INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

SOUTH32 SA INVESTMENTS LIMITED

Claimant

and

REPUBLIC OF COLOMBIA

Respondent

ICSID CASE NO. ARB/20/9

DISSENTING OPINION OF THE ARBITRATOR ANDRÉS JANA LINETZKY

Date sent to the parties: 21 June 2024.

INDEX

I. INTRODUCTION

1. I concur with the Majority on many of the conclusions reflected in the Award. However, to my regret and very respectfully, I cannot share my colleagues' decision to award an indemnity for future damages. That decision constitutes the critical disagreement that separates me from the Majority and which has compelled me to issue this partial dissenting opinion pursuant to Article 48(4) of the ICSID Convention.

2. This opinion focuses on substantiating my dissent with respect to the Award's order granting the indemnity sought by the Claimant, which is discussed in section III of this opinion. In addition to my disagreement on that issue, and although I agree with the Majority on the overall determination that the Respondent has breached Article II.3 of the Treaty, I note that I do not share some of the reasons on which the Majority bases this conclusion, as I will discuss in section IV of this opinion.

II. THE DISPUTE

3. In order to allow for a better understanding of my position, I will summarise here the underlying dispute between the Parties, only to the extent relevant for the purposes of this opinion.

4. The present dispute relates to the indirect shareholding of South32 SA Investments Limited, the Claimant, in the Colombian company, Cerro Matoso S.A. ("**CMSA**") which operates and has operated a nickel mine in northern Colombia (the "**Cerro Matoso Project**"), on the basis of three concession contracts (the "**Contracts**").[1] Two of these contracts have already expired. CMSA currently continues to operate the Cerro Matoso Project under the terms of the third contract.

5. Under the Contracts, CMSA has paid and will continue to pay certain royalties on the exploited mineral resources. The amount payable by CMSA for such royalties, historically and going forward, is at issue before Colombian courts, administrative authorities and local arbitral tribunals, and before the Arbitral Tribunal in this investment arbitration. Similarly, the minerals that should be subject to such royalties,[2] and the interpretation and application of the legal frameworks governing their calculation, are in dispute between the Parties in this arbitration.

6. The Claimant has alleged that certain actions of the Colombian authorities and entities in applying, reviewing and supervising the settlement of the Contracts and payment of the

[1] The Contracts comprise (i) Concession Contract 866 of 1963 (C-0007); (ii) Concession Contract 1727 of 1971 (C-0009); and (iii) Exploration and Exploitation Contract 051-96M of 1996 (C-0017). *See also* Additional Agreement to Concession 866, 22 July 1970 (C-0008); Agreement between CMSA and the Ministry of Mines, 23 August 1985 (C-0013); Amendment to Concession 866, 22 July 2005 (C-0020); Amendment to Concession 1727, 22 July 2005 (C-0021); Agreement between CMSA and Ingeominas of 30 August 2011 (C-0022); Amendment to Contract 51, 27 December 2012 (C-0025).

[2] In particular, whether it should apply only to nickel or also to iron.

aforementioned royalties are contrary to the terms of the Treaty[3] as they violate the obligation to accord a fair and equitable treatment.

7. As a result of this violation, the Claimant claims historical damages allegedly suffered due to an inadequate or incorrect application of the regulatory framework applicable to royalties for nickel and the reimbursement of royalties paid for iron.

8. In addition, the Claimant seeks an order to revoke and cease certain measures or conduct of the Respondent and its institutions, or, alternatively, that it be granted a guarantee or an indemnity in respect of damages that may arise in the future as a consequence of the measures it alleges to be in breach of the Treaty.

III. DISSENTING OPINION ON THE CLAIM FOR CONTINGENT FUTURE DAMAGES

9. As part of its request for relief, the Claimant has requested that the Tribunal order the Respondent to "cease any and all actions in furtherance of its breaches of the Treaty,"[4] and in the event that Colombia decides to maintain the allegedly unlawful actions and measures, that the Tribunal issue an order "provid[ing] full reparation for its breaches" setting out that the Respondent shall "fully indemnify and hold Claimant harmless in respect of any payments that CMSA may be ordered to make in respect of Colombia's unlawful Measures."[5]

10. The Respondent opposes this request arguing, *inter alia*, that the damage for which compensation is sought is hypothetical and uncertain and that the compensation sought infringes the state's sovereignty.[6]

11. The Award rejects the Claimant's request for revocation and cessation and accepts, by a Majority, the recognition of damages that "have not yet occurred",[7] which could result in a significant compensation in favour of the Claimant in accordance with paragraph 887.

12. In order to facilitate the reading of this opinion, I transcribe below paragraphs 815 to 820 of the Award, which contain the relevant part of the Majority's decision:

> *815. The Arbitral Tribunal has determined the existence of Measures in Breach, which already quantify the royalties being claimed. And the state's enforcement of these Measures in Breach is a foreseeable scenario, in view of the fact that the state has already tried to enforce one of them (Order 576, through Payment Order 692),*

[3] Agreement for the Promotion and Protection of Investments between the Government of the United Kingdom of Great Britain and Northern Ireland and the Republic of Colombia signed on 17 March 2010, in force since 10 October 2014 ("Treaty") (C-0001).
[4] Claimant's PHB, ¶ 261(b)(ii).
[5] Claimant's PHB, ¶ 261(c)(ii).
[6] Respondent's PHB, ¶¶ 205-206.
[7] Award, ¶ 811.

warning of the possibility of "secuestro, avalúo y remate de los bienes (seizure, appraisal and foreclosure of the assets)" of CMSA , in the event of non-payment.

816. The majority of the Arbitral Tribunal considers that all the elements necessary to hold the state liable for the damage caused by the implementation of the Measures in Breach are already contained in this Award – the causal link between the internationally wrongful act and the damage has been established.

817. If Colombia finally enforces the Measures in Breach, the damage, already anticipated in the content of the Measures in Breach, will occur. The damage, in that case, and once the Measures in Breach are enforced, will be certain.

818. The existing uncertainty to date only affects the materialisation of the damage. However, in the view of the majority of the Tribunal, there is no element of the causal chain leading to this damage on the existence and imputability of which the Arbitral Tribunal has not already ruled.

819. The majority of the Arbitral Tribunal considers that the difficulty that typically surrounds claims for future damages lies in the fact that there are elements of uncertainty that may affect the causation of the damage and on which the Arbitral Tribunal has not yet decided because it is unaware of them. This is not the case here, in the opinion of the majority of the Arbitral Tribunal, since the Tribunal has already stated that the re-assessment of royalties in the Measures in Breach constitutes an internationally wrongful act whose damage is already pre-determined.

820. The only pending matter is for the state to enforce the Measures in Breach and for CMSA to pay the corresponding re-assessment. These are future events which, although they have not yet occurred, do not require a new pronouncement by the Arbitral Tribunal to know whether they will form part of the causal chain – indeed, they will. [8]

13. In addition, on future damages related to iron royalties, the Majority considers that:

837. With respect to the iron royalty claim, the Arbitral Tribunal has indeed found that it constitutes a breach of the BIT. But, insofar as the damage has not yet occurred, the Arbitral Tribunal cannot order the Respondent to proceed immediately with its payment. The majority of the Arbitral Tribunal considers, however, that it can recognise that when the damage occurs because CMSA pays royalties on the iron, the state will have an obligation to compensate the Claimant for the damage suffered.

838. […] When the state enforces the Measures in Breach and, as a result, CMSA pays new royalty settlements contrary to this Award, the majority of the Tribunal believes that the state must compensate the Claimant for the damage suffered.

[8] Award, ¶¶ 815-820 (footnotes omitted).

> *839. Therefore, by majority, the Arbitral Tribunal orders Colombia to hold South32 Investments Limited harmless from any damages it may suffer as a result of CMSA paying iron royalties and/or nickel royalty re-assessments contained in any of the Measures in Breach.*
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> *840. The damage suffered by CMSA does not translate into full damage to the Claimant. The Respondent has already pointed out that the Claimant's damage is reduced both by the percentage at which the state taxes dividend income and by the percentage of ownership which is 0.06% short of full ownership[...].*[9]

14. On this basis, in paragraph 887(3)(i)-(ii) of the Award, the Majority orders Colombia to:

> *(i) Hold South32 SA Investments Limited harmless in USD by the percentage resulting from deducting the withholding tax on dividends in force and multiplying the percentage of ownership of Cerro Matoso S.A. held by South32 SA Investments Limited, on the amount that Cerro Matoso S.A. pays in execution of:*
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> - *resolution 293 of the Mining and Energy Planning Unit, which applies Arts. 8 and 9 of Resolution 293 of the National Mining Agency;*
> - *Order VSC 26;*
> - *Cundinamarca Petition;*
> - *Resolution 576;*
> - *Order 63.*
>
> *(ii) Hold South32 SA Investments Limited harmless in USD by the percentage that results from deducting the tax benefit obtained from the payment of the iron royalties, the withholding tax on dividends in force and multiplying the percentage of ownership of Cerro Matoso S.A. held by South32 SA Investments Limited, on the amount that Cerro Matoso S.A. pays for the iron royalty settlements.*[10]

15. I disagree with the decision to grant the Claimant's claim for an indemnity for future damages, for reasons of a legal nature that also have systemic consequences, which can be summarised as follows.

i. *Absence of a legal basis to order the indemnity*. The rules governing damages in international investment arbitration do not allow compensation for uncertain or contingent damages that do not meet the requirement of materialisation of the damage and the existence of a causal link with the wrongful act. In the opinion of the undersigned, there is no legal basis under international law that grants the Tribunal the authority to issue an indemnity order to the State, requiring it to guarantee the investor the payment of future contingent damages arising from actions not yet enforced.

[9] Award, ¶¶ 837-840 (footnotes omitted).
[10] Award, ¶ 887(3)(i)-(ii).

ii. *Systemic implications.* In the opinion of the undersigned, the lack of a legal basis for issuing the Majority Order raises serious systemic issues that affect the State's sovereignty, as it results in inappropriate interference with legal proceedings and actions pending before national courts and local arbitral tribunals in Colombia.

III.1 ABSENCE OF LEGAL GROUNDS TO ORDER FUTURE DAMAGES

a. The future damages sought by the Claimant are uncertain and hypothetical. Awarding such damages is not consistent with the provisions of the Treaty and the principles applicable to damages compensation

i. The Claimant's claim for contingent future damages lacks the essential elements for awarding compensatory damages under the rules that govern economic damages

16. The rules governing compensatory damages require as *sine qua non* elements, the materialisation and proof of the damage as well as the existence of a causal link between the international wrongful act and the injury suffered.[11] The damages claimed by the Claimant as future damages are uncertain and hypothetical, and granting them contravenes the principle of full reparation, accepted by both Parties, as I will explain below.

17. First, given that there is no certainty as to whether and how the Respondent will enforce the Measures, or whether such enforcement will ultimately lead to harmful consequences for the investor, there is also no certainty as to the occurrence of the damage. In other words, we are dealing with a hypothetical or contingent damage that has not yet occurred and whose occurrence is uncertain.

18. With regard to this point, the Majority acknowledges that the State actions that could eventually result in damages to the Claimant are "pending" since neither has the State enforced the Measures in Breach, nor has CMSA paid the corresponding resettlements.[12] However, the Majority considers that this element is not an obstacle to accepting the Claimant's request for compensation, since the damage is foreseeable, given that it will materialise in the event that the Respondent finally enforces the Measures.[13] Thus, the Majority considers that the uncertainty surrounding the claim for future damages lies in the "materialisation of the damage".[14]

19. The alleged foreseeability of the damage which the Majority emphasises, does not remedy the aforementioned situation. The foreseeability of damages is usually one of the conditions for their reparation. However, by itself, the foreseeability of future damages does not verify

[11] *See e.g. Murphy Exploration & Production Company International v. Republic of Ecuador* (PCA Case No. 2012-16) Final Partial Award, 6 May 2016, ¶ 487 (CLA-0091), *citing BG Group plc v. Argentina*, UNCITRAL, Final Award, 24 December 2007, ¶¶ 428-429 (CLA-0046); *Khan Resources Inc, Khan Resources B.V., CAUC Holding Company Ltd. v. Mongolia, MonAtom LLC* (PCA Case No. 2011-09), Award on the Merits, 2 March 2015, ¶ 375 (RL-0055).
[12] *See* Award, ¶ 820.
[13] *See* Award, ¶¶ 820 and 815.
[14] Award, ¶ 818.

their existence or justify their compensation. Damages that have already materialised and were foreseeable must be compensated, but the fact that it might be foreseeable that damages in the future might occur does not make them existent. In other words, foreseeability is not a sufficient basis for compensating damages that have not yet materialised.

20. In sum, since uncertain or contingent damages are not compensable, there is no basis that permits awarding such damages by granting an anticipated order that guarantees their compensation.

21. In my view, this position is also supported by the tribunal's award in *BBVA v. Bolivia*, invoked by the Respondent when arguing that the Claimant's claim is not ripe for adjudication.[15] In that case, the tribunal rejected the respondent's request to consider within the decision determining the extent of damages a penalty that was undergoing judicial review as such penalty was not final and constituted a contingent liability.[16]

22. Without prejudice to the considerations that the Award makes with respect to the referred case,[17] in the opinion of the undersigned, *BBVA* highlights the fact that possible future contingent damages whose occurrence depends on possible future conduct or decisions of the State, whether of its executive or judicial branch, cannot be the object of compensation because, being contingent, they are uncertain or hypothetical, and therefore speculative.

23. The *BBVA* tribunal's decision not to consider contingent situations in determining damages is not unique. The tribunals in *Murphy* and *Khan Resources* explicitly recognise that under international law, speculative, remote or uncertain damages are not subject to compensation.[18] These decisions recognise that the damage must be a consequence or proximate cause of the wrongful act and that it is for the claimants to prove that they have suffered the injury they allege. This in my view reaffirms that compensation for future damage whose occurrence is uncertain is not permitted under international law.

24. Second, the Majority considers that, although the basis for compensation lies in future events of uncertain occurrence, if these events were to take place, they would not require a new ruling by the Arbitral Tribunal in order to know whether they would form part of the causal

[15] *See*, Respondent's PHB, ¶¶ 40, 61.
[16] *Banco Bilbao Vizcaya Argentaria (BBVA) S.A. v. Plurinational State of Bolivia (ICSID Case No. ARB(AF)/18/5),* Award, 12 July 2022, ¶¶ 651-652 (RL-0127).
[17] *See,* Award, ¶ 789.
[18] *Murphy Exploration & Production Company International v. Republic of Ecuador* (PCA Case No. 2012-16) Partial Final Award, 6 May 2016, ¶ 487 (CLA-0091) *("This approach is consistent with the general requirement for awarding damages for violations of international obligations that any compensable damage must not be too speculative, remote, or uncertain.")* citing in turn *BG Group plc v. Argentina*, UNCITRAL, Final Award, 24 December 2007, ¶¶ 428-429 (CLA-0046) ("*The damage, nonetheless, must be the consequence or proximate cause of the wrongful act. Damages that are 'too indirect, remote, and uncertain to be appraised' are to be excluded. In line with this principle, the Tribunal would add that an award for damages which are speculative would equally run afoul of 'full reparation' under the ILC Draft Articles*"); *Khan Resources Inc, Khan Resources B.V., CAUC Holding Company Ltd. v. Mongolia, MonAtom LLC* (PCA Case No. 2011-09), Award on the Merits, 2 March 2015, ¶ 375 (RL-0055) *("The burden of proof falls on the Claimants to show that they have suffered the loss they claim. The standard of proof required is the balance of probabilities. This, of course, means that damages cannot be speculative or uncertain.").*

chain. In the Majority's view, this situation is equivalent to making the ruling in the future and would be sufficient to establish the causal link between the Measures in Breach and the damage that the future enforcement of such measures could cause.[19]

25. In my opinion, however obvious it may seem, there can be no causal link if the damage has not materialised. The risk that harm may occur in the future cannot, as is also obvious, satisfy causation of an effect that the action has not produced. There will only be causation when the action translates into or materialises in concrete damage and the causal link can be examined and determined. In the instant case, we are not dealing with damages that have been caused but with potential or contingent damages, which makes it impossible to render a definitive ruling on the causation of the damage.

26. As will be examined in detail below, the reflective nature of the losses claimed by the Claimant makes the uncertainty as to the causality of harm even more problematic, as there are possible future events that could affect the dividends to which the Claimant could be entitled from the profits it earns from CMSA, its investment vehicle.

27. Third, I consider that awarding hypothetical and uncertain damages contradicts the basic principles of compensation for damages and the principle of full reparation,[20] which require compensation for all the damage actually suffered: not a peso less, but not any more either.

28. In particular, the function of compensation in investment arbitration is to compensate for actual losses suffered as a result of an international wrongful act. In other words, the compensation corresponds to the economically assessable loss which a claimant has actually suffered. It is not about punishing the responsible State, nor does compensation have an exemplary character in order to avoid or promote certain standards of conduct.

29. Under this premise, compensation can only be calculated on the basis of the actual harm caused to the investor's interests. Once this harm or damage exists and is known, and the causal link with the internationally wrongful act is established, the quantification of compensation must be made with the objective of "wip[ing] out all the consequences of the illegal act and reestablish[ing] the situation which would, in all probability, have existed if that act had not been committed."[21]

30. Thus, in accordance with this principle of full reparation, recognised as applicable by both Parties,[22] the reparation to be granted has a direct relationship with and depends on the existence, extent and verification of the damage produced. Therefore, the principle of full reparation requires compensation for the actual losses of the injured party, since only by

[19] *See* Award, ¶¶ 817 and 821.
[20] *See* Counter-Memorial, ¶ 470, where this argument is raised.
[21] *Case Concerning the Factory at Chorzów* (Germany/Poland), ICCJ Series A, No. 17, Judgment of 13 September 1928 (CLA-0001) ("*The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed* [...]").
[22] Memorial, ¶ 239; Rejoinder, ¶ 528.

verifying the extent of the damage can one be certain to award compensation that will wipe out the consequences of the international breach. In summary, condemning the State in respect of a loss that is still uncertain to guarantee its payment in the event that it may occur, contradicts the principles required for awarding compensation for damages.

ii. An order for future compensation for damages that have not materialised is inconsistent with the express terms of the Treaty

31. As part of its assessment of the jurisdictional objections raised by the Respondent, the Tribunal has considered whether the text of the Treaty admits the possibility of seeking remedies or reparations other than monetary compensation. Without prejudice to that matter and having regard to the Tribunal's finding in paragraph 186 of the Award, it is clear, in my view, that the award of pecuniary compensation for harm that has not occurred, and is uncertain and hypothetical as to its occurrence, is not consistent with the terms of the Treaty. As expected under the principles governing the reparation of damages in international law, there are several provisions of the Treaty that lead to the understanding that claims for damages must relate to existing or material harm.

32. Pursuant to Article IX.4 of the Treaty, the Notification of Intent, which must be submitted by the investor to the State six months before filing the Request for Arbitration, must contain, *inter alia*, "the estimated value of the damages and compensation sought."[23]

33. This provision, by requiring the investor to specify, prior to the commencement of the arbitration, the estimate of its damages and the compensation it seeks, is indicative, in my view, that the damages that have not materialised are not capable of being compensated through a claim for reparation under this Treaty.

34. This interpretation is also consistent with the terms of Articles IX.7 and IX.14 of the Treaty.

35. According to Article IX.7, "[t]he investor may only submit the Request for Arbitration if it has submitted the Notification of Intent in accordance with [Article IX.4] and the term established therein has elapsed."[24]

36. Article IX.14 provides that "[a]n investor may not submit the Notification of Intent, and therefore may not invoke the international arbitration procedures set out in this Article, if more than five (5) years have elapsed since the date the investor had knowledge or ought to have had knowledge of the alleged violation of this Agreement and of the alleged losses and damages" [emphasis added].[25]

37. The three aforementioned Treaty provisions, *i.e.*, Article IX, paragraphs 4, 7, and 14, emphasise that the damage must exist, must have materialised and must be known to the Claimant in order to be the subject of a compensation order by the Arbitral Tribunal in this

[23] Treaty, Article IX.4 (C-0001).
[24] Treaty, Article IX.7 (C-0001).
[25] Treaty, Article IX.14 (C-0001).

arbitration. Therefore, granting an order for future compensation for damages that have not materialised is not consistent with the express terms of the Treaty.

iii. The Claimant claims compensation for reflective losses, which increases the uncertainty as to the existence of damages

38. The uncertain and contingent nature of damages is reinforced in a claim, such as the present one, in which the investor claims damages for purely reflective losses, *i.e.*, damages arising from potential losses or damages suffered by an entity or vehicle owned by the Claimant.

39. This leads to difficulties of awarding compensation for potential or hypothetical damages being not only theoretical, but also manifesting themselves in the eventual calculation of damages.

40. In cases of claims for pure reflective losses such as the present one, the claimants' harm typically takes the form of a decrease in free flow of dividends, and consequently, any damages are generally subject to the existence and amount of profits in the local company that can be translated into dividend payments to the investor-shareholder.

41. Thus, in order to identify Claimant's reflective damage, it is essential to first determine the economic situation of the local investment vehicle, in this case, CMSA, and to calculate the free flow of dividends on that basis. The profit of the local entity, and thus the potential dividends, can only be determined once the fiscal year is closed and this profit is determined under the applicable legal and accounting rules, in this case, Colombian regulations. In other words, this cash flow can only be calculated once the annual results of the company are determined and the level of profits identified. Prior to that, it will not be possible to establish whether the harm to the investment vehicle also resulted in harm to the investor-claimant and what its amount is. To assume that all of the alleged harm to the local investment vehicle is free flow of dividends is, in my view, premature and speculative in the presence of a contingent harm that, should it occur, could be affected by supervening factors.

42. In response to this argument by the Respondent, who has pointed out that any future damages will be suffered by CMSA and not the Claimant[26], the Majority considers that the indirect nature of the damage is manifest in both historical and future damages, and that since the Respondent has not disputed that the Claimant lacked a cause of action for the former, there is no reason why the reflective nature of the reparation should preclude compensation for the latter.[27]

43. I consider this response unsatisfactory as it misses the crux of the Respondent's argument. With regard to historical damages, the rules and principles applicable to the compensation of monetary damages, subject to the arguments of the disputing Parties and their experts, allow the Arbitral Tribunal to estimate the historical damages that South32 may have suffered as a result of CMSA being affected by the challenged Measures. However, when

[26] See Award, ¶ 830.
[27] See Award, ¶ 831.

there are several corporate levels between the Claimant and the investment vehicle, as in the case of CMSA and South32,[28] the reflective nature of the Claimant's claim turns the claim for future damages into an exercise with speculative elements. This is because each level of the corporate structure has the potential to add an additional degree of uncertainty as to what magnitude of harm will ultimately result in profitability and dividend distributions to the investor-Claimant, South32.

44. In this regard, the Respondent appropriately distinguishes between the existence of damage and proof of the extent or magnitude of damage.[29] The proof of historical damages involves an exercise of persuasion, estimation and calculation within the power of the Parties, upon which the Arbitral Tribunal makes certain inferences in order to establish the damage suffered by the Claimant and calculates compensation. However, if the damage does not exist because it is contingent on future actions, the Tribunal cannot initiate this exercise without entering into determinations based on conjecture that may or may not turn out to be true, and which could be affected by supervening events with unknown effects.

45. Accordingly, in the case of a claim of reflective damage that requires the determination of the local company's profits in order to determine the free flow of dividends, and thus consequently the damage suffered by the investor, the uncertain and hypothetical character of the damage is heightened.

b. There is no legal basis or precedents for granting the indemnity order sought by the Claimant

46. In paragraph 887 3(i) and (ii), the Majority has issued an order to the Respondent requiring it to indemnify the investor in respect of damages that could eventually be caused if certain measures that the Tribunal found to be in breach were to materialise. This indemnity order or guarantee of compensation for uncertain and hypothetical damages lacks support under international investment law.

47. I consider that there are good reasons for this lack of support. The Majority's decision transforms the Respondent, a sovereign State, into a guarantor of the investor in respect of any damage that might occur in the event of it taking certain actions or proceeding in a certain way. That nature of guarantee or compensation obligation, resulting in an indemnity, would require – in my view – the agreement of the Parties to the Treaty, the disputing Parties, or an explicit legal rule, in this case, international. None of these exist in the case under consideration and, therefore, the Arbitral Tribunal lacks the authority to grant such order.

48. Moreover, the Majority's order would, to my knowledge, be unprecedented in investment arbitration as well as unprecedented under general international law.

49. To my understanding, there have been no awards rendered to date in international foreign investment arbitration that have issued a decision granting an indemnity, *i.e.*, ordering the

[28] See Award, ¶ 106.
[29] Counter-Memorial, ¶ 469.

State to guarantee monetary compensation to the investor in the event that it suffers damages in the future, which at the date of the award were contingent. Although there have been ICSID awards in which tribunals have included payment conditions in their operative part, to my knowledge, no investment arbitral tribunal has ordered an "indemnity" that places the State in the position of indemnity guarantor for actions it has not enforced and with respect to future damages which are potential and uncertain.

50. The Majority does not share this assessment and in paragraph 824 concludes that the decisions invoked by the Claimant in support of its request for an indemnity are "sufficiently relevant."[30]

51. I disagree with what is stated therein. Having reviewed each of these decisions, I consider that none of them orders an indemnity for future damages or orders a party to pay compensation in the future subject to the contingency of the materialization of damages. On the contrary, in these cases, the tribunals have sought to confirm the application of the principle of full reparation, ensuring that the respondent States should not undermine it by means of burdensome tax measures applied to the compensation ordered after the award has been issued. These cases considered real losses effectively suffered and already quantified.[31]

52. Furthermore, the Majority reproaches the Respondent for not having been able to cite "any award in which an arbitral tribunal has refused to order the payment of indemnities once the internationally wrongful act and the causal link have been established – which is the case here."[32] Subsequently, the Majority acknowledges that the Claimant's claim for future damages is exceptional and adds that "while exceptional, it is not unique."[33] In support of

[30] Award, ¶ 824.

[31] *See* **Tenaris** ("*Esto significa que dichas cuantías son las que realmente deben entrar en el patrimonio de las Demandantes, personas jurídicas que no tienen su residencia fiscal en Venezuela. […] Si la indemnización pudiera quedar sujeta a tributación en Venezuela, y Venezuela pretendiera aplicar una compensación entre la indemnización y el tributo, la indemnización efectivamente pagada sería menor a la establecida en este Laudo y la República Bolivariana estaría incumpliendo las obligaciones asumidas en los AAPRI*." (*Tenaris SA and Talta - Trading e Marketing Sociedade Unipessoal LDA v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/23) Award, 12 December 2016, ¶¶ 788 and 789 (CLA-0092), emphasis added); **Glencore** ("*If Colombia were to impose or deduct a tax on Claimants' award, Colombia could reduce the compensation 'effectively' received by Prodeco. A reductio ad absurdum proves the point: Colombia could practically avoid the obligation to pay Claimants the restitution awarded by fixing a 99% tax rate on income derived from compensations issued by international tribunals, thereby ensuring that Prodeco would only effectively receive a restitution of 1% of the amount granted [...].] In conclusion, the Tribunal, in order to guarantee that Claimants receive full reparation for Colombia's international wrong, [...], orders Respondent to indemnify Claimants with respect to any Colombian taxes in breach of such principle*.") (*Glencore International AG and CI Prodeco SA v. Republic of Colombia*, (ICSID Case No. ARB/16/6), Award, 27 August 2019, ¶¶ 1626 and 1630 (CLA-0096), emphasis added); **OperaFund** ("*To the Tribunal, it is clear that Spain as the Respondent is to pay the entire amount of damages and cannot charge and deduct Spanish taxes on the amount awarded. […]. Therefore, […] the Tribunal concludes and will expressly provide in the dispositive of this Award that the Award is made net of all taxes and/or withholdings by Spain, and Spain is ordered to indemnify Claimants for any tax liability or withholding that may be imposed in Spain.*") (*OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain* (ICSID Case No. ARB/15/36), Award, 6 September 2019, ¶ 705 (CLA-0097), emphasis added).

[32] Award, ¶ 825.

[33] Award, ¶ 827.

its conclusion, it invokes *Lion v. Mexico* at paragraphs 828 and 829 of the Award considering that that the referred tribunal orders compensation for future damage.

53. First, in my view, the exceptional nature and lack of precedent confirms the Respondent's position, thus the Respondent cannot be hold accountable for not providing precedent to the contrary. In other words, as the Claimant's request is unprecedented or at least exceptional, has no explicit normative basis, and there are no arbitral decisions making a specific analysis in this regard, the burden of proof cannot fall on the Respondent but on the petitioner of such an order.

54. Second, the tribunal in the *Lion* case, a proceeding under the Additional Facility Rules, in my understanding, does not order compensation for damages whose existence is uncertain, potential or contingent on the Respondent's conduct either. On the contrary, as in the above-mentioned awards, it is again a matter of embracing and properly applying the principle of full reparation for the totality of the damage. The tribunal ordered compensation, leaving pending only the calculation of the quantum of a damage whose existence has been established and whose causal link is identifiable and has been determined. None of these requirements are met in our case, therefore that award is not an applicable precedent.[34]

55. In addition, I consider that in any event the value of the *Lion* Award for this arbitration, in whichever sense, should be approached cautiously by the Arbitral Tribunal because although it is a public award, it was not submitted by either of the Parties and has not been the subject of discussion by them.

56. The duty of arbitrators to ensure the effectiveness of their decisions may require a tribunal to take into account rules that it must consider *sua sponte* or principles of international law governing the interpretation of investment treaties, irrespective of what is alleged by the disputing Parties. Thus, while I share the position of many tribunals that consider that the principle of *iura novit arbiter* should be considered in investment arbitration, this principle is subject to certain limitations, such as the equality and adversarial principles, and the prohibition of surprise decisions.

57. To make a determination on the basis of an award that is not on the record to resolve a disputed issue, especially when the existence of precedent is debated – a point on which there is no consensus among the members of the Tribunal – would be, in my view, problematic in light of the aforementioned constraints.

[34] *Lion Mexico Consolidated L.P. v. United Mexican States* (ICSID Case No. ARB(AF)/15/2) Award, 20 September 2021; *See* ¶ 836, in which the Tribunal makes express reference to the principle of full reparation citing Chorzów in support of its decision, and ¶ 838, stating that "[*l]a reparación integral requiere que México asuma la obligación de reembolsar a Lion dichos Honorarios Legales, en el monto que finalmente establezcan los tribunales Mexicanos y que efectivamente pague Lion al Deudor*."

III.2 SYSTEMIC IMPLICATIONS

58. Responding to one of the Respondent's arguments,[35] the Majority asserts that the Claimant's claim for an indemnity for future damages does not undermine the State's sovereignty as it is a pecuniary award, for an amount to be determined in the future.[36]

59. I disagree with this statement and conclusion of the Majority, as in my understanding, the claim for indemnity for future damages does represent an undue interference with the State's sovereignty:

    i. Subjecting the State to guarantee compensation for damages to an investor that could result from State measures, but which have not yet materialised, may be considered an intervention in the prerogatives of its public power.

    ii. The Majority's indemnity order for future damages risks putting the authorities and judges called upon to rule on such measures in a complex position, exposing them to international harm to the State unless they stay proceedings or rule against the State. Thus, ordering the State to adopt a certain conduct with respect to issues being debated in Colombian domestic courts, administrative institutions and arbitral tribunals may have the effect of being tantamount to dictating a particular result to those courts, institutions and tribunals. Inappropriate intervention in local proceedings and actions is exacerbated where anticipated compensation obligations have been established and quantified for actions not yet enforced, as in the present case.

    iii. Moreover, this interference has the aggravating factor of placing local authorities and judges in a situation of potential liability if they proceed with currently pending proceedings. If local judges rule against the State – on the basis of the order issued by the Majority – they could incur liability if there is no structure in place that authorises judges and other authorities considering the issues in dispute to take into account the decisions of international tribunals. On the other hand, if the judge reaches a decision that has a result that is inconsistent with the Majority's Order, the State will be obliged to hold the investor harmless by paying the alleged future damages ordered by the Majority.

60. This element is magnified in a situation such as the present one, in which the Treaty that grants the authority to such international tribunal contains a provision – Article IX.13 – that expressly excludes the jurisdiction of the Arbitral Tribunal to rule on the measures as a matter of domestic law. According to the Award, this provision should be interpreted in the sense that "the consideration that the Arbitral Tribunal may make of Colombian law or in relation to the Contracts limits its effects on the present case under the BIT."[37]

[35] See Respondent's PHB, ¶ 205 ("[E]*ste reclamo [de indemnidad] no solo es completamente improcedente, sino que su otorgamiento atentaría directamente contra la soberanía de Colombia*.")
[36] Award, ¶ 822.
[37] Award, ¶ 179.

61. In addition, as set out in paragraph 821 of the Award, the Tribunal by Majority has decided to grant the Claimant's claim for future damages, accepting its argument that failure to do so would be "leaving a part of the dispute unresolved."[38] The Majority considers that "it would make no sense to force the Claimant to commence another arbitration, simply to obtain an award of compensation for the damage that is already fixed and whose attribution the majority of the Arbitral Tribunal finds has already been decided in the Award."[39]

62. First, I consider that it is not for the Arbitral Tribunal to provide assurances or compensatory guarantees to one of the disputing Parties in respect of damages that have not occurred, in order to spare it the cost and difficulties of advancing a new claim. In my view, it is not the function of the Tribunal to prevent the Parties from bringing a new dispute or initiating other proceeding(s) in the future. Tribunals in investment arbitration are called upon to decide the dispute between the parties in accordance with the applicable law and within the limits imposed by the authority delegated to them.

63. Notwithstanding this, in my view, the indemnity order carries the risk of creating the opposite situation to the one indicated by the Majority, and instead of reaching a final resolution of the dispute between the Parties, it could lead to further disputes between them.

64. On the one hand, the implementation of a decision that lacks precedent will be subject to debate. To cite a few examples, discussions could arise if any event, large or small, happens that may impact the calculation basis indicated by the Majority. It is not possible to anticipate all of the calculation issues that may in the future give rise to discussions between the Parties on the application of the formula, especially given what has already been noted with respect to reflective damages.

65. In addition, it seems debatable to me whether the indemnity order for future damages can be considered a pecuniary obligation under Article 54 of the ICSID Convention. An indemnity claim such as the one advanced by the Claimant, seeks a declaration that the Respondent has a certain legal position, that of a guarantor, and that subsequently entails an obligation to compensate if the allegedly guaranteed conduct materialises at some point in the future.

66. As is well known, according to Article 54 of the ICSID Convention only "pecuniary obligations" imposed by the award shall be treated by all Contracting States to the Convention "as if it were a final judgment of a court in that State." In other words, the self-contained enforcement system of the ICSID Convention only covers pecuniary relief, so the indemnity Order, if it is considered that it imposes a guarantee obligation, may not be covered by the enforcement mechanism of Article 54 of the Convention.

67. This poses additional difficulties based on Article IX.10 of the Treaty. According to that provision, arbitral awards shall be enforced, where required, in accordance with the domestic law of the Contracting Party in whose territory the investment was made. How could an indemnity obligation issued by an international arbitral tribunal be enforced in accordance

[38] *See* Award, ¶ 821, citing, Memorial, ¶ 241.
[39] Award, ¶ 821.

with the domestic law of Colombia? The Parties have not provided the Tribunal with information on this element, which in itself is sufficient to further generate disputes between the Parties and may give rise to additional claims.

68. On account of my dissent regarding the admissibility of the Claimant's indemnity request, I further disagree with the Majority's decision regarding the costs of the arbitration.

IV. DISSENTING OPINION ON THE NATURE OF THE MEASURES THAT MAY GIVE RISE TO INTERNATIONAL RESPONSIBILITY OF THE STATE

69. As mentioned in the introduction, I concur with the Majority on the final decision of the Arbitral Tribunal to find that the Respondent has breached Article II.3 of the Treaty, as set out in paragraph 887.2 of the Award. This being the case considering that the actions and conduct attributable to the Respondent, considered in their final outcome, meet the requirements of the standard for State conduct to constitute an international wrongful act under the Treaty.

70. However, I respectfully disagree with the Majority's assessment and analysis of some of the State's measures, actions and conduct, as I will express in the subsequent paragraphs, which merit the following considerations.

71. Throughout the proceeding, the Respondent has argued that some of the contested Measures cannot give rise to international responsibility of the State as they do not represent State actions capable of resolving a dispute, result in an enforceable State order, or give rise to damage.[40] As part of those arguments, the Respondent has maintained that the Cundinamarca Petition is not a final measure with respect to the settlement of the Contracts, nor does it order a payment to CMSA.[41]

72. In the Award, the Arbitral Tribunal partially accepts this assertion, describing the Cundinamarca Petition as an act by which the National Mining Agency "requested [before] a judge"[42] or "initiated a court action"[43] to settle the Contracts. However, immediately thereafter, the Majority assesses the Cundinamarca Petition as if it were a final measure by stressing that in that act the Authority "does not offer any rational motivation to justify" the application of Resolution 293 to the period prior to 2015,[44] and on that basis later concludes that the Cundinamarca Petition violates the Treaty, since "the reopening of the settlement of the royalty claims on the occasion of the settlement of a contract has no reasonable and consistent justification, according to the applicable standards."[45]

73. In other words, the Award, both in the paragraphs cited above and subsequently, does not indicate that the Cundinamarca Petition does not resolve the reopening of the settlement. On

[40] PHB, Republic of Colombia ¶¶ 41-48.
[41] PHB, Republic of Colombia, ¶¶ 41-43.
[42] Award, ¶ 424.
[43] Award, ¶ 610.
[44] Award, ¶ 426.
[45] Award, ¶ 748.

the contrary, the Cundinamarca Petition is the initiation of a legal action by the mining authority before an administrative tribunal, which contains certain arguments and which includes, among its claims, the resettlement of the Contracts in accordance with certain parameters, without this having ultimately occurred, nor having given rise to a payment. It will be up to the judge to decide whether the judicial settlement of the Contracts is appropriate, and if so, how it will be carried out, given the absence of agreement between the parties in this regard.

74. In my view, the act of initiating a legal action – in this case before administrative tribunals – together with the submission of arguments or claims as part of that legal action, such as the claim to resettle the Contracts, cannot, in the present case, by its very nature, give rise to international responsibility of the State or constitute a breach of an international obligation. For this reason, I disagree with the Majority's decision, reflected in paragraphs 748, 751 and 753, to hold that the initiation of a legal action, *i.e.*, the action of bringing the Cundinamarca Petition before the courts, is, by itself, sufficient to give rise to an arbitrary act in breach of the standard of fair and equitable treatment.

75. Second, and considering the Parties' arguments, the Arbitral Tribunal analyses the timeliness of the Cundinamarca Petition. The Tribunal concludes that, under Colombian administrative law, the legal action that allowed to claim the settlement of the Contracts expired in 2015, that is, three years prior to the filing of the Cundinamarca Petition in 2018, regardless of any subsequent agreements reached by the parties.[46] In light of this determination, the Majority concludes that putting forward claims outside the limitation period is, in and of itself, an arbitrary act, which would give rise to an international wrongful act under the Treaty.[47]

76. In my view, the act of submitting a legal claim, even if it could be considered under local law that the limitation period has expired, does not *per se* constitute arbitrary treatment that would violate the standard of fair and equitable treatment under the Treaty.

77. This is even more so in the present case, since there is an agreement between the Parties that could support the State authority's decision to submit the Cundinamarca Petition on the grounds that it was within the legal time limit. Therefore, the conduct of the National Mining Agency cannot be characterized as grossly unfair, manifestly inconsistent or in defiance of the notion of legal correctness, and therefore cannot constitute an international wrongful act, as defined by the Majority, as it does not meet the threshold required to become an international breach.

78. Finally, I also disagree with the Majority regarding the decision to consider that the Colombian authorities' contractual interpretation of the term "provisional" contained in

[46] Award, ¶ 657. *See also*, Award, ¶ 649 ("*Colombia points out that it reached an agreement with CMSA to settle by mutual agreement until 15 April 2016, to which date the two months for unilateral settlement (15 June 2016) are added, and the two-year period to settle would thus expire on 15 June 2018 – as the request for judicial settlement was filed in February 2018 it would have been timely*").
[47] Award, ¶¶ 751 and 753.

Clause 2 of the Parties' 2011 Agreement[48] constitutes a State conduct that meets the threshold required to become an international wrongful act.

79. For the purpose of understanding my dissenting opinion, I will explain in the following paragraphs the discussion between the Parties on this point concerning revisions of settlements already made in the past. Clause 2 of the 2011 Agreement states:

> *La modificación [del índice de precios] aplicará provisionalmente desde el mes de marzo […] del año 2005 hasta el momento en que se fije el precio base de liquidación de regalías por parte de la Unidad de Planeación Minero Energética […] de conformidad con lo dispuesto en el artículo 23 [de la Ley de Regalías], momento en el cual la Autoridad Minera[] hará efectivo lo que se disponga en los actos administrativos que sean expedidos para el efecto.*[49]

The reference price, referred to in the above clause, was finally set in May 2015 by the National Mining Agency through Resolution 293.

80. According to the Respondent, once Resolution 293 was issued, the relevant Colombian authorities could review and recalculate the royalties paid in the past in accordance with the new formula, since the settlement previously made was "provisional" and therefore reviewable under the 2011 Agreement. According to the Claimant, the agreement does not allow for a review and reassessment of royalties, but rather establishes the methodology according to which royalties were to be provisionally settled as of March 2005 and until Colombia published the new reference settlement price, which it did through Resolution 293.[50]

81. It follows from the above that the Claimant understands the term "provisional" as a synonym for "temporary" (but definitive and not subject to revision), whereas the Colombian National Mining Authority understood it as an antonym of "definitive", so that the provisional application implied that it would be reviewed later, when the reference settlement price was fixed.[51]

82. Faced with this dispute, the Arbitral Tribunal notes that "the Parties themselves, in this arbitration, accept that the use of the term 'provisionally' could be misleading,"[52] but the Majority finds that "the Respondent's justification for retrospectively applying Resolution 293 [...] is unreasonable."[53]

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[48] *See* Agreement between CMSA and Ingeominas of 30 August 2011 (C-0022).
[49] Agreement between CMSA and Ingeominas of 30 August 2011, Clause 2 (C-0022).
[50] Reply, ¶ 107.
[51] For more detail, *see* Award, ¶¶ 384-391.
[52] Award, ¶ 405.
[53] Award, ¶ 410. In particular, the Arbitral Tribunal looks to the analysis and conclusion reached by a local arbitral tribunal constituted under the arbitration clause of the existing concession contract to determine that said contract did not allow for a future revision of royalties that had already paid. *See* Award, ¶¶ 392-411, and Award of 27 April 2022 (R-0083).

83. I consider that, as the Respondent submits, the question for the Arbitral Tribunal to answer in the face of this discrepancy is whether the Colombian authorities' interpretation of the adverb "provisionally" can be considered an arbitrary conduct that contravenes the fair and equitable treatment standard of the Treaty and international law.

84. Thus, considering that both the Parties and the Arbitral Tribunal agree that both interpretations were and are plausible and that the term is ambiguous, in my view, it cannot be concluded that the Colombian authorities, in making the above contractual interpretation, engaged in arbitrary conduct that may constitute a violation of Fair and Equitable Treatment under the Treaty, in accordance with the content of that standard as developed in paragraphs 706 and 707 of the Award.

85. In this regard, the fact that the Tribunal disagrees with Colombia's interpretation of that contractual provision, determining that it does not permit the retrospective application of Resolution 293 under the "2011 Agreements", is not sufficient to meet the threshold of a breach of the Treaty. It should be noted in this regard that, as the Award points out,[54] the fact that a conduct may be considered irregular under domestic law parameters is not sufficient to constitute a breach of the fair and equitable treatment standard.

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86. For the reasons mentioned in section III, I dissent from the Majority's opinion in section V.2.3.2. (B) corresponding to paragraphs 811 to 844 and reflected in the operative section at paragraphs 887.3(i) and (ii) of the Award. In my view, the Arbitral Tribunal should have rejected the Claimant's claim for an indemnity for future damages. In light of my dissent regarding the Claimant's indemnity request, I further disagree with the Majority's decision on the costs of the arbitration. For the same reasons, I further disagree with the Majority's decision to order interest in respect of each of the referred orders and the decision recorded in paragraph 887.9 of the Award.

87. In addition, for the reasons indicated in section IV above, I also disagree with part of the Majority's conclusions on the nature of State conduct that may give rise to international responsibility of the State. In my view, the Tribunal should have concluded that neither the filing of the Cundinamarca Petition before the administrative judge nor the Colombian authorities' contractual interpretation of the term "provisional" in an agreement between the Parties, can give rise to arbitrary conduct that would constitute a breach of an international obligation of the Colombian State. Accordingly, my concurrence with the decision on liability in the Award must be understood as qualified by what is stated in section IV of this partial dissenting opinion, in particular with respect to paragraphs 406, 410, 748, 751, 753 and 755 of the Award.

[*Signature page follows*]

[54] Award, ¶ 168.

[Signed]

Prof. Andrés Jana Linetzky
Arbitrator

Date: 10 June 2024