the level of annullable error in the Tribunal's handling of the FGN Documents. It heard argument from both Parties and gave full reasons for its decision. Its conclusion that, since the FGN proceedings had not progressed beyond the receipt by the FGN of the complaint from the ANDJE which was accompanied by the Disputed SIC Documents, to admit the Documents would effectively circumvent PO2 appears to the Committee entirely reasonable. The Committee has already held that the decision of the Tribunal in PO2 not to admit documents which the ANDJE possessed simply because they had been obtained by the SIC for a different purpose through the use of State powers was neither a serious departure from a fundamental rule of procedure nor a manifest excess of power. It is therefore axiomatic that declining to admit the same documents merely on the ground that the ANDJE had passed them to the FGN is likewise perfectly defensible.

(5) The Cumulative Effect of the Tribunal's Document Decisions

383. Before reaching a definitive conclusion on the documents issue, the Committee considers that it is necessary to stand back and look at the overall picture of the Tribunal's handling of the dispute over whether documents initially seized by the SIC should have been admitted into the record.

384. Since this is an annulment proceeding, the Committee cannot substitute its own discretion for that of the Tribunal. All the Committee has to – or can – decide is whether:

(1) The Tribunal manifestly exceeded its powers by excluding the documents;

(2) The Tribunal committed a serious departure from a fundamental rule of procedure by doing so; and

(3) The Tribunal failed adequately to state reasons for its decisions.

385. The third question – whether the Tribunal failed adequately to state its reasons – is easy to answer. The Committee finds that, at each stage in the proceedings, the Tribunal gave reasons for its decision which enabled the reader to understand what was being decided and which were not contradictory, incoherent or frivolous.

386. The first and second questions are linked in that, on the facts of this case, unless the Tribunal was guilty of a serious departure from a fundamental rule of procedure, its conduct would not have been a manifest excess of power. The Committee considers that the Tribunal's rulings on general issues of law – namely, whether a respondent is entitled to rely on documents obtained for another purpose by the use of State coercive powers, whether communications with in-house counsel are covered by legal privilege, and whether documents should been admitted on the basis that they had been given to an independent prosecutor – contravene no fundamental rule of procedure and involve no excess of power.

387. The only issue which remains, therefore, is whether the way in which the Tribunal gave effect to those decisions, which resulted in the exclusion from the record of most of the Disputed SIC Documents, entailed a serious departure from a fundamental rule of procedure. The Committee has concluded that it did not do so. While Colombia complains that its right of defence was seriously handicapped by the exclusion which deprived it of the evidence which would have proved the existence of corruption on the part of Glencore and Prodeco, the fact remains that the document on which Colombia placed greatest emphasis was admitted into the record and failed to convince the Tribunal of the truth of Colombia's allegations. In addition, the remaining documents have, after a lapse of three years, led to no proceedings against Glencore, Prodeco or any of their officials.

388. Accordingly, the Committee dismisses the application for annulment insofar as it is based on the decisions to exclude documents from the record.

VII. THE ILLEGALITY ISSUE

A. THE POSITIONS OF THE PARTIES

(1) Colombia

389. As an alternative and additional line of argument, Colombia submits that the Award should be annulled on the basis of the illegality of the alleged investment. It raises this line of argument as applicable even if the Tribunal's decisions in PO2, PO4 and PO6 are assumed to have been irreproachable.[590] Indeed, Colombia submits that the evidence which *was* ultimately included in the record of the case – if understood "*in accordance with the necessary inferences to be drawn*" – was sufficient to compel the conclusion that Glencore and Prodeco's investment was tainted by illegalities and that the Tribunal accordingly lacked jurisdiction over the dispute.[591] Instead, the Tribunal reached the opposite conclusion in a decision which Colombia argues gives rise to two grounds for annulment: on the one hand, the Tribunal manifestly exceeded its power by exercising jurisdiction in circumstances where it had none; and, on the other hand, the Tribunal's findings of fact were so egregious and irrational as to constitute a failure to state reasons and a manifest excess of power.[592]

390. Colombia interprets Articles 2 and 4(1) of the BIT as circumscribing its consent to arbitrate so as to exclude any investment not made in accordance with the laws and regulations of Colombia.[593] Colombia argues that this interpretation, whether or not based on the explicit language of the BIT, is consistent with the general consensus in international law that tribunals "*cannot exercise their jurisdiction over illegal, illicit, or improperly acquired investments*".[594] Colombia therefore maintains that a tribunal's exercise of jurisdiction *ratione materiae* over an illegally obtained investment would constitute an obvious excess

590 Mem. on Ann., para. 345.

591 Mem. on Ann., para. 348.

592 Tr. p. 71:16-21 (Professor Silva Romero); Mem. on Ann., para. 349.

593 Mem. on Ann., para. 352.

594 Mem. on Ann., para. 353.

of its powers.[595] In addition, in circumstances where a tribunal's excess of jurisdiction is manifest, an annullable error would be established.[596]

391. For these reasons Colombia asserts that the Committee must conduct a "*searching analysis*" of whether or not Glencore and Prodeco's investment was tainted by illegality, thereby depriving the Tribunal of jurisdiction.[597] Moreover, Colombia adds, such an analysis must lead to the conclusion that the alleged investment was illegally obtained.[598] On the one hand, Colombia maintains that the evidence on the record was sufficient for the Tribunal to have drawn the "*appropriate inference*" that the Eighth Amendment was tainted by corruption.[599] On the other hand, Colombia argues that the evidence shows that the Eighth Amendment was secured on the basis of fraudulent misrepresentations made by Prodeco.[600]

392. In this context, Colombia refers to the "*highly suspicious*" facts surrounding the sale of the 3ha plot. Colombia asserts that the inflated price of the land, the timing of its sale and the identity of the parties to that contract were an "*obvious* indicium *of corruption*".[601] In addition, Colombia claims that the ultimate production of exhibit R-100 at the oral hearing placed a "*veritable smoking gun*" before the Tribunal.[602] Colombia refers to that document to show that Prodeco's CEO had "*explained – even bragged*" that Mr Ballesteros' favourable treatment of Prodeco had been obtained as a result of the 3ha transaction.[603] Colombia does not accept the alternative explanation that Mr Nagle offered for the content of his email, submitting that his testimony to this effect was "*preposterous*" and maintains that the contents of the email "*cannot be explained without raising further questions and doubts*" as to the legality of the Eighth Amendment. [604]

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595 Mem. on Ann., para. 354.

596 Mem. on Ann., para. 354.

597 Mem. on Ann., para. 355.

598 Mem. on Ann., para. 355.

599 Mem. on Ann., para. 358.

600 Mem. on Ann., para. 379; Reply on Ann., para. 293.

601 Mem. on Ann., paras. 357-600.

602 Mem. on Ann., paras. 358-359.

603 Mem. on Ann., para. 359.

604 Tr. pp. 72:22-73:2 (Professor Silva Romero).

393. In the face of this evidence, and in keeping with the established investment law approach to cases where at least a *prima facie* case for corruption is established, Colombia maintains that the Tribunal ought to have dispensed with the burden of proof on Colombia to establish its corruption allegations. It not only declined to do so in the circumstances of this case, Colombia complains, but also refused to draw any adverse inference against Glencore and Prodeco as a result of their failure to produce the Disputed SIC Documents despite Colombia's "*herculean efforts*" to marshal them into the record.[605] Colombia claims that the Tribunal thereby erected an "*insurmountable presumption against*" the presence of corruption, ultimately resulting in its erroneous exercise of jurisdiction over Glencore and Prodeco's illegal investment.[606]

394. Colombia also points to Prodeco's internal reports as evidence that Glencore and Prodeco deliberately, and in bad faith, withheld geological, technical, and pricing information from Ingeominas and manipulated the data that it relied on to justify the "*purported economic necessity*" of the Eighth Amendment.[607] These documents, according to Colombia, prove that Prodeco's true assessment was that the Eighth Amendment was not in fact necessary for an increase in production at the Calenturitas Mine to have been feasible.[608] That assessment, Colombia argues, stands in "*stark contrast*" to what Prodeco told Ingeominas during their negotiations toward the conclusion of the Eighth Amendment.[609] Colombia adds that Glencore and Prodeco have yet to address these inconsistencies, and have not explained "*how and why*" Colombia would have agreed to the Eighth Amendment without having been convinced of the economic need for it.[610]

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605 Mem. on Ann., para. 363.

606 Mem. on Ann., paras. 360, 364.

607 Mem. on Ann., para. 379; Reply on Ann., para. 293.

608 Tr. p. 74:3-6 (Professor Silva Romero); Mem. on Ann., para. 379, note 494, referring to NPV Calculation Summary - 2008 Life of Mine Plans June Schedules (G&P0001160) of October 2009, NPV Summary Tab (**R-305.1**); Xstrata plc, Circular and Notice of Extraordinary Meeting of 2 February 2009, p. 32 (**R-303**) ("*An expansion of production of export thermal coal to 12 Mtpa is planned to be completed by 2013.* [...] *This may increase production to approximately 14 Mtpa.*"); and Colombia's Opening Statement before the Tribunal, slides 48, 52, 53 (**AAE-14**).

609 Mem. on Ann., para. 379; Reply on Ann., para. 293.

610 Colombia's Opening Statement before the Committee, note 391, above, slide 95 (**AAE-38**); Tr. p. 74:11-12, 23-25 (Professor Silva Romero).

395. Colombia argues that the Tribunal egregiously, irrationally, and incoherently disregarded key *indicia* of the illegality before it. It maintains this position in regard to both its allegation of the "*obvious corruption*" underlying the investment, as well as its allegation of Prodeco's bad faith conduct and misrepresentations made to secure the Eighth Amendment.[611]

396. First, concerning Glencore and Prodeco's alleged corrupting of Mr Ballesteros, Colombia argues that the Tribunal either totally "*elided*" or simply "*brushed over*" several red flags of corruption.[612] Colombia argues, for example, that the Tribunal refused properly to analyse the allegations made by "*multiple*" Ingeominas civil servants that Mr Ballesteros had exercised "*undue pressure*" to secure their agreement to the Eighth Amendment.[613] Colombia submits further that the Tribunal "*turned a blind eye to corruption*" by accepting Mr Nagle's "*highly implausible explanations*" of the content of exhibit R-100, despite the fact that "*many of these explanations consisted themselves in admissions of influence peddling*". Indeed, Colombia submits, Mr Nagle conceded that Prodeco had "*yield[ed] to the greenmail*".[614]

397. Secondly, Colombia maintains that the Tribunal failed rationally to analyse many key facts relating to Glencore and Prodeco's bad faith and *dolo* in obtaining the Eighth Amendment by fraudulent misrepresentations.[615] According to Colombia, the Tribunal "*ignored*" clear evidence of illegality, such as Mr Nagle's admission that Prodeco had made "*gross omissions during negotiations*".[616] Additionally, Colombia submits that the Tribunal relied on facts that were "*patently false, and knowingly so*" in order to reach the conclusion that Prodeco had not acted in bad faith during negotiations.[617]

398. This approach to the evidence led the Tribunal to a manifest excess of power by asserting jurisdiction despite what Colombia maintains was the illegality of the investment. In

611 Mem. on Ann., paras. 367-368.
612 Mem. on Ann, paras. 369-382.
613 Mem. on Ann., paras. 369-370.
614 Mem. on Ann., para. 373.
615 Mem. on Ann., para. 376.
616 Mem. on Ann., para. 377.
617 Mem. on Ann., para. 381.

addition, Colombia contends that the Tribunal's explanation of its decision was so flawed as to involve a failure to state reasons.

(2) Glencore and Prodeco

399. Glencore and Prodeco do not agree that the Tribunal mistreated the evidence of corruption and misrepresentation raised by Colombia.[618] They characterise Colombia's Application in this respect as an attempt to relitigate its allegations of fact, and assert that that type of enquiry is not permissible under the ICSID Convention annulment regime.[619] Annulment proceedings, Glencore and Prodeco submit, "*are not intended as vehicles to revisit*" a tribunal's findings of fact.[620]

400. Nevertheless, Glencore and Prodeco add that the Tribunal's finding of fact were absolutely correct and Colombia's allegation of corruption was "*fanciful*" and "*opportunistic*".[621] This, they argue, is confirmed by the fact that Colombia itself has taken no domestic prosecutorial action against Prodeco in respect of allegations of corruption raised for the first time only once the arbitration had commenced – some seven years after the alleged corruption took place.[622]

401. Responding to the assertion that the Tribunal failed to state reasons, Glencore and Prodeco argue that Colombia's allegations of corruption or misrepresentation were "*thoughtfully and comprehensively*" addressed by the Tribunal.[623] They recall the applicable standard, requiring that the Tribunal's assessment would have to be "*so irrational that no reasonable decision-maker could have come to the same conclusion*", and argue that no objective observer could conclude that that standard was met by the Tribunal's treatment of the evidence in this case.[624]

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618 Rej. on Ann., para. 89.

619 C-Mem. on Ann., para. 101; Tr. pp. 78:16-79:13 (Mr Blackaby).

620 Tr. p. 78:14-18 (Mr Blackaby).

621 Tr. pp. 78:14-15, 79:4-7, 80:14-15 (Mr Blackaby).

622 Tr. p. 80:16-24 (Mr Blackaby).

623 Rej. on Ann., para. 89; C-Mem. on Ann., para. 131.

624 Rej. on Ann., para. 89.

B. THE ANALYSIS OF THE COMMITTEE

402. The Committee considers it necessary to begin with three preliminary observations. First, Colombia states that it advances its case on the Illegality Issue as one which is wholly independent of the Documents Issue. As Colombia puts it, even if the Committee does not annul the Award on account of the exclusion of the illegality documents, "[b]*ased on the facts on the record, understood in accordance with the necessary inferences to be drawn, the Tribunal should have reached the conclusion that Claimants' purported investment was tainted by corruption and other illegalities and declined jurisdiction*".[625]

403. At times, however, Colombia loses sight of the distinction between the two issues and seeks to boost its case on the Illegality Issue by relying on what it perceives as the Tribunal's wrongful decision to exclude documents.[626] Colombia cannot, however, repackage its case on the documents in this way. Since Colombia has advanced its case on the Illegality Issue on the basis that the Award should be annulled because the Tribunal reached the wrong conclusion on a jurisdictional issue on the record before it, the Committee must assess this part of Colombia's case on the basis of that record alone. This part of Colombia's case for annulment cannot be strengthened by allusions to documents which did not form part of that record.

404. Secondly, Colombia's case for annulment on the Illegality Issue is advanced in two ways:

(a) that there was a manifest excess of power when the Tribunal assumed jurisdiction, since the Tribunal had no jurisdiction unless the investment had been made in accordance with Colombian law; and

(b) that "*the Tribunal failed to state reasons and manifestly exceeded its powers by reaching egregious and irrational findings of fact*".[627]

405. In practice, however, these two arguments are inseparable. There is no dispute that, if the Eighth Amendment had been obtained unlawfully, the investment would have fallen outside the scope of Article 2 of the BIT and the Tribunal would therefore have lacked jurisdiction. That was expressly accepted by the Tribunal[628] and is not contested by

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625 Mem. on Ann., para. 348.

626 See, e.g., Reply on Ann., paras. 294-295.

627 Mem. on Ann., para. 349.

628 Award, paras. 665, 825.

Glencore and Prodeco. Nor is there any dispute about what, as a matter of law, would render the investment illegal. The dispute is rather one of fact – was the Tribunal entitled, on the evidence before it, to reach the conclusion that the investment had not been illegally obtained? Colombia's first argument, that the Tribunal manifestly exceeded its powers by asserting jurisdiction, is thus dependent on its second argument, that the Tribunal manifestly exceeded its powers by reaching "*egregious and irrational findings of fact*".

406. Thirdly, it is important in this context to be particularly clear about the nature and extent of the Committee's powers. Article 52(1)(b) of the ICSID Convention permits an *ad hoc* committee to annul an award only for a *manifest* excess of power. The Committee shares the view of the *ad hoc* committee in *Duke Energy*:

> *An* ad hoc *committee will not therefore annul an award if the tribunal's disposition on a question of law is tenable, even if the committee considers that it is incorrect as a matter of law. The existence of a manifest excess of powers can only be assessed by an ad hoc committee in consideration of the factual and legal elements upon which the arbitral tribunal founded its decision and/or award based on the parties' submissions. Without reopening debates on questions of fact, a committee can take into account the facts of the case as they were in the record before the tribunal to check whether it could come to its solution, however debatable. Is the opinion of the tribunal so untenable that it cannot be supported by reasonable arguments? A debatable solution is not amenable to annulment, since the excess of powers would not then be "manifest".*[629]

407. In support of its argument that the Committee must conduct a searching examination of the evidence, Colombia cites the reference in paragraph 158 of the decision of the *ad hoc* committee in *Caratube* to errors of fact which are egregious and weighing of evidence which is irrational. However, that paragraph needs to be quoted in full:

> *Factual findings and weighing of evidence made by a tribunal are outside the powers of review of an annulment committee, except if the applicant can prove that the errors of fact are so egregious, or the weighing of evidence so irrational, as to constitute an independent cause for annulment. The respect for tribunals' factual findings is normally justified because it is the*

[629] *Duke*, note 303, above, at para. 99 (**AAL-14**).

> *tribunal who controlled the marshalling of evidence, and had the opportunity of directly examining witnesses and experts.*[630]

Moreover, it is important to note that the *Caratube* committee, in declining to annul the award in that case, referred to the fact that "*the Tribunal carefully analyzed and weighed the available evidence, and explained in some detail the reasons for its findings*".[631]

408. The Committee agrees with this analysis. It is not enough that the Tribunal's findings of fact and weighing of the evidence are open to debate. For the Award to be annullable on the ground of manifest excess of power, the finding that the investment had not been unlawfully obtained must have been so egregious that it was one which no reasonable tribunal could have reached.

409. The Committee considers that Colombia has failed to cross this threshold. The Tribunal carefully analysed the evidence in the record relating to the allegation of corruption[632] and that relating to the allegation of bad faith.[633] The Committee can find no flaw in that analysis, let alone an annullable error. Colombia disagrees with the Tribunal's conclusions regarding Document R-100 and the evidence of Mr Nagle but the Committee considers that the Tribunal was perfectly entitled to reach the conclusions which it did and which it painstakingly set out and explained in the Award. The Tribunal carefully examined all of the "*red flags*" in respect of both corruption and bad faith and weighed all of the evidence in the record before concluding that the totality of the evidence did not justify a finding of either corruption or bad faith.

410. Like the *Caratube* tribunal, the Tribunal explained in detail the reasons for its findings. That detail is frequently not reflected in Colombia's critique. For example, Colombia maintains:

> *... the Tribunal flouted a further patent* indicium *of corruption: the exorbitant sum of USD 1.75 million paid by Claimants for the infamous 3ha Contract. Despite the exclusion of the Illegality Documents, this extravagant and inexplicable expenditure should have been analysed in depth and ascribed great weight, rather than cast aside. Instead, the*

630 *Caratube*, note 308, above, at para. 158 (**RL-184**).

631 *Caratube*, note 308, above, at para. 159 (**RL-184**).

632 Award, paras. 596-747.

633 Award, paras. 751-858.

> *Tribunal reached the bizarre conclusion that, because the money was paid into Colombian accounts, and not into a shell company located in a tax haven, the activities must have been above board.*[634]

411. But the Tribunal did analyse this issue in depth and it was not "*cast aside*". On the contrary, the Tribunal devoted a substantial part of its award to analysing the payment, its size and circumstances.[635] Nor did it find that the sum paid did not indicate corruption merely because "*the money was paid into Colombian accounts, and not into a shell company located in a tax haven*".[636] What the Tribunal emphasized was the fact that Glencore and Prodeco had been open about the payment. In addition to the fact that they had not sought to conceal it by using an offshore account, the Tribunal also pointed to the fact that they had withheld tax, declared the payment in their accounts, declared it to Ingeominas and had continued to complain (without receiving any answer from the various agencies of the Colombian Government to whom those complaints were addressed) about what they saw as "*greenmail*".

412. Colombia argues that, faced with allegations of corruption, the Tribunal was wrong to insist that the burden of proof was on Colombia. In support, Colombia cites the discussion by Dr Betz of the award in *Spentex v. Uzbekistan*, in which she commented:

> *The Tribunal noted that issues of bribery are notoriously difficult to prove in arbitration and that 'there is an inherent danger to dispose of the problem by resorting to strict evidentiary rules that may make proving or disproving corruption practically impossible'. It found that the traditional rule of each party having to prove the facts on which it relied coupled with a heightened standard of proof of 'clear and convincing evidence' made it almost impossible for a party to prove bribery.*[637]

413. But the Tribunal in the present case did not rest its conclusions on the burden of proof but on an analysis of the whole of the record before it. Moreover, it is worth noting that Dr Betz continued (immediately after the passage quoted above):

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634 Mem. on Ann., para. 374.

635 See, especially, Award, paras. 611-626.

636 Mem. on Ann., para. 374.

637 K. Betz, *Proving Bribery, Fraud and Money Laundering in International Arbitration*, Cambridge University Press, 2017, p. 131 (**RL-149**).

> *But it also noted that shifting the burden of proof once a party had produced some corruption indications and then demanding '"clear and convincing evidence" for the absence of corruption from the other party' amounts to a '*probatio diabolica *or* de facto *impossibility to disprove the existence of corruption' for the latter.*

414. Nor is the Committee persuaded that the Tribunal committed an error, still less a manifest excess of power, in not attaching weight to an alleged conflict of interests on the part of a lawyer who, Colombia alleges, advised both Ingeominas and Prodeco, or by not drawing an adverse inference of corruption from the approach taken by Glencore and Prodeco to the issue of document production.

415. The Committee thus rejects the application to annul the Award for manifest excess of power. The application based on an alleged failure to state reasons also fails since the Tribunal gave a clear and coherent statement of its reasons which is neither contradictory nor frivolous. Those reasons clearly did not convince Colombia but that is not the test which the Committee has to apply.

VIII. COSTS

416. Article 61(2) of the ICSID Convention provides:

> *In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.*

417. This provision, which applies *mutatis mutandis* to annulment proceedings by virtue of Article 52(4) of the ICSID Convention, gives the Committee discretion to allocate all costs of the annulment, including attorney's fees and other costs, between the Parties as it deems appropriate.[638]

418. The Committee considers that, in the absence of exceptional circumstances, a party which has been wholly unsuccessful in an application for annulment – as the Applicants in this

[638] See also ICSID Arbitration Rule 47(1)(j), applied to annulment proceedings by ICSID Arbitration Rule 53.

case have been – should normally bear the entire costs of the proceedings (including the fees and expenses of its members and the costs of the Centre) and the reasonable costs of the successful party. The Committee can see no exceptional circumstances in the present case which would warrant a different decision.

419. Costs fall into two categories: (i) the costs of the proceedings themselves, namely the costs incurred by the Centre, and the fees and expenses of the Members of the Committee and the Special Assistant to the President; and (ii) the costs of representation incurred by the Parties, together with the expenses which the Parties have incurred.

420. The total costs of the proceedings (in US dollars) are as follows:-

ICSID Administrative Fees: USD 84,000.00

Fees and expenses of Members of the Committee:

Christopher Greenwood: USD 61,741.05

Doug Jones: USD 49,351.92

Bertha Cooper Rousseau: USD 42,153.15

Total: USD 153,246.12

Fees and Expenses of the Assistant (Ms Elphick): USD 14,562.50

Other Direct expenses: USD 20,775.89

Total: USD 272,584.51

421. The above costs have been paid out of the advances made by Colombia, as the Party seeking annulment, in accordance with Regulation 14(3)(e) of the Administrative and Financial Regulations. Colombia has advanced a total of USD 527,667.91. Colombia shall bear the entirety of these costs, any sum remaining from the advances will be repaid by ICSID to Colombia.

422. With regard to the costs incurred by the Parties for legal representation and associated expenses, the Parties submitted details on 24 November 2020, as follows:

Colombia:

Costs of representation USD 751,137.97[639]

Expenses USD 1,326.09

Glencore and Prodeco:

Costs of representation: USD 1,248,680.86

Expenses: USD 23,676.32.

423. The Committee considers that Colombia, having been unsuccessful in its application to annul the Award should reimburse Glencore and Prodeco for the costs of representation and expenses which they have incurred. The Committee notes, however, that Glencore and Prodeco's costs of representation are significantly greater than those of Colombia. Both Parties were represented by major international law firms. The Committee can see no reason why Glencore and Prodeco should have incurred costs which were more than half as much again as those incurred by Colombia. In these circumstances, it considers that it is equitable to award Glencore and Prodeco a sum of USD 1,000,000.00 in respect of costs and expenses.

IX. DISPOSITIF

424. For the reasons set forth above, the Committee decides as follows:

(1) The Application for Annulment of the Award of 23 December 2019 is dismissed in its entirety. In accordance with ICSID Arbitration Rule 54(3), the stay of enforcement of the Award automatically terminates with effect from the date of the present Decision;

(2) Colombia shall bear the entire costs of the proceedings, including the fees and expenses of the Members of the Committee and of the Assistant, in the amount of USD 272,584.51;

[639] This includes the sum of Colombian pesos 31,739,830 for the costs of the ANDJE personnel involved. This sum is converted into US dollars as USD 8,714.06.

(3) Colombia shall, within sixty days of the date of dispatch of this Decision, pay to Glencore and Prodeco the sum of USD 1,000,000.00 in respect of the latter's costs of representation and expenses.

[signed]

Professor Doug Jones
Member of the Committee

Date: 18 September 2021

Ms Bertha Cooper-Rousseau
Member of the Committee

Date:

Sir Christopher Greenwood
President of the Committee

Date:

[signed]

Professor Doug Jones
Member of the Committee

Date:

Ms Bertha Cooper-Rousseau
Member of the Committee

Date: 21 September 2021

Sir Christopher Greenwood
President of the Committee

Date:

Professor Doug Jones
Member of the Committee

Date:

Ms Bertha Cooper-Rousseau
Member of the Committee

Date:

[signed]

Sir Christopher Greenwood
President of the Committee

Date: 21 September 2021