

South32 SA Investments Limited v. the Republic of Colombia

(ICSID Case No. ARB/20/9)

RESPONDENT'S REDFERN SCHEDULE

28 October 2021

Throughout this Request for Document Production, “**document**” means a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means of storing or recording information.

Any reference to a document made in this Request for Document Production shall be understood as a reference to any document of South32 SA Investments Limited (“**South32**” or the “**Claimant**”), its subsidiaries (including CMSA), holding companies (including South32 Jersey Limited, the Claimant’s immediate parent company, and South32 Limited (Australian company registration number ACN 093 732 597), the parent company which ultimately controls the Claimant), affiliates, or of any employee or authorized representative of South32. For the avoidance of doubt, the requested documents include documents internal to South32 and their affiliates.

Unless indicated otherwise, the defined terms used in the present document have the same meaning as those used in prior submissions made by the Parties in the course of the present arbitration.

Request No. 1	
Documents or category of documents requested	Financial documents (including but not limited to audited accounts, audited financial statements, earnings reports, and annual returns) showing CMSA’s annual economic and financial performance, and containing forecasts of and comments on CMSA’s mining royalty payments since 1982. For the avoidance of doubt, the present request concerns forecasts of the royalty <i>amounts</i> which CMSA was expected to pay over the years, and the manner and extent to which those payments were subject to review.
Relevance and materiality according to the Requesting Party	CMSA owed mining royalties in accordance with the Constitution, the Colombian regulatory framework and the Concession Contracts and Contract 51. In practice, CMSA declared, self-assessed and paid mining royalties. The relevant Colombian authorities were thereafter in charge of verifying and auditing CMSA’s underlying data and ordering any relevant adjustment to its royalty payments. CMSA’s declaration, self-assessment and payment of mining

royalties were thus always subject to the relevant authorities' scrutiny and were not final until the contracts were liquidated.¹

The requested documents are relevant to support the Republic of Colombia's claim that "*CMSA knew that its declaration, self-assessment and payment of royalties were subject to review and adjustments*".²

Further, the requested documents are material to the outcome of the arbitration, as South32's knowledge of the Colombian authorities' obligation and power to audit and review CMSA's royalty payments is relevant for the assessment of (i) the absence of any legitimate expectation that CMSA's royalty payments were final; (ii) the absence of any legitimate expectation that Colombian authorities could not audit or review the different components of CMSA's royalty self-assessments, declarations or payments; and (iii) the reasonability of the Colombian authorities' actions, which relates to the *manner* in which the Colombian authorities exercised their duty to scrutinize CMSA's royalty declarations and payments.

Indeed, these documents will establish whether the Claimant (a) expected adjustments to CMSA's mining royalty payments (as well as the extent of these expected adjustments and over which components); (b) accounted for a specific timeframe during which it expected the Colombian authorities to exercise their oversight powers; and (c) anticipated the payment of iron royalties. These documents will illustrate the Claimant's understanding with respect to the applicable formulas to calculate the price of nickel. These elements are crucial to address the Claimant's claim that its alleged legitimate expectations were frustrated.

Finally, these documents will show how profitable CMSA has historically been and remains to this day, and how minimal the impact of the Colombian authorities' impugned measures has been (and might be) on CMSA's operations and profitability. This is also relevant to the Republic of Colombia's claim that it afforded the Claimant fair and equitable treatment.

It is reasonable to assume that these documents exist. The Claimant contends that the predictability of mining royalty payments is fundamental for the management of their investment in CMSA.³ Moreover, it is typical of a company of CMSA's caliber to create and retain such financial documentation.

¹ Counter-Memorial, Section II.B.

² Counter-Memorial, Section II.B.3.

³ Memorial, ¶ 224.

Documents not in the Requesting Party's possession	The Republic of Colombia confirms that none of the requested documents are in its possession, custody or control.
Responses / Objections to document request	<p>First, Colombia has failed to show that the requested documents are relevant to the case or material to its outcome, as required by Article 3.3(b) of the 2010 IBA Rules on the Taking of Evidence in International Arbitration (the <i>IBA Rules</i>) (applicable per Procedural Order No 1, paras 15, 28) because they are aimed at proving undisputed points, and because there is a complete disconnect between Colombia's Request 1 and the justification provided.</p> <p>Contrary to Colombia's characterization in Request 1 above, Claimant has not contested that CMSA knew that royalty payments could be "subject to review and adjustments."⁴ CMSA acknowledges that the Colombian authorities had the power to conduct certain audits and to exercise oversight authority over royalty payments (<i>see, eg</i>, Memorial, paras 45(a), 46, 126, 200, 222) as they did throughout the performance of the Concessions (<i>see</i> Memorial, paras 75, 179, 201). Claimants do not claim to have had an expectation that Colombian authorities would not audit or review the different components of CMSA's royalty self-assessments, declarations or payments, as argued above. Rather, Claimant objects to the arbitrary, contradictory, repetitive, overlapping and untimely <i>manner</i> in which Colombian authorities undertook such reviews, including by reassessing royalty payments made decades prior with retroactive effect) (<i>see, eg</i>, Memorial, paras 188-89, 192-204, 209, 220-24).</p> <p>Further, the request of documents containing "forecasts of royalty amounts" in no way would show Claimants' or CMSA's understanding regarding the <u>finality</u> of royalty payments made. The mere <u>amount</u> of projected royalties would not assist Colombia in showing whether CMSA knew that royalty payments "were subject to review and adjustments" (a statement that Claimants do not dispute, as already stated), or whether that the manner in which Colombia exercised its authority was proper or not.</p> <p>Moreover, by nature, forecasts are based on <i>projected</i> inputs to the formula used to calculate royalties owed, including production levels, which may or may not ultimately reflect <i>actual</i> production. However, royalties paid to Colombia are calculated only on the basis of actual volumes extracted. Similarly, the formula for paying royalties has never included a static reference price. Both under the 1985 Royalties Agreement and, later, when payments were made according to the reference prices set by UPME in accordance with National Mining Agency Resolution 293, the reference price has</p>

⁴ Counter-Memorial, Section II.B.3 and Request 1 above.

been determined on a quarterly basis. The resulting variance between the projected royalties and actual royalty payments has no bearing upon or correlation to the Claimant's or CMSA's understanding of Colombia's oversight authority, and is also unrelated to Colombia's additional royalty payment requests that are at issue in this case.

Second, Colombia's request is **excessively broad**, failing to identify a narrow and specific category of documents, as required by Article 3.3(a) of the IBA Rules, or even a specific time frame. Colombia's request refers to "financial documents [...] containing forecasts of and comments on CMSA's mining royalty payments since 1982."

Third, granting the request would impose an **unreasonable burden** on the Claimant (IBA Rules, Art 3.3(c)) and would affect the fairness and equality of the parties (IBA Rules, Art 9.2(g)) because its breadth would require that the Claimant searches for any document containing forward-looking statements regarding the payment of royalties, even if they were prepared 20, 30 or 40 years ago.

Moreover, any documents relating to royalty payment expectations predating 1996 are **already in Colombia's possession**. From 1979 to 1994 Colombia was the majority shareholder of CMSA, and it was not until 1996 in which it entirely divested from CMSA (Memorial, paras 11-12). Financial information, including relating to royalty payment obligations, would naturally have been shared with the shareholders.

For the above reasons, this Request amounts to a fishing expedition whereby Colombia seeks a broad universe of documents for which it has not provided a relevant justification. This exceeds the proper scope of the document production request, and should be rejected. As noted by Gary Born, "tribunals are generally very unwilling to permit parties to engage in 'fishing expeditions', aimed at identifying possible claims or sources of further inquiry" and "[t]he focus of disclosure should be on obtaining relevant and material evidence, not playing guessing games" (G Born, *International Commercial Arbitration* (3d edn 2021), pp 2534-35, 2536).

Colombia has made extensive references to the parties' submissions and the tribunal's decision⁵ in the document production phase conducted in the parallel ICC arbitration proceedings against Colombia (ICC Case No. No. 25297/JPA) (the **ICC Arbitration**). It has therefore waived any confidentiality in relation to such proceedings and so, to ensure equality between the parties, Claimant will make reference to the parties' submissions

⁵ See Colombia's Requests 2-9 below.

	<p>and tribunal decision in the ICC Arbitration as well. In that context, the tribunal in the ICC Arbitration rejected a virtually identical Request No. 1 for lack of relevance and materiality. Claimant sets out below its reasons.</p> <p>The only material difference in its request 1 in this arbitration is an additional request for “Financial documents (including but not limited to audited accounts, audited financial statements, earnings reports, and annual returns) showing CMSA’s annual economic and financial performance [...]” First, this information is entirely irrelevant to the questions at issue in this case. The profitability or financial performance of CMSA does not respond to any relevant legal question as to whether a breach of the UK-Colombia investment treaty has occurred. A breach of a treaty standard such as the fair and equitable treatment standard may cause loss to an investor without leading to the investor’s insolvency. It is therefore irrelevant to the question of whether a breach has occurred or what losses have flowed from that breach.</p> <p>In any event, and notwithstanding the above, as Colombia is aware, Claimant and CMSA’s ultimate parent company, South32 Limited (ABN 84 093 732 597) publishes its annual reports, reporting on the performance of all its controlled entities, including CMSA. To the extent that Colombia wishes to obtain information on the profitability of CMSA’s operations, this information is already in the public domain and fully available to it. Moreover, the annual reports contain information of contingent liabilities of subsidiaries and controlled entities. CMSA also publishes annual sustainability reports, which contain information of the company’s performance, its royalty payments and any contingencies, and Colombia has CMSA’s Financial Statements of 2015 to 2019 in its power as well (submitted as exhibits CLEX-013 through CLEX-017).</p> <p>In sum, the information requested by Colombia is irrelevant to the issues in dispute but is publicly available in any case and Colombia is trying to shift the burden of looking for and sorting that information to the Claimant.</p>
<p>Reply to Objections to document request</p>	<p>The Respondent maintains its request in full.</p> <p><i>First</i>, the requested documents are relevant to the dispute and material to its outcome.</p> <p>The Claimant’s objections confirm the relevance of Request No. 1. Indeed, the Claimant insists that what is at issue in the present arbitration is the “<i>manner in which Colombian authorities undertook</i>” reviews of CMSA’s royalty payments (emphasis in original). This is precisely what Request No. 1 seeks to address. Request No. 1 specifically relates to “<i>forecasts of [...] the manner and extent to which [royalty] payments were subject to review</i>”</p>

(emphasis added).⁶ It is therefore clear that the relevance and materiality of Request No. 1 are undisputed.

Further, the Claimant's objection is contradictory. On the one hand, the Claimant concedes that Colombia could audit royalty payments, but, on the other, Claimant alleges that Colombia's audits were illegal because they consisted in "*reassessing royalty payments made decades prior with retroactive effect*".⁷ The Claimant's objection does not make sense.

Finally, the Claimant's suggestion that information relative to CMSA's profitability or financial performance is irrelevant to the fair and equitable treatment standard is contradicted by its Memorial. The Memorial alleges that "*the prohibition against arbitrary conduct relies on the principle that State measures must follow reasonable policies and that its acts must be reasonably proportional to those policies*".⁸ Therefore, on the Claimant's case, the impact of Colombia's measures on the Claimant's investment, and thus its profitability or financial performance, is relevant to assessing a treaty breach.

Second, the Claimant overstates the scope of Request No. 1, which is neither broad, nor would it place an unreasonable burden on the Claimant.

For the avoidance of doubt, the Respondent only requests the production of one single document for each year since 1982. Thus, less than 40 documents containing the relevant information would suffice to satisfy Colombia's request.

In any event, the Claimant's objection to the timeframe of this request fails to grasp the purpose of Request No. 1. In order to assess the Claimant's expectations with respect to the Colombian authorities' power to review and assess CMSA's declaration, assessment and payment of mining royalties, the entirety of CMSA's period of exploitation must be taken into account.

Further, Request No. 1 is circumscribed to financial documents containing forecasts of royalty payments and the manner and extent to which those payments were subject to review. It is reasonable to assume that a company of CMSA's calibre:

⁶ See also the justification for Request No. 1, "*the requested documents are material to the outcome of the arbitration, as South32's knowledge of the Colombian authorities' obligation and power to audit and review CMSA's royalty payments is relevant for the assessment of[...] the reasonability of the Colombian authorities' actions, which relates to the manner in which the Colombian authorities exercised their duty to scrutinize CMSA's royalty declarations and payments.*"

⁷ See Claimant's objection to Request No. 1.

⁸ Claimant's Memorial ¶ 168.

- Periodically prepared financial documents containing forecasts of CMSA’s royalty payments and the manner and extent to which those payments were subject to review;
- Can easily identify which department(s), team(s) or individual(s) were in charge of establishing forecasts of royalty payments for the Cerro Matoso project; and
- Keeps record of these documents, whether in electronic or hard copy.

Indeed, in the course of the present arbitration, the Claimant has produced documents relating to CMSA’s royalty payments since the beginning of exploitation in 1982.⁹

Third, it is incorrect that documents responsive to Request No. 1 are available in the public domain.

1. Parent company consolidated accounts – The Claimant alleges that the information requested by Colombia is available in public documents prepared by CMSA’s ultimate parent company, South32 Limited (incorporated in Australia). This is inaccurate on two counts:

- No such documents are available prior to 2011. The earliest South32 Annual Report is dated 2015. Before that date, CMSA was a subsidiary of the BHP Billiton Group, for which Annual Reports are only publicly available for the years 2011-2014; and
- In any event, none of the publicly available BHP Billiton or South32 Annual Reports contain all the information requested by Colombia. They do not contain “*forecasts of the royalty amounts which CMSA was expected to pay over the years, and the manner and extent to which those payments were subject to review*”.

2. CMSA sustainability reports – The Claimant purports that CMSA publishes annual sustainability reports which contain the information requested by Colombia. This is inaccurate on two counts:

- The earliest available sustainability report is dated 2013; and
- In any event, none of the publicly available sustainability reports contain all the information

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Royalties Invoices under the Concessions (1983-2012), **Exhibit C-50**

	<p>requested by Colombia. They do not contain “forecasts of the royalty amounts which CMSA was expected to pay over the years, and the manner and extent to which those payments were subject to review”.</p> <p><i>Fourth</i>, the Respondent confirms that the requested documents are not in its possession, custody or control.</p> <p>The Claimant speculates that “[f]inancial information, including relating to royalty payment obligations, <u>would naturally have been shared</u>” with Colombia (emphasis added). In other words, the Claimant guesses that general “financial information” could have been shared with Colombia. The Claimant does not indicate which specific State entity or State-owned company may have been the recipient of this “financial information”. Even if the Claimant’s general allegation were of any relevance—<i>quod non</i>—it would not affect responsive documents created or shared after 1996, when CMSA’s shareholding was entirely privatized. In any event, Colombia confirms that the requested documents are not in its possession, custody or control.</p> <p><i>Finally</i>, Colombia must correct two errors in the Claimant’s objections to Request No. 1:</p> <ol style="list-style-type: none"> 1. The Claimant alleges that Colombia waived confidentiality over the ICC Arbitration. This is inapposite because the ICC Arbitration is not confidential; and 2. The Claimant alleges that there is only one “material difference” between Request No. 1 and a request in the ICC Arbitration, which Claimant purportedly quotes. This is incorrect. Request No. 1 also contains the following additional language (marked <u>bold underlined</u>): Request No. 1 “concerns forecasts of the royalty amounts which CMSA was expected to pay over the years, <u>and the manner and extent to which those payments were subject to review.</u>”
<p>Tribunal’s decision</p>	<p>Request No. 1 is partially accepted:</p> <p>a) The request for “[f]inancial documents (including but not limited to audited accounts, audited financial statements, earnings reports, and annual returns) showing CMSA’s annual economic and financial performance” – <u>is denied for failure to meet requirement R2:</u></p> <ul style="list-style-type: none"> - The economic or financial performance of CMSA is neither <i>prima facie</i> material nor substantial to the questions at issue in the present case;

	<ul style="list-style-type: none"> - Moreover, the Tribunal notes that a party making an allegation bears the burden of proof for said allegation and is free to marshal the evidence it deems fit to support its case; thus, it is Claimant who bears the burden of proof for its allegation that Colombia’s measures breached the fair and equitable treatment standard. Claimant’s failure to prove its allegation will simply lead to the dismissal of such allegation. Requests for document production should not serve the purpose of disproving the counterparty’s case. <p>b) “Financial documents (including but not limited to audited accounts, audited financial statements, earnings reports, and annual returns) [...] containing forecasts of and comments on CMSA’s mining royalty payments since 1982, [...] and the manner and extent to which those payments were subject to review” – <u>is granted</u> – but limited to documents from 1996 onwards – as it meets requirements R1 to R3:</p> <ul style="list-style-type: none"> - The request (b) is sufficiently narrow and specific, as already circumscribed by Respondent in its reply to objections; - The request appears to be <i>prima facie</i> relevant and material; - The Tribunal takes note of Respondent’s declaration that the requested documents are neither in the public domain nor in Respondent’s possession, custody or control. <p>The Tribunal takes note that Respondent did not specifically disprove that the requested documents predating 1996 are already in its possession.</p> <p>Therefore, Claimant should deliver the financial documents containing forecasts of royalty payments (i.e., <u>one single document for each year</u>) and the manner and extent to which those payments were subject to review (if any exist) by the date established in the procedural calendar set out in Procedural Order No. 1 [the “Procedural Calendar”].</p>
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Request No. 2	
Documents or category of documents requested	All internal documents including, but not limited to, correspondence, memoranda, reports and minutes of meetings, created by and/or exchanged within South32 regarding, discussing or mentioning the 29 September 2011 meeting during which

	Ingeominas and CMSA discussed the payment by CMSA of royalties on iron. ¹⁰
Relevance and materiality according to the Requesting Party	<p><i>See</i> Request No. 1.</p> <p>The requested documents will evidence that South32 and CMSA knew, as of 29 September 2011 at the very latest, that CMSA owed iron royalties in respect of the Concession Contracts and Contract 51.</p> <p>These documents are material to the outcome of the arbitration, as South32’s knowledge of a potential disagreement regarding CMSA’s obligation to pay royalties in respect of iron is necessary to assess the Republic of Colombia’s claims that (i) the Claimant incurred in impermissible treaty shopping;¹¹ and (ii) the Claimant could not legitimately expect that CMSA was exempted from paying iron royalties.</p> <p>It is reasonable to assume that documents or exchanges exist in which the South32 entities discuss and react to the 29 September 2011 meeting, to which CMSA participated.</p>
Documents not in the Requesting Party’s possession	The Republic of Colombia confirms that none of the requested documents are in its possession, custody or control.
Responses / Objections to document request	<p>First, Colombia’s Request 2 refers to CMSA / South32 internal documents which in turn refer to a document (the minutes of the 29 September 2011 meeting) that Claimant’s related entities themselves requested from Colombia in the ICC Arbitration. In fact, in their Request 1 in the ICC Arbitration, Claimant’s related entities, South32 (BVI) Limited and Conicol BVI Limited (together the <i>ICC Claimants</i>), requested “Minutes of the 29 September 2011 meeting between Ingeominas and CMSA and any subsequent internal correspondence between Ingeominas officers and the Ministry of Mines and any other state entity, in which the 29 September 2011 meeting is discussed.” The ICC Claimants explained in those proceedings that Colombia had cited to this meeting as representing an important milestone in the discussion regarding iron royalties—which Claimant denies—but had failed to produce the actual document.</p> <p>Accordingly, neither the ICC Claimants nor the Claimant in this case had this document in their possession as of the date of that request (3 August 2021). Colombia objected to producing this document in the ICC Arbitration, and the tribunal in the ICC Arbitration rejected the ICC Claimants’ request for it for lack of</p>

¹⁰ Counter-Memorial, ¶ 159.

¹¹ Counter-Memorial, Section III.C.

relevance and materiality. Curiously, Colombia ultimately submitted the requested minutes as Exhibit R-24 in this arbitration despite having argued that the ICC Claimants' request was not relevant to the case or material to its outcome.

Colombia has **failed to show that the requested documents are relevant to the case or material to its outcome**, as required by Article 3.3(b) of the IBA Rules. Colombia's request relies on a mischaracterization of what took place at that meeting, according to the very minutes that Colombia has now surrendered. The minutes show that prior to the date of the meeting (i.e. 29 September 2011) the Colombian Congress had sent an inquiry to Ingeominas and the Ministry of Mines to ascertain whether or not CMSA had an obligation to pay royalties in relation to the iron content of the ferronickel produced by CMSA. This request makes plain that the Colombian government itself did not know whether payment of royalties for the iron content of ferronickel was due. In fact, the minutes show that at the time even Ingeominas—the government entity with technical, mining expertise and charged with assessing and collecting royalties—had no position on whether such royalties were due.¹² Colombia's own confusion with respect to the point shows that the question of paying royalties for the uneconomic iron content of ferronickel was devoid of contractual or other legal support.¹³ Yet from the mere fact of this inquiry, and Ingeominas's confusion, Colombia makes a leap of logic to conclude that it should have been plain to CMSA that the government had a right to demand the payment of royalties over the valueless iron content of ferronickel (content which to the contrary reduces the value of the nickel),.

Colombia suggests that the requested documents are material to proving "South32's knowledge of a potential disagreement regarding CMSA's obligation to pay royalties in respect of iron", which in turn, they argue, would help their case of alleged treaty shopping. Colombia misconstrues the applicable legal standard. As explained by the tribunal in *Orascom*, which Colombia cites heavily in its Counter-Memorial, treaty abuse exists "where an investment was restructured to attract BIT protection at a time when a dispute with the host state had arisen or was foreseeable".¹⁴ However, by definition, a dispute cannot have arisen or be foreseeable when the State has not even announced, much less adopted any measures to recover royalties in respect of iron content

¹² During the meeting, Oscar Paredes Zapata, General Director of Ingeominas, stated that "the mining authority still doesn't have a clear position about that, and therefore all possible alternatives are being studied in order to take a position" (in Spanish, "la autoridad minera aún no tiene una posición clara al respecto, por lo que se están estudiando todas las posibilidades para definir una posición"). See R-24, page 2.

¹³ Exhibit R-24, p 2.

¹⁴ *Orascom v Algeria*, RL-67, para 540 (emphasis added).

	<p>of the ferronickel. In other words, Colombia cannot misconstrue a document (here the 29 September 2011 minutes) and then claim related documents are necessary to support the misconstruction.</p> <p>In any event, Colombia’s assertion of relevance is based on another misconstruction – that the 2015 transaction was an exercise in treaty shopping. However, as explained in Claimant’s Memorial¹⁵ and further below,¹⁶ the transaction had nothing to do with seeking treaty protection that was not otherwise available. The transaction was the consequence of a demerger decision by the BHP Billiton group to divest a number of its southern hemisphere assets, including CMSA to the newly created South32 Group. The demerger was motivated by commercial reasons unrelated to any circumstances surrounding the CMSA investment. In the absence of any transaction aimed at seeking treaty protection in respect of the investment in CMSA, the foreseeability of any alleged dispute concerning royalty payments on the iron content of the ferronickel as of the date of that transaction is irrelevant.</p> <p>Notwithstanding and without prejudice to the above, in the spirit of cooperation, Claimant agrees to conduct a reasonable search for a narrower category of documents responsive to Colombia’s request, namely any internal and contemporaneous documents created by and/or exchanged within South32 regarding, discussing or mentioning the 29 September 2011 meeting. Claimants offer to produce any non-privileged documents that meet these criteria.</p>
<p>Reply to Objections to document request</p>	<p>Colombia maintains its request in full.</p> <p>Notwithstanding its unjustified assertions, Claimant has recognized the relevance of Request No. 2 by agreeing to comply with it, but for a cosmetic change.</p> <p>Claimant agreed to search for a “<i>narrower category of documents</i>”, namely “<i>internal and contemporaneous documents</i>” rather than “<i>internal documents including, but not limited to, correspondence, memoranda, reports and minutes of meetings</i>”. Claimant has not explained what difference there might be, or why such a “<i>narrower</i>” search would be justified.</p> <p>To the extent any ambiguity exists, Claimant should be directed to search for documents responsive to Request No. 2 as originally formulated.</p>
<p>Tribunal’s decision</p>	<p>The Tribunal takes note of Claimant’s voluntary agreement “to conduct a reasonable search for a <u>narrower category of documents</u> responsive to Colombia’s request, namely any internal and</p>

¹⁵ Memorial, para 137 and footnote 317.

¹⁶ See Claimant’s response to Request 9.

	<p>contemporaneous documents created by and/or exchanged within South32 regarding, discussing or mentioning the 29 September 2011 meeting” during which Ingeominas and CMSA discussed the payment of royalties on iron by CMSA and, thus, to partially comply with this request.</p> <p>Request No. 2 is granted, as it meets requirements R1 to R3:</p> <ul style="list-style-type: none"> - The request is sufficiently narrow and specific; - The request appears to be <i>prima facie</i> relevant and material in light of Respondent’s jurisdictional objection regarding treaty shopping; - The Tribunal takes note of Respondent’s declaration that the requested documents are not in its possession, custody or control. <p>The Tribunal is satisfied that the scope of the documents offered by Claimant is sufficiently broad and material to cover the request.</p> <p>Therefore, Claimant should deliver the requested documents (if any exist) by the date established in the Procedural Calendar.</p>
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Request No. 3	
Documents or category of documents requested	All internal documents including, but not limited to, correspondence, memoranda, reports and minutes of meetings, created by and/or exchanged within South32 regarding BDO’s second audit of CMSA’s royalty payments covering the period 1998-2003, initiated on 5 November 2013, ¹⁷ and the resulting Order VSC-026. ¹⁸
Relevance and materiality according to the Requesting Party	In response to a substantially similar document production request by the Respondent in the parallel ICC arbitration against Colombia (ICC Case No. No. 25297/JPA) (the “ ICC Arbitration ”), ¹⁹ the Claimant’s subsidiaries, South32 (BVI) Limited and Conicol BVI Limited, (the “ ICC Claimants ”) agreed to “ <i>conduct a reasonable search for a narrower category of documents responsive to Colombia’s request, namely: internal documents including correspondence, memoranda, reports and minutes of meetings in Claimants’ possession in which CMSA and/or the Claimants discussed Payment Order VSC 26, prepared between 26 March 2015 –the date of Payment Order VSC 26—and 8 April 2015—the</i>

¹⁷ Counter-Memorial, Section III.C.(i).

¹⁸ Exhibit C-26.

¹⁹ Counter-Memorial, Sections II.C.7 and III.B.

	<p><i>date in which CMSA objected to Payment Order VSC 26 and made a partial payment under protest. Claimants offer to produce any non-privileged documents that meet these criteria</i>". Colombia assumes that South32's offer also applies to the present arbitration. For the avoidance of doubt, document production in the ICC Arbitration has not yet taken place.</p> <p>The specificities of this arbitration, however, justify broadening the scope of the search agreed to by the ICC Claimants, to cover (i) a larger period; and (ii) further entities within the South32 Group, including the Claimant, the Claimant's immediate parent company (South32 Jersey Limited), and parent company which ultimately controls the Claimant, (South32 Limited, Australian company registration number ACN 093 732 597).</p> <p>The requested documents, including those dating from the initiation of BDO's second audit (November 2013), are material to the outcome of the arbitration, as South32's knowledge of the Colombian authorities' auditing of CMSA's royalty payments for the period 1998-2003, which took place in CMSA's offices in November 2013,²⁰ and of which CMSA was fully informed, is material to the assessment of the Republic of Colombia's claims that (i) the Claimant incurred in impermissible treaty shopping;²¹ (ii) the Claimant could not legitimately expect that the Colombian authorities would not request additional royalty payments from CMSA following BDO's second audit; and (iii) the Colombian authorities' actions were reasonable.</p>
<p>Documents not in the Requesting Party's possession</p>	<p>The Republic of Colombia confirms that none of the requested documents are in its possession, custody or control.</p>

²⁰ Counter-Memorial, ¶ 169.

²¹ Counter-Memorial, Section III.C.

<p>Responses Objections to document request</p>	<p>First, contrary to Colombia’s assertion that “document production in the ICC Arbitration has not yet taken place”, , ICC Claimants complied with that deadline of 23 August 2021 for its voluntary production of documents . . The ICC tribunal agreed with the scope of the voluntary offer and did not order the production of any additional documents.</p> <p>There are no specificities related to this arbitration that justify broadening the scope of the search agreed to by the ICC Claimants (ie, by covering a larger period or by encompassing internal documents produced by other South32 entities). With regard to the covered period, the ICC Claimants’ offer covered documents “prepared between 26 March 2015 –the date of Payment Order VSC 26—and 8 April 2015—the date on which CMSA objected to Payment Order VSC 26 and made a partial payment under protest.” Colombia now requests documents covering the additional period from 5 November 2013 (the date when the BDO Audit allegedly begun) until the beginning of the period covered by the ICC Claimants’ offer, on 26 March 2015.</p> <p>Colombia has failed to show that the requested additional documents are relevant to the case or material to its outcome, as required by Article 3.3(b) of the IBA Rules. As explained above, the Claimant does not contest that CMSA knew that royalty payments could be audited and ultimately subject to review and adjustments.²² Claimant acknowledges that the Colombian authorities had the power to conduct audits and to exercise oversight authority over royalty payments (<i>see, eg, SoC, paras 45(a), 46, 126, 210, 232</i>) as they did throughout the performance of the Concessions (<i>see SoC, paras 75, 219, 221</i>). In fact, Claimant relies on the fact that Colombian authorities periodically audited royalty payments over the life of the Concessions, arguing that Colombia has failed to afford fair and equitable treatment to Claimant’s investment by failing to provide a stable and predictable legal and business environment by reopening already audited periods.²³</p> <p>Colombia further suggests that the requested documents are material to proving “South32’s knowledge of the Colombian authorities’ auditing of CMSA’s royalty payments for the period 1998-2003”, which in turn, they argue, would help their case of alleged treaty shopping. As explained above, Colombia misconstrues the applicable legal standard of treaty abuse, and contrary to Colombia’s argument, a dispute cannot be foreseeable when the State has not announced, much less adopted a measure. The mere fact that Colombia was auditing CMSA’s royalty payments did not put the Claimant on notice that the State would</p>
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²² See Claimant’s response to Request 1.

²³ Memorial, Section V.B.4.

	<p>ultimately act in an arbitrary manner seventeen years later by demanding an additional COP\$48.8 billion (approximately US\$25.9 million) in payment for royalty payments already made and audited up to 17 years before.²⁴</p> <p>The treaty shopping argument is further proven moot by the nature of the transaction whereby Claimant became an indirect shareholder of CMSA, in the context of the demerger of South32 from BHP Billiton which included a large number of assets other than CMSA and was motivated by commercial considerations totally unrelated to the protection of CMSA’s investment.²⁵ Thus, the documents requested would not assist Colombia in advancing its treaty shopping argument.</p> <p>Notwithstanding and without prejudice to the above, in the spirit of cooperation, and taking in consideration that Payment Order VSC 26 is one of the challenged measures in this the arbitration, Claimant reiterates the voluntary offer made by the ICC Claimants, and agrees to conduct a reasonable search for a narrower category of documents responsive to Colombia’s request, namely: internal documents including correspondence, memoranda, reports and minutes of meetings in Claimant’s possession in which CMSA and/or the Claimant’s discussed Payment Order VSC 26, prepared between 26 March 2015 –the date of Payment Order VSC 26—and 8 April 2015—the date in which CMSA objected to Payment Order VSC 26 and made a partial payment under protest. Claimants offer to produce any non-privileged documents that meet these criteria.</p> <p>As already indicated, the tribunal in the ICC proceedings rejected the rest of Colombia’s Request No. 3 for lack of relevance and materiality.</p>
<p>Reply to Objections to document request</p>	<p>As a preliminary comment, contrary to the Claimant’s allegation, the ICC Arbitration’s document production phase is not complete. The parties to the ICC Arbitration agreed to suspend those proceedings pending the resolution of the present arbitration. The suspension occurred before any party to the ICC Arbitration produced documents in accordance with the ICC tribunal’s orders. As to the ICC Claimants’ voluntary production, it is incomplete. Indeed, the ICC Claimants only produced a privilege log and indicated that they had located additional potentially responsive documents which they would review in order to potentially update their production. To date, the ICC Claimants have not produced any additional responsive documents, nor have they updated their privilege log. The ICC Claimants have therefore not complied in</p>

²⁴ National Mining Agency Payment Order VSC 26 (*Payment Order VSC 26*), 12 March 2015, C-26.

²⁵ See Claimant’s response to Request 9 below. See also Memorial, paras 16 and 137.

full with their offer to produce a portion of the requested documents.

Colombia notes that the Claimant agrees to produce documents related to Order VSC-026, prepared between 26 March 2015 and 8 April 2015. Colombia maintains its request in full as there is no logical basis for the Claimant's suggested narrowing of Request No. 3.

First, the Claimant's objection is based on the incorrect factual assumption that the BDO's second audit and Payment Order VSC-062 covered years which had already been audited (1998-2003). Claimant's reference to Section V.B.4. of its Memorial is of no use. There is nothing in that section which supports Claimant's allegation.²⁶ In any event, the mining authorities did not review CMSA's self-assessment, declaration and payment of royalties for the years 1998 to 2003 before the second BDO audit.

All the requested documents, including those relative to BDO's second audit, are relevant and material to the outcome of the case, and specifically to the following claims:

Arbitrariness/reasonability

Claimant alleges that Payment Order VSC-026 was arbitrary and recognizes that documents relative to it are relevant to the outcome of the case. Clearly then, all documents relative to the **genesis** of Payment Order VSC-026, namely the second BDO audit, which began on 5 November 2013, must also be relevant. Documents relative to the second BDO audit are thus material to Colombia's assertion that Payment Order VSC-026 was not arbitrary, but reasonable. For this reason alone, the Claimant's offer to reduce the timeframe and the scope of Request No. 3 is inapposite.

Legitimate expectations

Moreover, as explained above (*see* replies to Request No. 1), the requested documents are key to Colombia's assertion that "*the Claimant could not legitimately expect that the Colombian authorities would not request additional royalty payments from CMSA following BDO's second audit*". The Claimant's objection to this point is difficult to understand and is in any event contradictory. On the one hand, the Claimant concedes that Colombia has the right to audit CMSA's royalty payments but, on the other, the Claimant alleges that Colombia does not have the right to act on the conclusions of those audits. This begs the question of what the Claimant understands the purpose of such

²⁶ Section V.B.4 of the Memorial merely contends that "*CMSA provided the relevant information to the mining authorities (eg, extracted volume) and the mining authorities would calculate the amounts due and issue the corresponding invoice*". There is no suggestion that Colombia verified the data or inputs provided by CMSA.

	<p>audits to be—if not to potentially form the basis of a request for additional royalty payments? The requested documents will prove Colombia’s assertion with respect to legitimate expectations.</p> <p>Treaty shopping</p> <p>Because (i) the second BDO audit resulted in Payment Order VSC-026, (ii) the Claimant claims that Payment Order VSC-026 constitutes a treaty breach, and (iii) the second BDO audit pre-dates the Claimant’s investment in CMSA, <u>documents relative to the second BDO audit will prove that a dispute was foreseeable prior to the Claimant’s investment.</u>²⁷ The Claimant’s suggestion that there can be no treaty shopping because Payment Order VSC-026 post-dates the Claimant’s investment is inapposite. Payment Order VSC-026 is the direct consequence of the second BDO audit. A dispute was thus foreseeable prior to the Claimant’s investment. The requested documents will prove this.</p> <p>The Claimant’s secondary treaty shopping counter-argument, premised on the alleged causes of the investment, is irrelevant to Request No. 3 which is focused on the timing of the investment. In any event, the Claimant’s justification for the causes of its investment are self-serving: the Claimant merely asserts that South32’s participation in CMSA was restructured as a result of a demerger. Yet, the group’s demerger could have taken a myriad of forms and steps. The restructuring alone does not justify the Claimant’s purchase of an indirect share in CMSA.</p>
<p>Tribunal’s decision</p>	<p>The Tribunal takes note of Claimant’s voluntary agreement “to conduct a reasonable search for a narrower category of documents responsive to Colombia’s request, namely: internal documents including correspondence, memoranda, reports and minutes of meetings in Claimant’s possession in which CMSA and/or the Claimant’s discussed Payment Order VSC 26, prepared between 26 March 2015 –the date of Payment Order VSC 26—and 8 April 2015—the date in which CMSA objected to Payment Order VSC 26 and made a partial payment under protest” and, thus, to partially comply with this request.</p> <p>Request No. 3 is granted, as it meets requirements R1 to R3:</p> <ul style="list-style-type: none"> - The request is sufficiently narrow and specific; - The request appears to be <i>prima facie</i> relevant and material, in light of Respondent’s jurisdictional objection regarding treaty shopping;

²⁷ Counter- Memorial, ¶ 326.

	<p>- The Tribunal takes note of Respondent’s declaration that the requested documents are not in its possession, custody or control.</p> <p>The Tribunal takes note that Claimant does not dispute that the documents are <i>prima facie</i> relevant for establishing Respondent’s allegation that Claimant “knew of a potential dispute”. This is without prejudice to Claimant’s disagreement regarding the standard to establish an allegation of treaty shopping.</p> <p>For the reasons set out above, in particular in light of Respondent’s jurisdictional objection regarding treaty shopping, the Tribunal sees no reason to narrow the scope of Request No. 3. The Tribunal considers, for purposes of the treaty shopping objection, that documents dating from a time prior to the date of Claimant’s alleged investment in February 2015, are especially relevant. Therefore, the Tribunal grants this request as it was originally formulated by Respondent. As a result, Claimant shall also conduct a search for documents covering the additional period from 5 November 2013 until 26 March 2015.</p> <p>Therefore, Claimant should deliver the requested documents (if any exist) by the date established in the Procedural Calendar.</p>
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Request No. 4	
Documents or category of documents requested	All internal documents including, but not limited to, correspondence, memoranda, reports and minutes of meetings, created by and/or exchanged within South32 regarding the CGR’s audit of CMSA’s declaration and payment of royalties for the period 1998-2003, initiated by the CGR in 2012. ²⁸ This request includes documents regarding CMSA’s internal reaction at the time when it was informed by the ANM of the CGR’s intention to audit CMSA’s royalty payments and received the CGR’s entire file of its audits.
Relevance and materiality according to the Requesting Party	<p><i>See</i> Requests Nos. 1 and 2.</p> <p>The requested documents are material to the outcome of the arbitration, as South32’s knowledge of the Colombian authorities’ obligation and power to audit and review CMSA’s royalty payments is relevant to assess the Republic of Colombia’s claims that (i) CMSA could not legitimately expect that its royalty payments were final and/or that; (ii) CMSA could not legitimately expect that the Colombian authorities could not audit or review the different components of CMSA’s royalty self-assessments,</p>

²⁸ Counter-Memorial, ¶ 162.

	<p>declarations or payments; and (iii) the Colombian authorities' actions were reasonable.</p> <p>Further, the requested documents are relevant to support the Republic of Colombia's assertion that CMSA was fully aware of the CGR's role and prerogative to supervise the payment of mining royalties.²⁹ These documents are material to demonstrate that, at the time of its alleged investment in February 2015, the Claimant knew that the CGR would initiate investigations, and possibly proceedings, regarding CMSA's royalty declarations and payment. The requested documents are therefore material to the outcome of the dispute because they will demonstrate that the Claimant incurred in impermissible treaty shopping.³⁰</p>
<p>Documents not in the Requesting Party's possession</p>	<p>The Republic of Colombia confirms that none of the requested documents are in its possession, custody or control.</p>
<p>Responses / Objections to document request</p>	<p>Colombia makes here an identical request to the one made in the ICC Arbitration, which the tribunal in those proceedings rejected in full for lack of relevance and materiality.</p> <p>Here, Colombia also fails to show that the requested documents are relevant to the case or material to its outcome, as required by Article 3.3(b) of the IBA Rules. Colombia reiterates its broad justification of Requests 1 and 2—while adding a reference to the supervisory powers of the Comptroller General's Office.</p> <p>Colombia argues that the documents are relevant to show that: "(i) CMSA could not legitimately expect that its royalty payments were final and/or that; (ii) CMSA could not legitimately expect that the Colombian authorities could not audit or review the different components of CMSA's royalty self-assessments, declarations or payments; and (iii) the Colombian authorities' actions were reasonable."</p> <p>As explained in Claimant's objection to Requests 1 and 2 above, the Claimant has not argued that the Claimant and/or CMSA had an expectation "that CMSA[']s ... royalty payments [would be] final." Nor is it contested that CMSA knew that royalty payments could be subject to "audit or review."³¹ CMSA acknowledges that the Colombian authorities had the power to conduct audits and to exercise oversight authority over royalty (<i>see, eg</i>, Memorial, paras 45(a), 46, 126, 200, 222) as they did throughout the performance of the Concessions (<i>see</i> Memorial, paras 75, 179, 201). Rather, the Claimant objects to the arbitrary, contradictory, repetitive,</p>

²⁹ Counter-Memorial, Section III.B and ¶ 249.

³⁰ Counter-Memorial, Section III.C.

³¹ Counter-Memorial, Section II.B.3 and Request 1 above.

overlapping and untimely *manner* in which Colombian authorities undertook such reviews, including reassessing royalty payments made decades prior with retroactive effect) (*see, eg*, Memorial, paras 188-89, 192-204, 209, 220-24).

Colombia argues that the documents are relevant to show that “CMSA could not legitimately expect that the Colombian authorities could not audit or review the different components of CMSA’s royalty self-assessments, declarations or payments”. Although this is not in dispute, Colombia omits to mention that until 2012, CMSA did not self-declare or self-assess royalties: CMSA provided the relevant information to the mining authorities (*eg*, extracted volume) and the mining authorities would calculate the amounts due and issue the corresponding invoice. The audit of the Comptroller General’s Office in 2012 referred entirely to periods in which there was no self-assessment of royalties (*ie*, the period 1998-2003, *see* SoC paras 52, 62, 117, 204). Thus, the requested documents would have no bearing on Colombia’s justification—*ie* CMSA’s understanding on the finality of its self-assessment of royalties, a point that is in any event not in dispute. Furthermore, the reasonableness of Colombian authorities’ actions can only be evidenced by reviewing the treatment that Colombia afforded to the Claimant and comparable third parties, not by turning to reviewing the Claimant’s internal documents.

Finally, Colombia suggests that the requested documents would help their case of alleged treaty shopping. As explained above, Colombia misconstrues the applicable legal standard of treaty abuse, and contrary to Colombia’s argument, a dispute cannot be foreseeable when the State has not announced, much less adopted a measure. Even if CMSA had been aware of the fact that CGR was conducting an audit, this cannot be equated to being aware of a controversy under the Treaty. The mere fact that Colombia was exercising its authority to audit CMSA’s royalty payments in 2012 did not put the Claimant on notice that the State would ultimately—more than six years later—exercise that authority in an arbitrary manner and demand COP\$10 billion (approximately US\$3.5 million at the time) in payment for royalty payments already made and closed 15 to 20 years before.³²

The treaty shopping argument is further proven moot by the nature of the transaction whereby Claimant became an indirect shareholder of CMSA, in the context of the demerger of South32 from BHP Billiton which included a large number of assets other than CMSA and that was motivated by commercial considerations totally unrelated to the protection of the investment in CMSA.³³

³² Exhibit C-111, pp 274-275.

³³ *See* Claimant’s response to Request 9 below. *See* also Memorial, paras 16 and 137.

	<p>Thus, the documents requested would not assist Colombia in advancing its treaty shopping argument.</p> <p>For the above reasons, this Request amounts to a nothing more than a fishing expedition whereby Colombia seeks a broad universe of documents in hopes of building a case. This strategy exceeds the proper scope of the document production request, and should be rejected. As noted by Gary Born, “tribunals are generally very unwilling to permit parties to engage in ‘fishing expeditions’, aimed at identifying possible claims or sources of further inquiry” and “[t]he focus of disclosure should be on obtaining relevant and material evidence, not playing guessing games” (G Born, <i>International Commercial Arbitration</i> (3d edn 2021), pp 2534-35, 2536).</p> <p>The tribunal in the ICC proceedings in fact rejected Colombia’s Request No. 4 which was virtually identical to Request No. 4 in this case for lack of relevance and materiality.</p>
<p>Reply to Objections to document request</p>	<p>Colombia maintains its request in full. <i>See</i> replies to Requests Nos. 1 to 3.</p> <p>In addition, the Claimant describes the status of its royalty payments in a contradictory manner.</p> <p>The Claimant, on the one hand, concedes that the CGR “<i>was exercising its authority to audit CMSA’s royalty payments</i>”³⁴ in 2012. On the other hand, however, the Claimant alleges that the CGR’s acting on the conclusions of the audit by requesting “<i>payment for royalty payments already made and closed 15 to 20 years before</i>” constitutes a treaty breach.³⁵ This begs the question of what the Claimant understands the purpose of such audits to be—if not to potentially form the basis of a request for adjustments to the royalty payments.</p> <p>The Claimant’s technical argument regarding the “<i>self-assessment</i>” of royalties is equally unavailing. The Claimant suggests that the “<i>finality of [CMSA’s] self-assessment of royalties [...] is in any event not in dispute</i>”. And this is purportedly because, for the relevant years, “<i>CMSA did not self-declare or self-assess royalties</i>”. This is a straw man argument.</p> <p>First, during the relevant years, the Claimant did autonomously determine how much royalties it would pay. As the Claimant explains in the above objection, for the relevant years, “<i>CMSA provided the relevant information to the mining authorities (eg, extracted volume) and the mining authorities would calculate the</i></p>

³⁴ See Claimant’s objection to Request No. 4.

³⁵ See Claimant’s objection to Request No. 4.

	<p><i>amounts due and issue the corresponding invoice</i>". There is no suggestion that Colombia verified the data or inputs provided by CMSA. CMSA was determining the inputs to, and therefore the outcome of, its royalty payment calculations. As discussed in the Counter-Memorial, CMSA's payment of mining royalties was always based on CMSA's self-declaration of production, costs, and price data.³⁶</p> <p>Second, and in any event, Colombia's request is relevant to showing that "<i>CMSA could not legitimately expect that the Colombian authorities could not audit or review the different components of CMSA's royalty self-assessments, <u>declarations or payments</u></i>". The Claimant entirely ignores the latter two, focusing solely on "<i>royalty self-assessments</i>". Even if, <i>quod non</i>, CMSA was not self-assessing, this would leave the question of the finality of CMSA's declarations and payments, which Claimant has failed to address.</p> <p>The requested documents will prove that Colombia's actions were entirely reasonable, legitimate and predictable.</p> <p>In addition, the requested documents will prove Colombia's treaty shopping claim. The reasoning set out in Request No. 3 applies <i>mutatis mutandis</i> to Request No. 4.</p> <p>In brief, because (a) the CGR's 2012 audit resulted in Payment Order 217, (b) Claimant claims that Payment Order 217 constitutes a treaty breach, and (c) the CGR's 2012 audit pre-dates Claimant's investment in CMSA, documents relative to the CGR's 2012 audit will prove that a dispute was foreseeable prior to Claimant's investment.</p>
<p>Tribunal's decision</p>	<p>Request No. 4 is granted, as it meets requirements R1 to R3:</p> <ul style="list-style-type: none"> - The request is sufficiently narrow and specific; - The request appears to be <i>prima facie</i> relevant and material, in light of Respondent's jurisdictional objection regarding treaty shopping; - The Tribunal takes note of Respondent's declaration that the requested documents are not in its possession, custody or control. <p>Therefore, Claimant should deliver the relevant documents (if any exist), dated up to February 2015, by the date established in the Procedural Calendar.</p>

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Counter-Memorial, ¶ 114.

Request No. 5	
Documents or category of documents requested	All internal documents including, but not limited to, correspondence, memoranda, reports and minutes of meetings, created by and/or exchanged within South32 regarding the ANM’s Resolutions 576 and 168 dated 27 September 2018 and 1 March 2019. ³⁷
Relevance and materiality according to the Requesting Party	<p>In response to a substantially similar document production request by the Respondent in the ICC Arbitration, the ICC Claimants agreed to “<i>conduct reasonable search for a narrower category of documents responsive to Colombia’s [Request]: internal documents including correspondence, memoranda, reports and minutes of meetings in Claimants’ possession in which CMSA and/or Claimants discuss either of these Resolutions, prepared between 27 September 2018 – the date on which the Mining Agency issued [Resolution 576] – and 6 May 2019 – the date on which CMSA challenged [Resolutions 576 and 168] before the Colombian courts</i>”. The Respondent assumes that South32’s offer also applies to the present arbitration. For the avoidance of doubt, document production in the ICC Arbitration has not yet taken place.</p> <p>The specificities of this arbitration, however, justify broadening the scope of the search agreed to by the ICC Claimants, to cover (i) a larger period; and (ii) further entities within the South32 Group, including the Claimant, the Claimant’s immediate parent company (South32 Jersey Limited), and parent company which ultimately controls the Claimant, (South32 Limited, Australian company registration number ACN 093 732 597).</p> <p>In particular, the search should be conducted in respect of all documents from the date agreed to by the ICC Claimants (27 September 2018) up until the date of the Request for Arbitration (11 March 2020), rather than until 6 May 2019. There is no compelling reason why documents produced after CMSA’s challenge of ANM Resolutions 576 and 168 would be any less relevant than those created or exchanged before that date. The relevance to this arbitration of CMSA’s and the Claimant’s evaluation of the bases on which the ANM issued Resolutions 576 and 168 is unaffected by CMSA’s decision to challenge those Resolutions.</p>
Documents not in the Requesting Party’s possession	The Republic of Colombia confirms that none of the requested documents are in its possession, custody or control.

<p>Responses Objections to document request</p>	<p>First, contrary to Colombia’s assertion that “document production in the ICC Arbitration has not yet taken place”, ICC Claimants complied with the deadline of 23 August 2021 for voluntary production of documents. The ICC tribunal agreed with the scope of the voluntary offer and did not order the production of any additional documents.</p> <p>There are no specificities related to this arbitration that justify broadening the scope of the search agreed to by the ICC Claimants (<i>ie</i>, by covering a larger period or by encompassing internal documents produced by other South32 entities). With regard to the covered period, the ICC Claimants’ offered covered documents prepared between 27 September 2018 – the date on which the Mining Agency issued Resolution 576 – and 6 May 2019 – the date on which CMSA challenged Resolutions 576 and 168 before the Colombian courts. Although Colombia did not expand the time scope of its request in the actual request above,³⁸ Colombia’s justification mentions that it seeks documents up until the date of the Request for Arbitration (11 March 2020), rather than until 6 May 2019, as offered by the ICC Claimants. With regard to the covered entities, Claimant confirms that the voluntary offer below covers the relevant substantive communications with respect to the issue within the South32 Group.</p> <p>Colombia has failed to show that the requested additional documents are relevant to the case or material to its outcome, as required by Article 3.3(b) of the IBA Rules. Any documents produced once Resolutions 576 and 168 were challenged before Colombian courts would likely be irrelevant, as they would entirely reflect CMSA’s position with regard to those Resolutions reflected in the briefs submitted before Colombian courts (already in Colombia’s possession), and would almost certainly be covered by legal privilege.</p> <p>Notwithstanding and without prejudice to the above, in the spirit of cooperation, and taking in consideration that Mining Agency Resolutions 576 and 168 are part of the challenged measures in this arbitration, Claimant reiterates the voluntary offer made by the ICC Claimants, and agrees to conduct a reasonable search for a narrower category of documents responsive to Colombia’s request, namely: internal documents including correspondence, memoranda, reports and minutes of meetings in Claimant’s possession in which CMSA and/or Claimant discusses either of these Resolutions, prepared between 27 September 2018—the date on which the Mining Agency issued Mining Agency Resolution 576—and 6 May 2019—the date on which CMSA challenged Mining Agency</p>
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³⁸ Colombia states that it seeks: “All internal documents including, but not limited to, correspondence, memoranda, reports and minutes of meetings, created by and/or exchanged within South32 regarding the ANM’s Resolutions 576 and 168 dated 27 September 2018 and 1 March 2019.” That is, verbatim the exact same request as in the ICC Arbitration.

	<p>Resolutions 576 and 168 before the Colombian courts. Claimant offers to produce any non-privileged documents that meet these criteria (noting that the requested documents were prepared at a time in which the present dispute had already arisen (the Notice of Dispute having been sent to Colombia on 20 June 2016, <i>see Exhibit C-29</i>)) and therefore may be privileged.</p> <p>As already indicated, the tribunal in the ICC proceedings rejected the rest of Colombia’s equivalent request in the ICC Arbitration (also Request No. 5) for lack of relevance and materiality.</p>
<p>Reply to Objections to document request</p>	<p>As a preliminary comment, contrary to the Claimant’s allegation, the ICC Arbitration’s document production phase is not complete. The parties to the ICC Arbitration agreed to suspend those proceedings pending the resolution of the present arbitration. The suspension occurred before any party to the ICC Arbitration produced documents in accordance with the ICC tribunal’s orders. As to the ICC Claimants’ voluntary production, it is incomplete. Indeed, the ICC Claimants only produced a privilege log and indicated that they had located additional potentially responsive documents which they would review in order to potentially update their production. To date, the ICC Claimants have not produced any additional responsive documents, nor have they updated their privilege log. The ICC Claimants have therefore not complied in full with their offer to produce a portion of the requested documents.</p> <p>Colombia notes that the Claimant agrees to produce “<i>internal documents including correspondence, memoranda, reports and minutes of meetings in Claimant’s possession in which CMSA and/or Claimant discusses either of these Resolutions, prepared between 27 September 2018—the date on which the Mining Agency issued Mining Agency Resolution 576—and 6 May 2019—the date on which CMSA challenged Mining Agency Resolutions 576 and 168 before the Colombian courts</i>”.</p> <p>Colombia maintains its request with respect to documents in the possession of the entities referred to in the introduction to the present Request for Document Production. The Claimant is a holding company, wholly owned by South32 Limited, the group parent company. Important decisions and documents would in all likelihood have been taken, made and exchanged within the group parent company.</p> <p>The Respondent further maintains its request with respect to documents created and/or exchanged after 6 May 2019. Indeed, ordering the Claimants to conduct a reasonable search for responsive documents created and/or produced after that date would not impose any burden on the Claimants.</p>

Tribunal’s decision	<p>The Tribunal takes note of Claimant’s voluntary agreement “to conduct a reasonable search for a narrower category of documents responsive to Colombia’s request, namely: internal documents including correspondence, memoranda, reports and minutes of meetings in Claimant’s possession in which CMSA and/or Claimant discusses either of these Resolutions, prepared between 27 September 2018—the date on which the Mining Agency issued Mining Agency Resolution 576—and 6 May 2019—the date on which CMSA challenged Mining Agency Resolutions 576 and 168 before the Colombian courts” and, thus, to partially comply with this request. Claimant further confirms that its offer “covers the relevant substantive communications with respect to the issue within the South32 Group”.</p> <p>The remaining part of Request No. 5 is denied, <u>for failure to meet requirement R2</u>. The Tribunal does not find broadening the scope of the search agreed to by Claimant to be relevant or material to the outcome of this dispute.</p>
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Request No. 6	
Documents or category of documents requested	All internal documents including, but not limited to, correspondence, memoranda, reports and minutes of meetings, created by and/or exchanged within South32 regarding the ANM’s Orders 206 and 62, dated 23 August 2019 and 11 March 2020. ³⁹
Relevance and materiality according to the Requesting Party	<p>In response to a substantially similar document production request by the Respondent in the ICC Arbitration, the ICC Claimants agreed to “<i>conduct a reasonable search for a narrower category of documents responsive to Colombia’s [Request], namely: internal documents including correspondence, memoranda, reports and minutes of meetings in Claimants’ possession in which CMSA and/or Claimants discussed [Payment Order No. 206 and/or Payment Order No. 62], prepared between 23 August 2019 – the date in which the Mining Agency issued [Payment Order 206] – and 27 April 2020 – the date in which CMSA objected to [Payment order 62] and made a partial payment under protest.</i>” The Respondent assumes that South32’s offer also applies to the present arbitration. For the avoidance of doubt, document production in the ICC Arbitration has not yet taken place.</p> <p>The specificities of this arbitration, however, justify broadening the scope of the search agreed to by the ICC Claimants, to cover (i) a larger period; and (ii) further entities within the South32 Group, including the Claimant, the Claimant’s immediate parent company (South32 Jersey Limited), and parent company which ultimately</p>

³⁹ Counter-Memorial, ¶¶ 236-238; Exhibits C-124 and C-129.

	controls the Claimant (South32 Limited, Australian company registration number ACN 093 732 597).
Documents not in the Requesting Party's possession	The Republic of Colombia confirms that none of the requested documents are in its possession, custody or control.
Responses / Objections to document request	<p>First, contrary to Colombia's assertion that "document production in the ICC Arbitration has not yet taken place", ICC Claimants complied with the deadline of 23 August 2021 for voluntary production of documents. The ICC tribunal agreed with the scope of the voluntary offer and did not order the production of any additional documents.</p> <p>There are no specificities related to this arbitration that justify broadening the scope of the search agreed to by the ICC Claimants (<i>ie</i>, by covering a larger period or by encompassing internal documents produced by other South32 entities). With regard to the time of production of the requested documents, although Colombia's justification claims that a longer period of documents is relevant, it fails to specify a specific date range.⁴⁰ With regard to the covered entities, Claimant confirms that the voluntary offer below covers the relevant substantive communications with respect to the issue within the South32 Group.</p> <p>Colombia has failed to show that the requested additional documents are relevant to the case or material to its outcome, as required by Article 3.3(b) of the IBA Rules. The Request contains no additional justification. Furthermore, Colombia's Request No. 6 is excessively broad, failing to identify a narrow and specific category of documents, as required by Article 3.3(a) of the IBA Rules, or even a specific time frame.</p> <p>Notwithstanding and without prejudice to the above, in the spirit of cooperation, and taking in consideration that Payment Orders VSC 206 and VSC 62 are two of the measures challenged in this arbitration, Claimant reiterates the voluntary offer made by the ICC Claimants, and agrees to conduct a reasonable search for a narrower category of documents responsive to Colombia's request, namely: internal documents including correspondence, memoranda, reports and minutes of meetings in Claimant's possession in which CMSA and/or Claimant discussed either of these Payment Orders, prepared between 23 August 2019—the date in which the Mining Agency issued Payment Order VSC 206—and 27 April 2020—the date in which CMSA objected to Payment Order VSC 62 and made a partial payment under protest. Claimant offers to produce any non-privileged documents that meet these criteria (noting that the</p>

⁴⁰ The request merely states that Colombia seeks: "All internal documents including, but not limited to, correspondence, memoranda, reports and minutes of meetings, created by and/or exchanged within South32 regarding the ANM's Orders 206 and 62, dated 23 August 2019 and 11 March 2020."

	<p>requested documents were prepared at a time in which the present dispute had already arisen (the Notice of Dispute having been sent to Colombia on 20 June 2016, <i>see Exhibit C-37</i>) and therefore may be privileged). As already indicated, the tribunal in the ICC proceedings rejected the rest of Colombia’s equivalent request in those proceedings (also Request No. 6) for lack of relevance and materiality.</p>
<p>Reply to Objections to document request</p>	<p>As a preliminary comment, contrary to the Claimant’s allegation, the ICC Arbitration’s document production phase is not complete. The parties to the ICC Arbitration agreed to suspend those proceedings pending the resolution of the present arbitration. The suspension occurred before any party to the ICC Arbitration produced documents in accordance with the ICC tribunal’s orders. As to the ICC Claimants’ voluntary production, it is incomplete. Indeed, the ICC Claimants only produced a privilege log and indicated that they had located additional potentially responsive documents which they would review in order to potentially update their production. To date, the ICC Claimants have not produced any additional responsive documents, nor have they updated their privilege log. The ICC Claimants have therefore not complied in full with their offer to produce a portion of the requested documents.</p> <p>The Respondent notes that the Claimants agree to produce “<i>internal documents including correspondence, memoranda, reports and minutes of meetings in Claimants’ possession in which CMSA and/or Claimants discussed either of these Payment Orders, prepared between 23 August 2019—the date in which the Mining Agency issued Payment Order VSC 206—and 27 April 2020—the date in which CMSA objected to Payment Order VSC 62 and made a partial payment under protest</i>”.</p> <p>Colombia maintains its request with respect to documents in the possession of the entities referred to in the introduction to the present Request for Document Production. Claimant is a holding company, wholly owned by South32 Limited, the public group parent company. Important decisions and documents would in all likelihood have been taken, made and exchanged within the group parent company.</p> <p>Colombia further maintains its request with respect to documents created and/or exchanged after 27 April 2020. Indeed, ordering the Claimant to conduct a reasonable search for responsive documents created and/or produced after that date would not impose any burden on the Claimant.</p>
<p>Tribunal’s decision</p>	<p>The Tribunal takes note of Claimant’s voluntary agreement “to conduct a reasonable search for a narrower category of documents responsive to Colombia’s request, namely: internal documents including correspondence, memoranda, reports and minutes of</p>

	<p>meetings in Claimant’s possession in which CMSA and/or Claimant discussed either of these Payment Orders, prepared between 23 August 2019—the date in which the Mining Agency issued Payment Order VSC 206—and 27 April 2020—the date in which CMSA objected to Payment Order VSC 62 and made a partial payment under protest” and, thus, to partially comply with this request. Claimant further confirms that its offer “covers the relevant substantive communications with respect to the issue within the South32 Group”.</p> <p>The remaining part of the Request No. 6 is denied, <u>for failure to meet requirement R2</u>. The Tribunal does not find broadening the scope of the search agreed to by Claimant to be relevant or material to the outcome of this dispute.</p>
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Request No. 7	
Documents or category of documents requested	All internal documents including, but not limited to, correspondence, memoranda, reports and minutes of meetings, created by and/or exchanged within South32 regarding the UPME’s Resolutions 562 and 293. ⁴¹
Relevance and materiality according to the Requesting Party	<p>In response to a substantially similar document production request by Colombia in the ICC Arbitration, the ICC Claimants agreed to “conduct a reasonable search for a narrower category of documents responsive to Colombia’s [Request], namely: internal documents including correspondence, memoranda, reports and minutes of meetings in Claimants’ possession in which CMSA and/or Claimants discussed either of [Resolutions 562 and/or 293], prepared between 21 September 2017 – the date in which UPME issued Resolution 562 – and 12 October 2018 – i.e., four months after UPME Resolution 293 was issued, and the legal term to challenge it expired.” The Respondent assumes that South32’s offer also applies to the present arbitration. For the avoidance of doubt, document production in the ICC Arbitration has not yet taken place.</p> <p>The specificities of this arbitration, however, justify broadening the scope of the search agreed to by the ICC Claimants, to cover (i) a larger period; and (ii) further entities within the South32 Group, including the Claimant, the Claimant’s immediate parent company (South32 Jersey Limited), and parent company which ultimately controls the Claimant, (South32 Limited, Australian company registration number ACN 093 732 597).</p> <p>In particular, the search should be conducted in respect of all documents from the date agreed to by the ICC Claimants (21</p>

⁴¹ Counter-Memorial, Section II.C.4.(iv), Exhibits C-30 and C-34.

	<p>September 2017) up until the date of the Request for Arbitration (11 March 2020), rather than until 12 October 2018. There is no compelling reason why documents produced after CMSA’s challenge of UPME Resolutions 562 and 293 would be any less relevant than those created or exchanged before that date. The relevance to this arbitration of CMSA’s and the Claimant’s evaluation of the bases on which the UPME issued Resolutions 562 and 293 is unaffected by CMSA’s decision to challenge those Resolutions.</p>
Documents not in the Requesting Party’s possession	<p>The Republic of Colombia confirms that none of the requested documents are in its possession, custody or control.</p>
Responses / Objections to document request	<p>First, contrary to Colombia’s assertion that “document production in the ICC Arbitration has not yet taken place”, ICC Claimants complied with the deadline of 23 August 2021 for voluntary production of documents. The ICC tribunal agreed with the scope of the voluntary offer and did not order the production of any additional documents.</p> <p>There are no specificities related to this arbitration that justify broadening the scope of the search agreed to by the ICC Claimants (<i>ie</i>, by covering a larger period or by encompassing internal documents produced by other South32 entities). With regard to the time of production of the requested documents, Colombia’s justification claims that it seeks documents “up until the date of the Request for Arbitration (11 March 2020), rather than until 12 October 2018 (<i>ie</i>, four months after UPME Resolution 293 was issued, and the legal term to challenge it expired) as covered in the ICC Claimants’ voluntary production offer. With regard to the covered entities, Claimant confirms that the voluntary offer below covers the relevant substantive communications with respect to the issue within the South32 Group.</p> <p>Colombia has failed to show that the requested additional documents are relevant to the case or material to its outcome, as required by Article 3.3(b) of the IBA Rules. The Request contains no additional justification. With regard to the period covered, any documents produced once Resolution 562 was challenged before Colombian domestic courts (<i>ie</i>, 19 December 2017) would likely be irrelevant, as they would entirely reflect CMSA’s position with regard to that Resolution reflected in the briefs submitted before Colombian courts (already in Colombia’s possession), and would almost certainly be covered by legal privilege. In consideration of the fact that CMSA did not expressly challenge UPME Resolution 293, as it essentially reiterates the same order as Resolution 562 and they both have the same bases, the ICC Claimants proposed to extend the end of the date range until the legal term to challenge such Resolution expired.</p>

	<p>Notwithstanding and without prejudice to the above, in the spirit of cooperation, and taking in consideration that UPME’s Resolutions 562 and 293 are two of the measures challenged in this arbitration, Claimant reiterates the voluntary offer made by the ICC Claimants, and agrees to conduct a reasonable search for a narrower category of documents responsive to Colombia’s request, namely: internal documents including correspondence, memoranda, reports and minutes of meetings in Claimant’s possession in which CMSA and/or Claimant discussed either of these Resolutions, prepared between 21 September 2017—the date in which UPME issued UPME Resolution 562—and 12 October 2018—<i>ie</i>, four months after UPME Resolution 293 was issued, and the legal term to challenge it expired. Claimant offers to produce any non-privileged documents that meet these criteria (noting that the requested documents were prepared at a time in which the present dispute had already arisen (the Notice of Dispute having been sent to Colombia on 20 June 2016, <i>see Exhibit C-37</i>) and therefore may be privileged).</p> <p>As already indicated, the tribunal in the ICC proceedings rejected the rest of the equivalent request in those proceedings (also Request No. 7) for lack of relevance and materiality.</p>
<p>Reply to Objections to document request</p>	<p>As a preliminary comment, contrary to the Claimant’s allegation, the ICC Arbitration’s document production phase is not complete. The parties to the ICC Arbitration agreed to suspend those proceedings pending the resolution of the present arbitration. The suspension occurred before any party to the ICC Arbitration produced documents in accordance with the ICC tribunal’s orders. As to the ICC Claimants’ voluntary production, it is incomplete. Indeed, the ICC Claimants only produced a privilege log and indicated that they had located additional potentially responsive documents which they would review in order to potentially update their production. To date, the ICC Claimants have not produced any additional responsive documents, nor have they updated their privilege log. The ICC Claimants have therefore not complied in full with their offer to produce a portion of the requested documents.</p> <p>Colombia notes that the Claimant agrees to produce “<i>internal documents including correspondence, memoranda, reports and minutes of meetings in Claimants’ possession in which CMSA and/or Claimants discussed either of these Resolutions, prepared between 21 September 2017—the date in which UPME issued UPME Resolution 562—and 12 October 2018—ie, four months after UPME Resolution 293 was issued, and the legal term to challenge it expired</i>”.</p> <p>Colombia maintains its request with respect to documents in the possession of the entities referred to in the introduction to the</p>

	<p>present Request for Document Production. Claimant is a holding company, wholly owned by South32 Limited, the group parent company. Important decisions and documents would in all likelihood have been taken, made and exchanged within the group parent company.</p> <p>The Respondent further maintains its request with respect to documents created and/or exchanged after 12 October 2018. Indeed, ordering the Claimants to conduct a reasonable search for responsive documents created and/or produced after that date would not impose any burden on the Claimants.</p>
Tribunal’s decision	<p>The Tribunal takes note of Claimant’s voluntary agreement “to conduct a reasonable search for a narrower category of documents responsive to Colombia’s request, namely: internal documents including correspondence, memoranda, reports and minutes of meetings in Claimant’s possession in which CMSA and/or Claimant discussed either of these Resolutions, prepared between 21 September 2017—the date in which UPME issued UPME Resolution 562—and 12 October 2018—ie, four months after UPME Resolution 293 was issued, and the legal term to challenge it expired” and, thus, to partially comply with this request. Claimant further confirms that its offer “covers the relevant substantive communications with respect to the issue within the South32 Group”.</p> <p>The remaining part of Request No. 7 is denied, <u>for failure to meet requirement R2</u>. The Tribunal does not find broadening the scope of the search agreed to by Claimant to be relevant or material to the outcome of this dispute</p>

Request No. 8	
Documents or category of documents requested	All internal documents including, but not limited to, correspondence, memoranda, reports and minutes of meetings, created by and/or exchanged within South32 regarding (i) CMSA’s meetings and discussions with the ANM and/or the UPME with respect to the prospective methodology for the determination of nickel prices under the 1994 Law’s regime and (ii) the draft resolutions circulated by the ANM and/or the UPME in this respect. ⁴²
Relevance and materiality according to the Requesting Party	Pursuant to Art. 23 of the 1994 Law, CMSA owed nickel royalties amounting to 12% of the pithead value of nickel. This value was to be determined by reference to FOB prices of nickel at Colombian ports, from which various costs would be deducted in order to obtain the metal’s pithead value. However, given that there are no

⁴² Counter-Memorial, Section II.C.4, in particular ¶¶ 179-185.

	<p>nickel producers in Colombia, there was no available data on FOB prices of nickel at Colombian ports. The mining authorities were thus compelled to estimate these prices and to establish a methodology for the determination of the pithead value of nickel.⁴³</p> <p>On 15 May 2015, after years of consultations, including of CMSA, the ANM published Resolution 293 setting out a methodology—or formula—to determine the price of nickel for the purpose of calculating nickel royalties.⁴⁴ In the present arbitration, the Claimants attack the reasonability of Resolution 293 and claim that its enactment amounts to a breach of FET.</p> <p>The requested documents are relevant to support the Republic of Colombia’s claim that South32 only took issue with Resolution 293 because it allegedly resulted in a royalty higher than what CMSA was willing to pay.⁴⁵</p> <p>The requested documents are material to the outcome of the arbitration, as South32’s assessment of the methodology contained in Resolution 293 is relevant to assess (i) the reasonability of the Colombian authorities’ behavior; (ii) the absence of discrimination when the ANM published Resolution 293; (iii) the short and long-term economic impact which South32 anticipated Resolution 293 would have on CMSA; and (iv) the Claimants’ alleged legitimate expectations that the ANM would adopt a different methodology or apply that methodology differently.</p> <p>Finally, these documents are material to the outcome of the arbitration, as South32’s knowledge of a potential dispute regarding the ANM’s determination of the methodology pursuant the 1994 Law, prior to the Claimant’s investment, is relevant to the Republic of Colombia’s claim that the Claimant incurred in impermissible treaty shopping.⁴⁶</p>
Documents not in the Requesting Party’s possession	The Republic of Colombia confirms that none of the requested documents are in its possession, custody or control.
Responses / Objections to document request	First, Colombia has failed to show that the requested documents are relevant to the case or material to its outcome , as required by Article 3.3(b) of the IBA Rules. The tribunal in the ICC Arbitration rejected Colombia’s identical request in full for lack of relevance and materiality. The justification provided by Colombia

⁴³ Counter-Memorial, ¶ 183.

⁴⁴ Exhibit C-28.

⁴⁵ Counter-Memorial, ¶ 192.

⁴⁶ Counter-Memorial, Section III.C.

shows that the request is aimed at proving points that are not relevant to the disposal of the case.

Colombia argues that these documents will help it prove that “South32 only took issue with Resolution 293 because it allegedly resulted in a royalty higher than what CMSA was willing to pay”. The relevant inquiry is whether Resolution 293 was in accordance with the provisions of Article 23 of the 1994 Royalties Law to which it purportedly gave effect (*see, eg*, Memorial, paras 54-56, 84-85). That issue is disposed of on a simple reading of those documents, as explained further below. The second issue is the Mining Agency’s attempt to retroactively apply Resolution 293, a point that is unrelated to the forward-looking impact on royalty payment amounts.

The requested documents are also **not relevant to the case and or material to its outcome** in accordance with Article 9.2(a) of the IBA Rules because they would not advance any of Colombia’s allegations.

Colombia asserts that the requested documents are material to determine “(i) the reasonability of the Colombian authorities’ behavior; (ii) the absence of discrimination when the ANM published Resolution 293; (iii) the short and long-term economic impact which South32 anticipated Resolution 293 would have on CMSA; and (iv) the [Claimant’s] alleged legitimate expectations that the ANM would adopt a different methodology or apply that methodology differently.” However, these are not points that turn on the Claimant’s or CMSA’s reaction or internal discussions relating to Mining Agency Resolution 293. The reasonableness of the actions of Colombian authorities, by definition, must be assessed by analyzing the actions of the Colombian authorities, not that of the Claimant. Similarly, the question of whether Colombia’s actions were discriminatory with respect to CMSA and the Claimant can only be evidenced by reviewing the treatment that Colombia afforded to comparable third parties, not by turning to reviewing the Claimant’s internal documents. With regard to the Claimant’s legitimate expectations with respect to the methodology to determine the nickel base price for royalty purposes, whether the methodology adopted in Resolution 293, or its application, is consistent with Article 23 of the 1994 Royalties Law (it is not on its face) may be resolved exclusively on the basis of the documents already on the record—*ie*, the 1994 Royalties Law (**Exhibit C-14**) and the Mining Agency Resolution 293 (**Exhibit C-28**) (*see, eg*, Memorial, paras 54-55, 84). It is therefore unnecessary for Colombia to access the internal documents requested to dispose of these issues.

Second, Colombia acknowledges that it received comments from CMSA with respect to the methodology ultimately adopted in Mining Agency Resolution 293 (*see* Counter-Memorial, paras 190-

193). Those documents submitted to the Mining Agency—and thus already within Colombia’s possession, custody or control—lay out the Claimant’s contemporaneous comments on the issue.

Colombia also alleges that the requested documents would prove that South32 knew “of a potential dispute regarding the ANM’s determination of the methodology pursuant the 1994 Law, prior to the Claimant’s investment” and are thus relevant to prove that “Claimant incurred in impermissible treaty shopping” (emphasis added). Colombia’s argument on the relevance and materiality of the documents is based on the false legal premise that the mere possibility that there was a potential difference between the parties with respect to the methodology to determine the nickel base price meets the very high standard of a treaty abuse. As stated above, the misconstruction of the legal standard should suffice to dismiss Colombia’s request because the relevance and materiality of the documents rest on a false premise.

Colombia is requesting documents that refer to “meetings and discussions ... with respect to the prospective methodology” and “the draft resolutions circulated by the ANM and/or the UPME,” suggesting that those documents would show that this specific dispute (as it relates to the reference price methodology) was foreseeable. However, a dispute could not have been foreseeable at a time in which no measure had been even announced and when it was uncertain whether any such measure would be announced—as the Tribunal may recall, by 2015 Colombia’s obligation to establish the methodology to set the nickel base price had been overdue for more than 20 years.

The treaty shopping argument is in any event proven moot by the nature of the transaction whereby Claimant became an indirect shareholder of CMSA, in the context of the demerger of South32 from BHP Billiton which included a large number of assets other than CMSA and was motivated by commercial considerations totally unrelated to the circumstances surrounding the CMSA investment.⁴⁷ Thus, the documents requested would not assist Colombia in advancing its treaty shopping argument.

For the above reasons, this Request amounts to a fishing expedition whereby Colombia seeks a broad universe of documents in hopes of establishing its case. This strategy exceeds the proper scope of the document production request, and should be rejected. As noted by Gary Born, “tribunals are generally very unwilling to permit parties to engage in ‘fishing expeditions’, aimed at identifying possible claims or sources of further inquiry” and “[t]he focus of disclosure should be on obtaining relevant and material evidence,

⁴⁷ See Claimant’s response to Request 9 below. See also Memorial, paras 16 and 137.

	<p>not playing guessing games” (G Born, International Commercial Arbitration (3d edn 2021), pp 2534-35, 2536).</p> <p>As mentioned above, the tribunal in the ICC Arbitration rejected Colombia’s identical request in those proceedings for lack of relevance and materiality.</p>
<p>Reply to Objections to document request</p>	<p>Colombia maintains its request in full.</p> <p>As a threshold point, it is irrelevant that the tribunal in the ICC Arbitration rejected a similar request by Colombia. The justification for this Request No. 8 is different to that in the ICC Arbitration. In particular, the Claimant in this arbitration allegedly invested in CMSA in 2015, whereas the ICC Claimants purportedly finalized their investments in 1996.⁴⁸ The date of an investment has obvious implications for legitimate expectations and impermissible treaty shopping claims.</p> <p>Colombia notes that the Claimant’s only objection relates to the relevance and materiality of the requested documents. The requested documents are relevant and material to the outcome of the case, and specifically to the following claims:</p> <p>Legitimate expectations</p> <p>Colombia takes note of the Claimant’s concession that the Claimant’s legitimate expectations “<i>with respect to the methodology to determine the nickel base price for royalty purposes, whether the methodology adopted in Resolution 293, or its application, is consistent with Article 23 of the 1994 Royalties Law (it is not on its face) may be resolved exclusively on the basis of [...] the 1994 Royalties Law and the Mining Agency Resolution 293</i>”.</p> <p>Colombia however maintains its request because the requested documents will further prove that the Claimant expected Colombia to determine the reference price methodology as Colombia eventually did.</p> <p>When consulted by Colombia during the elaboration of the reference price methodology, CMSA had technical objections to discrete aspects of the methodology.⁴⁹ CMSA never, however, objected to the general framework. The requested internal documents and correspondence, which are not in Colombia’s possession, will further demonstrate that CMSA recognized the legitimacy and reasonability of Colombia’s methodology.</p>

⁴⁸ Statement of Claim in the ICC Arbitration, ¶¶ 12, 38.

⁴⁹ Email from CMSA to ANM, 11 December 2014, **Exhibit R-39**, and Email from CMSA to ANM, 19 December 2014, **Exhibit R-40**. See also Counter-Memorial, ¶¶ 190-196.

	<p>Treaty shopping</p> <p>The Claimant incurred in impermissible treaty shopping because CMSA was aware of the precise content of the measure it contests in this arbitration (ANM Resolution 293) prior to the Claimant’s investment. The Claimant notes that the “<i>the mere possibility that there was a potential difference between the parties</i>” cannot give rise to a claim for treaty shopping. The Claimant misconstrues Colombia’s treaty shopping claim. The Claimant incurred in impermissible treaty shopping because CMSA had <u>full knowledge</u> of the content of Resolution 293 prior to its issuance. A dispute was foreseeable, if not already triggered.</p> <p>The Claimant’s allegation that it was unsure, prior to the issuance of Resolution 293, of whether a methodology would ever be published is disingenuous. Resolution 293 was the fruit of years of work, including a public process involving various experts.⁵⁰ Prior to Claimant’s investment, CMSA was consulted and provided by the ANM with a near final draft of the methodology.⁵¹ It is not credible that CMSA was at that point unsure about whether a methodology would ever be announced. CMSA was even aware of the new methodology’s specific parameters.</p> <p>The Claimant’s secondary treaty shopping counter-argument, premised on the alleged causes of the investment, is irrelevant to Request No. 8, which is focused on the timing of the investment. In any event, the Claimant’s justification for the causes of its investment are self-serving: the Claimant merely asserts that South32’s participation in CMSA was restructured as a result of a demerger. Yet, the group’s demerger could have taken a myriad of forms and steps. The restructuring alone does not justify the Claimant’s purchase of an indirect share in CMSA.</p>
<p>Tribunal’s decision</p>	<p>Request No. 8 is granted, as it meets requirements R1 to R3:</p> <ul style="list-style-type: none"> - The request is sufficiently narrow and specific; - The request appears to be <i>prima facie</i> relevant and material, in light of Respondent’s jurisdictional objection regarding treaty shopping; - The Tribunal takes note of Respondent’s declaration that the requested documents are not in its possession, custody or control.

⁵⁰ Counter-Memorial, Section II.C.4.

⁵¹ Counter-Memorial, Section II.C.4.(ii).

	Therefore, Claimant should deliver the relevant documents (if any exist), dated up to February 2015, by the date established in the Procedural Calendar.
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Request No. 9	
Documents or category of documents requested	All internal documents including, but not limited to, correspondence, memoranda, reports and minutes of meetings, created by and/or exchanged within South32 (including but not limited to the Claimant, the Claimant's immediate parent company (South32 Jersey Limited), and parent company which ultimately controls the Claimant, (South32 Limited, Australian company registration number ACN 093 732 597)) regarding the Claimant's decision to become CMSA's shareholders in February 2015, including the results of any due diligence carried out by South32 for the purpose of this decision. ⁵²
Relevance and materiality according to the Requesting Party	<p>The Claimants allege that the Republic of Colombia frustrated their legitimate expectations and therefore breached the FET standard (which does not apply to the present dispute). As discussed in the Counter-Memorial, even assuming that an autonomous FET standard applied to the present arbitration, South32's alleged expectations would only be protected if, among others, the Claimants had relied on the Republic of Colombia's specific commitment when deciding to invest.⁵³</p> <p>The requested documents are relevant to (i) the Respondent's claim that none of the alleged legitimate expectations invoked by the Claimant was material to its decision to invest in CMSA in February 2015; and (ii) the Respondent's claim that the Claimant incurred in impermissible treaty shopping.</p> <p>The requested documents are therefore material to the outcome of the present arbitration.</p> <p>It bears emphasis that the tribunal in the ICC Arbitration ordered the ICC Claimants and the South32 Group to comply with a substantially identical request in respect of the documentation relative to the acquisition by the ICC Claimants of their interests in CMSA.</p>
Documents not in the Requesting Party's possession	The Republic of Colombia confirms that none of the requested documents are in its possession, custody or control.

⁵² Counter-Memorial, ¶ 40.

⁵³ Counter-Memorial, ¶¶ 396-398.

<p>Responses Objections document request / to</p>	<p>Colombia’s request concerns documents held by the Claimant or its current (immediate or ultimate) shareholders regarding their alleged “decision to become CMSA’s shareholders” in February 2015. This request misunderstands the nature of the demerger transaction through which Claimant became an indirect shareholder of CMSA.</p> <p>As explained in Claimant’s Memorial,⁵⁴ in 2015, following a decision announced in August 2014 by CMSA’s then ultimate shareholder, the BHP Group (<i>BHP</i>), a number of BHP’s assets in multiple jurisdictions (the <i>Demerged Companies</i>) were demerged (<i>ie.</i>, segregated) and transferred to the newly created South32 Group, whose parent company is South32 Limited (incorporated in Australia). CMSA was one of the Demerged Companies transferred into the South32 Group, alongside several other companies then owned by BHP, including investments in Mozambique, South Africa, Australia, and Brazil.</p> <p>As such, the decision to transfer the Demerged Companies (including CMSA) into the newly created South32 Group was made exclusively by BHP at the parent level and before the South32 Group even came into existence. The resulting corporate structure of the Demerged Companies within the South32 Group was also decided at the parent level of BHP.</p> <p>As part of this process, in February 2015 a BHP entity called BHP Billiton SA Investments Limited (later renamed South32 SA Investments Limited), the Claimant entity in this arbitration,⁵⁵ received a 99.94 percent interest in CMSA (through its 100 percent ownership of South32 BVI Limited, which in turn fully owns South32 Group (BVI) Limited and Conicol BVI Limited).⁵⁶ The Claimant’s parent entity South32 Limited, was then demerged from BHP, along with all its controlled entities and subsidiaries, including CMSA, to create the South32 group.</p> <p>As such, given the nature of the demerger transaction, neither Claimant nor its <i>current</i> parent companies were involved in the decision-making process that resulted in the demerger of CMSA. Those decisions were made at the parent level by BHP under strict confidentiality considerations in light of the delicate nature of the transaction. Thus, any discussions or documentation about the rationale for the restructuring and subsequent demerger, including any due diligence undertaken on the assets to be demerged, would have been commissioned by BHP and not by Claimant or its shareholders. Colombia’s request therefore relates to documents that, if they exist, were prepared by a third party with which</p>
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⁵⁴ Memorial, para 16.

⁵⁵ Memorial, para 137 and footnote 317.

⁵⁶ Memorial, para 16, footnotes 21 and 22.

	<p>Claimant and the entire South32 group is no longer affiliated. Any such documents would thus not be in the possession, custody or control of the Claimant (<i>see</i> IBA Rules, Art 3.3.(c)).</p> <p>Given that BHP’s demerger transaction in 2015 was not triggered by a motivation by Claimant or its current shareholders to acquire an interest in CMSA, but, rather, to a broader, strategic commercial decision to restructure the entire BHP Group, it is uncertain whether any document specifically related to the transfer of the interest in CMSA to Claimants would even exist.</p> <p>Notwithstanding and without prejudice to the above, in the spirit of cooperation and in good faith, the Claimant agrees to conduct a reasonable search of documents including correspondence, memoranda, reports and minutes of meetings, created by and/or exchanged with regard to Claimant’s decision to become CMSA’s shareholders in February 2015, including the results of any due diligence carried out by South32 for the purpose of this decision, and to produce any non-privileged document that it finds.</p>
<p>Reply to Objections to document request</p>	<p>Colombia notes that the Claimant agrees to search for documents responsive to Request No. 9.</p> <p>The Claimant has not suggested (as it did in its objections to Requests No. 2, 3, 5, 6, and 7) that it would carry out a narrower search than that requested by Colombia. Yet the Claimant’s purported restatement of Request No. 9 omits certain specifications (marked in bold below) included in the original formulation of Request No. 9:</p> <p><i>“correspondence, memoranda, reports and minutes of meetings, created by and/or exchanged within South32 (including but not limited to the Claimant, the Claimant’s immediate parent company (South32 Jersey Limited), and parent company which ultimately controls the Claimant, (South32 Limited, Australian company registration number ACN 093 732 597)) regarding the Claimant’s decision to become CMSA’s shareholders in February 2015, including the results of any due diligence carried out by South32 for the purpose of this decision”</i></p> <p>If any ambiguity exists as to the scope of the search which the Claimant has agreed to conduct, it should be settled in favor of the original formulation of Request No. 9. This is because such ambiguity would be solely attributable to the Claimant.</p> <p>Colombia wishes to make two clarifications regarding this request and the Claimant’s objection.</p> <p><i>First</i>, the requested documents are key to showing why the South32 Group was structured as it was. The Claimant alleges that there may</p>

be no documented reason for the manner in which the demerger was implemented. This is unsatisfactory.

The Claimant suggests that because the South32 Group demerger was motivated by a “*broader, strategic commercial decision to restructure the entire BHP Group, it is uncertain whether any document specifically related to the transfer of the interest in CMSA to Claimants would even exist*”. So, allegedly, there may simply not be a documented reason why a 99.94% interest in CMSA was transferred to the Claimant, which is incorporated in England, rather than to a company incorporated in South Africa, Australia or the Bahamas.

This is untenable given that the Claimant received its shareholding in CMSA from **another South32 Group entity** incorporated in Jersey⁵⁷ (rather than a BHP Group entity). The demerger of CMSA from the BHP Group would have been effective without the transfer of CMSA from the South32 Jersey entity to the Claimant.

The BHP Group and South32 Group are highly sophisticated. Their corporate structures are complex and deliberate. An indirect 99.94% shareholding in CMSA was ultimately transferred to an English company for a specific reason. And that reason is material to the outcome of the present arbitration.

Second, the Claimant has a duty to disclose documents relative to its investment in CMSA at the document production stage of this arbitration. Adverse inferences can be drawn if the Claimant fails to discharge this duty.

The inaccessibility to Colombia of the evidence required to prove its treaty shopping claim has specific implications in the context of document production. The requested documents are confidential and closely guarded, as confirmed by the Claimant. Colombia has no access to the documents, but needs them to prove its claim. It is precisely to correct such imbalances that the document production phase exists. As explained by the *AMTO v. Ukraine* tribunal in an analogous situation,⁵⁸

“[T]he relative accessibility of evidence would [...] support a duty to disclose evidence so that a respondent could request the disclosure of specific documents from the claimant where the documentation is not otherwise accessible. Alternatively, where the agreed procedure, as in this case, provides for Tribunal questions then the Tribunal can request the necessary clarifications. In both cases, negative inferences might be drawn

⁵⁷ Counter-Memorial, ¶ 317.

⁵⁸ *Limited Liability Company Amtó v. Ukraine*, AISCC Arbitration No. 080/2005, Final Award, 26 March 2008, Exhibit RL-22, ¶ 65.

	<p><i>against the claimant for a failure to provide the requested documents or information”.</i></p>
<p>Tribunal’s decision</p>	<p>The Tribunal takes note of Claimant’s voluntary agreement “to conduct a reasonable search of documents including correspondence, memoranda, reports and minutes of meetings, created by and/or exchanged with regard to Claimant’s decision to become CMSA’s shareholders in February 2015, including the results of any due diligence carried out by South32 for the purpose of this decision, and to produce any non-privileged document that it finds”.</p> <p>Request No. 9 is granted, as it meets requirements R1 to R3:</p> <ul style="list-style-type: none"> - The request is sufficiently narrow and specific; - The request appears to be <i>prima facie</i> relevant and material, in light of Respondent’s jurisdictional objection regarding treaty shopping; - The Tribunal takes note of Respondent’s declaration that the requested documents are not in its possession, custody or control. <p>The Tribunal further takes note that Claimant argues that “Colombia’s request therefore relates to documents that, if they exist, were prepared by a third party with which Claimant and the entire South32 group is no longer affiliated. Any such documents would thus not be in the possession, custody or control of the Claimant”. Nonetheless, the Tribunal notes that this is not the scope of Request No. 9, but rather the documents “<u>within South32</u> (including but not limited to the Claimant, the Claimant’s immediate parent company (South32 Jersey Limited), and parent company which ultimately controls the Claimant, (South32 Limited, Australian company registration number ACN 093 732 597))”.</p> <p>Therefore, the Tribunal sees no reason to modify the exact scope of Request No. 9, <i>i.e.</i>, as it was originally formulated and, thus, grants Request No. 9 in full, including:</p> <p><i>“correspondence, memoranda, reports and minutes of meetings, created by and/or exchanged within South32 (including but not limited to the Claimant, the Claimant’s immediate parent company (South32 Jersey Limited), and parent company which ultimately controls the Claimant, (South32 Limited, Australian company registration number ACN 093 732 597)) regarding the Claimant’s decision to become CMSA’s shareholders in February 2015, including the results of any due diligence carried out by South32 for the purpose of this decision”.</i></p>

	Claimant should conduct its research of the relevant documents (if any exist) by the date established in the Procedural Calendar.
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