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 – RECTIFICATION

DECISION ON REQUEST FOR RECTIFICATION

Members of the Tribunal
Ms. Deva Villanúa, President of the Tribunal
Prof. Guido S. Tawil, Arbitrator
Prof. Andrés Jana Linetzky, Arbitrator

Secretary of the Tribunal
Ms. Catherine Kettlewell

Assistant to the Tribunal
Ms. Francisca Seara Cardoso

Date of dispatch to the parties: 29 January 2025

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TABLE OF ABBREVIATIONS/DEFINED TERMS

ANDJE	*Agencia Nacional de Defensa Jurídica del Estado* (National Agency for the Legal Defense of the State)
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings of 10 April 2006
Award	Award rendered by the Tribunal on 21 June 2024
Claimant's Rectification Costs	Claimant's Statement of Costs of 4 November 2024
Colombia, Respondent or the Republic	The Republic of Colombia
Decision	The current decision on the Request for Rectification
Disputed Paragraph	Para. 887(3) of the Award
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966
ISCID or the Centre	International Centre for Settlement of Investment Disputes
Parties	Claimant and Respondent jointly
Rectification Costs	Statements of Costs of 4 November 2024
Rejoinder	Respondent's Rejoinder to the Reply of 15 October 2024
Reply	Claimant's Reply to the Response of 1 October 2024
Request for Rectification	Claimant's Request for Rectification of 2 August 2024
Respondent's Rectification Costs	Respondent's Statement of Costs of 4 November 2024

Response	Respondent's Response to the Request for Rectification of 17 September 2024
South32 or Claimant	South32 SA Investments Limited
Treaty or the BIT	Bilateral 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
Tribunal	Tribunal in this case, composed of Ms. Deva Villanúa, Prof. Dr. Guido S. Tawil and Prof. Andrés Jana Linetzky

LIST OF CASES CITED

Gavazzi	*Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No ARB/12/25, Decision on Rectification, 13 July 2017. Accesible at: https://www.italaw.com/sites/default/files/case-documents/italaw9508.pdf.
Gold Reserve	*Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/09/1, Decision Regarding the Claimant's and the Respondent's Requests for Corrections, 15 December 2014. Accesible at: https://www.italaw.com/sites/default/files/case-documents/italaw4079.pdf .
Infracapital	*Infracapital F1 S.à r.l. and Infracapital Solar B.V v. Kingdom of Spain*, ICSID Case No ARB/16/18, Decision on the Requests for Rectification, 26 September 2023. Accessible at: https://italaw.com/sites/default/files/case-documents/180320.pdf.
Ickale	*İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No ARB/10/24, Decision on Claimant's Request for Supplementary Decision and Rectification of the Award, 4 October 2016. Accessible at: https://italaw.com/sites/default/files/case-documents/italaw7611.pdf.
IC Power	*IC Power Ltd and Kenon Holdings Ltd v. the Republic of Peru*, ICSID Case No ARB/19/19, Decision on the Requests for Rectification and Clarification, 3 May 2024. Accessible at: https://www.italaw.com/sites/default/files/case-documents/italaw180938.pdf.
Philip Morris	*Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No ARB/10/7, Decision on Rectification, 26 September 2016. Accessible at: https://www.italaw.com/sites/default/files/case-documents/italaw7585.pdf.
Watkins Holding	*Watkins Holding S.À.R.L et al v. Kingdom of Spain*, ICSID Case No ARB/15/44, Decision on Spain's Request for Rectification of the Award, 13 July 2020. Accessible at: https://www.italaw.com/sites/default/files/case-documents/italaw11742.pdf.

I. INTRODUCTION

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ["**ICSID**" or the "**Centre**"] on the basis of the Bilateral 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 [the "**Treaty**" or the "**BIT**"] which entered into force on 10 October 2014, and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 [the "**ICSID Convention**"].

2. The claimant is South32 SA Investments Limited ["**South32**" or the "**Claimant**"], a limited liability company incorporated under the laws of England and Wales, with registered office in London and with commercial activities in the United Kingdom.

3. The respondent is the Republic of Colombia ["**Colombia**", the "**Respondent**" or the "**Republic**"].

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

II. PROCEDURAL HISTORY

5. On 27 March 2020 the Secretary-General of ICSID registered the Request for Arbitration submitted by South32 SA Investments Limited against the Republic of Colombia. The Tribunal was constituted and the proceedings began on 17 November 2020.

6. On 21 June 2024 the Tribunal presided by Ms. Deva Villanúa, and also comprising Profs. Guido S. Tawil and Andrés Jana Linetzky [the "**Tribunal**"], rendered its award [hereafter the "**Award**"].

7. On 2 August 2024, pursuant to Art. 49(2) of the ICSID Convention and Rule 49 of the ICSID Rules of Procedure for Arbitration Proceedings of 10 April 2006 ["**Arbitration Rules**"], Claimant submitted a request for rectification of the Award ["**Request for Rectification**"], accompanied by the lodging fee in accordance with Arbitration Rule 49(1)(d).

8. On 5 August 2024 the Acting Secretary-General registered Claimant's Request for Rectification pursuant to Arbitration Rule 49(2)(a) and transmitted a copy of the Request for Rectification, together with the notice of registration, to each member of the Tribunal.

9. On 6 August 2024 the Tribunal set out a procedural calendar under which it invited the Republic to submit a response to the Request for Rectification by 27 August 2024. This would then be followed by a reply to the response, if Claimant so wished. In the event that South32 filed a reply, Colombia had the option to submit a rejoinder.

10. On 17 August 2024 Colombia requested an extension until 27 September 2024 to produce its response. Claimant rejected the length of the requested extension, proposing that the Republic be granted until 10 September 2024.

11. On 23 August 2024 the Tribunal issued its decision on the extension request, granting Colombia until 17 September 2024 to produce the response.

12. On 17 September 2024 Respondent filed its Response to Claimant's Request for Rectification ["**Response**"].

13. On 19 September 2024 the Tribunal asked Claimant to indicate whether it intended to submit a reply to the Response. This was confirmed by South32 on 23 September 2024.

14. On 1 October 2024 Claimant filed its reply to the Response ["**Reply**"].

15. On 15 October 2024 Respondent submitted its rejoinder to the Reply ["**Rejoinder**"].

16. On 21 October 2024 the Tribunal invited the Parties to simultaneously present their statements of costs ["**Rectification Costs**"].

17. On 4 November 2024 the Parties filed their Rectification Costs ["**Claimant's Rectification Costs**" and "**Respondent's Rectification Costs**"].

18. On 11 November 2024 the Republic provided further comments on Claimant's Rectification Costs. Upon the Tribunal's invitation, Claimant set out its comments in response.

III. RELEVANT PROVISIONS

19. For the purpose of this Decision, the relevant provisions regarding rectification are the following:

20. Art. 49(2) of the ICSID Convention:

> "The Tribunal upon the request of a party made within 45 days after the date on which the award was rendered may after notice to the other party decide any question which it had omitted to decide in the award, and shall rectify any clerical, arithmetical or similar error in the award. Its decision shall become part of the award and shall be notified to the parties in the same manner as the award. The periods of time provided for under paragraph (2) of Article 51 and paragraph (2) of Article 52 shall run from the date on which the decision was rendered".

21. Arbitration Rule 49(1):

> "Within 45 days after the date on which the award was rendered, either party may request, pursuant to Article 49(2) of the Convention, a supplementary decision on, or the rectification of, the award. Such a request shall be addressed in writing to the Secretary-General. The request shall:
>
> […]
>
> (c) state in detail:
>
> (i) any question which, in the opinion of the requesting party, the Tribunal omitted to decide in the award; and
>
> (ii) any error in the award which the requesting party seeks to have rectified; and
>
> (d) be accompanied by a fee for lodging the request".

IV. PARTIES' POSITIONS

22. Claimant's Request for Rectification gives rise to three separate groups of proposed amendments: the proposed rectification of paras. 739 and 822 to amend the translation of the word "*condena*" in the English version of the Award (**1.**); the changing of the date of accrual in para. 883 (**2.**) and the rectification of the dipositive part of the Award, namely para. 887(3) (**3.**).

1. PARAGRAPHS 739 AND 822

A. Claimant's position

23. Claimant is of the view that the word "*condena*" has been mistranslated in para. 739 of the Award[1] and believes that the following change should be made to the English version of the Award[2]:

> "In addition, **Order 63** revises the same period already subject to re-assessment by Order 217 and whose ~~sentence~~ payment order had **already been paid** by CMSA. The state thus tried to tax the same period twice for the same reason, resulting in a manifest **abuse** and a **violation of legal certainty**"[3].

24. Similarly, Claimant takes issues with the translation of "*condena*" in para. 822 of the Award[4]:

> "Nor does the majority of the Arbitral Tribunal consider that the claim infringes on the sovereignty of the state, as it is a pecuniary ~~sentence~~ order, for an amount to be determined in the future".

B. Respondent's position

25. Colombia does not object to "*condena*" being translated as "payment order" and "order" respectively, believing that the requests fall under the scope of rectification under Art. 49(2) of the ICSID Convention[5].

2. PARAGRAPH 883

A. Claimant's position

26. Claimant requests the following amendment to para. 883 of the Award[6]:

[1] Request for Rectification, para. 13.
[2] Request for Rectification, para. 15.
[3] The changes in red within Section IV represent Claimant's proposed changes to the Award.
[4] Request for Rectification, paras. 14 – 15.
[5] Response, para. 11.
[6] Request for Rectification, para. 17.

> "The dates and amounts, relevant for accrual, shall be:
>
> - ~~23 July 2023~~ 27 July 2023 until the date of payment to South32 Investments Limited, in respect of a principal amount of USD 4,519,417;
>
> - 21 June 2024 until the date of payment to South32 Investments Limited, in respect of a principal amount of USD 5,050,000;
>
> - The date on which CMSA disburses any amount claimed in the unenforced Measures in Breach and for iron royalties, until Colombia pays South32 Investments Limited that amount converted to USD, net of dividend withholding, and multiplied by 99.96% – this amount being the principal amount on which interest will accrue".

27. Claimant argues that date reflected in para. 883 of the Award, that being "23 July 2023", likely reflects a typo as the notional valuation date used for the calculation of interest on the damages owed was 27 July 2023 – as acknowledged by the Tribunal through the use of this date in other sections of the Award[7].

B. Respondent's position

28. As with respect to paras. 739 and 822, Colombia does not oppose the correction of para. 883 to take into account the correct valuation date, arguing that it amounts to a "clerical, arithmetical or similar" error pursuant to Art. 49(2) of the ICSID Convention[8].

3. PARAGRAPH 887(3)

A. Claimant's position

29. Claimant argues that para. 887(3) of the Award ["**Disputed Paragraph**"] requires further clarification for the future indemnity to have full effect. The Claimant proposes the following amendment[9]:

> "By 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:
>
> - 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;

[7] Request for Rectification, para. 16, *citing* Award, paras. 767, 778, 779.
[8] Response, para. 11.
[9] Request for Rectification, para. 21.

- Cundinamarca Petition;
- Resolution 576;
- Order 63~~.~~;

Such indemnity shall be:

- First, converted to USD (at the exchange rate applicable on the date of payment);
- Then, reduced by the percentage at which the state taxes income obtained through dividends; and
- Then, multiplied by 99.94% (the percentage of ownership held by South32 Investments Limited in CMSA).

(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.

Such indemnity shall be:

- First, reduced to the extent that Cerro Matoso S.A.'s iron royalty settlement payments lead to any income tax rebate for Cerro Matoso S.A.;
- Then, converted to USD (at the exchange rate applicable on the date of payment);
- Then, reduced by the percentage at which the state taxes income obtained through dividends; and
- Then, multiplied by 99.94% (the percentage of ownership held by South32 Investments Limited in CMSA)".

30. Claimant believes that it is not unambiguously clear in either language version of the Award that the wording of the Disputed Paragraph properly reflects the Tribunal's methodology for calculating the future indemnity to be paid by Colombia[10] as expressed in paras. 841 to 843[11]:

> "841. The majority of the Tribunal orders that compensation shall therefore be calculated as follows:
>
> 842. *First*, the amount paid by CMSA due to the enforcement of a Measure in Breach:
>
> - Will be converted to USD;

[10] Request for Rectification, para. 20.
[11] Request for Rectification, para. 18.

- Will be reduced by the percentage at which the state taxes income obtained through dividends;

- Will be multiplied by 99.94% (the percentage of ownership held by South32 Investments Limited in CMSA).

> 843. In the case of the iron royalty, moreover, and as already seen in the analysis of the historical damage, CMSA accounted for it as an expense, which led to a reduction of the income tax that should now be deducted from the compensation to be received. Therefore, to the extent that future iron royalty payments lead to an income tax rebate, that amount should first be reduced by the applicable income tax percentage. Once the amount net of the tax's impact is obtained, it shall be converted into USD and reduced based on the tax on dividends and ownership".

31. Claimant suggests that its proposed changes merely reflect *verbatim* the Tribunal's methodology as set out in the aforementioned paragraphs[12].

32. South32 draws particular attention to the phrase "[h]old harmless … by the percentage …", suggesting that an indemnity is an amount of money rather than a percentage. It also believes that the Disputed Paragraph leaves the exact amount on which the adjustments must be made unclear, as it first states the adjustments that need to be made prior to indicating the amount on which they must be carried out[13].

33. Thus, the proposed changes aim to ensure that there are no issues when enforcing the indemnity before the courts[14].

B. Respondent's position

34. Respondent opposes Claimant's request to rectify this paragraph, considering it as falling outside the scope of Art. 49(2) of the ICSID Convention[15] and Arbitration Rule 49(1)[16] for failing to identify an outright error that meets the requirements of the former provision.

35. Therefore, and in accordance with "arbitral practice", Respondent believes that a rectification request must meet two criteria[17]:

- Contain a clerical, arithmetical or similar error; and

- Be related to an accessory aspect of the award.

36. But here, Respondent argues, Claimant originally only identified an "ambiguity", rather than an error, without framing the alternate conclusion which an enforcing court may be drawn

[12] Reply, para. 18.
[13] Reply, para. 9.
[14] Request for Rectification, para. 21.
[15] Response, para. 14.
[16] Response, para. 15.
[17] Response, para. 17.

to[18]. This, it suggests, is acknowledged by South32 through it later characterising its request to rectify the Disputed Paragraph as one to correct an error in its Reply[19]. What's more, Claimant fails to identify how the original wording of the Disputed Paragraph could affect the Tribunal's ordered indemnity[20]. Thus, Respondent claims that South32 in fact seeks to redraft the Tribunal's orders.

37. Furthermore, Respondent argues that rectifying para. 887(3) would have the effect of modifying an essential part of the Award and is anyhow unnecessary due to the Tribunal's reasoning in paras. 841 to 843 largely corresponding to the description in the Disputed Paragraph[21]; there is therefore no error to be amended.

38. Regarding Claimant's argument that the use of the word "percentage" is particularly confusing, Colombia fails to find a justification for such reasoning. Instead, it suggests that the word is unambiguous, meaning a number that is a proportion or a fraction of an amount, and is consistent anyhow with its use in para. 842 of the Award[22].

39. The second limb of Colombia's argument, as set out in its Response, is that Claimant is in fact concealing an attempt to recharacterise the Tribunal's methodological approach regarding the indemnity against the payment of future iron royalties[23]. Respondent puts particular emphasis on Claimant's proposal to change the reference to a "tax benefit" to that of a "tax rebate", arguing that it could have a material impact on South32's future indemnities[24].

40. This argument was disputed by Claimant who suggested that there is no material difference between the use of "tax rebate" and "tax benefit", pointing to the presence of "tax benefit" within para. 843 of the Award – which neither Party has sought to rectify. It therefore inferred that the Tribunal has used the two terms interchangeably. Nevertheless, Claimant is willing to modify its Request for Rectification to include the term "tax benefit" in order to allay Colombia's concerns[25].

C. Other decisions

41. Claimant finds support for the carrying out the proposed rectification in previous decisions:

42. It cites *Infracapital* as an example of a minor adjustment to an award in order to better reflect the tribunal's methodology to calculate damages – despite its reasoning being evident from its analysis[26]. Similarly, South32 finds support for its position in *Ickale*, where it was decided that a correction to a paragraph which incorrectly reflected the conclusion of its analysis

[18] Response, para. 20.
[19] Rejoinder, para. 14.
[20] Rejoinder, para. 15.
[21] Response, paras. 23 – 24.
[22] Rejoinder, para. 16.
[23] Response, para. 27.
[24] Response, paras. 31 – 33.
[25] Reply, paras. 19 – 20.
[26] Reply, paras. 11 – 12.

comprised a "clerical, arithmetical or similar" error[27]. The Republic avers that *Infracapital* and *Ickale* lack relevance for the current proceedings insofar as South32, unlike the parties seeking rectification in said cases, has failed to identify an error as required under Art. 49 of the ICSID Convention[28].

43. Claimant finds that, as demonstrated by *IC Power*, the need to avoid future enforcement issues forms a relevant part of a tribunal's analysis when making a decision according to Art. 49 of the ICSID Convention[29]. In contrast, Colombia alleges that the tribunal made the necessary rectification in response to a difference of interpretation between the parties – rather than to deal with enforcement related concerns. In the present dispute, there is no dispute between the Parties regarding the interpretation of the Disputed Paragraph and therefore no need to carry out a rectification[30].

44. Respondent, in turn, finds support in *Watkins Holding* to argue that any recharacterisation of the Tribunal's methodological approach in damages quantification is outside the scope of a request for rectification[31]. Similarly, the tribunal in *Gavazzi* rejected part of a rectification request aimed at clarifying the wording of the award, rather than correcting a clerical or arithmetical error[32].

45. The Republic also cites the case of *Philip Morris* as evidence of a tribunal finding the existence of various potential interpretations of a paragraph irrelevant[33]. South32 finds the case inapposite given that rectification was sought because of an alleged mischaracterisation of a party's argument, which the tribunal found not to have occurred, instead being the result of a '"strained reading of the statements' in the award"[34]. Colombia downplays Claimant's argument, emphasising that the tribunal agreed that the claimant's consideration of how the paragraphs would be interpreted was immaterial[35].

[27] Reply, paras. 13 – 14.
[28] Rejoinder, para. 21.
[29] Reply, paras. 15 – 16.
[30] Rejoinder, paras. 22 – 24.
[31] Response, para. 26.
[32] Rejoinder, para. 19.
[33] Response, para. 22.
[34] Reply, para. 17.
[35] Rejoinder, para. 25.

V. ANALYSIS

1. APPLICABLE STANDARD

46. Art. 49(2) of the ICSID Convention establishes the following:

> "The Tribunal upon the request of a party made within 45 days after the date on which the award was rendered may after notice to the other party decide any question which it had omitted to decide in the award, and shall rectify any clerical, arithmetical or similar error in the award. Its decision shall become part of the award and shall be notified to the parties in the same manner as the award. The periods of time provided for under paragraph (2) of Article 51 and paragraph (2) of Article 52 shall run from the date on which the decision was rendered".

47. Similarly, Arbitration Rule 49(1) provides as follows:

> "Within 45 days after the date on which the award was rendered, either party may request, pursuant to Article 49(2) of the Convention, a supplementary decision on, or the rectification of, the award. Such a request shall be addressed in writing to the Secretary-General. The request shall:
>
> (a) identify the award to which it relates;
>
> (b) indicate the date of the request;
>
> (c) state in detail:
>
> (i) any question which, in the opinion of the requesting party, the Tribunal omitted to decide in the award; and
>
> (ii) any error in the award which the requesting party seeks to have rectified; and
>
> (d) be accompanied by a fee for lodging the request".

48. There is no dispute between the Parties that the Request for Rectification was filed within 45 days of the Award's issuance and accompanied by the required lodging fee. It is also not disputed that the Parties have the right to pursue rectification in accordance with Arbitration Rule 49(1).

49. The core of the debate between the Parties in relation to para. 887(3) revolves around whether or not Claimant has pursued the rectification of "clerical, arithmetical or similar errors", as per Art. 49(2) of the ICSID Convention.

50. As set out in Procedural Order No. 1, the procedural languages of the arbitration are both English and Spanish, with both language versions of the Award being equally authentic[36].

[36] Procedural Order No. 1, paras. 12.1 and 12.14.

As an integral part of the Award[37], this decision on Claimant's Request for Rectification ["**Decision**"] is also issued in both procedural languages. This being the case, the Tribunal believes that it is prudent to also assess the relevance of the Spanish version of the ICSID Convention which translates "clerical, arithmetical or similar error[s]" as "*errores materiales, aritméticos o similares*".

51. The Tribunal notes the potential differing rectification standard that can be derived from the use of the terms "clerical" and "*material*". However, both Parties have debated whether the proposed changes to the Disputed Paragraph amount to a "clerical, arithmetical or similar" error, with no reference to the Spanish version being made. Furthermore, as recognised in *Philip Morris* in analogous circumstances, and according to Art. 33(4) of the Vienna Convention on the Law of Treaties, when there is a conflict between the two language versions the meaning which "best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted". In accordance with the principle of finality of the award, as recognised by the ICSID Convention itself[38], the use of the word "clerical" has best regard to the purpose of the treaty, as it refers to an unintentional error related to documentation or administrative tasks, perfectly aligned with an arithmetical error as set out in Article 49(2) of the ICSID Convention.

52. Therefore, for the purpose of this Decision, attention shall be given to the English version of the Article.

2. PARAGRAPHS 739 AND 822

53. The Tribunal acknowledges that Respondent is in agreement with Claimant that amending the translation of the word "*condena*" in the Spanish version of the Award as "payment order" and "order", respectively, meets the requirements of Art. 49(2) of the ICSID Convention. The Tribunal concurs with the Parties in this regard and finds that an "error" has been identified pursuant to Arbitration Rule 49(1) – that being a mistranslation into English of the word "condena" from the Spanish version of the Award. Therefore, South32's request to rectify paras. 739 and 822 of the Award is hereby upheld.

3. PARAGRAPHS 883 AND 887(6)

54. The Tribunal notes that Colombia agrees with Claimant's proposed amendment to para. 883 of the Award. The Tribunal also notes, however, that the same error is present in para. 887(6) insofar as the Tribunal ordered:

> "the payment of interest at a rate equal to the average annual U.S. Prime rate plus 2%, compounded semi-annually, on:
>
> - USD 4,519,417 accruing from 23 July 2023 until the date of actual payment;"

[37] ICSID Convention, Art. 49(2).
[38] ICSID Convention, Art. 53.

55. The Tribunal finds that in its proposed changes to para. 883 Claimant has identified a "clerical, arithmetical or similar error" and therefore accepts its rectification. As was correctly identified by Claimant, 27 July 2023 is the notional valuation date used as the basis for the experts' calculations in the Joint Valuation Model of the same date[39].

56. Para. 887(6) also contains such an error which, despite not being raised by the Parties, needs rectification. As per Art. 49(2) of the ICSID Convention the Tribunal is instructed, upon the request of a party, to rectify "**any** clerical, arithmetical or similar error" – irrespective of whether said error is identified by the Parties. This being so, para. 887(6) is similarly amended so that interest accrues from 27 July 2023.

4. PARAGRAPH 887(3)

57. In its analysis of the Parties' arguments regarding the Disputed Paragraph, the Tribunal will first discern whether an alleged "error" has correctly been identified (**4.1.**). It will then ascertain whether the proposed changes constitute a change to the Tribunal's methodological approach (**4.2.**) and whether clarifying said approach constitutes a rectifiable error (**4.3.**). Finally, it will address whether the need to avoid future enforcement issues is a relevant consideration in the Tribunal's analysis (**4.4**) before setting out its decision (**4.5.**).

4.1. IDENTIFICATION OF AN ERROR

58. The first point of contention between the Parties surrounds whether Claimant has identified the "error" which it wishes to be rectified in its Request for Rectification, as per the requirements of Arbitration Rule 49(1).

59. Claimant explains that para. 887(3) holds Claimant to be indemnified in a percentage that results after the application of compensation formula and that difficulties may arise at the enforcement stage because a "percentage" is not a unit of compensation.

60. Respondent focuses on the fact that Claimant has failed to identify a specific "error" within its Request for Rectification[40], instead choosing to refer to the need to "unambiguously give effect to the tribunal's intention" and to avoid any future enforcement issues[41]. It highlights that there is no possible error or unambiguity, as both Parties are in agreement as to what the Award decided.

61. The Tribunal finds that Art. 49(2) of the ICSID Convention allows the rectification of any "clerical, arithmetical or **similar** error". Claimant seems to be including its rectification request in the latter category: the error would consist of a choice of words in the Award which does not correctly reflect the Tribunal's previous findings.

62. The Tribunal decided in paras. 841 to 843 of the Award that Claimant was to be kept indemnified in an as-yet undetermined amount that would be determined by applying a

[39] Award, para. 779.
[40] Rejoinder, para. 14.
[41] Request for Rectification, para. 21.

certain formula, which included percentages which reflect Claimant's ownership in CMSA and the rate at which the state levies taxes on the income obtained via dividends. It was, therefore, clear that the Tribunal was ordering Respondent to hold Claimant indemnified in an amount of money. Since para. 887(3) of the Award literally orders Respondent to hold Claimant indemnified in a percentage, Claimant believes that the Decision does not correctly reflect the Tribunal's previously explained finding.

63. The Tribunal is, in view of this, satisfied that Claimant has identified an error which may potentially require rectification, pursuant to Arbitration Rule 49(1).

4.2. ALLEGED CHANGES TO THE METHODOLOGICAL APPROACH

64. One element of Respondent's argument for rejecting the changes to the Disputed Paragraph is the idea that Claimant is intending to change the Tribunal's methodological approach through its amendments. Colombia draws particular attention to the change in phrasing that would occur, if Claimant's proposal was accepted, from "tax benefit" to "tax rebate"[42]. Claimant ultimately agreed to amend its proposed changes in order to maintain the reference to "tax benefit"[43]. The matter, therefore, has been dealt with.

65. Putting the debate around the use of "tax rebate" aside, the Tribunal does not find that Claimant, through its proposed changes to the Disputed Paragraph, intends to amend its methodological approach. As rightly noted by Claimant[44], the proposed changes largely quote *verbatim* the Tribunal's approach as set out in paras. 841 to 843 of the Award and are, therefore, consistent with its methodology.

4.3. RECTIFICATION TO CLARIFY THE TRIBUNAL'S APPROACH

66. Claimant turns to the decision in *Infracapital* to support its proposition that awards may be rectified in order to clarify the methodology used to calculate damages despite its methodology being "evident"[45]. Similarly, it gives *Ickale* as an example of the rectification of a drafting error which resulted in an incorrect description of the conclusion of its analysis[46].

67. Respondent, on the other hand, asserts that these cases can be differentiated from the present one as South32 has failed to identify an error under Art. 49(2) of the ICSID Convention[47]. In support of its argument, it refers to *Gavazzi,* in which the tribunal rejected a requested amendment for attempting to simply clarify, rather than rectify, the wording[48] and *Philip Morris*, where the tribunal found the potential varying interpretations of a paragraph to be irrelevant.

[42] Response, paras. 29 – 33.
[43] Reply, para. 20.
[44] Reply, para. 18.
[45] Reply, paras. 11 – 12.
[46] Reply, paras. 13 – 14.
[47] Rejoinder, para. 21.
[48] Rejoinder, para. 19.

68. Claimant is correct in asserting that the tribunal in *Infracapital* carried out a rectification in order to "properly reflect its analysis and conclusion"[49]. Although comparisons can be drawn with Claimant's proposed changes, the change carried out in *Infracapital* rectified an error, rather than mere ambiguity, and was limited to the substitution of a word – rather than a wholesale redrafting of the paragraph, as Claimant now requests.

69. Similarly, in *Ickale*, although the rectification made was more extensive[50], it responded to errors in the drafting instead of merely enhancing the paragraph's readability.

70. This is consistent with the decision in *Gavazzi*, whereby the tribunal rejected the claimants' proposed amendment due to it merely seeking to clarify something that they acknowledged was self-evident[51].

71. The majority of the tribunal in *Philip Morris* agreed that there being multiple possible interpretations does not constitute a valid reason for rectification[52].

72. As set out in *Gold Reserve*, the purpose of rectification is to "ensure that the true intentions of the tribunal are given effect"[53].

73. In view of the above, the Tribunal notes that previous tribunals have accepted rectification requests to provide clarity, to the extent that:

- They were needed to reflect the tribunal's analysis and conclusion so as to ensure that the true intentions of the tribunal are given effect;

- The meaning of the paragraphs whose clarification was sought was not self-evident; and

- The scope of redrafting was limited in its extension.

4.4. NEED TO AVOID FUTURE ENFORCEMENT ISSUES

74. As an additional consideration, South32 argues that the Tribunal should consider the need to avoid future enforcement issues. Claimant provides the example of the decision in *IC Power*, in which the tribunal failed to reaffirm that the pre-award interest it had ordered should be calculated at the date of the award and be compounded in the dispositive part of the award[54]. Despite both requirements being discernible from its earlier reasoning, rectification was ordered in order to avoid "uncertainties and problems in the event of enforcement of the [a]ward"[55].

---

[49] *Infracapital* (*Decision on the Requests for Rectification*), para. 80.
[50] *Ickale* (*Decision on Claimant's Request for Supplementary Decision and Rectification of the Award*), para. 135.
[51] *Gavazzi* (*Decision on Rectification*), paras. 72 and 74.
[52] Rejoinder, para. 25.
[53] *Gold Reserve* (*Decision Regarding the Claimant's and the Respondent's Requests for Corrections*), para. 38.
[54] Reply, para. 15.
[55] *IC Power* (*Decision on the Requests for Rectification and Clarification*), para. 37.

75. The Tribunal agrees with the principle that ensuring the Award can be properly enforced is a relevant consideration when assessing whether an error should be rectified. However, the Tribunal acknowledges the differing context in *IC Power*, as noted by Colombia, in that there was disagreement between the parties of that case regarding the interpretation of a paragraph[56]. In the current proceedings, the Parties broadly agree on the interpretation of the Disputed Paragraph, with Claimant instead alleging that its wording is not unambiguously clear.

4.5. DECISION

76. The Tribunal agrees with Claimant that an "error" has been identified as per Arbitration Rule 49(1) and Art. 49(2) of the ICSID Convention.

77. References to holding South32 harmless by a "percentage" within the Disputed Paragraph represent a drafting error insofar as an indemnity is an amount, rather than a percentage. The Tribunal accepts that that the word "percentage" be replaced with "amount", to properly give effect to the Tribunal's true intentions, as expressed in paras. 841 to 843 of the Award, and to, eventually, facilitate the enforcement of the Award.

78. As to the remainder of the proposed changes, the Tribunal finds them unsuitable, as they imply substantive redrafting of self-evident paragraphs – thereby not meeting the required standard to warrant rectification. As previously stated, changes that merely increase the Disputed Paragraph's legibility exceed the scope of Art. 49(2) of the ICSID Convention.

79. For the reasons set out *supra*, the Tribunal finds that the requirements of Art. 49(2) of the ICSID Convention and Arbitration Rule 49(1) have both been met in relation to the use of "percentage" in the phrase "hold South32 SA Investments Limited harmless in USD by the percentage …" as used within para. 887(3). Therefore, the Tribunal upholds Claimant's proposed amendment to the Disputed Paragraph in this regard, whilst rejecting all further changes to the subparagraph.

[56] *IC Power* (*Decision on the Requests for Rectification and Clarification*), para. 31.

VI. COSTS

1. COSTS OF RECTIFICATION

80. In this section of the Decision, the Tribunal shall establish and allocate the costs of this rectification procedure ["**Costs of Rectification"**]. The Tribunal shall first determine the applicable rules as well as each category of Costs of Rectification (**1.1.**): the fees and expenses of the arbitrators and the expenses incurred by the Parties for their defence in the rectification procedure. The Tribunal shall then briefly summarise the Parties' claims in respect of the Costs of Rectification (**1.2. and 1.3.**). Finally, the Tribunal shall award the Costs of Rectification accordingly (**1.4.**).

1.1. APPLICABLE RULES

81. As per Arbitration Rules 47(1)(j) and 49(4) the Tribunal must make a decision on the Costs of Rectification.

82. Additionally, Art. 61.2 of the ICSID Convention provides as follows:

> "[T]he 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".

83. The Costs of Rectification include:

- The fees and expenses of the arbitrators ["**Administrative Costs**"] (**A.**); and
- Reasonable expenses incurred by the Parties for their defence in the rectification proceedings ["**Legal Costs**"] (**B.**).

A. Administrative Costs

84. The fees accrued and expenses incurred by the Tribunal have been as follows:

	Fees (USD)	**Expenses (USD)**
Guido Tawil	7,500-	61.85-
Andrés Jana	2,750-	-

Deva Villanúa	13,000-	53.26-
Total	23,250-	115.11-

85. In total, the fees and expenses of the members of the Tribunal amount to USD 23,365.11.

86. Thus, the entire Administrative Costs are therefore covered by the remaining balance in the account held by ICSID for this case[57]. ICSID will reimburse the remaining balance to the Parties in proportion to the payments that they advanced, after the deduction of the Administrative Costs. The final financial statement for the rectification proceedings will be sent to the Parties separately.

B. Legal Costs

87. On 4 November 2024, the Parties filed their Rectification Costs.

88. Claimant submitted the following breakdown of its legal and other costs[58]:

	(USD)
Lawyers' fees	100,138.16
Lodging Fee	10,000
Total	**110,138.16**

89. In turn, Respondent claimed to have incurred USD 684.28 in Legal Costs[59].

1.2. CLAIMANT'S POSITION

90. Claimant requests that the Tribunal[60]:

[57] In accordance with para. 866 of the Award, at the closing of the main proceeding there was a remaining balance from the deposits of advance funds made by the Parties throughout the main proceeding, which is yet to be reimbursed and is sufficient to cover the Administrative Costs related to the Request for Rectification.
[58] Claimant's Rectification Costs, para. 5.
[59] Respondent's Rectification Costs, para. 2.
[60] Reply, para. 24(d).

> "ORDER Colombia to pay all of the costs and expenses associated with these proceedings under Article 49 of the ICSID Convention, including Claimant's legal fees and costs, the fees and expenses of the Tribunal and ICSID's other costs".

91. As the basis for its request that Colombia be ordered to pay all the Costs of Rectification, Claimant argues that the Tribunal should take into account the meritorious nature of both South32's arbitration claim and its Request for Rectification. It also seeks to highlight the Republic's "obstructive conduct" due to the length of its deadline extension request to present its Response and the frivolous content of its pleadings. For these reasons, Claimant believes it should not have to bear the costs of the rectification of what are ultimately clerical errors in the Award[61].

92. As for the difference between its own Legal Costs and those of Colombia, South32 suggests that any comparison is unwarranted as Respondent did not engage external counsel and its submissions were limited to objecting to its Request for Rectification, placing the onus on Claimant to defend its pleading. In any case, the Republic's comments on its Legal Costs should be rejected outright for stemming from an unauthorised communication[62].

1.3. RESPONDENT'S POSITION

93. Respondent has requested that the Tribunal[63]:

> "Order Claimant to pay all the costs and expenses associated with these proceedings under Article 49 of the ICSID Convention, including the Republic of Colombia's legal fees, the expenses of the Tribunal, and ICSID's other costs".

94. Additionally, Colombia has requested that Claimant be ordered to pay interest on its Legal Costs[64].

95. Colombia argues that the supposed lack of merit of Claimant's arguments, and irrelevance of its presented case law, mean that the Costs of Rectification should be fully assigned to South32. Regarding its deadline extension request, it believes that it was fully justified as the *Agencia Nacional de Defensa Jurídica del Estado* ["**ANDJE**"] was attempting to retain external counsel – ultimately failing to do so, resulting in ANDJE having to present its pleadings in these proceedings in order to avoid any undue delay. Respondent seeks to contrast its behaviour, agreeing to two of the three rectification requests and presenting reasonable objections to the third, with that of Claimant – filing an unsupported Request for Rectification and unnecessarily extending the proceedings by demanding a second round of submissions[65].

[61] Reply, paras. 22 – 23.
[62] Claimant's email of 11 November 2024.
[63] Rejoinder, para. 35(ii).
[64] Respondent's Rectification Costs, para. 3.
[65] Rejoinder, paras. 28 – 34.

96. Regarding the appropriateness of Claimant's Legal Costs, the Republic finds them to be excessive relative to the filing of two pleadings of limited length; even more so considering that it was South32's decision to proceed with a second round of pleadings on rectification[66].

1.4. TRIBUNAL'S DECISION

97. As per Art. 61(2) of the ICSID Convention, the Tribunal has broad discretion when apportioning the Costs of Rectification between the Parties.

98. Seeing as both Parties were successful in convincing the Tribunal of the merits of elements of their arguments regarding rectification, as well as the analogous evidentiary effort made by the Parties, the Tribunal finds that each Party shall bear its own Legal Costs and share the Administrative Costs in equal measures, totalling 11,682.55 per Party.

99. In reaching this decision the Tribunal took into account:

- The Parties' good faith: although Claimant was fully successful in all but one of its requested amendments, Respondent did not oppose the amendment of three of the four paragraphs. Similarly, South32 accepted the maintenance of the reference to "tax benefit" within para. 887(3); and

- The Tribunal does not find either of the Parties' arguments to be frivolous nor does it perceive evidence of "obstructive conduct" by Respondent in the length of its request for a deadline extension to produce its Response or by Claimant in its decision to file its Reply. The fact that Colombia was ultimately unable to obtain external legal counsel, instead being represented by the ANDJE, seems *prima facie* to uphold Respondent's argument that the extension was due to an inability to obtain external legal counsel.

100. Seeing as each Party will bear the burden of its own Legal Costs, whether Claimant's are excessive, or if interest should accumulate on them, are no longer relevant. Therefore, the Tribunal does not deem it necessary to opine on such matters.

[66] Respondent's email of 11 November 2024.

VII. DECISION

101. For all the above reasons, the Tribunal unanimously[67]:

1. RECTIFIES the English version of para. 739 of the Award as follows:

> "In addition, **Order 63** revises the same period already subject to re-assessment by Order 217 and whose ~~sentence~~ payment order had **already been paid** by CMSA. The state thus tried to tax the same period twice for the same reason, resulting in a manifest **abuse** and a **violation of legal certainty**".

2. RECTIFIES the English version of para. 822 of the Award as follows:

> "Nor does the majority of the Arbitral Tribunal consider that the claim infringes on the sovereignty of the state, as it is a pecuniary ~~sentence~~ order, for an amount to be determined in the future".

3. RECTIFIES para. 883 of the English and Spanish versions of the Award as follows:

> "The dates and amounts, relevant for accrual, shall be:
>
> - ~~23 July 2023~~ 27 July 2023 until the date of payment to South32 Investments Limited, in respect of a principal amount of USD 4,519,417;
>
> - 21 June 2024 until the date of payment to South32 Investments Limited, in respect of a principal amount of USD 5,050,000;
>
> - The date on which CMSA disburses any amount claimed in the unenforced Measures in Breach and for iron royalties, until Colombia pays South32 Investments Limited that amount converted to USD, net of dividend withholding, and multiplied by 99.96% – this amount being the principal amount on which interest will accrue".
>
> "*Las fechas e importes, relevantes para el devengo serán:*
>
> *- El ~~23 de julio de 2023~~ 27 de julio de 2023 hasta la fecha de pago a South32 Investments Limited, respecto a un principal de USD 4.519.417;*
>
> *- El 21 de junio de 2024 hasta la fecha de pago a South32 Investments Limited, respecto a un principal de USD 5.050.000;*
>
> *- La fecha en que CMSA desembolse cualquier cantidad reclamada en las Medidas Violatorias aún no ejecutadas y por regalías del hierro, hasta que Colombia pague a South32 Investments Limited aquella cantidad convertida a USD, deducida la retención*

[67] The arbitrator Prof. Andrés Jana wishes to convey that, without prejudice to his position with respect to the Award, as contained in his Dissenting Opinion, he concurs with the contents of the present Decision.

por dividendos, y multiplicada por 99,96% – siendo este importe el principal sobre el que se devengarán intereses".

4. RECTIFIES para. 887 of the English and Spanish versions of the Award as follows:

"For all the above reasons, the Arbitral Tribunal

(3) By majority, orders Colombia to:

(i) Hold South32 SA Investments Limited harmless in USD by the ~~percentage~~ amount resulting from deducting the percentage 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:

- 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~~ amount that results from deducting the percentage 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".

[…]

(6) Unanimously orders the payment of interest at a rate equal to the average annual U.S. Prime rate plus 2%, compounded semi-annually, on:

- USD 4,519,417 accruing from ~~23 July 2023~~ 27 July 2023 until the date of actual payment;"

"*Por todas las razones expuestas, el Tribunal Arbitral:*

(3) Por mayoría, ordena a Colombia a:

(i) Mantener a South32 SA Investments Limited indemne en USD por el ~~porcentaje~~ importe que resulte de deducir ~~la~~ el porcentaje de retención sobre dividendos vigente y multiplicar el porcentaje de propiedad sobre Cerro Matoso S.A. detentado por South32 SA Investments Limited, sobre el importe que Cerro Matoso S.A. pague, en ejecución de:

- *resolución 293 de la Unidad de Planeación Minero Energética, en aplicación de los arts. 8 y 9 de la Resolución 293 de la Agencia Nacional de Minería;*

- *Auto VSC 26;*

- *Petición Cundinamarca;*

- *Resolución 576;*

- *Auto 63.*

(ii) Mantener a South32 SA Investments Limited indemne en USD por el ~~porcentaje~~ importe que resulte de deducir el porcentaje de beneficio fiscal obtenido del pago de las regalías sobre el hierro, la retención sobre dividendos vigente y multiplicar el porcentaje de propiedad sobre Cerro Matoso S.A. detentado por South32 SA Investments Limited, sobre el importe que Cerro Matoso S.A. pague por las liquidaciones de regalías sobre el hierro.

[…]

(6) Por unanimidad, ordena pagar intereses a un tipo equivalente a la media anual del U.S. Prime rate aumentado en un 2%, capitalizado semestralmente, sobre:

- *USD 4.519.417, devengándose desde el ~~23 de julio de 2023~~ 27 de julio de 2023 hasta la fecha de pago efectivo;*"

5. DECIDES that each Party shall bear its own Legal Costs and half of the Administrative Costs.

6. REJECTS any other claims.

* * *

[Signature page follows.]

[Signed]

Prof. Dr. Guido S. Tawil
Arbitrator

Date: 21 January 2025

Prof. Andrés Jana Linetzky
Arbitrator

Date:

Ms. Deva Villanúa
President of the Tribunal

Date:

[Signed]

Prof. Dr. Guido S. Tawil
Arbitrator

Date:

Prof. Andrés Jana Linetzky
Arbitrator

Date: 21 January 2025

Ms. Deva Villanúa
President of the Tribunal

Date:

Prof. Dr. Guido S. Tawil
Arbitrator

Date:

Prof. Andrés Jana Linetzky
Arbitrator

Date:

[Signed]

Ms. Deva Villanúa
President of the Tribunal

Date: 21 January 2025