

IN THE MATTER OF AN ARBITRATION
UNDER THE UNCITRAL ARBITRATION RULES (2013)

**ALBERTO CARRIZOSA GELZIS,
FELIPE CARRIZOSA GELZIS,
ENRIQUE CARRIZOSA GELZIS,**
Claimants,

v.

THE REPUBLIC OF COLOMBIA,
Respondent.

PCA Case No. 2018-56

Colombia's Rejoinder on Jurisdiction

16 March 2020

Arnold & Porter

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Glossary

Term	Full Name or Description
1998 Regulatory Measures	Collectively, the Capitalization Order and the Value Reduction Order
2005 Administrative Judicial Tribunal Judgment	Judgment dated 27 July 2005 issued by the Administrative Judicial Tribunal, rejecting Claimants' claims
2007 Council of State Judgment	Judgment issued by the Council of State on 1 November 2007, revoking the 2005 Administrative Judicial Tribunal Judgment
2011 Constitutional Court Judgment	Judgment SU-447 issued by the Constitutional Court on 26 May 2011, dismissing Claimants' claims
2014 Confirmatory Order	Order No. 188/14 issued by the Constitutional Court on 25 June 2014, confirming the 2011 Constitutional Court Judgment
Administrative Judicial Tribunal	First Section of the Administrative Tribunal of Cundinamarca
Annulment Petition	Petition filed by Claimants (through their Holding Companies) on 11 December 2011 to annul the 2011 Constitutional Court Judgment
CAV	<i>Corporación de Ahorro y Vivienda</i> , a specific type of financial entity whose object was to obtain capital via deposits and with that capital provide loans
Capitalization Order	Order issued by the Superintendency on 2 October 1998, directing Granahorrar to raise capital to offset its insolvency

Term	Full Name or Description
Carrizosa Family	Julio Carrizosa Mutis (Claimants' father); Astrida Benita Carrizosa (Claimants' mother); and Alberto Carrizosa Gelzis, Felipe Carrizosa Gelzis, and Enrique Carrizosa Gelzis (Claimants)
Central Bank	<i>Banco de la República</i>
Central Bank Technical Unit	<i>Subgerencia Monetaria y de Reservas</i> , a body of experts of the Central Bank that conducts financial analyses
Chapter 10 MFN Clause	Article 10.4 ("Most-Favored Nation Treatment") of the U.S.-Colombia Trade Promotion Agreement
Chapter 12 MFN Clause	Article 12.3 ("Most-Favored Nation Treatment") of the U.S.-Colombia Trade Promotion Agreement
Chapter 10 MFN Footnote	Article 10.4, footnote 2, of the U.S.-Colombia Trade Promotion Agreement
Claimants	Alberto Carrizosa Gelzis, Felipe Carrizosa Gelzis, and Enrique Carrizosa Gelzis
Colombia	Republic of Colombia, or Respondent
Colombia-Switzerland BIT	Agreement Between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments
Conformity Requirement	The international law principle requiring that an investment be made in conformity with the law of the host State to qualify for investment treaty protection

Term	Full Name or Description
Constitutional Court	<i>Corte Constitucional</i> , the highest court of the Colombian court system adjudicating issues of constitutionality, which is charged with protecting the integrity and supremacy of the Colombian Constitution
Contentious Administrative Code	Contentious Administrative Code of Colombia in force in 1998
COP	Colombian peso (in accordance with the ISO 4217 currency standard)
Corporate Superintendency	<i>Superintendencia de Sociedades</i>
Council of State	<i>Consejo de Estado</i> , the highest tribunal adjudicating administrative matters in the Colombian court system
Creditor Banks	<i>Acreeedores</i> , or financial entities to whom the Carrizosa Family had pledged its Granahorrar shares in exchange for financing, (namely, <i>Bancafé Colombia y Bancafé (Panama)</i> ; <i>Corfivalle</i> ; <i>Banco Ganadero</i> ; <i>Bancolombia</i> ; <i>Banco Popular</i> ; <i>Banco Superior</i> ; <i>Interbanco</i> ; <i>Comercia</i> ; <i>Findesarrollo</i> ; <i>Banco Santander</i> ; and <i>Banco Del Estado</i>)
Exchange Office	<i>Oficina de Cambios</i> of the Central Bank
Exchange Registry Division	<i>División de Registro de Cambio de la Superintendencia de Comercio Exterior</i>
Financial Act	<i>Estatuto Orgánico del Sistema Financiero de Colombia de 1993</i> , or “EOSF”
Fogafín	<i>Fondo de Garantía de Instituciones Financieras</i>

Term	Full Name or Description
Fogafín Agreement	Agreement executed by Granahorrar and Fogafín on 6 July 1998, through which Fogafín agreed to guarantee Granahorrar’s interbank financing and overdraft obligations (Granahorrar and Fogafín amended the Fogafín Agreement 13 times, to increase the ceiling of support, modify the type of support to include direct financing, and extend the contractual term)
Fogafín Board	Board of Directors of Fogafín
Foreign Capital Investment Framework	A series of provisions of Colombian law (in force at the time Claimants obtained their alleged interest in Granahorrar) requiring the approval and registration of foreign capital investments
Granahorrar	Corporación Grancolombiana de Ahorro y Vivienda “Granahorrar”
Holding Companies	Companies owned by the Carrizosa Family, through which Claimants held their shares in Granahorrar (namely, <i>Asesorías e Inversiones C.G. S.A.</i> (“Asesorías e Inversiones”); <i>Inversiones Lieja Ltda.</i> (“Inversiones Lieja”); <i>I.C. Interventorías y Construcciones Ltda.</i> (“Interventorías y Construcciones”); <i>Exultar S.A.</i> (“Exultar”); <i>Compto S.A.</i> (“Compto”); and <i>Fultiplex S.A.</i> (“Fultiplex”))
IACHR	Inter-American Commission on Human Rights
ILC Articles on State Responsibility	Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries (2001)
Iran-U.S. Claims Tribunal	Iran-United States Claims Tribunal
Judgment Exclusion Provision	Article 10.28, footnote 15, of the U.S.-Colombia Trade Promotion Agreement

Term	Full Name or Description
Law 43	Law 43 of 1993, which in Article 22 requires dual nationals to enter and exit Colombia and perform their civil and political acts in Colombia in their capacity as Colombian nationals
NAFTA	North American Free Trade Agreement
Notice of Appeal	Claimants' notice of appeal dated 5 August 2005, challenging the 2005 Administrative Judicial Tribunal Judgment
Nullification and Reinstatement Action	Claimants' complaint dated 28 July 2000 before the Administrative Judicial Tribunal, challenging the 1998 Regulatory Measures
PCIJ	Permanent Court of International Justice
Petitioners	Individuals who filed petitions seeking to annul the 2011 Constitutional Court Judgment (namely, Claimants, along with Magistrate Mauricio Fajardo, a member of the Council of State)
Planning Department	<i>Departamento Administrativo de Planeación</i> of Colombia
Resolution No. 25	Resolution No. 25 of 1995, regulating the issuance of temporary liquidity infusions by the Central Bank
Superintendency	<i>Superintendencia Financiera</i> , or <i>Superintendencia Bancaria</i>
TLI	Temporary Liquidity Infusion, or funds disbursed by the Central Bank to financial entities experiencing temporary liquidity shortfalls
TPA	U.S.-Colombia Trade Promotion Agreement

Term	Full Name or Description
TPA Limitations Period	The three-year limitations period contained in TPA Article 10.18.1
<i>Tutela</i> Petitions	<i>Tutela</i> Petitions filed by Fogafín and the Superintendency on 5 March 2008 before the Fifth Section of the Council of State, challenging the 2007 Council of State Judgment
UNHRC	United Nations Human Rights Committee
Value Reduction Order	Resolution No. 002 of 1998 issued by Fogafín on 3 October 1998, which ordered Granahorrar to reduce the nominal value of its shares to COP 0.01
VCLT	Vienna Convention on the Law of Treaties
UNCITRAL	United Nations Commission on International Trade Law

I. INTRODUCTION

1. On 24 January 2018, Alberto Carrizosa Gelzis, Felipe Carrizosa Gelzis, and Enrique Carrizosa Gelzis (“**Claimants**”) filed a Notice of and Request for Arbitration (“**RFA**”) under the financial services chapter (i.e., Chapter 12) of the United States-Colombia Trade Promotion Agreement (“**TPA**”).¹ Claimants’ claims as delineated in the RFA concerned the alleged treatment of shares that they held (through certain holding companies) in a Colombian financial institution called *Corporación Grancolombiana de Ahorro y Vivienda* (“**Granahorrar**”).² Claimants subsequently agreed to bifurcate the proceeding. The present, jurisdictional phase of the proceeding addresses the question of whether Claimants’ claims fall within the scope of Colombia’s consent to arbitration under the TPA.
2. Under international law, the State’s consent to the submission of claims before an international adjudicatory body must be explicit. As observed by the International Court of Justice:

[W]hatever the basis of consent, the attitude of the respondent State must “be capable of being regarded as ‘an unequivocal indication’ of the desire of that State to accept the Court’s jurisdiction in a ‘voluntary and indisputable’ manner.”³

Indeed, consent has been aptly characterized as the “cornerstone” of jurisdiction in arbitration.⁴

¹ See generally Claimants’ Notice of and Request for Arbitration, 24 January 2018 (“**Request for Arbitration**”).

² See Request for Arbitration, ¶ 8.

³ **RLA-0079**, *Certain Questions of Mutual Assistance in Criminal Matters*, ICJ, Judgment, 4 June 2008 (“**Certain Questions of Mutual Assistance (Judgment)**”), ¶ 62.

⁴ See **RLA-0076**, *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26 (Oreamuno Blanco, Landy, von Wobeser), Award, 2 August 2006 (“**Inceysa (Award)**”), ¶ 167.

3. The burden of proving the facts necessary to establish jurisdiction rests with the claimant.⁵ Here, however, Claimants devoted much of their Memorial on Jurisdiction (“**Memorial**”) to a lengthy account of the facts, of the merits of their claims, and of the basis for their damages request, yet they gave short shrift to the issues that really matter at this stage of the proceeding: the jurisdictional issues.⁶ For its part, Colombia in its Answer on Jurisdiction (“**Answer**”) addressed those facts that are relevant to the jurisdictional determinations that the Tribunal must make. In that context, Colombia demonstrated – with reference to the TPA, to legal authorities, and to evidentiary items – that Claimants’ claims fall outside of the Tribunal’s jurisdiction.⁷
4. Claimants have now responded to Colombia’s Answer with a needlessly voluminous, 611-page monster of a Reply on Jurisdiction (“**Reply**”). Following on the Request for Arbitration and Memorial, the Reply provided Claimants with yet another opportunity to satisfy their burden of proving the jurisdictional elements that must be satisfied for this arbitration to proceed. However, they have failed to do so. While Claimants’ Reply is rife with fustian rhetoric concerning Colombia’s allegedly “baseless,”⁸ “improper,”⁹ and “abusive”¹⁰ arguments, Claimants have failed to rebut the legal and factual bases of Colombia’s jurisdictional objections. In this Rejoinder on Jurisdiction (“**Rejoinder**”), Colombia will further substantiate

⁵ See **RLA-0024**, *Spence International Investments, LLC et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2 (Bethlehem, Kantor, Vinuesa), Interim Award, 25 October 2016 (“**Spence (Interim Award)**”), ¶ 239; **RLA-0066**, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12 (Veeder, Tawil, Stern), Decision on the Respondent’s Jurisdictional Objections, 1 June 2012 (“**Pac Rim (Decision on Jurisdiction)**”), ¶¶ 2.8–2.15.

⁶ For example, Claimants devoted a scant 3 pages of their Memorial to the subject of the Tribunal’s jurisdiction *ratione temporis*. See Claimants’ Memorial (PCA), ¶¶ 233–36.

⁷ See generally Colombia’s Answer (PCA).

⁸ Claimants’ Reply (PCA), ¶ 563.

⁹ Claimants’ Reply (PCA), p. 20.

¹⁰ Claimants’ Reply (PCA), ¶ 579.

such objections, and will demonstrate conclusively that this Tribunal lacks jurisdiction to hear Claimants' claims.

5. Colombia's objections are predicated on defects of four different types: *ratione temporis*, *ratione voluntatis*, *ratione personae*, and *ratione materiae*. Each of those is summarized briefly below in the remainder of this Introduction, and then developed in greater detail in the body of this Rejoinder.
6. ***Ratione Temporis* Objections.** Claimants' claims fall outside of the *ratione temporis* scope of the TPA, for three reasons. The first is that the TPA does not apply retroactively, and therefore does not apply to State acts or omissions that occurred before the TPA's entry into force on 15 May 2012.¹¹ To recall, in their RFA and Memorial, Claimants had complained of two specific pre-treaty measures—the regulatory measures adopted in 1998 in an attempt to save Granahorrar ("**1998 Regulatory Measures**")¹² and the final judgment of the Constitutional Court ("**2011 Constitutional Court Judgment**")¹³—both of which predated the TPA's entry into force. In their Reply, Claimants appear to concede that such measures cannot constitute breaches of the TPA, given the latter's limited

¹¹ See **CLA-0124**, Vienna Convention on the Law of Treaties, United Nations, 23 May 1969 ("**VCLT**"), Art. 28 ("Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.").

¹² See, e.g., Claimants' Memorial (PCA), ¶ 5 (complaining of the allegedly "discriminatory, irregular, extreme, excessive, and unprecedented treatment on the part of the Central Bank of Colombia ("Banco de la República" or "the Central Bank"), Fondo de Garantías de Industrias Financieras ("**FOGAFIN**") and Superintendency of Banking," which took action with respect to Granahorrar in 1998); Request for Arbitration, pp. 1-2 (complaining of "acts of regulatory excesses [taken by Fogafin in 1998]").

¹³ See, e.g., Claimants' Memorial (PCA), ¶ 45 ("The Constitutional Court's Opinion [of 2011] represents an emblematic denial of justice that even more importantly itself gave rise to a constitutional crisis because of the extent of its abuse of regulatory-judicial authority"); see also *id.* ¶¶ 42-77, 425-28, 437.

temporal reach.¹⁴ Claimants thus appear to have abandoned the two pre-treaty actions as a formal basis for their claims herein, and are now focusing exclusively on the order denying Claimants' petition to annul the 2011 Constitutional Court Judgment ("**2014 Confirmatory Order**"). In fact, Claimants explicitly describe such order as the sole asserted basis for liability in the present arbitration: "The challenged State measure . . . is the Constitutional Court's issuance of Order 188/14."¹⁵ However, the mere reformulation of their claims in this fashion does not allow Claimants to overcome the *ratione temporis* jurisdictional hurdle.

7. As discussed later in this Rejoinder, in numerous previous cases in which the relevant facts straddled the entry into force of a treaty, tribunals have dismissed claims that, while purporting to be based on *post*-treaty State conduct, were actually rooted in *pre*-treaty conduct. Here, Claimants' claims about the 2014 Confirmatory Order are decidedly rooted in pre-treaty conduct. Indeed, although Claimants now purport to base their claims exclusively on the (post-TPA) 2014 Confirmatory Order,¹⁶ Claimants have not actually articulated any asserted basis for the wrongfulness of that particular act. Instead, Claimants' only theory of liability is that the measures that underlay the 2014 Confirmatory Order—namely, the 1998 Regulatory Measures and 2011 Constitutional Court Judgment—were wrongful.¹⁷ Claimants' claims are thus fundamentally rooted in

¹⁴ See Claimants' Reply (PCA), ¶¶ 98–99 ("There is no dispute that the TPA entered into force on May 15, 2012, nor that Order 188/14 was issued thereafter, on June 25, 2014. . . . Respondent's argument is premised upon the unremarkable proposition that the TPA does not apply to acts that occurred prior to its entry into force. **Claimants have no quarrel with this proposition**, which, as Respondent notes, is grounded in Art. 28 of the VCLT.") (emphasis added).

¹⁵ Claimants' Reply (PCA), ¶ 86. See also *id.*, ¶ 3 ("Here, Claimants' claims arise from Order 188/14, the Constitutional Court's June 25, 2014 denial of the motion for annulment of its May 26, 2011 opinion.").

¹⁶ See Claimants' Reply (PCA), p. 83, heading 1 ("Claimants' Claims Are Based Upon a Measure Taken by Colombia After the TPA Entered Into Force").

¹⁷ See, e.g., Claimants' Memorial (PCA), ¶¶ 48–53.

pre-treaty conduct, and for that reason fall outside of the jurisdiction *ratione temporis* of the Tribunal.

8. The second reason for which Claimants' claims are barred *ratione temporis* is because the present *dispute* arose before the TPA's entry into force. In their Reply, Claimants attempt to elude this jurisdictional constraint (i) by challenging the applicability of the general principle of non-retroactivity to pre-treaty *disputes* (as opposed to pre-treaty *acts*),¹⁸ and (ii) by applying their own, self-serving definition of "dispute"¹⁹ (rather than the established definition adopted by the International Court of Justice and observed by a plethora of international tribunals).²⁰ Further, Claimants insist that in any event the present dispute did not arise until 2014, which was after the TPA's entry into force in 2012.²¹
9. In their Reply, Claimants concede that the present dispute encompasses both pre- and post-treaty conduct. For example, they describe the dispute as encompassing certain regulatory measures, which predated the TPA:

The Tribunal shall find that it has jurisdiction to conduct a full and thorough merits hearing arising from The Republic of Colombia's abuse of **regulatory**, legislative, and judicial sovereignty.²² (Emphasis added)

10. As explained in more detail in the body of this Rejoinder, the only regulatory conduct at issue in this proceeding took place in 1998.²³ The dispute between Claimants and Colombia over such regulatory conduct crystallized in the years following 1998, long before the TPA's entry into force, and such dispute continues, now in the form of the present arbitration. As discussed further below, the

¹⁸ Claimants' Reply (PCA), ¶ 129.

¹⁹ See Claimants' Reply (PCA), ¶¶ 131–32.

²⁰ See Claimants' Reply (PCA), ¶¶ 131–32.

²¹ Claimants' Reply (PCA), p. 104 ("This 'Dispute' Arose in 2014").

²² Claimants' Reply (PCA), p. 21.

²³ It is not at all clear from Claimants' written submissions what State conduct is alleged to constitute an "abuse . . . of legislative . . . sovereignty." Claimants' Reply (PCA), p. 21.

jurisprudence supports the proposition that a dispute that arose prior to an investment treaty's entry into force lies outside the temporal scope of such treaty.

11. Third, Claimants' claims transcend the *ratione temporis* scope of the TPA because they are time-barred under the TPA's 3-year limitations provision (TPA Article 10.18.1). Pursuant to such provision, a claimant must file a claim within 3 years from the time that the claimant knew (or should have known) about the alleged breach and resulting loss caused by the relevant State conduct.²⁴ In response, Claimants now argue (i) that the TPA limitations period does not apply at all to their claims;²⁵ (ii) that, by means of the most-favored nation clause of Chapter 12 of the TPA ("**Chapter 12 MFN Clause**"), they can in any event import and apply the more generous 5-year limitations provision contained in the Colombia-Switzerland BIT;²⁶ and (iii) that they did not know until 2014 of the alleged breach that gave rise to their claims.²⁷ Colombia demonstrates in the body of this Rejoinder that none of the above-cited rebuttal arguments is supported or tenable, and that Claimants failed to satisfy the applicable 3-year limitations period under the TPA. As a result, their claims must be dismissed.
12. ***Ratione Voluntatis* Objections.** Claimants' claims also fall outside of the jurisdiction *ratione voluntatis* of the Tribunal, as a consequence of the TPA's explicit conditions on Colombia's consent to arbitration. In their Reply, Claimants once again engage in interpretive acrobatics in an attempt to elude and elide the referenced consent conditions. Although Claimants do not deny that they have not satisfied various TPA requirements (e.g., those of notice of intent; consultation and negotiation; and waiver), they argue (i) that such conditions do not apply to their

²⁴ **RLA-0001**, Free Trade Agreement between the United States and Colombia, Chapter Ten (Investment), 22 November 2006 ("**TPA**"), Art. 10.18.1.

²⁵ Claimants' Reply (PCA), ¶ 4.

²⁶ Claimants' Reply (PCA), ¶ 5.

²⁷ Claimants' Reply (PCA), ¶¶ 4, 34.

claims;²⁸ (ii) that such conditions are not mandatory, because they are not actually “requirements;”²⁹ and (iii) that in any event, they can circumvent such conditions using the MFN Clause of TPA Chapter 12.³⁰ Colombia demonstrates below that, notwithstanding Claimants’ contortions, the TPA’s express conditions of consent do indeed fully apply to Claimants, that they cannot avoid such conditions by means of the Chapter 12 MFN Clause, and that such conditions bar their claims herein.

13. Jurisdiction *ratione voluntatis* is also lacking with respect to a portion of the Claimants’ substantive claims (specifically, their fair and equitable treatment claims and their national treatment claims). The *fair and equitable treatment* claims are barred because the TPA does not impose any obligation to provide fair and equitable treatment under Chapter 12 (i.e., Chapter 12 does not include any fair and equitable treatment obligation).³¹ Nor does Chapter 12 incorporate by reference any such obligation. While in Article 12.1.2(a)³² Chapter 12 does incorporate by reference from Chapter 10 four specific protections, such four protections do not include fair and equitable treatment. Claimants are also not entitled to import into Chapter 12 a fair and equitable treatment protection from some other treaty by means of the MFN Clause of Chapter 12, as they attempt to do. In short, Claimants cannot claim for the breach of a non-existent obligation. Claimants’ fair and equitable treatment claim therefore must be summarily dismissed.

²⁸ See Claimants’ Reply (PCA), ¶¶ 502, 566.

²⁹ See Claimants’ Reply (PCA), ¶¶ 517, 608, 639.

³⁰ Claimants’ Reply (PCA), ¶ 569.

³¹ See generally **RLA-0001**, TPA, Ch. 12.

³² **RLA-0001**, TPA, Article 12.1.2(a) (“Articles 10.7 (Expropriation and Compensation), 10.8 (Transfers), 10.11 (Investment and Environment), 10.12 (Denial of Benefits), 10.14 (Special Formalities and Information Requirements), and 11.11 (Denial of Benefits) are hereby incorporated into and made a part of this Chapter.”).

14. Furthermore, both Claimants' *fair and equitable treatment* and *national treatment* claims are barred because the TPA parties did not consent to the arbitration of those types of claims under Chapter 12. In Article 12.1.2(b), the TPA parties specified only four types of claims that can be submitted to arbitration under Chapter 12.³³ Fair and equitable treatment and national treatment are not amongst the four cited categories. Accordingly, no claimant is eligible to file either fair and equitable treatment claims or national treatment claims pursuant to Chapter 12 of the TPA.
15. In a muddled, 200-page-long argument,³⁴ Claimants reject the foregoing straightforward, plain-text interpretation of Article 12.1.2(b), and advance instead a self-serving interpretation that is based largely upon Claimants' own (tendentious) interpretation of the analogous provision in the North American Free Trade Agreement ("**NAFTA**"), which is Article 1401(2) of that treaty.³⁵ However, and unfortunately for Claimants, the only tribunal that has interpreted that provision of NAFTA adopted precisely the interpretation that Colombia is advancing herein.³⁶ Moreover, such interpretation was forcefully endorsed by two of the three NAFTA States Parties (Canada and Mexico).³⁷ Accordingly, Claimants' argument based on the NAFTA text does not help Claimants' cause.

³³ **RLA-0001**, TPA, Article 12.1.2(b) ("**Section B (Investor-State Dispute Settlement) of Chapter Ten (Investment) is hereby incorporated into and made a part of this Chapter solely for claims that a Party has breached Articles 10.7 (Expropriation and Compensation), 10.8 (Transfers), 10.12 (Denial of Benefits), or 10.14 (Special Formalities and Information Requirements), as incorporated into this Chapter.**") (emphasis added).

³⁴ See Claimants' Reply (PCA), pp. 112–310.

³⁵ See generally Claimants' Reply (PCA), Section III; Expert Report of Olin L. Wethington ("**First Wethington Expert Report**"); Supplemental Expert Report of Olin L. Wethington, 10 December 2019 ("**Second Wethington Expert Report**").

³⁶ See **RLA-0112**, *Fireman's Fund Insurance Company v. The United Mexican States*, ICSID Case No. ARB(AF)/02/01 (van den Berg, Lowenfeld, Olavarrieta), Decision on the Preliminary Question, 17 July 2003 ("**Fireman's Fund (Decision)**"), ¶ 66.

³⁷ See **RLA-0113**, *Fireman's Fund Insurance Company v. The United Mexican States*, ICSID Case No. ARB(AF)/02/01, Mexico's Submission on Preliminary Issues of Jurisdiction, 21 October 2002

16. Claimants also attempt to save their fair and equitable treatment and national treatment claims by relying—once again—on the Chapter 12 MFN Clause. However, such argument also fails because MFN clauses cannot be used to manufacture consent to arbitration where none exists otherwise, as tribunals have repeatedly held.³⁸
17. For all of the foregoing reasons, Claimants’ claims fall outside of the scope of Colombia’s consent to arbitration, and thus such claims must be dismissed for lack of *ratione voluntatis* jurisdiction.
18. ***Ratione Personae* Objections.** The Tribunal also lacks jurisdiction *ratione personae* over Claimants’ claims. The terms of Chapter 12 of the TPA impose obligations on Colombia with respect to foreign (i.e., US) investors.³⁹ When an investor is a dual national of the United States and Colombia, the TPA deems that investor “exclusively a citizen of the State of his or her dominant and effective nationality.”⁴⁰ Claimants here are dual US and Colombian nationals; as a result, in order to qualify for TPA protection, Claimants’ dominant and effective nationality must have been that of the United States at the relevant times.

(“**Fireman’s Fund (Mexico’s Submission)**”), ¶ 24(e); **RLA-0114**, *Fireman’s Fund Insurance Company v. The United Mexican States*, ICSID Case No. ARB(AF)/02/01, First Submission of Canada Pursuant to Article 1128 of NAFTA, 27 February 2003 (“**Fireman’s Fund (Canada’s Submission)**”), ¶ 16.

³⁸ See Colombia’s Answer (PCA), ¶¶ 333–37.

³⁹ **RLA-0001**, TPA, Art. 12.1.1(b) (establishing that that Chapter 12 “applies to measures adopted or maintained by a Party relating to . . . investors of another Party, and investments of such investors, in financial institutions in the Party’s territory.”); see *id.* at Art. 12.20 (defining the term “investor of a Party” as “a person of a Party, that attempts to make, is making, or has made an investment in the territory of another Party”) (emphasis added).

⁴⁰ **RLA-0001**, TPA, Art. 12.20. Chapter 10 of the TPA contains a virtually identical definition. See *id.* at Art. 10.28.

19. In the present case, the Parties agree that Claimants' US and Colombian nationalities were effective at the relevant times.⁴¹ The remaining question is which nationality was dominant, and the answer will depend upon the relative strength of Claimants' ties to each State, as assessed using a series of factors identified by previous international courts and tribunals.⁴² The dominant nationality must be analyzed on two critical dates: the date of the alleged breach of the TPA and the date of the submission of Claimants' claims.⁴³
20. Claimants bear the burden of proving the facts necessary to establish jurisdiction,⁴⁴ and therefore must prove that they are "more foreign than national,"⁴⁵ through documentary evidence.⁴⁶ Yet Claimants have relied exclusively on four witness statements comprised of self-serving and unsupported allegations, thus failing to satisfy their burden of proof. In any event, Colombia has disproven many of those allegations through documentary evidence that it has submitted,⁴⁷ and such

⁴¹ See Colombia's Answer (PCA), ¶ 395 ("Claimants concede that their Colombian nationality is indeed an effective nationality (along with that of the US); and . . . Colombia does not dispute the effectiveness of Claimants' US nationality."); Claimants' Reply (PCA), ¶ 822.

⁴² See Colombia's Answer (PCA), ¶¶ 397-401.

⁴³ See **RLA-0088**, *Michael Ballantine and Lisa Ballantine v. the Dominican Republic*, PCA Case No. 2016-17 (Ramírez Hernández, Cheek, Vinuesa), Final Award, 3 September 2019 ("**Ballantine (Final Award)**"), ¶¶ 556 ("[A]n analysis should be performed to examine how, at that particular time [i.e., the time of the alleged breach and the time of the submission of the claim], the connections to both States could be characterized in terms of dominance and effectiveness.").

⁴⁴ **CLA-0014**, *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB 12/20 (Söderlund, Bermann, Malintoppi), Award, 26 April 2017, ¶ 66; **RLA-0065**, *Abaclat et al. v. Argentine Republic*, ICSID Case No. ARB/07/5 (Pierre, Abi-Saab, van den Berg), Decision on Jurisdiction and Admissibility, 4 August 2011, ¶ 678; **RLA-0063**, *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005 (Runeland, Söderlund, Cremades), Final Award, 26 March 2008, ¶ 64.

⁴⁵ See **RLA-0118**, *Enrique Heemsen and Jorge Heemsen v. The Bolivarian Republic of Venezuela*, CPA Case No. 2017-18 (Derains, Gómez-Pinzón, Stern) Award on Jurisdiction, 29 October 2019 ("**Heemsen (Award on Jurisdiction)**"), ¶ 433 (Spanish Original: stating that the only type of claimant who can submit a claim against a State is one that is "*más extranjero que nacional*").

⁴⁶ **RLA-0120**, *Reza And Shahnaz Mohajer-Shojaee v. The Islamic Republic Of Iran*, IUSCT Case No. 273 (Broms, Holtzmann, Noori) Award, 5 October 1990 ("**Mohajer-Shojaee (Award)**"), ¶ 9.

⁴⁷ See **Ex. R-0369**, *Allegations Made by Claimants that have been Disproven by Documentary Evidence*, 16 March 2020.

documentary evidence demonstrates that Claimants' Colombian nationality was the dominant one on the critical dates. Consequently, the Tribunal lacks jurisdiction *ratione personae* over Claimants' claims.

21. ***Ratione Materiae* Objections.** The Tribunal also lacks jurisdiction *ratione materiae* over Claimants' claims. It is a basic tenet of investment treaty arbitration – and an explicit requirement of the TPA⁴⁸ – that to be able to assert arbitral claims, a would-be claimant must identify and prove the existence of a qualifying investment under the terms of the treaty.
22. So far in this proceeding, Claimants' alleged qualifying investment has been a moving target. Initially, in their Request for Arbitration, Claimants had identified as the relevant investment their indirect interest in shares in Granahorrar.⁴⁹ In their Memorial, Claimants shifted the narrative, contending that it was the Council of State's 2007 judgment ("**2007 Council of State Judgment**") (rather than the Granahorrar shares) that constituted their qualifying investment under the TPA.⁵⁰ In their Reply, Claimants remarkably change their story yet again, this time bizarrely asserting that "the investment was transformed into different modes at different times."⁵¹ Under the latter rendition of the qualifying investment, Claimants' investment in the form of their indirect shareholding in Granahorrar was subsequently "transformed into a judgment" – namely, the 2007 Council of

⁴⁸ See **RLA-0001**, TPA, Art. 12.1.1 ("This Chapter applies to measures adopted or maintained by a Party relating to . . . (b) investors of another Party, and investments of such investors, in financial institutions in the Party's territory").

⁴⁹ Request for Arbitration (PCA), p. 1 ("In the case before this Tribunal the investment of three U.S. citizens in one of the Republic of Colombia's leading financial institutions [Granahorrar] was reduced to the peppercorn value of COP1 0.01 based upon discriminatory, irregular, and unprecedented treatment on the part of the Central Bank of Colombia . . . FOGAFIN . . . and Superintendency of Banking.").

⁵⁰ Claimants' Memorial (PCA), ¶ 420 ("[F]or purposes of pleading and/or proof of *ratione materiae*, the Council of State's November 1, 2007 Judgment represents and constitutes Claimants' investment as alleged and demonstrated in this proceeding").

⁵¹ Claimants' Reply (PCA), p. 18.

State Judgment.⁵² However, Claimants’ “transformation” theory does nothing to overcome the *ratione materiae* jurisdictional hurdle.

23. Claimants’ indirect interest in shares in Granahorrar does not constitute a qualifying investment under the TPA. Pursuant to the TPA⁵³ and customary international law,⁵⁴ the relevant qualifying investment must have existed both (i) at the time of entry into force of the TPA (i.e., 15 May 2012), and (ii) at the time of the challenged measure (here, the 2014 Confirmatory Order, which was dated 25 June 2014). However, Granahorrar was dissolved—and its assets absorbed by another financial institution—in 2006.⁵⁵ Claimants’ Granahorrar shares thus ceased to exist in 2006,⁵⁶ which is six years before the entry into force of the TPA in 2012, and eight years before the 2014 State measure that Claimants are challenging in this arbitration. An investment that was non-existent by the time the TPA entered into force, and also non-existent at the time of the measure purportedly challenged under the TPA, by definition cannot constitute a qualifying investment under the TPA.
24. As Colombia observed in its Answer,⁵⁷ the 2007 Council of State Judgment also cannot constitute a qualifying investment under the TPA, for the simple reason that such decision is a judicial ruling, and the TPA explicitly excludes court

⁵² Claimants’ Reply (PCA), ¶ 1021.

⁵³ See **RLA-0001**, TPA, Art. 12.1.1 (“This Chapter applies to measures adopted or maintained by a Party relating to . . . (b) investors of another Party, and investments of such investors, in financial institutions in the Party’s territory”).

⁵⁴ See **CLA-0124**, VCLT, Art. 28; **RLA-0010**, ILC Articles on State Responsibility for Internationally Wrongful Acts, (“**ILC Articles on State Responsibility**”), Art. 13 (“An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.”).

⁵⁵ See **Ex. R-0312**, Certificate of Existence and Legal Representation of Granahorrar, Financial Superintendency, 18 February 2020, p. 2; **Ex. R-0129**, Decree No. 663, President of Colombia, 2 April 1993 (“*Financial Act*”), Art. 60(3).

⁵⁶ See **Ex. R-0312**, Certificate of Existence and Legal Representation of Granahorrar, Financial Superintendency, 18 February 2020, p. 2; **Ex. R-0129**, Financial Act, Art. 60(3).

⁵⁷ See Colombia’s Answer (PCA), ¶¶ 466–68.

judgments from the definition of “investment”: “The term ‘investment’ does not include an order or judgment entered in a judicial or administrative action.”⁵⁸ Claimants do not deny that the 2007 Council of State Judgment in fact constitutes a judgment issued in a judicial action. In any event, the 2007 Council of State Judgment was overturned by a final judgment of the Constitutional Court on 26 May 2011. Accordingly, the 2007 ruling ceased to exist long before the TPA’s entry into force in 2012, and also long before the measure challenged in this arbitration, which is the 2014 Confirmatory Order. For these reasons, the 2007 Council of State Judgment (like the Granahorrar shares) is not a qualifying investment under the TPA.

25. In sum, neither of the “different modes” of the alleged investment⁵⁹ that Claimants have identified as the relevant investment for purposes of their TPA claim in fact qualify as an “investment” under the TPA. Claimants’ “transformation” theory thus does not bring their claims within the jurisdiction *ratione materiae* of the Tribunal: just like neither the 2007 Council of State Judgment nor the Granahorrar shares qualify as an investment under the TPA, the purported combination of the two, and/or the transformation of one into the other, also does not qualify as an investment, and therefore does not serve to overcome the jurisdictional hurdle.
26. Finally, in order to qualify for the protection of the TPA, Claimants’ alleged investment must have been made in accordance with Colombian law. Claimants deny the existence of this fundamental *ratione materiae* requirement,⁶⁰ but it is firmly supported by the jurisprudence, as discussed later in this Rejoinder.
27. Claimants failed to comply with Colombian law in making their investment. As explained in Colombia’s Answer, at the time that Claimants (through their Holding Companies) purchased shares in Granahorrar, Colombian law required

⁵⁸ **RLA-0001**, TPA, Art. 10.28, fn. 15.

⁵⁹ Claimants’ Reply (PCA), p. 18.

⁶⁰ See *e.g.*, Claimants’ Reply (PCA), ¶ 1030.

that investments made with foreign capital be approved by, and be registered with, the Colombian Government. The available evidence suggests that Claimants made their investment in Granahorrar using foreign capital. If that is the case, Claimants failed to register or obtain the required approval for their foreign investment, and thereby violated Colombian law in making the investment.⁶¹

28. Surprisingly, in their Reply, Claimants do *not* deny: (i) that they made their investment in Granahorrar using foreign capital; (ii) that Colombian law required the approval and registration of foreign investments; or (iii) that they did not comply with such approval and registration requirements. Accordingly, Claimants' claims fall outside of the jurisdiction *ratione materiae* of this Tribunal.

* * *

29. In sum, the Tribunal lacks jurisdiction *ratione temporis*, *ratione voluntatis*, *ratione personae*, and *ratione materiae* over Claimants' claims. Colombia therefore respectfully requests that this Tribunal dismiss all of Claimants' claims, by enforcing the explicit limits and conditions on consent contained in the plain text of the relevant provisions of the TPA.
30. Colombia concludes this Introduction with two brief final observations. *First*, Colombia has limited the scope of this Rejoinder only to the legal and factual issues that appear relevant to its jurisdictional objections. In doing so, Colombia has deliberately avoided engaging with those aspects of Claimants' submissions that are improper for the present stage, or otherwise irrelevant to the immediate task at hand. For instance, Claimants and their experts devoted significant portions of their written submissions to arguments concerning the merits of Claimants' claims.⁶² It is neither necessary nor appropriate for Colombia to respond to such

⁶¹ Colombia's Answer (PCA), ¶¶ 478–97.

⁶² See generally Claimants' Memorial (PCA), § I, II, V, IV; Expert Report of Antonio L. Argiz, 28 May 2019 (“**First Argiz Expert Report**”); Expert Report of Jack J. Coe, Jr., 7 March 2019 (“**First Coe Report**”). See also Expert Report of Alfonso Vargas Rincón, 11 June 2019 (“**First Vargas**”).

arguments in the present jurisdictional phase. Colombia's refusal to address the merits of Claimants' claims at this stage does *not* mean that Claimants' arguments (or those of their experts) are "unrebutted," as Claimants mistakenly assert in their Reply.⁶³ Colombia previously reserved its rights to respond to Claimants' arguments on the merits in the event that this dispute were to proceed to a merits phase,⁶⁴ and Colombia reiterates such reservation of rights now.

31. *Second*, Colombia also does not attempt herein to respond to Claimants' various baseless accusations. In their Reply, for example, Claimants repeatedly attack Colombia for alleged bad faith and alleged mischaracterization of the applicable legal authorities.⁶⁵ In some cases, the accusations are impossible to understand (e.g., the allegation that "[Colombia] pursues a piecemeal 'cut and paste' approach to legal analysis"⁶⁶). In other cases, Claimants and their experts have adopted a tone that is disrespectful—even hostile—towards Colombia, its counsel, and its expert, which is unwarranted and improper.⁶⁷ For the avoidance of doubt, Colombia categorically rejects any and all of Claimants' accusations and suggestions of impropriety and/or mischaracterization, but does not attempt herein to respond to each such accusation or suggestion. Instead, Colombia will limit itself to declaring that it has not willfully misrepresented or mischaracterized anything at all, and to the contrary ratifies its belief that it has presented jurisdictional objections that are well-founded in both law and fact.

Rincón Report"), ¶¶ 30–31; Expert Report of Luis Fernando López Roca, 22 May 2019 ("**First López Roca Report**"), ¶¶ 33, 71–72, 96, 98, 114–38; Expert Report of Martha Teresa Briceño de Valencia, 24 May 2019 ("**First Briceño de Valencia Expert Report**"), ¶¶ 30–31, 75–116; Second Expert Report of Jack J. Coe, 17 December 2019 ("**Second Coe Expert Report**"), ¶ 30.

⁶³ Claimants' Reply (PCA), ¶ 1015.

⁶⁴ See Colombia's Answer (PCA), ¶ 28.

⁶⁵ See, e.g., Claimants' Reply (PCA), ¶¶ 563, 579, 580.

⁶⁶ Claimants' Reply (PCA), ¶ 151.

⁶⁷ See, e.g., Claimants' Reply (PCA), ¶ 597 (characterizing Colombia's conduct as "the apogee of duplicity and pettifoggery"), ¶ 603 ("Respondent here is simply acting in bad faith. It is unfortunate that this Tribunal has been presented with "analysis" of this nature and quality.")

32. In the sections of the Rejoinder that follow below, Colombia provides a more detailed analysis of each of its various jurisdictional objections.

II. JURISDICTIONAL OBJECTIONS

A. The Tribunal lacks jurisdiction *ratione temporis*

33. In its Answer, Colombia demonstrated that all of Claimants' claims fall outside of the jurisdiction *ratione temporis* of this Tribunal. Specifically, Colombia established that:

- a. Claimants' claims are based on alleged acts that took place before the TPA entered into force;
- b. The present dispute arose before the entry into force of the TPA; and
- c. Claimants failed to comply with the three-year limitations period contained in Article 10.18.1 of the TPA.

34. In their Reply, Claimants insisted that the temporal restrictions identified by Colombia – whether imposed by the TPA or by principles of customary international law – do not apply to their claims. However, for the reasons set forth below, these restrictions in fact do apply to all of Claimants' claims, with preclusive effect.

1. *The Tribunal lacks jurisdiction ratione temporis over Claimants' claims because they are based on alleged State acts that took place before the TPA entered into force*

35. The Parties agree that claims based on State acts or omissions that took place before the TPA entered into force fall outside of the jurisdiction *ratione temporis* of the Tribunal.⁶⁸ The Parties disagree, however, on how to approach situations such as

⁶⁸ Claimants' Reply (PCA), ¶ 99 ("Respondent's argument is premised upon the unremarkable proposition that the TPA does not apply to acts that occurred prior to its entry into force. Claimants have no quarrel with this proposition[.]").

the one at issue in the present case, in which the alleged State conduct straddles the entry into force of the applicable treaty.

36. Previous tribunals facing similar circumstances have assessed the facts (both before and after the treaty entered into force) in order to determine whether the claims are in fact rooted in pre-treaty conduct and thus fall outside of the tribunal's jurisdiction. In doing so, these tribunals have evaluated different factors, including whether the post-treaty act challenged by the claimant altered the pre-treaty "status quo," or whether such act is "independently actionable." An assessment of these factors in the instant case demonstrates that Claimants' claim based on the single post-TPA act that they are invoking—the 2014 Confirmatory Order—is rooted in pre-treaty conduct, such that Claimants' claims fall outside of the jurisdiction *ratione temporis* of the TPA.
37. As discussed in the following subsections: (i) the TPA does not apply retroactively to claims of breach based on State acts that predate the TPA's entry into force; (ii) the TPA does not apply to claims of breach based on post-TPA State acts that are rooted in pre-TPA conduct; and (iii) Claimants' claims of breach based on the 2014 Confirmatory Order are rooted in pre-TPA conduct, because the 2014 Confirmatory Order did not alter the status quo of Claimants' alleged investment, and is not independently actionable.
 - a. The TPA does not apply retroactively to alleged treaty breaches that are based on State acts that predate the entry into force of the TPA
38. As noted above, the Parties agree that a claimant cannot bring a claim under the TPA based on State acts or omissions that predate the treaty's entry into force.⁶⁹

⁶⁹ See Claimants' Reply (PCA), ¶ 99.

This rule is codified in Article 10.1.3 of the TPA,⁷⁰ and is fully consistent with Article 28 of the Vienna Convention on the Law of Treaties (“VCLT”)⁷¹ and Article 13 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts (“ILC Articles on State Responsibility”).⁷²

39. In their written submissions, Claimants have been inconsistent and deliberately vague about the specific State measures that they are challenging. It is evident, however, that Claimants are basing their claim on State conduct that predated the entry into force of the TPA. For instance, in their Notice of and Request for Arbitration and Memorial, Claimants had asserted claims based on the following conduct by Colombia, which occurred *before* the TPA entered into force on 15 May 2012:
- a. “[T]he Republic of Colombia is responsible, through the actions and omissions of its **executive**^[73] **and judicial authorities**, for the breach of a number of treaty obligations contained in the TPA and the Colombia-Switzerland BIT” (emphasis added);⁷⁴

⁷⁰ See **RLA-0001**, TPA, Art. 10.1.3. (Article 10.1.3 provides, “[f]or greater certainty,” that Chapter 10 of the TPA “does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.”).

⁷¹ **CLA-0124**, VCLT, Art. 28 (“Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.”).

⁷² **RLA-0010**, ILC Articles on State Responsibility, Art. 13 (“An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.”).

⁷³ The reference to executive measures appears to be an allusion to the 1998 Regulatory Measures, which were adopted before the TPA’s entry into force in May 2012.

⁷⁴ Claimants’ Memorial (PCA), ¶ 293.

- b. “The Tribunal shall find that it has jurisdiction to conduct a full and thorough merits hearing **arising from** The Republic of Colombia’s **abuse of regulatory, legislative, and judicial sovereignty**” (emphasis added);⁷⁵
 - c. “This case is about the inordinate abuse of **regulatory** sovereignty”⁷⁶ (emphasis added); and
 - d. “As demonstrated in Section II of this Memorial on Jurisdiction, both the **regulatory**[⁷⁷] and the judicial treatments imposed by the Republic of Colombia on Claimants were discriminatory and in breach of the provisions under Article 12.2 of the TPA”⁷⁸ (emphasis added).
40. The “executive” and “regulatory” measures invoked by Claimants all took place in 1998 – fourteen years before the TPA’s entry into force in 2012. Moreover, most of the relevant “judicial” conduct also took place before 2012. Specifically, the 2005 Administrative Judicial Tribunal Judgment, the 2007 Council of State Judgment, and the 2011 Constitutional Court Judgment all predated the TPA. In other words, many of Claimants’ claims are based on pre-treaty conduct.
41. After Colombia pointed out in its Answer the temporal jurisdictional bar to claims based on pre-treaty conduct, Claimants changed their case theory. Now cognizant of the impediments posed by the fundamental principle of non-retroactivity, in their Reply Claimants pivoted, insisting that all of their claims arise from the 2014 Confirmatory Order, rather than from any pre-TPA acts or omissions by Colombia.⁷⁹

⁷⁵ Claimants’ Reply (PCA), p. 21.

⁷⁶ Notice of and Request for Arbitration, p. 1.

⁷⁷ The only “regulatory treatment” at issue in this case relates to the Capitalization Order and the Value Reduction Order, both of which took place in 1998 – well before the entry into force of the TPA in 2012.

⁷⁸ Claimants’ Memorial (PCA), ¶ 437.

⁷⁹ See Claimants’ Reply (PCA), ¶ 3.

42. Claimants thus concede—as they must—that there can be no liability for any of the State measures that they had purported to challenge and discussed at length not only in their RFA, but also in their Memorial. As a result, and consistent with the principle of non-retroactivity, Claimants’ claims based on pre-treaty State conduct (including the 1998 Measures and the 2011 Constitutional Court Judgment) cannot be the source of liability under the TPA, and fall outside of the Tribunal’s jurisdiction *ratione temporis*.

b. State acts that are rooted in pre-treaty conduct cannot be the source of liability under the TPA

43. Although the Parties agree that the customary international law principle of non-retroactivity of treaties applies to the TPA, the Parties disagree as to the operation of that principle in situations—like the present one—in which the alleged State conduct straddles the entry into force of the applicable treaty.

44. Colombia explained in its Answer that tribunals faced with such situations have analyzed the facts in order to determine whether claims based on post-treaty acts nevertheless fall outside the scope of the tribunal’s jurisdiction. Case law warns against allowing claimants to subvert a treaty’s temporal restrictions by means of the invocation of some post-treaty event as a vehicle for challenging measures that are rooted in pre-treaty conduct.⁸⁰ Previous tribunals have therefore considered whether such claims are in fact rooted in pre-treaty conduct, for the purpose of assessing whether the claims are outside the *ratione temporis* scope of the relevant

⁸⁰ See, e.g., **RLA-0024**, *Spence* (Interim Award), ¶ 217 (“[P]re-entry into force conduct cannot be relied upon to establish the breach in circumstances in which the post-entry into force conduct would not otherwise constitute an actionable breach in its own right”); **RLA-0012**, *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3 (Dupuy, Mantilla-Serrano, Thomas), Award on the Respondent’s Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016 (“**Corona (Award on Preliminary Objections)**”), ¶ 215 (“[W]here a ‘series of similar and related actions by a respondent State’ is at issue, an investor cannot evade the limitations period by basing its claim on ‘the most recent transgression in that series[.]’”).

treaty.⁸¹ In doing so, such tribunals have applied different factors. Recent tribunals, for instance, have asked whether the post-treaty act altered the pre-treaty “status quo,”⁸² or whether that post-treaty act is “independently actionable.”⁸³ These tribunals have articulated the test in different ways, but they have all sought to identify the instances in which a claimant is invoking a post-treaty act to assert claims that are actually rooted in pre-treaty conduct.⁸⁴

45. In their Reply, Claimants advance three arguments in response to Colombia’s discussion of the relevant legal authorities. Specifically, they assert: (i) that Colombia is advocating a “blanket exemption from responsibility” if there is conduct that straddles the date of entry into force;⁸⁵ (ii) that Colombia “invent[ed]” a test from the jurisprudence; and (iii) that the identification by Claimants of a

⁸¹ See, e.g., **RLA-0024**, *Spence* (Interim Award), ¶ 246 (“The Tribunal considers, additionally, that the [c]laimants have failed to show, again manifestly, in the face of this pre-entry in force, pre-limitation period conduct, that the breaches that they allege are independently actionable breaches, separable from the pre-entry into force conduct in which they are deeply rooted.”); **RLA-0012**, *Corona* (Award on Preliminary Objections), ¶ 212 (analyzing whether the act after the relevant date “was understood by the Claimant itself at that time as not producing any separate effects on its investment other than those that were already produced by the initial decision”); **RLA-0013**, *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14 (Mayer, Gaillard, Stern), Award, 18 August 2017 (“**EuroGas (Award)**”), ¶ 455 (“The [subsequent judicial decisions] did not change Belmont’s legal and factual situation”); **RLA-0011**, *ST-AD GmbH v. Republic of Bulgaria*, PCA Case No. 2011-06 (Stern, Klein, Thomas), Award on Jurisdiction, 18 July 2013 (“**ST-AD (Award on Jurisdiction)**”), ¶ 332.

⁸² See, e.g., **RLA-0012**, *Corona* (Award on Preliminary Objections), ¶ 212; **RLA-0013**, *Eurogas* (Award), ¶ 455 (where, referring to a chart establishing the timeline of events, the tribunal concluded that “the situation was exactly the same on 3 May 2005, before the BIT entered into force, and 1 August 2012, after the BIT entered into force: the mining rights that were lost by Rozmin were reassigned to another company. In other words, the mining rights were taken from Rozmin in 2005, allegedly in violation of Belmont’s rights under the Canada-Slovakia BIT and international law, and several decisions of the mining authorities (not the judicial authorities) refused to reconstitute the rights to Rozmin. The [subsequent judicial decisions] did not change Belmont’s legal and factual situation.”).

⁸³ See, e.g., **RLA-0024**, *Spence* (Interim Award), ¶ 221 (“[T]he Tribunal considers that, to move beyond a jurisdictional assessment, any such alleged breach must relate to independently actionable conduct within the permissible period.”).

⁸⁴ **RLA-0024**, *Spence* (Interim Award), ¶ 246.

⁸⁵ Claimants’ Reply (PCA), ¶ 99.

single post-treaty act as the basis for their claim suffices to establish jurisdiction.⁸⁶ Colombia will address each of these arguments in turn.

46. First, the notion that Colombia is somehow asserting a “blanket exemption from responsibility” is a mischaracterization of Colombia’s argument. As clearly stated in Colombia’s Answer, the existence of pre- and post-treaty conduct requires that a tribunal *consider* whether the post-treaty conduct is sufficiently distinct and separate from the pre-treaty conduct as to be able to form the basis for independent claims. The proposed standard is therefore clearly *not* a “blanket exemption.”
47. Second, Claimants accuse Colombia of “invent[ing]” a two-part test, assertedly on the basis of the *Spence v. Costa Rica* award.⁸⁷ They contend that the *Spence* award “says nothing about fundamental changes to the status quo of the investment, and its reference to the challenged measure being independently actionable is simply a reference to the intertemporal principle codified in Art. 10.1.3 of CAFTA-DR.”⁸⁸ However, Claimants’ criticism is unfounded. Colombia did not and does not assert that the *Spence* tribunal articulated a two-part test that must be followed here. Instead, Colombia in its Answer discussed the different factors that have been relied upon by previous tribunals (i) when assessing situations in which the relevant State acts straddle the date of entry into force of the treaty, and (ii) in deciding to dismiss claims for lack of jurisdiction *ratione temporis*.⁸⁹

⁸⁶ Claimants’ Reply (PCA), ¶ 80 (“[W]hen State actions straddle a relevant cut-off date, what is required is ‘conduct of the State after that date which is itself a breach.’”).

⁸⁷ Claimants’ Reply (PCA), ¶ 59.

⁸⁸ Claimants’ Reply (PCA), ¶ 59.

⁸⁹ Colombia’s Answer (PCA), ¶ 175 (“The fact that the fourth measure, i.e., 2014 Confirmatory Order, occurred after the entry into force of the TPA does not negate the Tribunal’s lack of jurisdiction *ratione temporis* over all of Claimants’ claims. Such is the conclusion that must be drawn from the application of the principles of non-retroactivity and intertemporal law discussed above, which have been observed by various other investment tribunals when deciding jurisdictional objections concerning acts that straddle the entry into force of a treaty. Indeed, as discussed below, several tribunals have upheld jurisdictional objections *ratione temporis* over acts that post-date the entry into force of the treaty in circumstances in which such acts were rooted in pre-treaty conduct.”).

48. As Colombia explains below, the test articulated by the tribunal in *Spence* aims to ascertain whether the challenged measures effected a change to the status quo of the investment, and whether the challenged measure is independently actionable. In particular, the *Spence* tribunal considered whether “the [post-treaty] breaches . . . are independently actionable breaches, separable from the pre-entry into force conduct in which they are deeply rooted.”⁹⁰
49. There is no single or uniform test that must be met. Instead, the jurisprudence calls for an assessment of a claimant’s claims in the light of various factors, to determine whether the measures being challenged are within the jurisdiction *ratione temporis* of the tribunal. In its Answer, Colombia demonstrated that the application of the factors identified by previous tribunals prove that Claimants’ claims indeed fall outside of the jurisdiction *ratione temporis* of this Tribunal.⁹¹ Specifically, Colombia showed that Claimants’ claims based on the 2014 Confirmatory Order did not alter the pre-treaty status quo of Claimants’ investment,⁹² and also that the 2014 Confirmatory Order is not “independently actionable.”⁹³
50. Third, Claimants assert that, to establish the jurisdiction *ratione temporis* of a tribunal, it suffices for a claimant to identify a single State act that post-dates the entry into force of the relevant treaty.⁹⁴ In support of this self-serving and inaccurate generalization, Claimants refer to four cases: *Chevron v. Ecuador*, *Blaga v. Romania*, *Singarosa v. Sri Lanka*, and *Kouidis v. Greece*.⁹⁵ As a threshold matter,

⁹⁰ **RLA-0024**, *Spence* (Interim Award), ¶ 246.

⁹¹ Colombia’s Answer (PCA), ¶¶ 191, 202.

⁹² See **RLA-0012**, *Corona* (Award on Preliminary Objections), ¶ 212.

⁹³ See **RLA-0024**, *Spence* (Interim Award), ¶ 221.

⁹⁴ See Claimants’ Reply (PCA), ¶ 80 (“[W]hen State actions straddle a relevant cut-off date, what is required is ‘conduct of the State after that date which is itself a breach.’ The Constitutional Court’s Order 188/14 is precisely such conduct in this case.”), p. 15 (“The Tribunal has jurisdiction *ratione temporis* because this matter was timely commenced and concerns a State measure that was taken after the TPA’s entry into force.”).

⁹⁵ See Claimants’ Reply (PCA), ¶¶ 100–06.

only one of those cases – *Chevron v. Ecuador* – is an investment treaty arbitration. The *Chevron* award is inapposite, however, because as explicitly noted by the tribunal in that case, the applicable treaty contained a clause that “ma[de] an exception to the principle of non-retroactivity in accordance to Article 28 VCLT.”⁹⁶ In the light of that clause, pursuant to which the “BIT applies as long as there are ‘investments existing at the time of entry into force,’”⁹⁷ the *Chevron* tribunal noted that there was “not an issue of the non-retroactivity of treaties.”⁹⁸ Accordingly, the *Chevron* case is inapposite here, since the TPA contains no exception of the sort that existed in the BIT at issue in that case.

51. The other three cases cited by Claimants are complaints by individuals brought before the U.N. Human Rights Committee (“UNHRC”) alleging violations of a multilateral human rights treaty – the International Covenant on Civil and Political Rights. These three cases are likewise inapposite, as – unlike here – they all involved allegations of “continuing breaches” of the relevant treaty.⁹⁹ A “continuing” breach is a type of treaty breach that, for purposes of the assessment of jurisdiction *ratione temporis*, is conceptually distinct from other types of breach.¹⁰⁰ Claimants here are not invoking the doctrine of “continuing acts” which was at issue in the three above-mentioned cases. Accordingly, the three UNHRC cases are likewise inapposite here.

⁹⁶ **CL-0173**, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No. 34877 (Böckstiegel, Brower, van den Berg), Interim Award, 1 December 2008 (“*Chevron (Interim Award)*”), ¶ 265.

⁹⁷ **CL-0173**, *Chevron (Interim Award)*, ¶ 265.

⁹⁸ **CL-0173**, *Chevron (Interim Award)*, ¶ 281.

⁹⁹ See **CL-0354**, *Nallaratnam Singarasa v. Sri Lanka*, UN Doc. CCPR/C/81/D/1033/2001 (Human Rights Committee), Communication No. 1033/2001, 30 July 2004, ¶ 6.3 (discussing the Committee’s jurisprudence concerning “continuing violation[s]”); **CL-0355**, *Alexandros Kowidis v. Greece*, UN Doc. CCPR/C/86/D/1070/2002 (Human Rights Committee), Communication No. 1070/2002, 31 March 2006, ¶ 6.5; **CL-0356**, *Aurel Blaga and Lucia Blaga v. Romania*, UN Doc. CCPR/C/86/D/1158/2003 (Human Rights Committee), Communication No. 1158/2003, 30 March 2006, ¶ 6.4.

¹⁰⁰ See **RLA-0010**, ILC Articles on State Responsibility, Art. 14.

52. Moreover, in all of the above-mentioned cases, the decision-makers carefully analyzed the ties (or lack thereof) between the pre- and post-treaty conduct.¹⁰¹ Such analysis thus undermines Claimants' theory that simply identifying a single post-treaty act suffices to establish jurisdiction *ratione temporis*.
53. In conclusion, it is not sufficient for Claimants to point to a single State act that post-dates the entry into force of the TPA (namely, the 2014 Confirmatory Order), as a basis for jurisdiction *ratione temporis*. Instead, the existence of alleged pre- and post-treaty conduct requires an assessment as to whether Claimants' claims are in fact rooted in pre-treaty conduct, even though they purport to be based on post-treaty acts. That assessment can be guided by the legal test adopted by other tribunals, including: (1) whether the post-treaty act altered the pre-treaty status quo of Claimants' investment; and (2) whether the post-treaty act is "independently actionable," such that the "alleged breach [can] be evaluated on the merits without requiring a finding going to the lawfulness of pre-[treaty] conduct."¹⁰²

c. Claimants' claims of breach based on the 2014 Confirmatory Order are rooted in pre-treaty conduct, and are therefore outside the *ratione temporis* scope of the TPA

54. Despite Claimants' shifts in position concerning the precise State conduct of which they complain in this arbitration,¹⁰³ in their Reply they seem to settle on a single

¹⁰¹ See **CL-0173**, *Chevron* (Interim Award), ¶ 298; **CL-0354**, *Nallaratnam Singarasa v. Sri Lanka*, UN Doc. CCPR/C/81/D/1033/2001 (Human Rights Committee), Communication No. 1033/2001, 30 July 2004, ¶ 6.3; **CL-0355**, *Alexandros Kouidis v. Greece*, UN Doc. CCPR/C/86/D/1070/2002 (Human Rights Committee), Communication No. 1070/2002, 31 March 2006, ¶ 6.5; **CL-0356**, *Aurel Blaga and Lucia Blaga v. Romania*, UN Doc. CCPR/C/86/D/1158/2003 (Human Rights Committee), Communication No. 1158/2003, 30 March 2006, ¶ 6.4.

¹⁰² See **RLA-0024**, *Spence* (Interim Award), ¶ 237(b); Colombia's Answer (PCA), ¶ 189.

¹⁰³ Claimants' Memorial (PCA), ¶ 423 ("[T]he Republic of Colombia is responsible, through the actions and omissions of its executive and judicial authorities, for the breach of a number of treaty obligations contained in the TPA and the Colombia-Switzerland BIT"), ¶ 425 ("The Constitutional Court in its 2011 and 2014 Opinions committed serious abuses of jurisdiction and authority, and

State act as the alleged source of Colombia's liability under the TPA: the 2014 Confirmatory Order.¹⁰⁴

55. Importantly for present purposes, the 2014 Confirmatory Order post-dated the entry into force of the TPA, and as demonstrated in Colombia's Answer and below, such order: (1) did not alter the pre-treaty status quo of Claimants' investment; and (2) is not independently actionable (i.e., Claimants' claims cannot be evaluated without also assessing the lawfulness of (non-actionable) pre-treaty conduct (namely, the 2011 Constitutional Court Judgment and the 1998 Measures)). As a result, all of Claimants' claims fall outside of the jurisdiction *ratione temporis* of the TPA.

i. The single post-treaty act identified by Claimants did not alter the status quo of Claimants' alleged investment

56. As explained in Colombia's Answer,¹⁰⁵ when faced with acts that straddle the entry into force of the TPA, the *Spence*, *Corona*, *Eurogas*, and *ST-AD* tribunals assessed the relevant post-treaty acts to determine whether those acts had changed the pre-treaty status quo of the claimant's investment.¹⁰⁶ Here, the single post-treaty act invoked by Claimants (i.e., the 2014 Confirmatory Order) did *not* change the pre-2012 status quo.

radically renounced universal principles of justice and due process"), ¶ 437 ("As demonstrated in Section II of this Memorial on Jurisdiction, both the regulatory and the judicial treatments imposed by the Republic of Colombia on Claimants was discriminatory and in breach of the provisions under Article 12.2 of the TPA").

¹⁰⁴ See Claimants' Reply (PCA), ¶ 34 ("The relevant measure, which gave rise to this treaty dispute, was the Constitutional Court's June 25, 2014 issuance of Order 188/14").

¹⁰⁵ Colombia's Answer (PCA), Section B.1.b.i.

¹⁰⁶ See **RLA-0024**, *Spence* (Interim Award), ¶ 246; **RLA-0012**, *Corona* (Award on Preliminary Objections), ¶ 212; **RLA-0013**, *Eurogas* (Award), ¶ 455; **RLA-0011**, *ST-AD* (Award on Jurisdiction), ¶ 318.

57. In their Reply, Claimants assert that the question as to whether the 2014 Confirmatory Order changed the pre-treaty status quo is irrelevant.¹⁰⁷ In an attempt to support this argument, they discuss the decisions that Colombia cited in its Answer: *Corona*, *Eurogas*, and *ST-AD*. According to Claimants, these rulings have no bearing in the present case because they involved the application of treaties other than the TPA to facts other than those at issue here. However, Claimants' attempt to distinguish those three cases from the instant case is unpersuasive.
58. First, they allege that the *Eurogas* tribunal applied a treaty that contained a unique definition of the term "dispute."¹⁰⁸ As should be obvious, however, a previous case need not present *identical* issues of law and fact in order to be apposite. If identical treaties and factual circumstances were always required—as Claimants appear to suggest—no tribunal would ever be able to rely upon the reasoning of one of its predecessors.
59. Second, Claimants emphasize that the tribunal in *Corona* was applying a specific limitations period treaty provision rather than the principle of non-retroactivity. That may be true, but the case is nevertheless instructive, insofar as the *Corona* tribunal was required to assess its jurisdiction *ratione temporis* in light of the fact that the alleged State conduct had occurred both before and after the critical date established by the limitations period. Such reasoning is therefore plainly relevant to the present case: the existence of acts that straddle the relevant date (be it the entry into force of a treaty (as here with the TPA) or the critical date for purposes of a limitations period (as in *Corona*)) require that a tribunal assess such acts and their relationship to determine whether the dispute is within the tribunal's jurisdiction *ratione temporis*.

¹⁰⁷ See, e.g., Claimants' Reply (PCA), p. 60, heading a.

¹⁰⁸ Claimants' Reply (PCA), ¶ 72.

60. Third, the *Corona*, *Eurogas*, and *ST-AD* decisions are all directly apposite, and offer useful guidance for analyzing whether a claimant's claims are within a tribunal's jurisdiction *ratione temporis* in a context in which the conduct at issue straddles the entry into force of the treaty. Specifically, those tribunals assessed whether the acts that occurred after the relevant date (i) produced a separate effect on the claimant's investment,¹⁰⁹ or (ii) instead, did *not* change the circumstances that existed at the time of the treaty's entry into force.
61. For instance, in *Corona*, the Respondent State had denied the claimant's application for a mining license. As noted above, the tribunal there was assessing the issue of temporal jurisdiction in the context of a limitations period prescribed by the relevant treaty. The denial of the mining license had taken place before the "critical date" for purposes of the relevant treaty's limitations period. *After* such critical date, the claimant had requested reconsideration of the license denial, but had received no response from the relevant State agency. The claimant then filed for arbitration, arguing that the tribunal had jurisdiction *ratione temporis* because the reconsideration request had post-dated the critical date. However, the tribunal rejected the claimant's argument, finding that there had been no change in the status quo, inasmuch as the claimant's status after the critical date had remained exactly the same as before the critical date, i.e., the claimant did not have a mining license. As a result, the tribunal found that the "claims [were] time-barred by DR-CAFTA Article 10.18.1."¹¹⁰
62. The tribunal in *Corona* also observed that the reconsideration request (referred to by the tribunal as the "Motion for Reconsideration") filed by the claimant after the critical date was "only aimed at having the same administration review its own

¹⁰⁹ See, e.g., **RLA-0012**, *Corona* (Award on Preliminary Objections), ¶ 212 (analyzing whether the act after the relevant date "was understood by the Claimant itself at that time as not producing any separate effects on its investment other than those that were already produced by the initial decision").

¹¹⁰ **RLA-0012**, *Corona* (Award on Preliminary Objections), ¶ 238.

decision.”¹¹¹ As such, “the very purpose of the Motion for Reconsideration was to have the Ministry re-open the proceeding and render a different decision.”¹¹² Accordingly, in the view of the tribunal, the respondent’s post-critical date conduct “[wa]s nothing but an implicit confirmation of its previous decision.”¹¹³ Notably, the fact that the claimant in *Corona* alleged that the later-in-time act amounted to a denial of justice did not alter the tribunal’s analysis. What the Claimants are attempting here is precisely what the claimant in *Corona* attempted, unsuccessfully: they are trying to establish jurisdiction on the basis of a post-TPA State act – the 2014 Confirmatory Order – that confirmed pre-TPA decisions by the State, and that thus merely maintained the pre-TPA status quo.

63. In *Eurogas*, certain mining rights held by the claimant had been reassigned by the State prior to the relevant treaty’s entry into force. In arguing that its treaty arbitration claims fell within the tribunal’s jurisdiction, the claimant sought to rely on certain post-entry into force decisions in which the Slovakian judiciary had refused to restate the relevant mining rights to the claimant. As discussed in Colombia’s Answer,¹¹⁴ the *Eurogas* tribunal considered whether judicial decisions issued after the entry into force of the treaty had “change[d] [the claimant’s] legal and factual situation.”¹¹⁵ The tribunal concluded that the post-treaty government decisions had not altered the pre-treaty status quo, but rather had merely confirmed it; on that basis, the tribunal held that it did not have jurisdiction *ratione temporis* over such decisions (even though they had post-dated the treaty’s entry into force).¹¹⁶ The same is true here, in respect of the 2014 Confirmatory Order, insofar as the latter did not change the legal or factual situation that Claimants

¹¹¹ **RLA-0012**, *Corona* (Award on Preliminary Objections), ¶ 211.

¹¹² **RLA-0012**, *Corona* (Award on Preliminary Objections), ¶ 211.

¹¹³ **RLA-0012**, *Corona* (Award on Preliminary Objections), ¶ 211.

¹¹⁴ Colombia’s Answer (PCA) ¶ 181.

¹¹⁵ **RLA-0013**, *Eurogas* (Award), ¶ 455; see also Colombia’s Answer (PCA), ¶ 181.

¹¹⁶ See **RLA-0013**, *Eurogas* (Award), ¶¶ 455–58.

were in following the 2011 Constitutional Court Judgment (which predated the TPA's entry into force).

64. In *ST-AD*, as part of its claim the claimant pointed to alleged State conduct that had occurred *before* the claimant had become a protected investor under the BIT. Such conduct included a judicial decision by a lower court concerning the investment, as well as the rejection by the Supreme Cassation Court of an application by the claimant for a set-aside of the lower court decision.¹¹⁷ Subsequently, *after* the critical date, the claimant filed a new set-aside application with the Supreme Cassation Court, which was also rejected.¹¹⁸ The tribunal observed that the latter judicial decision was “the only possible relevant event that happened after the critical date.”¹¹⁹ It also characterized the post-critical date set-aside application as merely “a ‘repackaging’ of the first application to set aside that same Decision, rendered six years before the [critical date].”¹²⁰ Having confirmed that “nothing new happened after [the relevant date],”¹²¹ the tribunal upheld the respondent’s objection to its jurisdiction *ratione temporis*. Precisely the same can be said in the instant case about the 2014 Confirmatory Order. Such order did not alter the status quo of Claimants’ alleged investment, and amounts merely to a confirmation or extension of the pre-TPA status quo.
65. As Dr. Ibáñez explains in his expert report, pursuant to Article 241 of the Colombian Constitution, “the judgments by the Constitutional Court are final.”¹²² Article 49 of Decree No. 2067 of 1991 also provides that “there are no appeals for

¹¹⁷ **RLA-0011**, *ST-AD* (Award on Jurisdiction), ¶¶ 307–08, 311.

¹¹⁸ **RLA-0011**, *ST-AD* (Award on Jurisdiction), ¶ 311.

¹¹⁹ **RLA-0011**, *ST-AD* (Award on Jurisdiction), ¶ 316.

¹²⁰ **RLA-0011**, *ST-AD* (Award on Jurisdiction), ¶ 331.

¹²¹ **RLA-0011**, *ST-AD* (Award on Jurisdiction), ¶ 318.

¹²² Second Expert Report of Dr. Jorge Enrique Ibáñez Najar (“**Second Ibáñez Expert Report**”), ¶ 146 (Spanish Original: “*De conformidad con el artículo 241 de la Constitución Política, las sentencias que emita la Corte Constitucional tienen carácter definitivo.*”).

Constitutional Court judgments.”¹²³ Judgments of the Constitutional Court thus “resolve the issues raised before it in an unappealable manner, in the case of constitutionality proceedings and *tutela* proceedings.”¹²⁴ Claimants’ Colombian law experts do not deny that judgments of the Constitutional Court are final. Through the 2011 Constitutional Court Judgment, the Constitutional Court reversed the 2007 Council of State Judgment, and thereby dismissed Claimants’ claims. As a result, the 2007 Council of State Judgment no longer had any legal effect;¹²⁵ as underscored by Dr. Ibáñez, “the 2011 Constitutional Court Judgment put an end to the entire judicial proceeding that initiated with the Nullification and Reinstatement Action [(i.e., Claimants’ lawsuit)] before the contentious administrative jurisdiction.”¹²⁶

66. On 9 December 2011, Claimants submitted to the Constitutional Court its petition to annul the 2011 Constitutional Court Judgment (“**Annulment Petition**”).¹²⁷ As

¹²³ **Ex. R-0303**, Decree 2067, 4 September 1991, Art. 49 (English Translation: “There is no appeal against a Constitutional Court judgment. Nullity of a proceeding before the Constitutional Court may only be alleged before the decision is issued. Only irregularities implying violation of due process may serve as a basis for the Plenary of the Court to annul a proceeding”) (Spanish Original: “*Contra las sentencias de la Corte Constitucional no procede recurso alguno. La nulidad de los procesos ante la Corte Constitucional sólo podrá ser alegada antes de proferido el fallo. Sólo las irregularidades que impliquen violación del debido proceso podrán servir de base para que el Pleno de la Corte anule el Proceso.*”). See also Second Ibáñez Expert Report, ¶ 152 (English Translation: “There is no appeal against a Constitutional Court judgment. This is expressly provided in Article 49, paragraph one, of Decree 2067 of 1991”) (Spanish Original: “*Contra las sentencias de la Corte Constitucional no procede recurso alguno. Así lo dispone expresamente el inciso primero del artículo 49 del Decreto 2067 de 1991.*”).

¹²⁴ Second Ibáñez Expert Report, ¶ 146 (Spanish Original: “*Tales sentencias resuelven de manera inapelable los asuntos que se plantean ante la Corte Constitucional, cuando se trate de procesos de constitucionalidad en estricto sentido o procesos de tutela.*”).

¹²⁵ Expert Report of Dr. Jorge Enrique Ibáñez Najara (“**First Ibáñez Expert Report**”), ¶ 131.

¹²⁶ Second Ibáñez Expert Report, ¶ 145 (Spanish Original: “*La Sentencia de la Corte Constitucional (2011), puso término definitivo a todo el proceso judicial que inició con la Acción de Nulidad y Restablecimiento ante la jurisdicción contencioso administrativa*”).

¹²⁷ See generally **Ex. R-0059**, Annulment Petition by the Holding Companies, Constitutional Court, 9 December 2011.

discussed in Colombia's Answer,¹²⁸ Colombian law allows a litigant to seek the annulment of a final judgment of the Constitutional Court under extraordinary circumstances.¹²⁹ However, the Constitutional Court has explicitly stated that the potential for such annulment “**does not mean that there is an appeal against the [Constitutional Court's] decisions**, nor does it become a new opportunity to reopen the debate or examine disputes that have already been concluded”¹³⁰

¹²⁸ See Colombia's Answer (PCA), ¶¶ 187–88. See also First Ibáñez Expert Report, ¶¶ 131–43.

¹²⁹ See Second Ibáñez Expert Report, ¶ 143 (English Translation: “Like all the sentences issued when reviewing a tutela action that was already judged at the first and second instance, the 2011 Constitutional Court Judgment was a final and definitive decision of the dispute at the constitutional level”) (Spanish Original: “*La Sentencia de la Corte Constitucional (2011), como todas sus sentencias proferidas al revisar una acción de tutela que ya había sido despachada en primera y en segunda instancia, fue una decisión final y definitiva sobre la controversia planteada en sede constitucional*”), ¶ 143 (English Translation: “[T]he proceeding was selected by the Constitutional Court in its capacity as the highest and final constitutional court, to review the decisions adopted in said proceeding from the perspective of the Constitution”) (Spanish Original: (“[E]l procedimiento fue seleccionado por la Corte Constitucional, en su capacidad de máximo tribunal de cierre constitucional, para revisar desde la perspectiva de la Constitución las decisiones que se adoptaron en dicho procedimiento.”)).

¹³⁰ **Ex. R-0307**, Order No. 031A/02, Constitutional Court, 30 April 2002, § 3 (p. 7) (Spanish Original: “[N]o significa que haya un recurso contra sus providencias, ni llega a convertirse en una nueva oportunidad para reabrir el debate o examinar controversias que ya fueron concluidas.”); see also **Ex. R-0309**, Order No. 068/07, Constitutional Court, 14 March 2007, p. 1 (English Translation: “An incident of annulment cannot be understood as a new procedural instance, where closed debates and discussions regarding the facts and the assessment of evidence are reopened. It is only a mechanism aimed at safeguarding the fundamental right to due process. Hence the exceptional nature offered by said incident and the burden on the applicant to adequately frame his petition within the grounds recognized by constitutional jurisprudence. If a request for annulment does not prove the existence of at least one of said grounds, where appropriate, the exceptional and extraordinary nature that identifies these types of incidents must lead to the denial of the petition.”) (Spanish Original: “*No cabe entender el incidente de nulidad como una nueva instancia procesal, en la cual se reabran debates y discusiones culminados en relación con los hechos y la apreciación de las pruebas, sino tan sólo como un mecanismo encaminado a salvaguardar el derecho fundamental al debido proceso. De allí el carácter excepcional que ofrece dicho incidente y la carga que tiene el accionante de enmarcar adecuadamente su petición dentro de alguna de las causales reconocidas por la jurisprudencia constitucional, pues si la solicitud de nulidad no demuestra la existencia de al menos una de dichas causales de procedencia, la naturaleza excepcional y extraordinaria que identifica este tipo de incidentes debe conducir a la denegación de la solicitud impetrada*”); **Ex. R-0310**, Order No. 050/13, Constitutional Court, 13 March 2013, § 2 (pp. 5–6) (English Translation: “The Constitutional Court has repeatedly stressed that a request for annulment “is not a new procedural instance where the debate on the substantive issue that has already concluded in the review judgment can be reopened. It is only

(emphasis added). As explained by Dr. Ibáñez, only under exceptional and extreme circumstances can there be such an annulment of a judgment by the Constitutional Court.¹³¹ In sum, a petition seeking to annul a Constitutional Court Judgment is not part of the ordinary course of a litigation proceeding in Colombia;¹³² rather, it is extraordinary in nature.¹³³

67. The annulment petition filed by Claimants (through the Holding Companies) thus constituted an attempt to reopen the closed proceeding regarding the 1998 Regulatory Measures, which had produced a final judgment dismissing

a mechanism aimed at preserving the fundamental right to due process, which may have been injured during the issuance of the tutela review judgment.”) (Spanish Original: *La Corte Constitucional ha destacado reiteradamente que la solicitud de nulidad “no es una nueva instancia procesal en la cual pueda reabrirse el debate sobre el tema de fondo que ya ha concluido en la sentencia de revisión sino apenas un mecanismo encaminado a preservar el derecho fundamental al debido proceso, que pudiera haber sido lesionado con ocasión de la expedición de la sentencia de revisión de tutela.”*)

¹³¹ Second Ibáñez Expert Report, ¶ 155 (English Translation: “The Constitutional Court established that annulment of a judgment is ‘strictly exceptional’ when there are undoubted, proven, notorious, significant and transcendental violations of the due process guarantee that has substantial and direct repercussions on the decision or its effects”) (Spanish Original: “*La Corte Constitucional ha establecido que la nulidad de sus sentencias es ‘estrictamente excepcional’ cuando hay una violación ‘indudable, probada, notoria, significativa y trascendental a la garantía del debido proceso que tenga repercusiones sustanciales y directas sobre la decisión o sus efectos.’*”).

¹³² See First Ibáñez Expert Report, ¶ 143; Second Ibáñez Expert Report, ¶ 160 (English Translation: ““The Constitutional Court has repeatedly stressed that an annulment petition ‘is not a new procedural instance where a substantive issue that was concluded in the review judgment can be reopened. It is only a mechanism aimed at preserving the fundamental right to due process, which may have caused harm during the issuance of the tutela review judgment’”) (Spanish Original: “*La Corte Constitucional ha destacado reiteradamente que la solicitud de nulidad ‘no es una nueva instancia procesal en la cual pueda reabrirse el debate sobre el tema de fondo que ya ha concluido en la sentencia de revisión sino apenas un mecanismo encaminado a preservar el derecho fundamental al debido proceso, que pudiera haber sido lesionado con ocasión de la expedición de la sentencia de revisión de tutela’*”), ¶ 162 (English Translation: “An annulment petition does not imply a new procedural instance, and it does not entail attacking the substantive decision so that it is reviewed and a new judgment is issued instead to replace it or modify it”) (Spanish Original: “[L]a solicitud de nulidad del proceso no implica el trámite de una nueva instancia procesal y no conlleva atacar la decisión de fondo para que ella sea revisada y en su lugar se profiera una nueva sentencia que la reemplace o la modifique.”).

¹³³ See First Ibáñez Expert Report, ¶ 139; Second Ibáñez Expert Report, ¶ 155 (English Translation: “The Constitutional Court established that annulment of its judgments is ‘strictly exceptional’”) (Spanish Original: “*La Corte Constitucional ha establecido que la nulidad de sus sentencias es ‘estrictamente excepcional[.]’*”).

Claimants' claims. In that sense, it is akin to the reconsideration request filed by the claimant in *Corona*—a unilateral measure by the claimant designed to elicit a post-critical date act or decision by the State which the claimant could then invoke as the basis for asserting temporal jurisdiction. It is manifest and incontrovertible that the 2014 Confirmatory Order did not change the status quo; prior to the TPA's entry into force, there was a final court judgment that had dismissed Claimants' claims regarding the 1998 Regulatory Measures, and the litigation was closed; after the TPA's entry into force, the situation was *exactly* the same.

68. In attempting to rebut Colombia's argument, Claimants mischaracterize a number of important points. For instance, Claimants suggest that Colombia has argued that the 2014 Confirmatory Order "is not a State measure attributable to Respondent."¹³⁴ However, Colombia has never said any such thing; the 2014 Confirmatory Order is indeed a State measure. Moreover, Colombia has never denied that petitions for the annulment of Constitutional Court judgments are permitted under Colombian law.¹³⁵ Those arguments are therefore simply strawmen erected by Claimants, based on mischaracterizations of Colombia's statements.
69. Claimants also appear to question the status under Colombian law of judgments of the Constitutional Court. For instance, Claimants assert that "an annulment petition presents a meaningful opportunity for judicial recourse, notwithstanding the **supposedly** 'final' nature of the Constitutional Court decision" (emphasis added).¹³⁶ Yet, as was explained above and by Dr. Ibáñez, there can and should be no question that a judgment of the Constitutional Court is final.

¹³⁴ Claimants' Reply (PCA), ¶ 89 ("There can be no serious contention that Order 188/14 is not a State measure attributable to Respondent.").

¹³⁵ Claimants' Reply (PCA), ¶ 91 (suggesting that Colombia was "forced to acknowledge" the validity of such petitions under Colombia law).

¹³⁶ Claimants' Reply (PCA), ¶ 91.

70. Claimants' ultimate conclusion is that the 2014 Confirmatory Order "end[ed] all judicial labor in the litigation that had been brought by Claimants' companies with respect to their investments."¹³⁷ Claimants' strange reference to "judicial labor" is an obvious attempt to ignore the fact that the judicial proceeding itself was closed in 2011 – and remained closed thereafter. In other words, Claimants' claims for compensation were definitively extinguished in 2011, and the 2014 Confirmatory Order did nothing to change that fact.
71. So desperate are Claimants to breathe life into the 2014 Confirmatory Order, and to confer on it a significance that it simply does not have, that they are now brazenly arguing that the 2014 Confirmatory Order "**dramatically** changed the pre-treaty *status quo*"¹³⁸ (emphasis added). Such statement is wildly divorced from reality. The 2014 Confirmatory Order merely "den[ied] the petition to annul Judgment SU-477 of 2011 delivered by the plenary of the Constitutional Court;"¹³⁹ it did not alter at all the status of the 2011 Constitutional Court Judgment that had dismissed Claimants' claims. The 2014 Confirmatory Order thus did not change *in any way* the legal or factual status quo that resulted from the 2011 Constitutional Court Judgment – let alone "dramatically"¹⁴⁰ so.
72. Claimants' theory is simply a Trojan horse, designed to potentiate a claim that, at its core, challenges pre-treaty rather than post-treaty conduct. Under Claimants' theory, a claimant in a treaty arbitration would always be able to (i) present a post-treaty motion or extraordinary request before the domestic courts (i.e., any form of what the Claimants term "judicial labor") – even if the relevant domestic litigation has reached judicial finality – for the sole purpose of eliciting some form

¹³⁷ Claimants' Reply (PCA), ¶ 88.

¹³⁸ Claimants' Reply (PCA), ¶ 88.

¹³⁹ **Ex. R-0049**, 2014 Confirmatory Order, p. 78 (Spanish Original: "DENEGAR las solicitudes de nulidad frente a la Sentencia SU-477 de 2011 proferida por la Sala Plena de la Corte Constitucional.").

¹⁴⁰ Claimants' Reply (PCA), ¶ 88.

of post-treaty State conduct in response; and (ii) then use the latter conduct as a post-treaty jurisdictional hook to assert treaty claims.

73. Previous tribunals have cautioned against allowing such a circumvention of the jurisdictional constraints of a treaty. For example, the *Eurogas* tribunal held that to rule that it did have jurisdiction *ratione temporis* over the claimant's claims "'would require the Tribunal to engineer a legalistic and artificial reasoning to bypass' the temporal limits on the application of the treaty."¹⁴¹
74. In sum: the 2014 Confirmatory Order did not alter the pre-treaty status quo; Claimants' claim based on such order is in fact rooted in pre-treaty conduct (specifically, the 2011 Constitutional Court Judgment and the 1998 Measures), and the 2014 order is consequently outside the jurisdiction *ratione temporis* of the Tribunal.

ii. The single post-treaty act identified by Claimants is not independently actionable

75. When faced with situations in which the alleged State conduct straddles the entry into force of the treaty, tribunals have also assessed the post-treaty conduct to determine whether it is "independently actionable."¹⁴² As explained by the *Spence* tribunal, a claim based on post-treaty conduct is independently actionable if the post-treaty conduct can be "evaluated on the merits without requiring a finding going to the lawfulness of pre-[treaty] conduct."¹⁴³ In its Answer, Colombia discussed the relevant case law (including the *Spence* and *ST-AD* decisions), demonstrating that Claimants' claims based on the 2014 Confirmatory Order are not independently actionable, because such order cannot be evaluated on the

¹⁴¹ **RLA-0013**, *Eurogas* (Award), ¶ 458; see also **RLA-0012**, *Corona* (Award on Preliminary Objections), ¶ 450 ("To allow an investor to [base its claim on the most recent transgression in a series would] 'render the limitations provisions ineffective.'").

¹⁴² See **RLA-0024**, *Spence* (Interim Award), ¶ 237(b).

¹⁴³ **RLA-0024**, *Spence* (Interim Award), ¶ 237(b).

merits without a finding going to the lawfulness of pre-TPA acts (namely, the 2011 Constitutional Court Judgment and the 1998 Measures).¹⁴⁴

76. In their Reply, Claimants' position with respect to the "independently actionable" analysis is confusing. On the one hand, they do not go so far as to outright deny that the question as to whether its post-treaty claims are "independently actionable" is relevant.¹⁴⁵ On the other hand, they assert that Colombia's arguments are based on an "expansive interpretation" of the *Spence* interim award.¹⁴⁶ Subsequently, however, Claimants appear to acknowledge—as they must—that the *Spence* tribunal did in fact analyze whether the claimant's claims were "independently actionable."¹⁴⁷
77. The reasoning of the *Spence* interim award is apposite and offers useful guidance. As discussed in Colombia's Answer,¹⁴⁸ in *Spence* the claimants had alleged that Costa Rica's development of a national park for the protection of nesting leatherback turtles had unlawfully deprived them of real estate property.¹⁴⁹ The claimants took issue with regulatory conduct that had occurred prior to the entry into force of the applicable treaty, but based their treaty claims on the State's alleged post-treaty conduct (i.e., the State's alleged failure to pay compensation for the alleged taking).¹⁵⁰ Costa Rica raised a *ratione temporis* objection based on the "uncontroversial . . . general rule of customary international law . . . of non-

¹⁴⁴ Colombia's Answer (PCA), ¶¶ 190–95.

¹⁴⁵ Compare Claimants' Reply (PCA), p. 60 (wherein Claimants outright reject the relevance of the "status quo" analysis) with *id.*, p. 73 (wherein Claimants address the "Meaning of the 'Independently Actionable' Requirement").

¹⁴⁶ Claimants' Reply (PCA), ¶ 81.

¹⁴⁷ See Claimants' Reply (PCA), ¶ 84 (summarizing the *Spence* tribunal's reasoning as follows: "A claim is therefore not 'independently justiciable' under the treaty if it is based upon 'a finding going to the lawfulness of conduct judged against treaty commitments that were not in force at the time.'").

¹⁴⁸ Colombia's Answer (PCA), ¶ 196.

¹⁴⁹ See generally **RLA-0024**, *Spence* (Interim Award).

¹⁵⁰ **RLA-0024**, *Spence* (Interim Award), ¶ 228.

retroactivity” of treaties,¹⁵¹ pointing out that the post-treaty acts represented no more than “the lingering effects of pre-[entry into force] acts” or “dependent acts that did not in-and-of-themselves constitute independent breaches of the CAFTA.”¹⁵² The tribunal applied the customary international law principle¹⁵³ that the treaty does not bind any party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of the treaty,¹⁵⁴ and determined on that basis that it had to assess whether the claimants’ claims based on post-treaty acts fell within its jurisdiction *ratione temporis*.

78. The *Spence* tribunal observed that pre-treaty conduct can “constitute circumstantial evidence that confirms or vitiates an apparent post-entry into force breach, for example, going to the intention of the respondent.”¹⁵⁵ The tribunal emphasized, however, that the post-treaty conduct must “constitute an actionable breach in its own right.”¹⁵⁶ Along similar lines, the tribunal also stated that an “alleged breach must relate to independently actionable conduct within the permissible period.”¹⁵⁷ The tribunal cautioned that merely identifying a post-treaty act and characterizing that act as the source of liability is not sufficient. Instead, “it will be necessary to assess whether the claim that is alleged can be **sufficiently detached from pre-entry into force acts and facts** so as to be independently justiciable” (emphasis added).¹⁵⁸

¹⁵¹ **RLA-0024**, *Spence* (Interim Award), ¶ 215.

¹⁵² **RLA-0024**, *Spence* (Interim Award), ¶ 233.

¹⁵³ The applicable treaty included a clause to this effect, but the tribunal noted that “[i]t is uncontroversial that [the relevant treaty provision] restates the general rule of customary international law reflected in Article 28 of the Vienna Convention on the Law of Treaties.” **RLA-0024**, *Spence* (Interim Award), ¶ 215.

¹⁵⁴ **RLA-0024**, *Spence* (Interim Award), ¶ 214.

¹⁵⁵ **RLA-0024**, *Spence* (Interim Award), ¶ 217.

¹⁵⁶ **RLA-0024**, *Spence* (Interim Award), ¶ 217.

¹⁵⁷ **RLA-0024**, *Spence* (Interim Award), ¶ 221.

¹⁵⁸ **RLA-0024**, *Spence* (Interim Award), ¶ 222.

79. The *Spence* tribunal then applied the foregoing test to the facts at issue. It observed that “[t]he appreciations that lie at the core of every allegation that the [c]laimants advance can be traced back to . . . pre-[treaty] conduct, by the [r]espondent.”¹⁵⁹ The tribunal further found that the alleged breach could not “properly be evaluated on the merits without requiring a finding going to the **lawfulness of pre-[treaty] conduct**” (emphasis added).¹⁶⁰ The tribunal thus dismissed the claim, on the basis that the post-treaty conduct was rooted in pre-treaty conduct that lay outside the temporal scope of the treaty.¹⁶¹
80. The scenario in the instant case is similar to that in *Spence*. Claimants complain of regulatory conduct (i.e., the 1998 Regulatory Measures)¹⁶² that allegedly affected

¹⁵⁹ **RLA-0024**, *Spence* (Interim Award), ¶ 245.

¹⁶⁰ **RLA-0024**, *Spence* (Interim Award), ¶ 246.

¹⁶¹ See **RLA-0024**, *Spence* (Interim Award), ¶ 247.

¹⁶² See, e.g., Claimants’ Memorial (PCA), p. 12. (“In a nutshell, Colombia’s financial regulatory authorities unlawfully expropriated Claimants’ investment in that jurisdiction.”), ¶ 54 (“[T]he Constitutional Court’s Opinion approves and cloaks with the mantle of legal legitimacy the Superintendency’s denial of due process as to GRANAHORRAR arising from the Superintendency’s resolution (C-19) [(i.e., the 1998 Regulatory Measures)], which was devoid of factual premises in support of its findings.”), ¶ 59 (“[T]he Constitutional Court’s Opinion is an aberration and extreme departure from fundamental legality because it adopts as legally sufficient FOGAFIN’s resolution [(i.e., the 1998 Regulatory Measures)] reducing the value of GRANAHORRAR’s shares to COP 0.01, notwithstanding the resolution’s lack of factual premises and methodological bases.”); Notice of and Request for Arbitration, p. 1 (“This case is about the inordinate abuse of regulatory sovereignty.”), ¶ 199 (“FOGAFIN and the Superintendency of Banking imposed a treatment regime on GRANAHORRAR, including the U.S. shareholders, substantially and materially less favorable than that accorded to nationals of Colombia who invested in the financial sector and to investors of third States.”), ¶¶ 210–11 (“At no time did they contemplate or could they have contemplated that the leading government financial agencies and instrumentalities, FOGAFIN and the Superintendency of Banking, would deny them the institutional support that these agencies are charged with granting to financial institutions, let alone that in so being deprived of such services by design, the U.S. shareholders were to be treated less favorably than investors in the financial sector who were similarly situated but of Colombian nationality and nationals of third States who also invested in the financial sector. The acts and omissions of FOGAFIN and the Superintendency of Banking . . . caused GRANAHORRAR and the U.S. investors, among other harm, the artificial demise of GRANAHORRAR’s solvency status[.]”), ¶ 232 (“The underlying expropriation [comprised of the 1998 Regulatory Measures] . . . deprived the U.S. shareholders in absolute terms of the value of their investments.”).

their indirect shareholding interest in Granahorrar. Such regulatory conduct occurred more than a decade prior to the entry into force of the TPA. Claimants, however, point to a single post-treaty act (*viz.*, the 2014 Confirmatory Order), and purport to base all of their claims on that lone post-treaty act, in an attempt to sweep their claims within the temporal scope of the TPA.

81. Claimants' claims about the 2014 Confirmatory Order are not "independently actionable" because adjudication of these claims would require a finding on the lawfulness of pre-treaty conduct (i.e., of the 1998 Regulatory Measures and of the 2011 Constitutional Court Judgment). To recall, in their RFA and in their Memorial, Claimants had presented claims based upon acts and conduct that took place *before* the entry into force of the TPA. Specifically, Claimants alleged the following in the referenced early pleadings:
- a. That the 1998 Regulatory Measures violated the TPA's national treatment clause;¹⁶³
 - b. That the 1998 Regulatory Measures violated the TPA's most-favored nation clause;¹⁶⁴

¹⁶³ See Notice of and Request for Arbitration, ¶ 199 ("FOGAFIN and the Superintendency of Banking imposed a treatment regime on GRANAHORRAR, including the U.S. shareholders, substantially and materially less favorable than that accorded to nationals of Colombia who invested in the financial sector and to investors of third States.").

¹⁶⁴ Notice of and Request for Arbitration, ¶¶ 210-11 ("At no time did they contemplate or could they have contemplated that the leading government financial agencies and instrumentalities, FOGAFIN and the Superintendency of Banking, would deny them the institutional support that these agencies are charged with granting to financial institutions, let alone that in so being deprived of such services by design, the U.S. shareholders were to be treated less favorably than investors in the financial sector who were similarly situated but of Colombian nationality and nationals of third States who also invested in the financial sector. The acts and omissions of FOGAFIN and the Superintendency of Banking . . . caused GRANAHORRAR and the U.S. investors, among other harm, the artificial demise of GRANAHORRAR's solvency status[.]").

- c. That the 1998 Regulatory Measures violated the TPA's fair and equitable treatment clause;¹⁶⁵
- d. That the 1998 Regulatory Measures violated the TPA's expropriation clause;¹⁶⁶
- e. That the 2011 Constitutional Court Judgment violated the TPA's fair and equitable treatment clause;¹⁶⁷ and
- f. That the 2011 Constitutional Court Judgment violated the TPA's expropriation clause.¹⁶⁸

¹⁶⁵ Notice of and Request for Arbitration, ¶ 210 ("At no time did they contemplate or could they have contemplated that the leading government financial agencies and instrumentalities, FOGAFIN and the Superintendency of Banking, would deny them the institutional support that these agencies are charged with granting to financial institutions, let alone that in so being deprived of such services by design, the U.S. shareholders were to be treated less favorably than investors in the financial sector who were similarly situated but of Colombian nationality and nationals of third States who also invested in the financial sector.").

¹⁶⁶ *See* Notice of and Request for Arbitration, ¶ 232 ("The underlying expropriation [comprised of the 1998 Regulatory Measures] . . . deprived the U.S. shareholders in absolute terms of the value of their investments."); First Argiz Expert Report, ¶ 1 (Claimants' damages expert was retained (in his words) "to provide expert opinions on damages incurred by the Claimants as a result of the Colombian government's ("Respondent") actions through its agencies (e.g. Central Bank, FOGAFIN and Superintendency of Banking) to expropriate Corporacion Colombiana de Ahorro y Vivienda ("Granahorrar"), resulting in loss of value of Claimants' interest in Granahorrar [(i.e., the 1998 Regulatory Measures)].").

¹⁶⁷ *See, e.g.*, Claimants' Memorial (PCA), ¶ 43 ("The [2011] Constitutional Court's Opinion presents fundamental due process challenges at multiple levels."), ¶ 45 ("The [2011] Constitutional Court's Opinion represents an emblematic denial of justice"), ¶ 50 ("[T]he [2011] Constitutional Court's Opinion represents a flagrant denial of due process, in part, because . . . it approves discriminatory treatment directed at the GRANAHORRAR shareholders [through the 1998 Regulatory Measures]").

¹⁶⁸ *See* Notice of and Request for Arbitration, ¶ 220 ("Colombia engaged in judicial expropriation because the outcome of the [2011] Constitutional Court's opinion (Exhibit 23) was to deprive in its entirety the U.S. shareholders of their property in the form of a readily enforceable decree that the Council of State issued. In this regard, the Constitutional Court's opinion amply meets the type of judicial action that treaty based investor-state arbitral tribunals have identified as an actionable taking of property in violation of public international law.").

82. Claimants openly recognized in their Memorial that the determinations that the Tribunal would need to make in order to adjudicate their claims centered on pre-treaty conduct. For example, they stated:

[T]he Tribunal is being invited to **determine whether the [2011] Constitutional Court’s Opinion is so extreme** in its manifest deficits so as to impress upon a qualified reader that pretextual exercises of judicial sovereignty were employed far beyond the ambit or expectation of any legal rubric so as to warrant the reasonable conclusion that actions far afield from any reasonable expectations were undertaken to the detriment of the investors (Claimants) here at issue.¹⁶⁹ (Emphasis added)

83. It appears that Claimants have now abandoned the above-listed claims, predicated on the 1998 Regulatory Measures and the 2011 Constitutional Court Judgment. In their Reply, Claimants instead insist that their claims are based exclusively on the (post-TPA) 2014 Confirmatory Order.¹⁷⁰
84. However, it remains unclear precisely what those claims are at this point. Whereas in their Memorial Claimants had asserted *sixteen* different reasons why the 2011 Constitutional Court allegedly violated the TPA,¹⁷¹ Claimants have provided *no* such argumentation as to how or why the 2014 Confirmatory Order assertedly violated the TPA. As far as Colombia can discern, Claimants’ complaint is that the 2014 Confirmatory Order failed to overturn the 1998 Regulatory Measures or the 2011 Constitutional Court Judgment;¹⁷² in Claimants’ words, the 2014

¹⁶⁹ Claimants’ Memorial (PCA), ¶ 97. *See also id.* ¶ 98 (citing the text of the 2011 Constitutional Court Judgment as the “best evidence” of the asserted TPA breaches). *See also* Notice of and Request for Arbitration, ¶¶ 161–80.

¹⁷⁰ *See, e.g.*, Claimants’ Reply (PCA), p. 16, ¶¶ 3, 34, 38, 72, 80, 86, 98.

¹⁷¹ *See* Claimants’ Memorial (PCA), ¶ 47 (“Analysis of the Constitutional Court’s Opinion establishes, without limitation, that it violated the U.S. shareholders’ procedural and substantive due process rights by adopting, condoning, and ratifying, far beyond the ambit of its jurisdictional purview, and contrary to the most fundamental principles of due process, on at least the following sixteen (16) propositions.”).

¹⁷² Claimants’ Reply (PCA), ¶ 34.

Confirmatory Order marked the end of all “judicial labor”¹⁷³ in Claimants’ domestic litigation concerning the 1998 Regulatory Measures.

85. In sum, the only articulation or description that Claimants have offered so far in this arbitration of the nature of their merits claims relates to the alleged unlawfulness of the 2011 Constitutional Court Judgment and the 1998 Regulatory Measures—both of which are pre-TPA measures. Confronted with the reality that such claims fall outside of the jurisdiction *ratione temporis* of the Tribunal, Claimants now purport to base all of their claims on the 2014 Confirmatory Order. However, Claimants’ complaints concerning the 2014 Confirmatory Order seem to consist solely of the criticism that such measure failed to declare unlawful the 1998 Regulatory Measures and 2011 Constitutional Court Judgment. The result is that the alleged unlawfulness of the 2014 Confirmatory Order, of which they complain, cannot be established without evaluating the unlawfulness of the underlying pre-treaty conduct (namely, the 1998 Regulatory Measures and 2011 Constitutional Court Judgment). Consistent with the reasoning of the *Spence* tribunal, Claimants’ claim based upon the 2014 Confirmatory Order is therefore not independently actionable.
86. The fact that Claimants’ earlier complaints about the pre-treaty conduct are predicated on the “same theory of liability” as their complaints about the 2014 Confirmatory Order further evidences that their claims are not independently actionable. In this respect, the reasoning of the *Corona v. Dominican Republic* tribunal is instructive. As discussed above,¹⁷⁴ as well as in Colombia’s Answer,¹⁷⁵ the applicable treaty in the *Corona* case contained a limitations period that precluded claims “if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the

¹⁷³ See Claimants’ Reply (PCA), ¶¶ 34, 88.

¹⁷⁴ See Section I.A.iii.a.

¹⁷⁵ See Colombia’s Answer (PCA), ¶ 183–84.

breach.”¹⁷⁶ To recall, prior to the critical date for purposes of that limitations period, the Dominican Republic had denied the claimant’s application for a mining license. Subsequently, *after* the critical date, the claimant filed a motion for reconsideration, to which the Dominican Republic did not reply.¹⁷⁷ In the arbitration, the claimant insisted that all of its claims were based on the post-treaty act—i.e., the State’s failure to respond to the motion for reconsideration.¹⁷⁸ The Dominican Republic raised a jurisdictional objection on the basis that the tribunal lacked “jurisdiction to hear the [c]laimant’s claims because the alleged acts and omissions on which the [c]laimant’s claims are allegedly based took place outside of the three-year period required under DR-CAFTA Article 10.18.1.”¹⁷⁹

87. The *Corona* tribunal thus had to determine whether the Dominican Republic’s conduct with respect to the motion for reconsideration could “be considered as . . . a separate breach of the treaty.”¹⁸⁰ In that regard, the tribunal held: “[A]ll of the alleged breaches relate to **the same theory of liability**”¹⁸¹ (emphasis added). Specifically, all of the claimant’s claims were “predicated on the notion that ‘the [State] refused to permit [the claimant] to proceed with its mining project for reasons that are not legitimate.’”¹⁸² The tribunal thus concluded that the claimant had actual knowledge of the alleged breach before the critical date, and “as a consequence, its claims [were] time-barred by DR-CAFTA Article 10.18.1.”¹⁸³

¹⁷⁶ **RLA-0012**, *Corona* (Award on Preliminary Objections), ¶ 184.

¹⁷⁷ See *Colombia’s Answer* (PCA), ¶ 179.

¹⁷⁸ **RLA-0012**, *Corona* (Award on Preliminary Objections), ¶ 201.

¹⁷⁹ **RLA-0012**, *Corona* (Award on Preliminary Objections), ¶ 54.

¹⁸⁰ **RLA-0012**, *Corona* (Award on Preliminary Objections), ¶ 210.

¹⁸¹ **RLA-0012**, *Corona* (Award on Preliminary Objections), ¶ 210.

¹⁸² **RLA-0012**, *Corona* (Award on Preliminary Objections), ¶ 210.

¹⁸³ **RLA-0012**, *Corona* (Award on Preliminary Objections), ¶ 238.

88. The same reasoning was applied by the tribunal in *Sociedad Anónima Eduardo Vieira v. Chile*.¹⁸⁴ There, prior to the entry into force of the relevant treaty, the State had partially denied the claimant's application for a fishing license. Thereafter, the claimant repeatedly but unsuccessfully sought review of such denial, before different State bodies. At least one of those denials post-dated the treaty's entry into force. The claimant based its treaty claims on such post-entry into force conduct. However, the tribunal dismissed the case for lack of jurisdiction *ratione temporis*, reasoning that in each successive appeal, the claimant was ultimately complaining about the same thing: the allegedly improper denial of its fishing license application.¹⁸⁵ In other words, the tribunal concluded that the same basis for liability applied both to the pre- and post-treaty conduct, rendering the latter not independently actionable.¹⁸⁶
89. In the present case, Claimants' complaints about the pre-treaty conduct and their claims based on the (post-treaty) 2014 Confirmatory Order are likewise predicated on what the *Corona* tribunal labeled the "same theory of liability."¹⁸⁷ Such theory in this case is based on the alleged wrongfulness of the 1998 Regulatory Measures and 2011 Constitutional Court Judgment; in Claimants' own words:

¹⁸⁴ **RLA-0075**, *Sociedad Anónima Eduardo Vieira v. Republic of Chile*, ICSID Case No. ARB/04/7 (von Wobeser, Czar de Zalduendo, Reisman), Award, 21 August 2007 ("**Vieira (Award)**").

¹⁸⁵ **RLA-0075**, *Vieira (Award)*, ¶ 303.

¹⁸⁶ Although the *Vieira* tribunal was assessing the issue through the prism of a treaty clause that barred claims relating to *disputes* that predated the treaty's entry into force (rather than a statute of limitations provision), the distinction is conceptually irrelevant for present purposes, and the *Vieira* tribunal's reasoning is therefore instructive.

¹⁸⁷ **RLA-0012**, *Corona (Award on Preliminary Objections)*, ¶ 210.

- a. “This case is about the inordinate abuse of **regulatory** sovereignty”¹⁸⁸ (emphasis added).
- b. “In a nutshell, Colombia’s **financial regulatory** authorities unlawfully expropriated Claimants’ investment [(i.e., their shares in Granahorrar)] in that jurisdiction”¹⁸⁹ (emphasis added).
- c. “The value of [Claimants’] investment was ‘reduced’ . . . based on upon discriminatory, irregular, extreme, and excessive, and unprecedented **treatment on the part of the Central Bank of Colombia (“Banco de la República” or “the Central Bank”), Fondo de Garantías de Industrias Financieras (“FOGAFIN”) and Superintendency of Banking**”¹⁹⁰ (emphasis added).
- d. “[T]he Constitutional Court’s Opinion [i.e., the 2011 Constitutional Court Judgment] **approves and cloaks with the mantle of legal legitimacy the Superintendency’s denial of due process as to GRANAHORRAR** arising from the Superintendency’s resolution (C-19) [(i.e., one of the 1998 Regulatory Measures)], which was devoid of factual premises in support of its findings”¹⁹¹ (emphasis added). (In their Memorial, Claimants referred to the 2011 Constitutional Court Judgment as “the Constitutional Court’s Opinion.”¹⁹²).
- e. “[T]he Constitutional Court’s Opinion is an aberration and extreme departure from fundamental legality because **it adopts as legally sufficient FOGAFIN’s resolution** [(i.e., one of the 1998 Regulatory Measures)]

¹⁸⁸ Notice of and Request for Arbitration, p. 1.

¹⁸⁹ Claimants’ Memorial (PCA), p. 12.

¹⁹⁰ Claimants’ Memorial (PCA), ¶ 5.

¹⁹¹ Claimants’ Memorial (PCA), ¶ 54.

¹⁹² See Claimants’ Memorial (PCA), ¶ 3 (defining the term as follows: “the Constitutional Court’s Opinion of May 26, 2011 (“Constitutional Court’s Opinion) (C-26)”).

reducing the value of GRANAHORRAR's shares to COP 0.01, notwithstanding the resolution's lack of factual premises and methodological bases"¹⁹³ (emphasis added).

f. "[T]he Constitutional Court's June 25, 2014 issuance of Order 188/14 . . . **denied the motions for annulment of the Constitutional Court's May 26, 2011 opinion.** This coincided with the end of all judicial labor in Colombia concerning the Claimants' investment"¹⁹⁴ (emphasis added).

90. The allegations identified above show that Claimants' theory of liability is that the Colombian regulatory authorities acted inappropriately with respect to Claimants' shares in Granahorrar. Exactly the same premise thus underlies (i) Claimants' complaints about the pre-treaty conduct (i.e., the 1998 Regulatory Measures, and the 2011 Constitutional Court Judgment (which allowed the 1998 Regulatory Measures to stand)), and (ii) Claimants' claims concerning the sole post-treaty act that they invoke (i.e., the 2014 Confirmatory Order, which declined to annul the 2011 Constitutional Court Judgment).

91. Moreover, the fact that Claimants' claims are based on the theory that the pre-treaty measures were wrongful is also patently corroborated by Claimants' damages claims, insofar as they are seeking compensation herein for

damages incurred by the Claimants as a result of the Colombian government's . . . **actions through its agencies (e.g. Central Bank, FOGAFIN and Superintendency of Banking)** to expropriate Corporación Colombiana de Ahorro y Vivienda ("Granahorrar"), resulting in loss of value of Claimants' interest in Granahorrar.¹⁹⁵ (Emphasis added)

¹⁹³ Claimants' Memorial (PCA), ¶ 59.

¹⁹⁴ Claimants' Reply (PCA), ¶ 34.

¹⁹⁵ First Argiz Expert Report, ¶ 1.

92. In other words, Claimants are seeking compensation for the *pre-treaty* regulatory conduct, rather than for the post-treaty judicial conduct that they purportedly invoke as the basis for their claims in this arbitration.

93. For all of the foregoing reasons, Claimants' claims based upon the 2014 Confirmatory Order are not "independently actionable," and thus fall outside of the jurisdiction *ratione temporis* of this Tribunal.

2. *The Tribunal lacks jurisdiction ratione temporis over Claimants' claims because the **dispute** arose prior to the entry into force of the TPA*

94. In its Answer, Colombia demonstrated that the TPA not only does not apply retroactively to *State conduct* that occurred prior to the date of its entry into force, but also that it does not apply to *disputes* that arose prior to such date. In their Reply, Claimants argue that pre-treaty disputes *do* fall within this Tribunal's jurisdiction, and that in any event the present dispute did not arise until 2014, with the issuance of the 2014 Confirmatory Order.

95. In the following sections, Colombia will demonstrate that: (i) the TPA does not apply retroactively to pre-treaty disputes; (ii) there is a commonly accepted definition of "dispute" that applies to this case; (iii) the present dispute arose before the TPA's entry into force; and (iv) Claimants' claims are therefore barred *ratione temporis*. The analysis below thus confirms that Claimants' claims fall outside of the jurisdiction *ratione temporis* of the Tribunal for a second reason, relating to the timing of the *dispute* (which is a different and separate reason from that articulated in Section B.1 above, which centered on the timing of the alleged *State acts and omissions*).

a. The TPA does not apply retroactively to disputes that arose before its entry into force

96. For the reasons explained in Colombia's Answer, pursuant to the customary international law principle of non-retroactivity, an investment treaty does not

apply to disputes that arose before the treaty's entry into force, unless the treaty expressly provides otherwise.¹⁹⁶

97. In their Reply, Claimants acknowledge the principle of non-retroactivity of treaties,¹⁹⁷ but assert that it only applies to *acts* (not disputes) that occurred prior to the entry into force of the relevant treaty.¹⁹⁸ In support of their argument, Claimants note that some treaties include a provision that explicitly excludes from the temporal scope of the treaty *disputes* that arose prior to the entry into force of the treaty. According to Claimants, such provisions “would be superfluous if pre-existing disputes were already excluded as a general principle.”¹⁹⁹ Claimants conclude from this that the TPA applies to disputes that arose before its entry into force, simply because the treaty contains no explicit exclusionary clause.²⁰⁰
98. Claimants are mistaken, however. As a threshold matter, the fact that some treaties include provisions that expressly exclude pre-treaty disputes does not mean *a fortiori*, as Claimants suggest,²⁰¹ that the general principle of non-retroactivity of treaties does not apply to disputes (as opposed to State acts). It is often the case that a treaty will expressly incorporate into the treaty language that reflects a given rule of international law. For example, some treaties codify the customary international law principle²⁰² that treaties do not bind States in relation to acts or

¹⁹⁶ See Colombia's Answer (PCA), § III.B.2.a.

¹⁹⁷ Claimants' Reply (PCA), ¶ 112.

¹⁹⁸ Claimants' Reply (PCA), ¶ 113.

¹⁹⁹ Claimants' Reply (PCA), ¶ 120.

²⁰⁰ Claimants' Reply (PCA), ¶ 115.

²⁰¹ See Claimants' Reply (PCA), ¶ 120.

²⁰² Claimants' Reply (PCA), ¶ 99 (“Respondent’s argument is premised upon the unremarkable proposition that the TPA does not apply to acts that occurred prior to its entry into force. Claimants have no quarrel with this proposition, which, as Respondent notes, is grounded in Art. 28 of the VCLT.”).

omissions that took place prior to entry into force,²⁰³ whereas other treaties do not.²⁰⁴ However, such difference in treaty practice does not undermine or alter the existence of the customary international law principle of non-retroactivity, which will apply regardless of whether it is expressly stated in the treaty or not.

99. In its Answer, Colombia had identified a number of tribunals that have applied the principle of non-retroactivity to bar disputes that arose prior to the relevant treaty's entry into force, notwithstanding the absence of specific treaty language to that effect.²⁰⁵ For example, the *MCI* tribunal stated unequivocally that silence in the treaty concerning its applicability to pre-treaty disputes did not mean that the principle of non-retroactivity did not apply:

The non-retroactivity of the BIT excludes its application to disputes arising prior to its entry into force. Any dispute arising prior to that date will not be capable of being submitted to the dispute resolution system established by the BIT. **The silence of the text of the BIT with respect to its scope in relation to disputes prior to its entry into force does not alter the effects of the principle of the nonretroactivity of treaties.**²⁰⁶ (Emphasis added)

²⁰³ See, e.g., **RLA-0001**, TPA, Art. 10.1.3 ("For greater certainty, this Chapter does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement"); Dominican Republic–Central America–United States Free Trade Agreement, Chapter 10, Art. 10.1.3 ("For greater certainty, this Chapter does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.").

²⁰⁴ See, e.g., **RLA-0107**, Agreement between the Government of the Italian Republic and the Government of the Islamic Republic of Pakistan on the Promotion and Protection of Investments, 19 July 1997.

²⁰⁵ See Colombia's Answer (PCA), ¶¶ 201–05.

²⁰⁶ **RLA-0008**, *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6 (Vinuesa, Greenberg, Irarrázabal), Award, 31 July 2007 ("**MCI (Award)**"), ¶ 61. See also **RLA-0019**, *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9 (Paulsson, Salpius, Voss), Award, 16 September 2003 ("**Generation Ukraine (Award)**"), ¶ 17.1 ("The Tribunal's jurisdiction extends to any dispute arising out of or relating to an 'alleged breach of any right conferred or created by [the] Treaty' . . . to the extent that the dispute arose on or after 16 November 1996 [i.e., the date of the treaty's entry into force].").

100. In their Reply, Claimants attempt to distinguish the case law cited by Colombia. However, such attempt fails for at least three reasons.
101. First, Claimants misrepresent Colombia's arguments concerning the referenced case law. For instance, Claimants assert that *Lucchetti v. Peru* is the "principal case" on which Colombia relied in support of the principle that treaties do not apply retroactively to pre-treaty disputes,²⁰⁷ and argue that the tribunal in that case was interpreting a provision of the applicable treaty that specifically excluded pre-treaty disputes. However, Colombia did not cite the *Lucchetti* case as support for its position on the scope of application of the general principle of non-retroactivity. Rather, Colombia referred to the *Lucchetti* award as an authority on the definition of the term "dispute" under international law.²⁰⁸ Claimants' criticism of Colombia's reliance on *Lucchetti* therefore is not only misplaced, but also misleading. Unfortunately, Claimants recurrently mischaracterize Colombia's arguments in that fashion, whether deliberately or otherwise.²⁰⁹
102. Second, Claimants' criticism in respect of the cases that Colombia cited concerning the principle of non-retroactivity with respect to disputes is also unavailing. For example, Colombia relied on *ATA v. Jordan*, wherein the tribunal observed that the treaty did not apply "retroactive[ly] with respect to disputes existing prior to the entry into force of the [treaty]."²¹⁰ Unable to present a substantive rebuttal,

²⁰⁷ Claimants' Reply (PCA), ¶ 118.

²⁰⁸ Colombia's Answer (PCA), ¶ 204 ("As explained by the *Lucchetti* tribunal, the term 'dispute' 'has an accepted meaning' under international law. The Permanent Court of International Justice defined a dispute as 'a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.' The ICJ similarly defined a dispute as the 'situation in which two sides hold clearly opposite views concerning the question of the performance or non-performance' of a legal obligation. The *Lucchetti* tribunal adopted these definitions.") (internal citations omitted).

²⁰⁹ Claimants similarly mischaracterized Colombia's argument with respect to the *Vieira v. Chile* case. See Claimants' Reply (PCA), ¶ 120.

²¹⁰ **RLA-0018**, *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2 (Fortier, El-Koshery, Reisman), Award, 18 May 2010 ("**ATA (Award)**"), ¶ 98.

Claimants meekly retort that “the *ATA* award is simply not a persuasive precedent on this point.”²¹¹

103. Colombia also relied on the *MCI* and *Generation Ukraine* awards. Claimants assert that these two awards are inapposite because they referred to a “narrow[er]” definition of a dispute.²¹² However, nowhere in these awards do these tribunals offer an alternative to the classic definition of a dispute (as highlighted in the *Lucchetti* case²¹³).
104. Third, Claimants rely upon the *Chevron* and *Mondev* awards for the proposition that a treaty does in fact apply to disputes that arose prior to its entry into force. However, the treaty at issue in *Chevron* contained a unique clause that, as pointed out by the tribunal, “makes an exception to the principle of non-retroactivity in accordance to Article 28 VCLT”²¹⁴ (emphasis added). In *Chevron*, the tribunal noted that the “BIT applies as long as there are ‘investments existing at the time of entry into force.’”²¹⁵ The tribunal held that because of that unique clause, it saw “no need to conduct a separate examination of jurisdiction over disputes.”²¹⁶ Claimants’ reliance on the *Chevron* award is thus misplaced, since the TPA contains no treaty clause that is similar or analogous to the one in *Chevron* discussed above.

²¹¹ Claimants’ Reply (PCA), ¶ 126.

²¹² Claimants’ Reply (PCA), ¶¶ 124–25.

²¹³ See Colombia’s Answer (PCA), ¶ 204 (“As explained by the *Lucchetti* tribunal, the term ‘dispute’ ‘has an accepted meaning’ under international law. The Permanent Court of International Justice defined a dispute as ‘a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.’ The ICJ similarly defined a dispute as the ‘situation in which two sides hold clearly opposite views concerning the question of the performance or non-performance’ of a legal obligation. The *Lucchetti* tribunal adopted these definitions.”) (internal citations omitted).

²¹⁴ CL-0173, *Chevron* (Interim Award), ¶ 265.

²¹⁵ CL-0173, *Chevron* (Interim Award), ¶ 265.

²¹⁶ CL-0173, *Chevron* (Interim Award), ¶ 264.

105. Claimants likewise mischaracterize *Mondev*.²¹⁷ The award in that case did not address the issue of pre-entry into force *disputes*, but rather only that of *continuing acts*, some of which predated the entry into force of the treaty.²¹⁸ In the latter regard, while the tribunal in *Mondev* stated that “events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation[.]”²¹⁹ it specifically emphasized that “it must still be possible to point to conduct of the State after that date which is itself a breach.”²²⁰ In other words, the source of liability must still be an act that post-dates the entry into force of the treaty. The claimant in *Mondev* alleged that decisions by local courts and the Supreme Court of the United States amounted to NAFTA violations, but the tribunal clarified that “[u]nless those [post-entry into force] decisions were themselves inconsistent with applicable provisions of Chapter 11, the fact that they related to pre-[treaty] conduct which might arguably have violated obligations under NAFTA (had NAFTA been in force at the time) cannot assist [the claimant].”²²¹ In other words, the *Mondev* case (i) did not address the issue of the timing of the *dispute*, and (ii) supports Colombia’s position with respect to the timing of the relevant State *conduct*.

²¹⁷ Claimants’ Reply (PCA), ¶ 122 (“A similar example is provided by *Mondev v. United States*, where the parties were in agreement that ‘the dispute as such arose before NAFTA’s entry into force’, but the tribunal found jurisdiction *ratione temporis* over the claims concerning State conduct after that date. The tribunal expressly noted the intertemporal principle as the basis for its focus on the timing of conduct as the governing standard.”).

²¹⁸ **CLA-0051**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2 (Stephen, Crawford, Schwebel), Award, 11 October 2002 (“*Mondev (Award)*”), ¶¶ 57–58, 70.

²¹⁹ **CLA-0051**, *Mondev (Award)*, ¶ 70.

²²⁰ **CLA-0051**, *Mondev (Award)*, ¶ 70.

²²¹ **CLA-0051**, *Mondev (Award)*, ¶ 70.

106. In sum, Claimants fail in their effort to dispute the proposition that, pursuant to the customary international law principle of non-retroactivity, the TPA does not apply to *disputes* that arose before the TPA's entry into force.

b. Case law provides a general, well-established definition of "dispute"

107. Having established as a conceptual and doctrinal matter that the TPA does not apply to disputes that arose prior to its entry into force, the next step of the analysis is to determine when the dispute in the present case arose.²²² In their Reply, Claimants (i) advocate a "narrow" definition of a dispute;²²³ and (ii) insist that new State conduct triggers a new dispute each time.²²⁴

108. Contrary to Claimants' claims, and as demonstrated in the following subsections, under the well-established definition of "dispute," it is not the case that each new State act in a series will trigger a new dispute.

i. The definition of "dispute" under international law

109. In its Answer, Colombia had recalled the accepted definition of "dispute" articulated by the Permanent Court of International Justice ("PCIJ") in the *Mavrommatis* Advisory Opinion: "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."²²⁵ Colombia applied this definition in order to identify the dispute in the instant case.²²⁶

²²² See Colombia's Answer (PCA), ¶ 204.

²²³ Claimants' Reply (PCA), ¶ 124. See also *id.*, ¶¶ 130-34.

²²⁴ See Claimants' Reply (PCA), ¶ 134.

²²⁵ **RLA-0022**, *The Mavrommatis Palestine Concessions (Greece v. Britain)*, PCIJ, Judgment, 30 August 1924 ("*Mavrommatis (Advisory Opinion)*"), p. 5.

²²⁶ See Colombia's Answer (PCA), ¶ 211 ("To the extent that Claimants' argument is that the dispute did not arise until the 2014 Confirmatory Order, that assertion is patently incorrect. As discussed above, the dispute concerns the 1998 regulatory measures, and a conflict of legal views or interests with respect to such measures developed almost immediately after those measures were adopted, and in any event no later than the date on which claims relating thereto were filed in Colombian courts by Colombian companies owned and controlled by Claimants.").

110. In their Reply, Claimants appear to reject this well-established and uncontroversial definition of “dispute.” Although Claimants rightly acknowledge that the PCIJ’s definition is the “classic definition”²²⁷ of a dispute, they later suggest that there are in fact different definitions, and that tribunals must interpret the same term differently in different treaties (including in the TPA).²²⁸ The reason for Claimants’ attempt to deviate from the general, well-established definition of dispute is obvious: under that definition, Claimants’ case must be dismissed on jurisdictional grounds, because the dispute in the case *sub judice* arose well before the entry into force of the TPA (as will be discussed in **Section II.A.2.c** below).
111. Notwithstanding Claimants’ contention, there are no different, shifting definitions of the concept of “dispute.” To the contrary, the International Court of Justice (“ICJ”)²²⁹ and other international tribunals²³⁰ have consistently – even uniformly – applied the above-cited definition articulated by the PCIJ.
112. Claimants criticize several tribunals (including that in *Lucchetti*) that have recognized and relied upon the PCIJ definition. Claimants argue, for instance, that such tribunals “rested upon an assumption that facts and circumstances sharing

²²⁷ Claimants’ Reply (PCA), ¶ 131.

²²⁸ See Claimants’ Reply (PCA), ¶ 132 (wherein Claimants appear to argue that the Tribunal should not apply the established definition, but instead “analyz[e] the term in its context within the relevant treaty and in light of the treaty’s object and purposes”).

²²⁹ See, e.g., **RLA-0109**, *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, ICJ, Judgment, 5 October 2016, ¶ 37 (“According to the established case law of the Court, a dispute is ‘a disagreement on a point of law or fact, a conflict of legal views or of interests’ between parties”); **RLA-0023**, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, ICJ, Advisory Opinion, 30 March 1950 (“**Interpretation of Peace Treaties (Advisory Opinion)**”), ¶ 74 (defining a dispute as the “situation in which two sides hold clearly opposite views concerning the question of the performance or non-performance” of a legal obligation).

²³⁰ See, e.g., **RLA-0075**, *Vieira* (Award); **CL-0039**, *Impregilo-Pakistan* (Decision on Jurisdiction), ¶¶ 302–03; **RLA-0018**, *ATA* (Award), ¶ 99; **CLA-0081**, *Siemens* (Decision on Jurisdiction), ¶ 159; **RLA-0008**, *MCI* (Award), ¶ 63; **RLA-0021**, *Gambrinus Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/31, Award, 15 June 2015 (Bernardini, Lalonde, Dupuy) (“**Gambrinus (Award)**”), ¶ 198.

the same ‘real cause’ formed part of the same, indivisible ‘dispute’” and failed to analyze the term “dispute” within each treaty.²³¹ However, Claimants were unable to come up with any reason—either on the basis of the TPA text or of the case law—for which the recognized, time-honored definition of “dispute” should not apply in this case.

113. In its Answer, Colombia explained that, consistent with the case law, a dispute is deemed to arise when a disagreement or conflict of views emerges between the parties. However, a prospective claimant need not have articulated a specific legal basis for a claim in order for the dispute to have arisen.²³² Nor does the prospective respondent need to have explicitly opposed the position or complaint of the other party.²³³ Rather, the test for determining whether a dispute has arisen is an objective one, and accordingly does not depend on the subjective belief of one of the parties.²³⁴

ii. The same dispute can evolve over time, without thereby giving rise to successive new and separate disputes

114. In their Reply, Claimants appear to suggest that any new State act in a series automatically triggers a new dispute. Specifically, they assert that “a dispute based upon an act or omission after the treaty has entered into force is distinct from even related disputes that predate the treaty.”²³⁵ This contention, which is not

²³¹ Claimants’ Reply (PCA), ¶ 132.

²³² See **RLA-0013**, *EuroGas* (Award), ¶ 437 (“As regards the occurrence of a dispute, the Tribunal agrees with the Respondent’s submission that the relevant consideration is the articulation of opposing views and interests, as opposed to the articulation of a specific legal basis for the claim.”).

²³³ **RLA-0025**, *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, ICJ, Advisory Opinion, 26 April 1988, ¶ 38.

²³⁴ **RLA-0015**, *Lao Holdings N.V. v. Lao People’s Democratic Republic*, ICSID Case No. ARB(AF)/12/6 (Binnie, Hanotiau, Stern), Decision on Jurisdiction, 21 February 2014, ¶ 124.

²³⁵ Claimants’ Reply (PCA), ¶ 134.

supported by the case law, is evidently motivated by a desire to define the dispute so narrowly as to bring it within the scope of the TPA.

115. The reality is that new State conduct does not necessarily trigger a new dispute. Acts or facts that take place after a dispute has arisen may confirm or prolong the same dispute, without thereby triggering an entirely new dispute. This reality was confirmed by the PCIJ, which observed that “subsequent factors” may constitute “confirmation or development of earlier situations or facts constituting the real cause of the dispute.”²³⁶ In other words, an adjudicator must assess on a case-by-case basis whether State conduct that occurs after a dispute has arisen forms part of the same dispute, or instead has triggered a new one. A number of tribunals have undertaken this analysis. For example, the *Lucchetti* tribunal explained that “the critical element in determining the existence of one or two separate disputes is whether or not they concern the same subject matter.”²³⁷ The tribunal thus set out “to determine whether or not the facts or considerations that gave rise to the earlier dispute continued to be central to the later dispute.”²³⁸
116. The reasoning of the *ATA v. Jordan* tribunal is also instructive. The *ATA* claimant and a Jordanian entity controlled by the Government of Jordan had in 2000 submitted a contractual dispute to arbitration, which produced an arbitral award in 2003.²³⁹ The Jordanian entity applied to the local courts to have the Final Award annulled. The Jordanian Court of Appeal annulled the award—*before* the BIT entered into force.²⁴⁰ Subsequently, *after* the BIT entered into force, the Jordanian Court of Cassation upheld the Court of Appeal’s judgment.²⁴¹ The claimant

²³⁶ **RLA-0026**, *Phosphates in Morocco*, PCIJ (Guerrero, *et al.*), Judgment, 14 June 1938, p. 18.

²³⁷ **RLA-0020**, *Empresas Lucchetti, S.A. and Lucchetti Perú, S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4 (Buerghenthal, Cremades, Paulsson), Award, 7 February 2005 (“**Lucchetti (Award)**”), ¶ 50.

²³⁸ **RLA-0020**, *Lucchetti (Award)*, ¶ 50.

²³⁹ See **RLA-0018**, *ATA (Award)*, ¶¶ 33–34.

²⁴⁰ See **RLA-0018**, *ATA (Award)*, ¶ 34.

²⁴¹ See **RLA-0018**, *ATA (Award)*, ¶¶ 34, 37.

therefore attempted to base all of its claims on the Court of Cassation decision (i.e., the only post-treaty act), arguing that “the decision of the Court of Cassation ‘crystallized’ the contractual dispute into a new claim.”²⁴² The ATA claimant thus sought to demonstrate that such single post-treaty court decision had triggered a new dispute, which fell within the jurisdiction *ratione temporis* of the tribunal. However, the ATA tribunal easily discerned the claimant’s strategem:

[C]laimant attempts to present a denial of justice as an independent violation of the BIT and to invite the Tribunal to treat it as if it were unconnected to the dispute in order to shift the moment of its occurrence forward and to locate it in time after the entry into force of a BIT.²⁴³

117. The tribunal explained that it could “only exercise jurisdiction *ratione temporis* over the [c]laimant’s claims if it finds that the dispute arose after the entry into force of the Treaty on 23 January 2006.”²⁴⁴ Citing *Lucchetti*, the tribunal noted that “[w]here an analysis purports to identify two distinct disputes and the ‘second’ dispute is comprised of the same subject-matter and has the same origin or source (in this case the collapse of Dike No. 19) as the first dispute, *Lucchetti* concluded that the disputes are legally equivalent.”²⁴⁵ Applying that reasoning, the ATA tribunal concluded that the parties had first expressed disagreement over the validity of the Final Award before the relevant BIT entered into force, and that the subsequent proceedings were merely a continuation of the same dispute:

The dispute over the Final Award first commenced in October 2003 when APC filed an action in the Jordanian courts for annulment under Article 49 of the Jordanian Civil Code. It was at this point that the parties first expressed disagreement over the validity of the Final Award. Unless it falls prey to Zeno’s paradox, the Tribunal must view the proceedings that

²⁴² RLA-0018, ATA (Award), ¶ 101.

²⁴³ RLA-0018, ATA (Award), ¶ 108.

²⁴⁴ RLA-0018, ATA (Award), ¶ 98.

²⁴⁵ RLA-0018, ATA (Award), ¶ 102.

followed as a continuation over this initial difference of legal opinion regarding the issue of annulment.”²⁴⁶

118. The ATA tribunal further reasoned that attempts to rely on the final judicial decision in a series “must fail if, as in this case, the occurrence is part of a dispute which originated before the entry into force of the BIT. For this reason, the Tribunal has concluded that the claim of denial of justice is also inadmissible for lack of jurisdiction *ratione temporis*.”²⁴⁷
119. In response to the foregoing, Claimants in the present case invoke three authorities: a dissenting opinion in *Eurogas*; the *MCI* award; and the *Jan de Nul* decision on jurisdiction.²⁴⁸ However, all three of those decisions undermine their argument (that new acts trigger new disputes). This is so because the tribunals in those cases (i) relied on the “classic” definition of a dispute,²⁴⁹ and (ii) actually assessed the specific facts of the case to determine whether a new dispute had arisen.²⁵⁰

²⁴⁶ **RLA-0018**, *ATA* (Award), ¶ 104.

²⁴⁷ **RLA-0018**, *ATA* (Award), ¶ 108.

²⁴⁸ See Claimants’ Reply (PCA), ¶¶ 133–35.

²⁴⁹ See, e.g., **RLA-0008**, *MCI* (Award), ¶ 63 (“The Tribunal recognizes that under the general international law applicable, a dispute means a disagreement on a point of fact or of law, a conflict of legal opinions or of interests as between the parties.”); **RLA-0013**, *EuroGas* (Award), ¶ 437 (“As regards the occurrence of a dispute, the Tribunal agrees with the Respondent’s submission that the relevant consideration is the articulation of opposing views and interests, as opposed to the articulation of a specific legal basis for the claim. The landmark case on this point remains the PCIJ *Mavrommatis* case, where the Court stated that a dispute is ‘[a] disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.’ A conflict of legal views does not require the expression of all possible legal arguments and grounds in support of one’s position.”).

²⁵⁰ **RLA-0013**, *EuroGas* (Award), ¶ 458 (“Since no new State conduct has given rise to a new dispute after 14 March 2009 (or even (re)crystallised an old dispute), the Tribunal must conclude that it lacks jurisdiction over Belmont’s claims.”); **RLA-0008**, *MCI* (Award), ¶¶ 51–58 (discussing the parties’ argument with respect to the time at which the dispute arose); **CLA-0041**, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13 (Kaufmann-Kohler, Mayer, Stern), Decision on Jurisdiction, 16 June 2006 (“*Jan de Nul* (Award)”), ¶ 127 (“Admittedly, the previous dispute is one of the sources of the present

120. Further, the practical implications of Claimants’ theory cannot be ignored. If every new act or fact were deemed to create a new dispute, a claimant would always be able to circumvent the non-retroactivity principle by pointing to some post-treaty State act – or by inducing or precipitating such an act – and then argue that such act gave rise to a new dispute. For instance, the claimant could file a new lawsuit (however frivolous) or submit some sort of reconsideration request, designed to elicit a reaction or response by the State. A claimant thus would always be able to artificially manufacture a “new” dispute, and thereby evade the intertemporal limitations of a treaty. Such a result cannot be correct. Yet, that is precisely the type of situation that the *ATA*, *Corona*, *Lucchetti*, and *Spence* tribunals warned against, and the situation that would obtain herein if Claimants’ theory were accepted.
121. In sum, contrary to Claimants’ claim, a new act or fact will not automatically create a new dispute. Claimants’ self-serving approach finds no support in the jurisprudence or doctrine, particularly given the well-established and widely-accepted definition of “dispute.”

c. The present dispute arose before the TPA entered into force

122. In its Answer, Colombia demonstrated that the present dispute arose before the TPA entered into force.²⁵¹ In their Reply, Claimants attempt to overcome that evidence by abandoning their claims predicated on pre-treaty acts, and by pointing instead to a single post-treaty State act (i.e., the 2014 Confirmatory Order). They argue on that basis that the present dispute arose after the TPA’s entry into force. In that sense, Claimants here – like the one in *ATA* – hope that the Tribunal will simply treat the 2014 Confirmatory Order “as if it were unconnected

dispute, if not the main one. It is clear, however, that the reasons, which may have motivated the alleged wrongdoings of the SCA at the time of the conclusion and/or performance of the Contract, do not coincide with those underlying the acts of the organs of the Egyptian State in the post-contract phase of the dispute. Since the Claimants also base their claim upon the decision of the Ismaïlia Court, the present dispute must be deemed a new dispute.”).

²⁵¹ See Colombia’s Answer (PCA), ¶ 223.

to the dispute in order to shift the moment of its occurrence forward and to locate it in time after the entry into force of a BIT.”²⁵² Despite Claimants’ obvious gambit, the evidence shows that the dispute herein arose between Claimants and Colombia at the latest on 28 July 2000 – more than a *decade* before the TPA entered into force. On that date, Claimants, through their Holding Companies, initiated the Nullification and Reinstatement Action before the Administrative Judicial Tribunal, through which they challenged the lawfulness of the 1998 Regulatory Measures²⁵³ and sought compensation from the State.²⁵⁴ Such lawsuit undeniably evidences a disagreement or conflict of views between the Parties. The real cause of the dispute at issue in this arbitration is therefore the treatment of Claimants’ shares and the legality under Colombian law of the 1998 Regulatory Measures.

123. The subsequent judicial actions concerned the same point of disagreement. Thus, the 2007 Council of State Judgment held that the 1998 Regulatory Measures had been unlawful, and the 2011 Constitutional Court Judgment in turn reversed the 2007 Council of State Judgment. Consistent with the reasoning of the *ATA*, *Eurogas* and *MCI* tribunals, the development of new facts or events relating to the dispute (such as court decisions), and the subsequent addition of new treaty claims (such as for denial of justice) based on such new facts or events, cannot alter the date upon which the dispute arose, and do not give rise to a series of new disputes.
124. Claimants now seek to parse the dispute at issue in this case, so as to create the appearance that a new dispute was triggered by the 2014 Confirmatory Order – i.e., a dispute that arose after the entry into force of the TPA. However, such attempt is contradicted by Claimants’ own petition to the Inter-American Commission on Human Rights (“**IACHR**”), in which they explicitly asserted that

²⁵² **RLA-0018**, *ATA* (Award), ¶ 108.

²⁵³ Claimants’ Memorial (PCA), ¶ 28; Notice of and Request for Arbitration, ¶ 151.

²⁵⁴ See **Ex. R-0050**, Nullification and Reinstatement Action, 28 July 2000, pp. 2–3.

the 2011 Constitutional Court Judgment and 2014 Confirmatory Order *together* violated their human rights:

Request that the Colombian State leave without effect the following sentences: (i) SU.447/11 of the Constitutional Court of 26 May 2011; and (ii) 188/14 of the Constitutional Court of 25 June 2014. **Said decisions, as we have expressed, became the principal instruments of the violation of the petitioners' human rights**, since they impaired the reparation decided by the sentence issued by the Council of State in domestic law.²⁵⁵ (Emphasis added)

125. Moreover, even though Claimants now seek to have the 2014 Confirmatory Order considered in isolation (to generate the impression of a separate dispute relating to such measure), they have nevertheless continued to present their claims in this arbitration as part of a single dispute beginning with the 1998 Regulatory Measures. Indeed, they have expressly challenged regulatory conduct (*viz.*, 1998 Regulatory Measures) and judicial conduct (*viz.*, 2011 Constitutional Court Judgment) that took place *before* the 2014 Confirmatory Order (and before the TPA's entry into force):
- a. "In a nutshell, Colombia's **financial regulatory authorities** unlawfully expropriated Claimants' investment in that jurisdiction"²⁵⁶ (emphasis added).
 - b. "[B]oth the regulatory and the judicial treatments imposed by the Republic of Colombia on Claimants were discriminatory and in breach of the provisions under Article 12.2 of the TPA²⁵⁷" (emphasis added).

²⁵⁵ **Ex. R-0120**, Revision Petition to the Inter-American Commission on Human Rights, 20 March 2017, p. 116 (Spanish Original: "*Solicite al Estado Colombiano deje sin efecto las sentencias: (i) SU.447/11 de la Corte Constitucional del 26 de mayo de 2011; y (ii) 188/14 de la Corte Constitucional del 25 de junio de 2014. Dichas decisiones tal como hemos expresado, se convierten en principales instrumentos de la violación de los derechos humanos de los peticionarios, ya que impidieron la reparación decidida por la sentencia del Consejo de Estado en el derecho interno.*").

²⁵⁶ Claimants' Memorial (PCA), p. 12.

²⁵⁷ Claimants' Memorial (PCA), ¶ 437.

- c. “[T]he Republic of Colombia is responsible, through the actions and omissions of its **executive and judicial authorities**, for the breach of a number of treaty obligations contained in the TPA and the Colombia-Switzerland BIT”²⁵⁸ (emphasis added).
126. Having thus explicitly complained of the State’s regulatory action (i.e., the 1998 Regulatory Measures) and of subsequent judicial conduct concerning those regulatory measures (i.e., the 2011 Constitutional Court Judgment),²⁵⁹ Claimants cannot credibly argue that the present dispute is *exclusively* about the 2014 Confirmatory Order. It seems obvious and incontrovertible that the dispute between Claimants and Colombia at issue in this arbitration arose well before the entry into force of the TPA. The Tribunal therefore lacks jurisdiction *ratione temporis* over Claimants’ claims.

3. *The Tribunal also lacks jurisdiction ratione temporis over Claimants’ claims because Claimants did not comply with the three-year limitations period under Article 10.18.1 of the TPA*

127. In its Answer, Colombia demonstrated that Claimants failed to comply with the three-year limitations requirement set forth in Article 10.18.1 of the TPA (“**TPA Limitations Period**”).²⁶⁰ That clause provides as follows:

No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under

²⁵⁸ Claimants’ Memorial (PCA), ¶ 423.

²⁵⁹ Notably, even if the 2011 Constitutional Court Judgment had in fact triggered a “new” dispute (*quod non*), such dispute would *still* have arisen prior to the entry into force of the TPA (in 2012), and therefore would fall outside of the Tribunal’s jurisdiction *ratione temporis* in any event.

²⁶⁰ See Colombia’s Answer (PCA), § III.B.3.

Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage.²⁶¹

128. Claimants allege, however, that the TPA Limitations Period does not apply to their claims, and that in any event they can use the MFN Clause in Chapter 12 of the TPA to circumvent the TPA Limitations Period.²⁶² For the reasons discussed below, the TPA Limitations Period does in fact apply to Claimants' claims (**Section A.3.a**). Furthermore, the Chapter 12 MFN Clause *cannot* be used to circumvent conditions of consent to jurisdiction (**Section A.3.b.i**). Even if Claimants could in fact use the Chapter 12 MFN Clause in the way they propose, they failed to comply even with the longer five-year limitations period contained in the Colombia-Switzerland BIT (**Section A.3.b.ii** below). For these reasons, too, the Tribunal lacks jurisdiction *ratione temporis* over Claimants' claims.

a. The TPA Limitations Period applies to and bars Claimants' claims

129. In their Reply, Claimants allege that TPA Article 10.18.1 does not apply to their claims.²⁶³ However, Claimants are mistaken. They have submitted their claims under Chapter 12 of the TPA. Chapter 12 of the TPA does not include an investor-State dispute settlement procedure, but instead incorporates the dispute resolution provisions of Chapter 10 (i.e., Section B of Chapter 10).²⁶⁴ The conditions of consent set forth in Section B of Chapter 10 therefore apply to Claimants' claims.

²⁶¹ **RLA-0001**, TPA, Art. 10.18.1. Article 10.16 is entitled "Submission of a Claim to Arbitration." *Id.*, Art. 10.16.

²⁶² See Claimants' Reply (PCA), ¶ 4 ("Claimants are entitled to benefit from the more favorable five-year limitations period contained in the Colombia-Switzerland BIT"); *id.*, ¶ 5 ("As explained in Claimants' Memorial on Jurisdiction (dated May 29, 2019) (at ¶¶ 333-396), in the accompanying Expert Witness Statement of Olin L. Wethington (dated May 16, 2019) (at ¶¶ 26-35), and in the Jurisdiction Ratione Voluntatis section of this Reply (at Part II), the MFN clause in Art. 12.3 of the TPA extends to Claimants the protections of more favorable procedural, as well as substantive, treatment extended by Colombia to investors of other nations.").

²⁶³ See Claimants' Reply (PCA), ¶ 4 ("The three-year limitations period set forth in Art. 10.18 of the TPA is inapplicable to Claimants' claims in this arbitration.").

²⁶⁴ **RLA-0001**, TPA, Art. 12.1.2(b).

Article 10.18.1 represents one such condition to consent; as a result – and contrary to Claimants’ argument – the TPA Limitations Period of Article 10.18.1 does in fact apply to Claimants’ claims.

130. The foregoing is fatal to Claimants’ claim, because they failed to comply with the three-year limitations period. To recall, Claimants submitted their claims on 24 January 2018. The cut-off date pursuant to Article 10.18.1 is therefore **24 January 2015** (i.e., three years before Claimants submitted their claims). This means that, in order to comply with the limitations period, Claimants must not have known prior to 24 January 2015 of the alleged breach(es) or that they had incurred loss or damage. The *latest* alleged breach about which Claimants complain, and about which they allege a resulting loss, was the 2014 Confirmatory Order. However, such order was issued on **25 June 2014**, which is six months *before* the cut-off date. Claimants thus failed to comply with the TPA Limitations Period, and their claims must be dismissed.

b. Claimants cannot circumvent the TPA Limitations Period by means of the Chapter 12 MFN Clause

131. Claimants invoke the Chapter 12 MFN Clause because they know that their claims are barred by the TPA Limitations Period. Specifically, Claimants seek to use the MFN provision to import the dispute resolution provision of the Colombia-Switzerland BIT, which contains a longer limitations period (five years) than the TPA (three years).²⁶⁵

132. Claimants are thus positing that the Chapter 12 MFN Clause can be used to circumvent an explicit condition of consent to arbitration that was included in the TPA. However, as explained by Colombia in its Answer and discussed further

²⁶⁵ **RLA-0004**, Agreement between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments, 17 May 2006 (“**Colombia-Switzerland BIT**”), Art. 11(5) (“An investor may not submit a dispute for resolution according to this Article if *five years* have elapsed from the date the investor first acquired or should have acquired knowledge of the events giving rise to the dispute.”) (emphasis added).

below, Claimants cannot use the Chapter 12 MFN Clause in this manner. Even if, *arguendo*, they could do so, as mentioned above Claimants failed to comply even with the longer, five-year limitations period of the third-party treaty that they are invoking pursuant to the Chapter 12 MFN Clause (namely, the Colombia-Switzerland BIT). As a result, the issue of which treaty's statute of limitations period is applicable here is moot in any event.

- i. The Chapter 12 MFN Clause cannot be used to circumvent conditions of consent to arbitration

133. In its Answer, Colombia interpreted the Chapter 12 MFN Clause in accordance with customary principles of treaty interpretation and the relevant jurisprudence, and demonstrated that such clause cannot be used to circumvent conditions of consent to arbitration (such as the TPA's three-year limitations period). Nevertheless, in their Reply, Claimants insist that the Chapter 12 MFN Clause can be used to circumvent the three-year limitations period.

134. The Parties agree that the Chapter 12 MFN Clause should be interpreted in accordance with the customary principles of treaty interpretation codified in Article 31 of the VCLT: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."²⁶⁶ However, the Parties disagree as to the outcome of this interpretative exercise. For the reasons set forth below, a proper interpretation of the Chapter 12 MFN Clause in accordance with the VCLT and the relevant case law leads to the conclusion that such clause cannot be used to circumvent the TPA's express conditions of consent to arbitration.

- 1) The ordinary meaning of the Chapter 12 MFN Clause

135. To recall, the Chapter 12 MFN Clause provides as follows:

²⁶⁶ CLA-0124, VCLT, Art. 31(1).

Each Party shall accord to investors of another Party, financial institutions of another Party, investments of investors in financial institutions, and cross-border financial service suppliers of another Party treatment no less favorable than that it accords to the investors, financial institutions, investments of investors in financial institutions, and cross-border financial service suppliers of any other Party or of a non-Party, in like circumstances.²⁶⁷

136. The Parties appear to agree that the above-referenced clause does not explicitly address whether or not it applies to conditions of consent (which Claimants refer to as “procedural rights”²⁶⁸). The question therefore is whether an MFN clause that does not expressly state whether it applies to conditions of consent can nevertheless be used by a claimant to import more favorable conditions of consent. The answer is that it cannot.
137. Colombia showed in its Answer²⁶⁹ that there is a persuasive line of

²⁶⁷ **RLA-0001**, TPA, Art. 12.3.1.

²⁶⁸ See, e.g., Claimants’ Reply (PCA), ¶¶ 163, 260, 322.

²⁶⁹ See Colombia’s Answer (PCA), ¶¶ 253–61.

jurisprudence²⁷⁰ – including the majority of recent decisions on the subject²⁷¹ – that has held that an MFN clause *cannot* be used to import conditions of consent, unless the text of the clause “clearly and unambiguously” provides for such application.²⁷² For example, the *Daimler* tribunal held that States:

may also perfectly well decide in the framework of a BIT to

²⁷⁰ See **CLA-0062**, *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24 (Salans, van den Berg, Veeder), Decision on Jurisdiction, 8 February 2005 (“**Plama (Decision on Jurisdiction)**”), ¶ 223 (“[The] MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the [treaty in question] leaves no doubt that the Contracting Parties intended to incorporate them”); **CLA-0088**, *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15 (Goodem, Allard, Marriott), Award, 13 September 2006 (“**Telenor (Award)**”), ¶ 93 (“[T]he effect of the wide interpretation of the MFN clause is to expose the host State to treaty-shopping by the investor among an indeterminate number of treaties to find a dispute resolution clause wide enough to cover a dispute that would fall outside the dispute resolution clause in the base treaty”); **CLA-0093**, *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, SCC Case No. 080-2004 (Sjövall, Lebedev, Weier), Award, 21 April 2006 (“**Berschader (Award)**”), ¶ 206 (“The Tribunal has applied the principle that an MFN provision in a BIT will only incorporate by reference an arbitration clause from another BIT where the terms of the original BIT clearly and unambiguously so provide or where it can otherwise be clearly inferred that this was the intention of the Contracting Parties”); **RLA-0034**, *ICS Inspection and Control Services Ltd. v. Argentine Republic*, PCA Case No. 2010-9 (Dupuy, Torres Bernárdez, Lalonde), Award on Jurisdiction, 10 February 2012 (“**ICS (Award on Jurisdiction)**”), ¶ 277 (“[T]he duty of the Tribunal is to discover and not to create [the] meaning” of an MFN clause); **RLA-0033**, *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1 (Dupuy, Brower, Bello Janeiro), Award, 22 August 2012 (“**Daimler (Award)**”), ¶ 176 (States may “perfectly well decide in the framework of a BIT to extend the bearing of a most-favored nation (MFN) clause to the international settlement of their disputes relating to investments. But this choice cannot be presumed or artificially constructed by the arbitrator; it can only result from the demonstrated expression of the states’ will”); **RLA-0102**, *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1 (Rowley, Park, Sands), Award, 2 July 2013 (“**Kılıç (Award)**”), ¶ 7.8.10 (“This is consistent too with the view expressed by Professor Zachary Douglas, namely that an MFN clause in a basic investment treaty ‘does not incorporate by reference provisions relating to the jurisdiction of the arbitral tribunal, in whole or in part, set forth in a third investment treaty, unless there is an unequivocal provision to that effect in the basic investment treaty.’”).

²⁷¹ See generally **CLA-0007**, *Austrian Airlines v. The Slovak Republic*, UNCITRAL (Kaufmann-Kohler, Brower, Trapl), Final Award, 9 October 2009 (“**Austrian Airlines (Final Award)**”); **RLA-0034**, *ICS (Award on Jurisdiction)*; **RLA-0033**, *Daimler (Award)*; **RLA-0035**, *European American Investment Bank AG v. Slovak Republic*, PCA Case No. 2010-17 (Greenwood, Petsche, Stern), Award on Jurisdiction, 22 October 2012 (“**Euram (Award on Jurisdiction)**”).

²⁷² **CLA-0093**, *Berschader (Award)*, ¶ 206.

extend the bearing of a most-favored nation (MFN) clause to the international settlement of their disputes relating to investments. But this choice cannot be presumed or artificially constructed by the arbitrator; **it can only result from the demonstrated expression of the states' will.**²⁷³ (Emphasis added)

138. Claimants' only response in their Reply to this case law is to muse that the jurisprudence is "in an intriguing and inviting state of flux,"²⁷⁴ and to characterize the line of jurisprudence cited by Colombia as "'controversial.'"²⁷⁵ Claimants also once again emphasize that the Chapter 12 MFN Clause guarantees to investors "treatment" that is no less favorable than that given to third-State parties,²⁷⁶ and argue (along with their expert, Professor Mistelis²⁷⁷) that the use of the word "treatment" means that the Chapter 12 MFN Clause can be used to import conditions of consent.²⁷⁸ In an attempt to support this argument, Claimants rely upon the same cases that they had cited in their Memorial: *Maffezini*, *Siemens*,

²⁷³ **RLA-0033**, *Daimler* (Award), ¶ 176 (internal citations omitted).

²⁷⁴ Claimants' Reply (PCA), ¶ 486.

²⁷⁵ Claimants' Reply (PCA), ¶ 481. Similarly, in his Second Expert Report, Professor Mistelis summarily dismisses the decisions in *Salini v. Jordan* and *Plama v. Bulgaria*. Professor Mistelis claims that in both cases the tribunals did not take into account the ordinary meaning of the term "treatment." However, as explained in paragraphs 262–271 of Colombia's Answer, the tribunals in *Salini* and *Plama*, among other tribunals, did analyze the terms of the MFN clause (as well as the terms that were missing from the MFN clause).

²⁷⁶ Claimants' Reply (PCA), ¶ 5 ("As explained in Claimants' Memorial on Jurisdiction (dated May 29, 2019) (at ¶¶ 333–96), in the accompanying Expert Witness Statement of Olin L. Wethington (dated May 16, 2019) (at ¶¶ 26–35), and in the Jurisdiction Ratione Voluntatis section of this Reply (at Part II), the MFN clause in Art. 12.3 of the TPA extends to Claimants the protections of more favorable procedural, as well as substantive, treatment extended by Colombia to investors of other nations.").

²⁷⁷ See Second Mistelis Expert Report, ¶¶ 9–12.

²⁷⁸ See Claimants' Reply (PCA), ¶ 6 ("[T]he test articulated by VCLT Art. 31 makes it plain that the MFN provision of TPA Art. 12.3 extends to all 'treatment', including treatment with respect to procedural remedies"), ¶ 9 ("The provision guarantees to investors of a Party, and their investments, 'treatment no less favorable' than that given by the other Party to any other country's investors and investments. This guarantee is not limited to the application of the substantive protection standards of the TPA, which are provided for in the treaty regardless of any MFN treatment. Nor is the guarantee limited to substantive protection standards at all.").

AWG, Suez, National Grid, and Impregilo. But Colombia had already showed in its Answer²⁷⁹ that multiple other tribunals have explicitly refused to interpret the word “treatment” in an MFN clause as permitting the importation of dispute resolution clauses from other treaties, absent express language to that effect.²⁸⁰

139. Claimants and Professor Mistelis also fail to respond to the discussion in Colombia’s Answer of the *Maffezini* line of cases.²⁸¹ Colombia had explained that such line of cases is inapposite here, for three reasons. First, most of those cases allowed for the importation of more favorable conditions of consent based on treaty language that is broader than that in the Chapter 12 MFN Clause.²⁸² For example, in deciding to allow for the importation of more favorable conditions of consent to arbitration, the *Suez* tribunal stated:

[I]t must be noted that the most-favored-nation-clause in the Argentina-Spain BIT is **much broader in scope** than was the language of the Bulgaria-Cyprus BIT in *Plama*. Whereas the Argentina-Spain BIT states that “**In all matters** governed by this Agreement, ...treatment shall be no less favorable than that accorded by each Party to investment made in its territory by investors of a third country”, the comparable clause in the Bulgaria-Cyprus BIT stated “Each Contracting Party shall apply to the investments in its territory by investors of the other Contracting Party a treatment which is

²⁷⁹ See Colombia’s Answer (PCA), ¶¶ 257–60.

²⁸⁰ See, e.g., **CLA-0062**, *Plama* (Decision on Jurisdiction); **CLA-0088**, *Telenor* (Award); **CLA-0093**, *Berschader* (Award); **CLA-0007**, *Austrian Airlines* (Final Award); **RLA-0034**, *ICS* (Award on Jurisdiction); **RLA-0033**, *Daimler* (Award); **RLA-0035**, *Euram* (Award on Jurisdiction); **CLA-0095**, *Wintershall* (Award); **CLA-0043**, *Kılıç* (Decision on Jurisdiction).

²⁸¹ For example, Claimants and Professor Mistelis did not address *Berschader*, which determined that an MFN clause can only be used to import elements of a dispute resolution clause (*i.e.*, conditions of consent) if the MFN clause “clearly and ambiguously” provides for such application. **CLA-0093**, *Berschader* (Award), ¶ 206.

²⁸² See **CLA-0031**, *Maffezini* (Decision on Jurisdiction), ¶ 38; **CLA-0086**, *Suez, Sociedad General de Aguas de Barcelona S A. and Inter Aguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17 (Salacuse, Kaufmann-Kohler, Nikken), Decision on Jurisdiction, 16 May 2006 (“*Suez (Decision on Jurisdiction)*”), ¶ 55; **CLA-0008**, *AWG* (Decision on Jurisdiction), ¶ 65.

not less favorable than that accorded to investments by investors of third states.”²⁸³ (Emphasis added)

140. This statement in the *Suez* decision—a decision that Claimants frequently cite—contradicts Claimants’ theory that the *default* rule is that an MFN clause can be used to circumvent conditions of consent to arbitration. Rather, the *Suez* tribunal’s reasoning rests—as it should—on the specific language of the relevant treaty. The Chapter 12 MFN Clause does not contain the broad language that appeared in the treaty interpreted by the tribunal in *Suez* (*viz.*, “[i]n all matters governed by this Agreement”), which led the tribunal to conclude that the MFN clause in that case *did* apply to conditions of consent.²⁸⁴
141. Second, *all* of the post-*Maffezini* line of cases cited by Claimants involved a claimant’s attempt to circumvent a clause in the applicable treaty which required 18-months of domestic litigation before resorting to international arbitration. Such clauses appear in many of Argentina’s treaties, for example. However, there is an important distinction between such 18-month litigation clauses and the limitations period clause at issue here: the purpose of the former is to *enable* arbitration after a specified period of time, whereas the purpose of the latter is to *foreclose* arbitration after a specified period of time. In other words, despite a requirement to comply with the 18-month litigation clause, a party will still be able to seek recourse in arbitration afterwards. By contrast, in the case of a limitations period clause, non-compliance with the relevant limitations period *bars* a party from pursuing arbitration. Not surprisingly, the International Law Commission stressed in its Final Report on the Study Group on the Most-Favoured-Nation Clause (2015) that the use of MFN clauses with respect to 18-month litigation clauses is unique: “Attempts to use MFN to add other kinds of dispute settlement

²⁸³ CLA-0086, *Suez* (Decision on Jurisdiction), ¶ 65.

²⁸⁴ See CLA-0086, *Suez* (Decision on Jurisdiction), ¶ 68.

provisions, going beyond an 18-month litigation delay, have generally been unsuccessful.”²⁸⁵

142. Third, and in any event, a number of tribunals have criticized the reasoning and effects of the *Maffezini* decision, and of its progeny.²⁸⁶ For instance, the *Telenor* tribunal observed that “the effect of the wide interpretation of the MFN clause is to expose the host State to treaty-shopping by the investor among an indeterminate number of treaties.”²⁸⁷ MFN clauses were not intended to enable claimants to create a “greatest hits” collection of the least stringent consent requirements from the respondent State’s various treaties. Such an interpretation would render nugatory the careful balance reached in each treaty by the parties’ negotiators with respect to the conditions for consent; it therefore cannot be the proper interpretation of these clauses.
143. In conclusion, and consistent with the majority line of cases on the subject, the plain language of the Chapter 12 MFN Clause does not enable the importation of more favorable conditions of consent to arbitration.

²⁸⁵ **CLA-0140**, International Law Commission, Study Group on the Most-Favoured Nation Clause, 29 May 2015 (“**ILC Study**”), ¶ 127.

²⁸⁶ See **CLA-0088**, *Telenor* (Award), ¶ 93; **CLA-0062**, *Plama* (Decision on Jurisdiction), ¶ 203; **CLA-0075**, *Salini-Jordan* (Decision on Jurisdiction), ¶ 115; **RLA-0108**, *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17 (Danelius, Brower, Stern), Concurring and Dissenting Opinion of Brigitte Stern, 21 June 2011, ¶ 6; **CLA-0161**, Zachary Douglas, *The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails*, JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT, p. 102 (2011).

²⁸⁷ **CLA-0088**, *Telenor* (Award), ¶ 93; see also **CLA-0062**, *Plama* (Decision on Jurisdiction), ¶ 203 (“The specific exclusion in the draft FTAA is the result of a reaction by States to the expansive interpretation made in the *Maffezini* case. That interpretation went beyond what State Parties to BITs generally intended to achieve by an MFN provision in a bilateral or multilateral investment treaty.”).

2) The context of the Chapter 12 MFN Clause

144. An analysis of the context of the Chapter 12 MFN Clause likewise leads to the conclusion that such clause cannot be used to circumvent conditions of consent to jurisdiction.
145. In their Reply, Claimants highlight other TPA protections – the national treatment provisions (Articles 10.3 and 12.2), and the MFN clause of Chapter 10 (“**Chapter 10 MFN Clause**”) (Article 10.4) – and argue that a comparison of those provisions to the Chapter 12 MFN Clause indicates that the latter applies to conditions of consent.²⁸⁸ For example, Claimants emphasize that a footnote to the Chapter 10 MFN Clause (“**Chapter 10 MFN Footnote**”) explicitly excludes dispute resolution provisions from the scope of the MFN clause.²⁸⁹ To recall, the Chapter 10 MFN Footnote states:

For greater certainty, treatment ‘with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments’ referred to in paragraphs 1 and 2 of Article 10.4 **does not encompass dispute resolution mechanisms**, such as those in Section B, that are provided for in international investment treaties or trade agreements.²⁹⁰ (Emphasis added)

146. Claimants argue that because the Chapter 12 MFN Clause does not contain a provision similar to that quoted above, that must mean that it was not meant to exclude consent requirements such as those set forth in dispute resolution clauses. However, Claimants ignore other aspects of the context of the Chapter 12 MFN Clause.

²⁸⁸ See Claimants’ Reply (PCA), ¶ 11.

²⁸⁹ See Claimants’ Reply (PCA), ¶ 17 (“Respondent makes much of footnote 2 to Art. 10.4 of the TPA, which clarifies that the specific language of that Article is not intended to ‘encompass dispute resolution mechanisms, such as those in Section B [of Chapter 10], that are provided for in international investment treaties or trade agreements.’”).

²⁹⁰ See **RLA-0001**, TPA, Art. 10.4(2), fn. 2.

147. Chapter 10 of the TPA includes an investor-State dispute settlement mechanism. Chapter 10 also includes an MFN clause, which – as discussed above – includes a footnote precluding the application of the MFN clause to the investor-State dispute settlement mechanism. As Claimants concede,²⁹¹ the conditions of consent to arbitration in Chapter 10 are thus “locked in” and not subject to change. A claimant filing claims under Chapter 10 therefore cannot circumvent the Chapter 10 conditions of consent in any way.
148. Chapter 12 does not include an endogenous investor-State dispute settlement mechanism. Instead, it partially imports the investor-State dispute settlement mechanism of Chapter 10.²⁹² In other words, Chapter 12 imports the “locked in” conditions of consent from Chapter 10.
149. However, under Claimants’ theory, a claimant filing claims under Chapter 12 (and thereby invoking the Chapter 10 dispute resolution provisions) would always be able to circumvent the conditions of consent contained in Chapter 10. Such a result is illogical and untenable; Chapter 12 cannot be used to import a more expansive scope of consent to arbitration than that contained in Chapter 10. Put differently, but for the importation of the investor-State dispute settlement mechanism of Section B of Chapter 10 into Chapter 12, there would be no State consent to investor-State dispute settlement in respect of investments in financial services. The limitations to consent included in Section B of Chapter 10 are not somehow shed in the act of importing such consent into Chapter 12.
150. The context of the Chapter 12 MFN Clause therefore supports the interpretation that the Chapter 12 MFN Clause cannot be used to circumvent conditions of

²⁹¹ See Colombia’s Answer (PCA), ¶ 17 (“Respondent makes much of footnote 2 to Art. 10.4 of the TPA, which clarifies that the specific language of that Article is not intended to ‘encompass dispute resolution mechanisms, such as those in Section B [of Chapter 10], that are provided for in international investment treaties or trade agreements.’ However, as Claimants have noted, the parties to the TPA chose not to include such a limiting footnote to the MFN clause in Art. 12.3.”).

²⁹² See Colombia’s Answer (PCA), ¶ 268.

consent to jurisdiction. Such context is also consistent with the key proposition that, in the *absence* of explicit language, an MFN clause cannot be used to import conditions of consent. The TPA Chapter 12 MFN Clause does *not* contain explicit language to that effect, and therefore cannot be used in the fashion proposed by Claimants.

3) The object and purpose of the TPA

151. In arguing whether the Chapter 12 MFN Clause can be used to circumvent conditions of consent to jurisdiction, Claimants devote the following, single sentence of their argument to the interpretation of the object and purpose of the TPA: “[I]nterpreting ‘treatment’ in Art. 12.3 of the TPA to extend to treatment in connection with dispute-resolution proceedings is most consistent with the TPA’s object and purpose.”²⁹³ This conclusory and unsubstantiated statement by Claimants does nothing to support their thesis.
152. There is no support for the notion that unrestricted investor-State dispute settlement is part of the TPA’s object and purpose. If that were the case, every investment treaty MFN clause that does not contain specific exclusionary language would have to be interpreted to allow for the importation from other treaties of conditions of consent with respect to investor-State dispute settlement. Yet tribunals have explicitly refused to interpret MFN clauses in that way.²⁹⁴

²⁹³ Claimants’ Reply (PCA), ¶ 29.

²⁹⁴ See **CLA-0062**, *Plama* (Decision on Jurisdiction), ¶ 223 (“[The] MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the [treaty in question] leaves no doubt that the Contracting Parties intended to incorporate them”); **CLA-0088**, *Telenor* (Award), ¶ 93 (“[T]he effect of the wide interpretation of the MFN clause is to expose the host State to treaty-shopping by the investor among an indeterminate number of treaties to find a dispute resolution clause wide enough to cover a dispute that would fall outside the dispute resolution clause in the base treaty”); **CLA-0093**, *Berschader* (Award), ¶ 206 (“The Tribunal has applied the principle that an MFN provision in a BIT will only incorporate by reference an arbitration clause from another BIT where the terms of the original BIT clearly and unambiguously so provide or where it can otherwise be clearly inferred that this was the intention of the Contracting Parties”); **RLA-0034**,

Moreover, tribunals faced with similar arguments—e.g., that the purpose of providing for dispute settlement should influence decision-makers to err on the side of interpreting treaties as *allowing* jurisdiction—have likewise rejected those arguments.²⁹⁵

153. Claimants thus have failed to demonstrate that the object and purpose of the TPA supports their expansive interpretation of the Chapter 12 MFN Clause.

4) The Parties' alleged "treaty practice"

154. In their Reply, Claimants devote three sections of their interpretative analysis of the Chapter 12 MFN Clause to the alleged "treaty practice" of the United States and Colombia.²⁹⁶ Claimants and Professor Mistelis describe the structure and provisions of a variety of other treaties entered into by the United States and Colombia.²⁹⁷ Some of these treaties have MFN clauses in separate investment and financial services chapters, which are similar to the Chapter 10 and Chapter 12

ICS (Award on Jurisdiction), ¶ 277 ("[T]he duty of the Tribunal is to discover and not to create [the] meaning" of an MFN clause); *RLA-0033, Daimler*, (Award), ¶ 176 (States may "perfectly well decide in the framework of a BIT to extend the bearing of a most-favored nation (MFN) clause to the international settlement of their disputes relating to investments. But this choice cannot be presumed or artificially constructed by the arbitrator; it can only result from the demonstrated expression of the states' will"); *RLA-0102, Kılıç* (Award), ¶ 7.8.10 ("This is consistent too with the view expressed by Professor Zachary Douglas, namely that an MFN clause in a basic investment treaty "does not incorporate by reference provisions relating to the jurisdiction of the arbitral tribunal, in whole or in part, set forth in a third investment treaty, unless there is an unequivocal provision to that effect in the basic investment treaty.").

²⁹⁵ See *CLA-0088, Telenor* (Award), ¶ 95 ("Those who advocate a wide interpretation of the MFN clause have almost always examined the issue from the perspective of the investor. But what has to be applied is not some abstract principle of investment protection in favour of a putative investor who is not a party to the BIT and who at the time of its conclusion is not even known, but the intention of the States who are the contracting parties. The importance to investors of independent international arbitration cannot be denied, but in the view of this Tribunal its task is to interpret the BIT and for that purpose to apply ordinary canons of interpretation, not to displace, by reference to general policy considerations concerning investor protection, the dispute resolution mechanism specifically negotiated by the parties.").

²⁹⁶ See Claimants' Reply (PCA), §§ I.A.1., III.B and III.C.

²⁹⁷ See, e.g., Claimants' Reply (PCA), ¶ 23; Second Mistelis Expert Report, ¶¶ 86–93.

MFN Clauses of the TPA, respectively.²⁹⁸ However, Claimants' argument based on the States' alleged "treaty practice" fails, for two reasons.

155. First, although Claimants acknowledge that the TPA should be interpreted in accordance with the VCLT, the latter does not direct or authorize an interpretation based upon a State's alleged "treaty practice" (i.e., based on an analysis of the treaties that a State has concluded with *other* States).²⁹⁹ Indeed, the VCLT does not authorize a party to interpret a treaty by reference to some other agreement unless the latter is between the same parties as the treaty being interpreted.³⁰⁰
156. Second, Claimants identify and quote other treaties with a similar structure to the TPA: those treaties have (i) an MFN clause in an investment chapter that is limited by language precluding its application to conditions of consent, and (ii) an MFN clause in the financial services chapter that does not include such preclusive language. Having identified these other treaties, Claimants baldly assert that these treaties prove their interpretation of the Chapter 12 MFN Clause. Claimants do not, however, refer to any decision by a tribunal or other body that has interpreted these other treaties in a manner that would support Claimants' theory. In the absence of such support, Claimants' "treaty practice" argument contributes nothing to their analysis, other than to show that the States Parties have employed similar language in other treaties. However, that does not get Claimants very far, because the correct interpretation of those other treaties is the same interpretation that Colombia posits here.

²⁹⁸ See, e.g., Claimants' Reply (PCA), ¶ 24.

²⁹⁹ See generally, CLA-0124, VCLT, Art. 31.

³⁰⁰ See CLA-0124, VCLT, Art. 31(2)(a) ("The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: Any agreement relating to the treaty which was made **between all the parties** in connection with the conclusion of the treaty") (emphasis added); *id.*, Art. 31(3)(a) ("There shall be taken into account, together with the context: Any subsequent agreement **between the parties** regarding the interpretation of the treaty or the application of its provisions") (emphasis added).

157. For all of the reasons articulated above, Claimants are not allowed to circumvent the TPA's conditions of consent by means of the importation (through the Chapter 12 MFN Clause) of the longer limitations period from the Colombia-Switzerland BIT.
- ii. Even if Claimants could circumvent the conditions of consent under the TPA using the Chapter 12 MFN Clause, Claimants did not comply with the five-year limitations period that they invoke
158. In any event, even if Claimants were allowed to import the longer (five-year) limitations period of the Colombia-Switzerland BIT (which they cannot), Claimants did not comply with such limitations period. Article 11(5) of the Colombia-Switzerland BIT establishes the following:
- An investor may not submit a dispute for resolution according to this Article if five years have elapsed from the date the investor first acquired or should have acquired knowledge of the events giving rise to the dispute.³⁰¹
159. The Parties agree that Article 11(5) of the Colombia-Switzerland BIT precludes the submission of a dispute to international arbitration if Claimants obtained knowledge, or should have obtained knowledge, of the events giving rise to the dispute more than five years before they submitted their claims to arbitration, i.e., before **24 January 2013**, which is the "cut-off date."³⁰²
160. Claimants allege that they complied with this limitations period. However, their argument is premised upon a unique, self-serving definition of "dispute." The case law establishes a single, well-accepted definition of "dispute," and pursuant to that definition, Claimants first acquired or should have acquired the requisite

³⁰¹ **RLA-0004**, Colombia-Switzerland BIT, Art. 11(5).

³⁰² See Claimants' Reply (PCA), ¶ 33. See also *id.*, ¶ 4 ("[T]he claims they are asserting arose after January 24, 2013 (i.e., within the five years prior to submitting the claims to arbitration).").

knowledge (i.e., of the events giving rise to this dispute) *before* the 24 January 2013 cut-off date under the Colombia-Switzerland BIT.

- 1) Claimants have created their own, self-serving definition of “dispute,” even though the term has an accepted meaning under international law

161. In their Reply, Claimants argue that “the relevant dispute [in the present case] is the controversy (1) between Claimants and Respondent (2) involving Claimants’ claims that Respondent has engaged in a measure in violation of the relevant treaty. Such a controversy “could not arise **until a challenged** state measure, alleged to **violate the TPA**, had occurred”³⁰³ (emphasis added). However, the narrow definition of “dispute” which Claimants are asking this Tribunal to adopt has no basis in law. As explained in **Section II.A.2.b.i** above, the definition of “dispute” recognized and adopted by international courts³⁰⁴ and tribunals³⁰⁵ is “a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.”³⁰⁶ Moreover, tribunals have affirmed that a party need not have invoked a particular legal obligation for a dispute to have arisen.³⁰⁷

³⁰³ Claimants’ Reply (PCA), ¶ 35.

³⁰⁴ See, e.g., **RLA-0022**, *Mavrommatis* (Advisory Opinion), p. 11; **RLA-0109**, *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, ICJ, Judgment, 5 October 2016, ¶ 37 (“According to the established case law of the Court, a dispute is ‘a disagreement on a point of law or fact, a conflict of legal views or of interests’ between parties”).

³⁰⁵ See, e.g., **RLA-0020**, *Lucchetti* (Award); **RLA-0075**, *Vieira* (Award), ¶ 236; **CLA-0039**, *Impregilo-Pakistan* (Decision on Jurisdiction), ¶¶ 302-303; **RLA-0018**, *ATA* (Award), ¶ 99; **CLA-0081**, *Siemens*, ¶ 159; **RLA-0008**, *MCI* (Award), ¶ 63; **RLA-0021**, *Gambrinus* (Award), ¶ 198.

³⁰⁶ **RLA-0022**, *Mavrommatis* (Advisory Opinion), p. 11.

³⁰⁷ See **RLA-0013**, *EuroGas* (Award), ¶ 437 (“As regards the occurrence of a dispute, the Tribunal agrees with the Respondent’s submission that the relevant consideration is the articulation of opposing views and interests, as opposed to the articulation of a specific legal basis for the claim”); **RLA-0025**, *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, ICJ, Advisory Opinion, 26 April 1988, ¶ 38 (“In the view of the Court, where one party to a treaty protests against the behaviour or a decision of another party, and claims that such behaviour or decision constitutes a breach of the treaty, the mere fact

2) Claimants first acquired or should have acquired knowledge of the events giving rise to the dispute prior to the cut-off date

162. Since the cut-off date under Article 11(5) of the Colombia-Switzerland BIT is 24 January 2013, if the date on which Claimants first acquired or should have acquired knowledge of the events giving rise to the dispute predates 24 January 2013, Claimants' claims are barred even under the longer, five-year limitations period contained in the Colombia-Switzerland BIT.
163. Applying the established definition of a "dispute," it becomes clear that the present dispute arose before the cut-off date of 24 January 2013. As discussed at length in **Section II.A.2.c** above, the dispute arose at the latest on 28 July 2000. It was on that date that Claimants, through their Holding Companies, initiated the Nullification and Reinstatement Action before the Administrative Judicial Tribunal, through which they challenged the lawfulness of the 1998 Regulatory Measures³⁰⁸ and sought compensation from the Colombian State.³⁰⁹ The subsequent judicial actions concerned the same point of disagreement: the 2007 Council of State Judgment held that the 1998 Regulatory Measures were unlawful, and the 2011 Constitutional Court Judgment in turn overturned the 2007 Council of State Judgment.
164. Contrary to Claimants' claim, the dispute relating to the 2014 Confirmatory Order cannot be disaggregated from the underlying dispute and treated as a "new" dispute. Claimants' own written submissions in this arbitration describe the dispute at issue as one that encompasses the 1998 Regulatory Measures and the 2011 Constitutional Court Judgment:

that the party accused does not advance any argument to justify its conduct under international law does not prevent the opposing attitudes of the parties from giving rise to a dispute concerning the interpretation or application of the treaty.").

³⁰⁸ Claimants' Memorial (PCA), ¶ 28; Notice of and Request for Arbitration, ¶ 151.

³⁰⁹ See **Ex. R-0050**, Nullification and Reinstatement Action, 28 July 2000, pp. 2-3.

- a. “In a nutshell, Colombia’s **financial regulatory authorities** unlawfully expropriated Claimants’ investment in that jurisdiction”³¹⁰ (emphasis added). The only “regulatory” conduct took place in 1998, through the 1998 Regulatory Measures adopted by Fogafín.
 - b. “[B]oth the **regulatory and the judicial treatments** imposed by the Republic of Colombia on Claimants were discriminatory and in breach of the provisions under Article 12.2 of the TPA³¹¹” (emphasis added). Again, the regulatory authorities adopted the relevant measures in 1998.
 - c. “[T]he Republic of Colombia is responsible, through the actions and omissions of its **executive and judicial authorities**, for the breach of a number of treaty obligations contained in the TPA and the Colombia-Switzerland BIT”³¹² (emphasis added).
165. Because—by their own admission—Claimants had knowledge of the events giving rise to this dispute before 24 January 2013, Claimants’ claims fail to satisfy even the longer five-year limitations period set forth in the Colombia-Switzerland BIT. Accordingly, the Tribunal lacks jurisdiction *ratione temporis* over Claimants’ claims.

* * *

166. In conclusion, for the reasons articulated above, the Tribunal lacks jurisdiction *ratione temporis* over Claimants’ claims, because (1) the claims are based on alleged State acts that took place before the TPA entered into force; (2) the present dispute arose prior to the entry into force of the TPA; and (3) Claimants did not comply with the three-year TPA Limitations Period (or even with the more generous five-

³¹⁰ Claimants’ Memorial (PCA), p. 12.

³¹¹ Claimants’ Memorial (PCA), ¶ 437.

³¹² Claimants’ Memorial (PCA), ¶ 423.

year limitations period under the Colombia-Switzerland BIT, which Claimants impermissibly seek to invoke via the TPA Chapter 12 MFN Clause).

B. The Tribunal lacks jurisdiction *ratione voluntatis*

167. In its Answer, Colombia argued that the Tribunal lacks jurisdiction *ratione voluntatis* because Claimants have not satisfied several of the TPA's conditions of consent to arbitration. Colombia also demonstrated that Claimants cannot submit fair and equitable treatment or national treatment claims under the TPA.³¹³
168. In their Reply, Claimants argue that the TPA's conditions of consent do not apply to them.³¹⁴ In addition, in an attempt to manufacture jurisdiction where none exists, they advance an incorrect interpretation of the TPA, and also improperly invoke the Chapter 12 MFN Clause.³¹⁵ For the reasons discussed below, those arguments by Claimants must be rejected. Specifically, Colombia will show that:
- a. The conditions of consent in TPA Chapter 10 *do* apply to Claimants' claims, and Claimants have not satisfied some of those conditions (**Section B.1**);
 - b. Claimants cannot submit fair and equitable treatment claims because Chapter 12 neither includes nor incorporates a fair and equitable treatment obligation (**Section B.2**); and
 - c. Claimants cannot submit to arbitration either fair and equitable treatment or national treatment claims because such claims fall outside of the States' consent to arbitration under Chapter 12 (**Section B.3**).

³¹³ See generally Colombia's Answer (PCA), § III.C.

³¹⁴ Claimants' Reply (PCA), ¶¶ 502, 566.

³¹⁵ Claimants' Reply (PCA), ¶ 569.

1. *Claimants have not satisfied several of the conditions of consent under TPA Chapter 10*

169. As discussed in greater detail below, Chapter 10 of the TPA contains several conditions of consent to arbitration, which are incorporated into Chapter 12 by virtue of Article 12.1.2(b). Those conditions of consent must be given effect. In the words of the International Court of Justice: “When [a State’s] consent is expressed in a compromissory clause in an international agreement, any conditions to which such consent is subject must be regarded as constituting the limits thereon.”³¹⁶
170. Consistent with that principle, and in accordance with the TPA, Colombia in its Answer objected to Claimants’ failure to comply with the following requirements of the TPA: the consultation and negotiation requirement (TPA Article 10.15), the notice of intent requirement (TPA Article 10.16.2), and the waiver requirement (TPA Article 10.18.2).³¹⁷ In their Reply, Claimants allege: (1) that the above-mentioned conditions of consent do not apply to their claims; (2) that such conditions are not mandatory or enforceable; and (3) that Colombia’s objections have been asserted in bad faith.³¹⁸ In the subsections that follow, Colombia will demonstrate that, contrary to Claimants’ arguments: (1) the conditions of consent set forth in the TPA *do* apply to their claims (**Section 1.a**); (2) those conditions are mandatory, and Claimants failed to comply with them (**Sections 1.b-d**); and (3) Colombia’s objections are well-founded and were made in good faith (**Section 1.e**).

³¹⁶ **RLA-0110**, *Case Concerning Armed Activities in the Territory of Congo (New Application: 2002)*, ICJ, Judgment, 3 February 2006, ¶ 88.

³¹⁷ See Colombia’s Answer (PCA), ¶¶ 281–98.

³¹⁸ Claimants’ Reply (PCA), ¶ 579.

- a. The TPA's conditions of consent fully apply to Claimants' claims

171. In their Reply, Claimants posit that the consultation and negotiation, notice of intent, and waiver requirements set forth in Chapter 10 do not apply to their claims, because they are submitting claims under Chapter 12:

The procedural rights contained in Chapter 10 of the TPA have not been invoked. Claimants and their investments in the Colombian Financial Services sector are governed by the specific provisions of the TPA's Chapter 12 (Financial Services).³¹⁹

172. However, under the TPA, the *only* basis on which Claimants can bring claims against Colombia for disputes concerning measures that affect investments in the financial sector is through Article 12.1.2(b), and the latter in turn incorporates by reference Section B of Chapter 10:

Section B (Investor-State Dispute Settlement) of Chapter Ten (Investment) is hereby incorporated into and made a part of this Chapter solely for claims that a Party has breached Articles 10.7 (Expropriation and Compensation), 10.8 (Transfers), 10.12 (Denial of Benefits), or 10.14 (Special Formalities and Information Requirements), as incorporated into this Chapter.³²⁰

Absent the incorporation by reference in the above-quoted clause, Claimants would have no basis to commence an investor-State arbitration against Colombia concerning measures adopted or maintained by Colombia relating to their investment in Granahorrar, which is a financial institution in Colombia. Put simply, Claimants cannot conduct an investor-State arbitration under the TPA yet

³¹⁹ Claimants' Reply (PCA), ¶ 502.

³²⁰ See **RLA-0001**, TPA, Art. 12.1.2(b) ("Section B (Investor-State Dispute Settlement) of Chapter Ten (Investment) is hereby incorporated into and made a part of this Chapter solely for claims that a Party has breached Articles 10.7 (Expropriation and Compensation), 10.8 (Transfers), 10.12 (Denial of Benefits), or 10.14 (Special Formalities and Information Requirements), as incorporated into this Chapter.").

at the same time argue that TPA Chapter 10 and the conditions of consent therein do not apply to their claims.

173. As Colombia noted in its Answer,³²¹ Chapter 12 does not contain an endogenous dispute resolution procedure, and instead incorporates by reference the dispute resolution procedure of Chapter 10 (with certain limitations).³²² Specifically, Article 12.1.2(b) incorporates “Section B (Investor-State Dispute Settlement) of Chapter Ten,” albeit only for certain types of claims.³²³ Section B of Chapter 10 includes the three conditions of consent identified above by Colombia (namely, consultation and negotiation (Article 10.15), notice of intent (Article 10.16.2), and waiver (Article 10.18.2)). In other words, by operation of Article 12.1.2(b), the above-listed three conditions of consent are incorporated by reference into Chapter 12, and thus apply to Claimants’ claims.
174. In their Reply, Claimants also argue that the TPA Chapter 10 conditions of consent do not apply to them because they have invoked the Chapter 12 MFN Clause to import the dispute resolution provision of the Colombia-Switzerland BIT.³²⁴
175. As discussed in **Section II.A.3.b** above, an MFN clause cannot be used to import more favorable conditions of consent to arbitration in the absence of express language in the MFN clause indicating the parties’ intent to enable that.³²⁵ The Chapter 12 MFN Clause includes no such language, and therefore cannot be used to bypass the TPA’s conditions of consent.³²⁶ Just as Claimants cannot circumvent the TPA’s three-year limitations period (**Section II.A.3.b** above), they cannot

³²¹ Colombia’s Answer (PCA), ¶ 268.

³²² See **RLA-0001**, TPA, Art. 12.1.2(b).

³²³ **RLA-0001**, TPA, Art. 12.1.2(b).

³²⁴ See Claimants’ Reply (PCA), ¶¶ 504, 570.

³²⁵ See *supra* Section II.A.b.i. See also **CLA-0062**, *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No.ARB/03/24 (Salans, van den Berg, Veeder), Decision on Jurisdiction, 8 February 2005 (“**Plama (Decision on Jurisdiction)**”); **CLA-0088**, *Telenor* (Award).

³²⁶ See **RLA-0001**, TPA, Art. 12.3.1.

circumvent the TPA's consultation and negotiation, notice of intent, and waiver requirements.

b. Claimants failed to comply with the TPA consultation and negotiation requirement

176. In its Answer, Colombia demonstrated that Claimants failed to comply with the consultation and negotiation requirement set forth in TPA Article 10.15.³²⁷ Claimants do not deny that they did not consult and negotiate with Colombia prior to commencing the present arbitration. Instead, in their Reply, they argue that Article 10.15 does not impose a mandatory requirement. Claimants are mistaken.

177. Article 10.15 provides as follows:

In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of nonbinding, third-party procedures.³²⁸

178. Claimants erroneously assert that “[t]here is no predicate mandatory requirement under this provision.”³²⁹ Claimants emphasize the word “should,” which, according to Claimants, “does nothing more than suggest what, in general, would be a desirable rule of engagement.”³³⁰ However, this interpretation has been rejected in the jurisprudence. In its Answer,³³¹ Colombia discussed various awards, (such as the *Murphy v. Ecuador* award), which have interpreted similar

³²⁷ See Colombia's Answer (PCA), § III.C.1.a.

³²⁸ **RLA-0001**, TPA, Art. 10.15.

³²⁹ Claimants' Reply (PCA), ¶ 605.

³³⁰ Claimants' Reply (PCA), ¶ 606.

³³¹ See Colombia's Answer (PCA), ¶ 284.

provisions—including ones that featured the word “should”—as mandatory requirements.³³²

179. In their Reply, Claimants allege that the *Murphy* tribunal interpreted a treaty that “is not at all comparable” to the TPA.³³³ Yet the provision that the *Murphy* tribunal was interpreting was Article VI(2) of the U.S.-Ecuador BIT, which states: “In the event of an investment dispute, the parties to the dispute **should** initially seek a resolution through consultation and negotiation”³³⁴ (emphasis added). That provision is therefore nearly identical to Article 10.15 of the TPA. The *Murphy* tribunal held that negotiations are “**required** under Article VI(2) of the Ecuador BIT”³³⁵ (emphasis added). The reasoning of the *Murphy* tribunal is therefore directly apposite, and supports Colombia’s position herein.
180. Moreover, the Spanish version of Article 10.15 of the TPA (which is “equally authentic”³³⁶) confirms that the consultation and negotiation requirement is mandatory:

En caso de una controversia relativa a una inversión, el demandante y el demandado **deben** primero tratar de solucionar la controversia mediante consultas y negociación,

³³² See **RLA-0048**, *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4 (Blanco, Grigera Naón, Vinuesa), Award on Jurisdiction, 15 December 2010 (“*Murphy (Award on Jurisdiction)*”), ¶ 149. See also **CLA-0075**, *Salini-Jordan* (Decision on Jurisdiction), ¶ 16; **RLA-0047**, *Enron Corp. and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 (Orrego Vicuña, Espiell, Tschanz), Decision on Jurisdiction, 14 January 2004, ¶ 88; **RLA-0111**, *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, PCA Case No. 2011-17 (Júdice, Conthe, Vinuesa), Award, 31 January 2014, ¶ 390 (English Translation: “The Tribunal concludes that, at least in this case, the ‘prior negotiation period’ constitutes a jurisdictional barrier that conditions the jurisdiction of the Tribunal *ratione voluntatis* . . .”) (Spanish Original: “El Tribunal concluye que, al menos en este caso, el “período de negociación previa” constituye una barrera de carácter jurisdiccional que condiciona la jurisdicción del Tribunal *ratione voluntatis* . . .”).

³³³ Claimants’ Reply (PCA), ¶ 615.

³³⁴ **RLA-0048**, *Murphy* (Award on Jurisdiction), ¶ 95.

³³⁵ **RLA-0048**, *Murphy* (Award on Jurisdiction), ¶ 139. See also *id.* at ¶¶ 116, 133.

³³⁶ **RLA-0001**, TPA, Art. 23.6 (“The English and Spanish texts of this Agreement are equally authentic.”).

lo que puede incluir el empleo de procedimientos de carácter no obligatorio con la participación de terceras partes.³³⁷ (Emphasis added)

181. The Spanish word “deben” means “must.” The *Real Academia Española* (which is the maximum authority on the Spanish language and vocabulary) explains that the word “deben” conveys an obligation.³³⁸ Moreover, multiple Spanish-to-English translation platforms, including *Word Reference*, *Spanish Dict.com*, and *Google Translate*, all translate “deben” as “must.”³³⁹ The text of the Spanish version of the TPA thus confirms that the consultation and negotiation requirement is mandatory. Claimants do not deny that they did not conduct any consultations or negotiations. Accordingly, they have failed to satisfy that requirement of TPA Chapter 10.
182. Finally, Claimants assert that even if Article 10.15 were indeed binding, it would be binding on both States, and Colombia has likewise failed to satisfy that obligation.³⁴⁰ This argument defies common sense: it is the claimant who must notify the respondent State of a dispute and to initiate consultation and negotiation, since it is the claimant who is invoking the TPA’s investor-State dispute settlement mechanism. In other words, if Claimants wish to have an arbitration, it is incumbent on them (and not Colombia) to demonstrate that the TPA’s conditions of consent have been met. It is also nonsensical to argue (as

³³⁷ **RLA-0001**, TPA (Spanish), Art. 10.15.

³³⁸ See **Ex. R-0284**, Spanish definition of the word “*Deben*,” REAL ACADEMIA ESPAÑOLA, last accessed 13 February 2020 (English Translation: defining “deber” as “to be obliged to do something because of divine natural or positive law”) (Spanish Original: defining “deber” as “*Estar obligado a algo por la ley divina, natural o positiva*”).

³³⁹ See **Ex. R-0285**, Spanish to English translation of the word “*Deben*,” WORD REFERENCE, last accessed 13 February 2020; **Ex. R-0286**, Spanish to English translation of the word “*deben*,” SPANISHDICT, last accessed 13 February 2020; **Ex. R-0287**, Spanish to English translation of the word “*Deben*,” GOOGLE TRANSLATE, last accessed 13 February 2020.

³⁴⁰ Claimants’ Reply (PCA), ¶ 609 (“The provision addresses both parties in dispute, not just the Claimant. . . . There is no evidence on record of Respondent having tried to engage in consultation or negotiation with Claimants.”).

Claimants seem to do) that the respondent State has to demonstrate that it complied with an obligation to conduct consultations in order to establish that a tribunal does *not* have jurisdiction.

183. It is not surprising, therefore, that similar language in other treaties (i.e., that both parties “should initially seek a resolution through consultation and negotiation”) has never been interpreted as an obligation that the respondent State must satisfy for the purpose of establishing that jurisdiction is lacking.³⁴¹
184. In any event, Claimants’ *tu quoque* argument is unavailing, as the Tribunal needs to satisfy itself, independently, that all of the relevant jurisdictional conditions have been met. Thus, a failure by Claimants to comply with the consultation and negotiation requirement will suffice for the Tribunal to lack jurisdiction (irrespective of what Colombia may have done with respect to such requirement).

c. Claimants failed to comply with the TPA notice of intent requirement

185. In its Answer, Colombia demonstrated that Claimants failed to comply with the notice of intent requirement set forth in TPA Article 10.16.2.³⁴² In their Reply, Claimants do not deny that they did not provide notice of intent before commencing this arbitration. Instead, they argue that the notice of intent requirement is “not enforceable,”³⁴³ and that it would be “unfair”³⁴⁴ to enforce such requirement against them.
186. Claimants’ assertion that Article 10.16.2 “is not enforceable” is directly contradicted by the plain text of the TPA, which provides:

At least 90 days before submitting any claim to arbitration under this Section, a claimant **shall deliver to the respondent**

³⁴¹ See **RLA-0048**, *Murphy* (Award on Jurisdiction), ¶¶ 90, 95.

³⁴² See Colombia’s Answer (PCA), § III.C.1.b.

³⁴³ Claimants’ Reply (PCA), ¶ 639.

³⁴⁴ Claimants’ Reply (PCA), ¶ 641.

a written notice of its intention to submit the claim to arbitration (“notice of intent”).³⁴⁵ (Emphasis added)

The use of the word “shall” unequivocally denotes a formal obligation by the claimant to deliver to the respondent State a written notice of the intention to submit a claim to arbitration.

187. In its Answer, Colombia quoted *Western Enterprise’s* statement that “[p]roper notice is an important element of the State’s consent.”³⁴⁶ Claimants retort that the *Western Enterprise* tribunal gave the claimant in that case the opportunity to provide proper notice after it had filed its claims. However, Claimants fail to point out that the treaty applied by the *Western Enterprise* tribunal did *not* include an explicit notice of intent requirement such as that imposed by TPA Article 10.16.2. In other words, even in the *absence* of a legal requirement to provide advance notice of an intent to submit claims to arbitration, tribunals have recognized that proper notice is an important element of the State’s consent. In the instant case, proper notice was formally required by Article 10.16.2 of the TPA, and Claimants failed to provide such notice, and their claims must therefore be dismissed.
188. Claimants have cited three other decisions in support of their theory that TPA Article 10.16.2 does not establish an obligation to provide notice: *B-Mex v. Mexico*, *Chemtura v. Canada*, and *Bayindir v. Pakistan*.³⁴⁷ The first two of these cases are inapposite, because the issue there was whether notices of intent filed by the claimants had been adequate; thus, those tribunals were not called upon to assess the consequences of a *total* failure to file notice—which is the case here. In particular, in *B-Mex v. Mexico*, Mexico objected to the omission of the names of

³⁴⁵ **RLA-0001**, TPA, Art. 10.16.2.

³⁴⁶ **RLA-0049**, *Western NIS Enterprise Fund v. Ukraine*, ICSID Case No. ARB/04/2 (Blanco, Paulsson, Pryles), Order, 16 March 2006 (“**Western NIS (Order)**”), ¶ 5.

³⁴⁷ See Claimants’ Reply (PCA), ¶¶ 668–78.

certain investors on the notice of intent.³⁴⁸ The tribunal considered the text of the NAFTA notice of intent requirement, and determined that it would not further the objectives of NAFTA to “bar[] access to that dispute resolution mechanism on the basis that the names of certain investors were omitted from the notice of intent.”³⁴⁹ In *Chemtura v. Canada*, the claimant had filed a notice of intent, but Canada complained that such notice had not adequately previewed all of the claimant’s claims.³⁵⁰ However, the tribunal rejected this objection.³⁵¹ Thus, neither of these NAFTA cases supports Claimants’ proposition that a notice requirement is not mandatory.

189. The third case cited by Claimants is *Bayindir v. Pakistan*. In that case, the tribunal interpreted a notice of intent requirement and decided that it “should not be interpreted as a precondition to jurisdiction.”³⁵² The *Bayindir* tribunal focused on the fact that “to require a formal notice would simply mean that *Bayindir* would have to file a new request for arbitration.”³⁵³ In other words, the *Bayindir* tribunal focused on the practical implications of the requirement. In doing so, however, the *Bayindir* tribunal failed to address how the plain language of the applicable treaty

³⁴⁸ See **CLA-0171**, *B-Mex, LLC et al. v. United Mexican States*, ICSID Case No. ARB(AF)/16/3 (Verhoosel, Born, Vinuesa), Partial Award, 19 July 2019 (“**B-Mex (Partial Award)**”), ¶ 76.

³⁴⁹ **CLA-0171**, *B-Mex* (Partial Award), ¶ 117.

³⁵⁰ **CLA-0018**, *Chemtura Corp. v. Government of Canada*, UNCITRAL (Kaufmann-Kohler, Brower, Crawford), Award, 2 August 2010 (“**Chemtura (Award)**”), ¶ 100 (“The Respondent, however, disputes the jurisdiction of the Tribunal to hear the claim for breach of Article 1103 of NAFTA. It argues, in essence, that the Claimant’s Memorial ‘advances an Article 1103 claim that cannot be traced in any way to its Notices of Intent and Arbitration . . . ’”) (internal citations omitted).

³⁵¹ See **CLA-0018**, *Chemtura* (Award), ¶ 103 (“It is true that the main argument made in such notices in connection with Article 1103 did not concern the potential import of a fair and equitable treatment provision from another treaty through the MFN clause in Article 1103. Yet, the facts mentioned therein are essentially the same as those subsequently referred to in the Claimant’s Memorial in support of the claim under Article 1103”).

³⁵² **CLA-0013**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29 (Kaufmann-Kohler, Berman, Böckstiegel), Decision on Jurisdiction, 14 November 2005 (“**Bayindir (Decision on Jurisdiction)**”), ¶ 95.

³⁵³ **CLA-0013**, *Bayindir* (Decision on Jurisdiction), ¶ 100.

(which stated that a party “shall” provide notice) could be read as non-mandatory. Instead, the *Bayindir* tribunal applied what it “consider[ed] that the real meaning” of the provision was.³⁵⁴ In other words, it simply substituted its own judgment for that of the treaty negotiators, on the basis that it did not consider the requirement practical or logical. In doing so, the tribunal exceeded its mandate.

190. In sum, the legal authorities cited by Claimants do not justify or excuse their failure to comply with the notice requirement imposed by TPA Article 10.16.2. The relevant analysis here is therefore straightforward: (i) Article 10.16.2 establishes a legal obligation by a claimant to provide a notice of intention to the respondent State before submitting a claim to arbitration; (ii) Claimants here do not deny that they failed to provide any such notice; (iii) Claimants thus failed to comply with the TPA notice obligation; and (iv) Claimants’ claims must therefore be dismissed.

d. Claimants failed to comply with the TPA waiver requirement

191. In its Answer, Colombia also demonstrated that Claimants failed to comply with the waiver requirement set forth in TPA Article 10.18.2(b),³⁵⁵ which provides:

No claim may be submitted to arbitration under this Section unless . . . the notice of arbitration is accompanied, (i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant’s written waiver, and (ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant’s and the enterprise’s written waivers of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.³⁵⁶ (Emphasis added)

³⁵⁴ **CLA-0013**, *Bayindir* (Decision on Jurisdiction), ¶ 96.

³⁵⁵ See Colombia’s Answer (PCA), § III.C.1.b.

³⁵⁶ **RLA-0001**, TPA, Art. 10.18.2(b).

192. Claimants do not deny that they failed to provide a written waiver of their right to initiate or continue other proceedings in relation to the measures of which they complain in this arbitration.
193. Instead, in their Reply, they make a series of arguments about the meaning of the waiver requirement, and about its application in the present case. For the reasons set forth below, Claimants' arguments fail.
- i. Contrary to Claimants' claims, the waiver requirement applies to Claimants' case
194. In an attempt to avoid the application of the waiver requirement to their case, Claimants advance several arguments concerning the waiver requirement under Article 10.18.2. Each of those arguments is discussed in turn below.
195. *First*, Claimants contend that the waiver requirement only "accrue[s]" when a parallel proceeding already exists.³⁵⁷ However, the plain text of the TPA contradicts this argument, as Article 10.18.2(b) does not include any language indicating that the waiver requirement is in any way conditional, or that it applies only if a parallel proceeding already exists. Indeed, the fact that the waiver requirement includes the word "initiate" (claimant must waive the right to "**initiate** or continue . . . any proceeding"³⁵⁸ (emphasis added)) unequivocally shows that the existence of a parallel proceeding is *not* a condition to the submission of a written waiver. If it were, the text of Article 10.18.2 would have required waiver only of the right to "continue" other proceedings, and not of the right to "initiate" such proceedings. In any event, Claimants' argument is rendered moot by the fact that, as explained in Colombia's Answer and discussed further below, Claimants have indeed failed to discontinue a parallel proceeding against the measures that they challenge in the present arbitration.

³⁵⁷ Claimants' Reply (PCA), ¶ 511.

³⁵⁸ RLA-0001, TPA, Art. 10.18.2(b).

196. Claimants' *second* argument concerning the waiver requirement is that such requirement only applies if the parallel proceeding is a domestic litigation involving the same claims as those submitted to arbitration.³⁵⁹ Specifically, Claimants contend that the requirement only applies when "the *same*, overlapping claims for the breach of the *same* provisions and protections under the US-Colombia TPA [are] brought before domestic means of dispute resolution, and before an international investment treaty arbitral tribunal"³⁶⁰ (emphasis in original). In other words, according to Claimants, "the legal basis [of the parallel claims] must be the *same* and there must be an *imminent risk of double recovery*"³⁶¹ (emphasis in original). Claimants base this conclusion on the alleged "operational objective" of Article 10.18.2(b).³⁶² However, Claimants' speculations on the treaty negotiators' objective cannot override the plain text of the relevant treaty provision, and in any event Claimants' theory suffers from at least the following four fatal flaws:

- a. The text of Article 10.18.2(b) does not limit the waiver to domestic proceedings only,³⁶³ but instead requires a claimant also to waive its right to pursue "other dispute settlement procedures;" thus, the relevant treaty provision contradicts Claimants' argument that the waiver requirement only "accrue[s]"³⁶⁴ if there is a *domestic* proceeding involving the same claims;³⁶⁵
- b. The text of Article 10.18.2(b) does not limit the waiver to "the *same*,

³⁵⁹ Claimants' Reply (PCA), ¶ 509.

³⁶⁰ Claimants' Reply (PCA), ¶ 509.

³⁶¹ Claimants' Reply (PCA), ¶ 554.

³⁶² Claimants' Reply (PCA), ¶ 509.

³⁶³ See Claimants' Reply (PCA), ¶ 516 ("[T]he waiver provision expressly concerns the filing of a (i) domestic proceeding, (ii) in the courts of the host-State").

³⁶⁴ Claimants' Reply (PCA), ¶ 511.

³⁶⁵ **RLA-0001**, TPA, Art. 10.18.2(b).

overlapping claims for the breach of the *same* provisions and protections under the US-Colombia TPA,” but instead requires a claimant to waive its right to “initiate or continue . . . **any proceeding with respect to any measure** alleged to constitute a breach referred to in Article 10.16”³⁶⁶ (emphasis added);

- c. The text of Article 10.18.2(b) does not include any language to suggest that “there must be an imminent risk of double recovery”³⁶⁷ for the waiver requirement to apply; and
- d. Claimants’ musings about the “operational objective” of the waiver requirement are in any event unsupported, as they have no basis in the plain text of the relevant treaty provision or in any other authoritative interpretative source.

197. Claimants’ *third* argument concerning the waiver requirement is that the requirement can be satisfied at any time prior to the merits phase. Claimants assert that “understandably Tribunals that have addressed this concern [(i.e., a waiver requirement)] have found that the requirement can be met *at any time* prior to the merits phase”³⁶⁸ (emphasis in original). However, Claimants provide no support for this assertion, other than an oblique reference to the *Thunderbird v. Mexico* award,³⁶⁹ which does not support Claimants’ argument. In *Thunderbird*, the claimant had filed a waiver with its statement of claim, rather than with its notice of arbitration, and the tribunal assessed whether such waiver was timely.³⁷⁰ Given that a waiver had in fact been filed, and that there was no allegation of a parallel

³⁶⁶ **RLA-0001**, TPA, Art. 10.18.2(b).

³⁶⁷ Claimants’ Reply (PCA), ¶ 554.

³⁶⁸ Claimants’ Reply (PCA), ¶ 517.

³⁶⁹ Claimants’ Reply (PCA), ¶ 555.

³⁷⁰ See **RLA-0052**, *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL (van den Berg, Wälde, Ariosa), Arbitral Award, 26 January 2006 (“**International Thunderbird Gaming (Arbitral Award)**”), ¶ 116.

proceeding, the tribunal dismissed Mexico's objection that the waiver was deficient.³⁷¹ In this case, by contrast, (i) Claimants did not submit any waiver (whether in writing or otherwise); and (ii) Claimants *are* pursuing a parallel proceeding. Accordingly, the scenario in the present case is very different from that in *Thunderbird*, and the latter case is therefore inapposite.

ii. Claimants did not comply with the waiver requirement

198. In its Answer, Colombia pointed out that Claimants had initiated a parallel proceeding against Colombia before the IACHR for the same measures that they are challenging in this arbitration.³⁷² Claimants argue that the waiver requirement does not apply because the nature of the parallel proceeding before the IACHR is different from this arbitration.

199. Colombia explained in its Answer that tribunals applying provisions similar to TPA Article 10.18.2(b) have determined that a waiver requirement entails two conditions: "(i) 'a 'form' requirement, whereby [a claimant] must in fact submit a waiver,'" and (ii) "a 'material' requirement, whereby [a claimant] must abide by such waiver by discontinuing" parallel proceedings before proceeding with arbitration.³⁷³ It is undisputed that Claimants have not satisfied the "form requirement"³⁷⁴ because they have not submitted a waiver—as Claimants have expressly conceded.³⁷⁵

200. Claimants also fail to comply with the "material requirement"³⁷⁶ because they did not discontinue the parallel IACHR proceeding when they initiated the present

³⁷¹ See **RLA-0052**, *International Thunderbird Gaming (Arbitral Award)*, ¶¶ 117–18.

³⁷² See Colombia's Answer (PCA), ¶¶ 296–97.

³⁷³ **RLA-0054**, *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador*, ICSID Case No. ARB/09/17 (van den Berg, Grigera Naón, Thomas), Award, 14 March 2011 ("**Commerce Group (Award)**"), ¶ 71 (quoting the respondent's argument).

³⁷⁴ **RLA-0054**, *Commerce Group (Award)*, ¶ 71 (quoting the respondent's argument).

³⁷⁵ See Claimants' Reply (PCA), ¶ 517 ("Claimants stand ready to file a waiver . . .").

³⁷⁶ **RLA-0054**, *Commerce Group (Award)*, ¶ 71 (quoting the respondent's argument).

ICSID arbitration. As Colombia explained in its Answer,³⁷⁷ the IACHR proceeding falls within the scope of the waiver requirement because it is (i) a “dispute settlement procedure[];”³⁷⁸ (ii) “with respect to a[] measure alleged to constitute a breach” of the TPA.³⁷⁹

201. First, the parallel claims before the IACHR unquestionably constitute a “dispute settlement procedure[],” within the meaning of Article 10.18.2(b).³⁸⁰ In their Reply, Claimants allege that “Respondent is raising this defense [under the waiver requirement] on an ‘incorrect’ reading of the Inter-American Human Rights system.”³⁸¹ According to Claimants, the proceeding before the IACHR is “non-judicial” and therefore “political” in nature,³⁸² and thus falls outside of the scope of TPA Article 10.18.2(b). However, the latter provision of the TPA does not distinguish between “political” and “judicial” (or administrative) proceedings. Rather, it refers to claims before “any administrative tribunal or court under the law of any Party, **or any other dispute settlement procedures**”³⁸³ (emphasis added). The IACHR indisputably qualifies as a “dispute settlement procedure,” and therefore the TPA waiver provision applies squarely with respect to the IACHR proceeding.

202. The IACHR is a body established by the American Convention on Human Rights that is composed of independent experts. The American Convention defines as follows the tasks that must be undertaken by the Commission with respect to petitions filed by individuals alleging violations of the Convention by a Member State: (i) reviewing the admissibility of the petition; (ii) “examin[ing] the matter

³⁷⁷ Colombia’s Answer (PCA), ¶¶ 296–97.

³⁷⁸ **RLA-0001**, TPA, Art. 10.18.2(b).

³⁷⁹ **RLA-0001**, TPA, Art. 10.18.2(b).

³⁸⁰ **RLA-0001**, TPA, Art. 10.18.2(b).

³⁸¹ Claimants’ Reply (PCA), ¶ 529.

³⁸² Claimants’ Reply (PCA), ¶ 528.

³⁸³ **RLA-0001**, TPA, Art. 10.18.2(b).

set forth in the petition or communication in order to verify the facts;” (iii) requesting the State concerned to provide information; (iv) if so requested, receiving written and oral statements from the disputing parties; (v) issuing a confidential report “setting forth the facts and stating its conclusions; (vi) if the matter is not settled, issuing an opinion and “prescribe a period within which the state is to take the measures that are incumbent upon it to remedy the situation;” and (vii) submitting the dispute to the Inter-American Court of Human Rights.³⁸⁴ It is self-evident that the process delineated above is designed to settle disputes as to alleged human rights violations, and that it therefore qualifies as a “dispute settlement procedure[.]” Claimants cannot credibly deny that they filed an IACHR petition with the view to resolving a dispute about the alleged human rights violations.

203. In their Reply, Claimants also argue that the reports and opinions issued by the IACHR are not binding.³⁸⁵ That is irrelevant, as nowhere does the text of the TPA create a requirement that the “dispute settlement procedure[.]” be binding. The IACHR dispute settlement procedure thus falls within the scope of Article 10.18.2(b) of the TPA.
204. An additional argument that Claimants advance—in an attempt to persuade that the waiver requirement does not apply with respect to the IACHR—is an argument concerning the Inter-American *Court* of Human Rights (as opposed to the IACHR, which is the Inter-American *Commission* of Human Rights). First, Claimants appear to concede that the Inter-American Court of Human Rights has “judicial functions” and thus would fall within the scope of Article 10.18.2(b).³⁸⁶ However, they imply that because their petition is not being adjudicated by the

³⁸⁴ **Ex. R-0248**, American Convention on Human Rights, 18 July 1978, Arts. 33–51.

³⁸⁵ See Claimants’ Reply (PCA), ¶¶ 531, 545.

³⁸⁶ See Claimants’ Reply (PCA), ¶ 532 (“The only judicial organ within the Inter-American Human Rights Organization is the Inter-American Court”).

Inter-American Court (but rather by the IACHR), such petition does not fall within the scope of the waiver requirement.

205. Such argument is predicated on a faulty understanding of the Inter-American Human Rights System, and in particular (i) of the procedures for the filing and adjudication of claims, and (ii) of the respective spheres of competence of the Court and Commission in that system. The official guidance provided by the IACHR includes the following description:

Only the States parties to the American Convention who have accepted the Court's contentious jurisdiction and the Commission may submit a case to the Inter-American Court. Individuals do not have direct recourse to the Inter-American Court; they **must first submit their petition to the Commission** and go through the procedure for cases before the Commission.³⁸⁷ (Emphasis added)

206. Thus, Claimants must first submit their claims to the Commission before such claims can reach the Court. The Inter-American Commission is therefore the necessary first step to achieving resolution of their human rights dispute, and it is disingenuous for Claimants to claim that the IACHR (as opposed to the Court) does not qualify as a "dispute settlement procedure[]" under the TPA.
207. Second, Claimants' argument concerning the waiver requirement fails because the IACHR proceeding relates to the same measures at issue in the present proceeding. In their Reply, Claimants insist that the IACHR proceeding is not relevant to the waiver requirement because they are not claiming any breach of the TPA before the IACHR.³⁸⁸ On this much the Parties agree: the IACHR does not

³⁸⁷ **Ex. R-0289**, *Petition and Case System: Informational Brochure*, Inter-American Commission on Human Rights, 2010, § 13.

³⁸⁸ See Claimants' Reply (PCA), ¶ 542-43 ("The present arbitration is being brought for the breach of a number of obligations under an international agreement for trade and the protection of foreign investors and foreign investments in the Colombian Financial Services sector. The proceeding before the IACHR was filed based on the alleged breach of the American Convention on Human Rights. The subject matter and the causes of action could not be more distinct.").

adjudicate claims of breach of investment treaties. But TPA Article 10.18.2(b) is not limited only to investment claims, as it refers more generally to proceedings “with respect to any **measure** alleged to constitute a breach”³⁸⁹ (emphasis added). In other words, a claimant does not need to invoke the same legal rules or assert exactly the same legal claims for the other proceeding to fall within the scope of the TPA waiver requirement.

208. Importantly, Claimants do not deny that their IACHR complaint is based on the same *measures* of which they complain before this Tribunal. Further, the below chart from Colombia’s Answer illustrates the direct substantive overlap between the two proceedings:

Measures about which Claimants Complain before this Tribunal	Measures about which Claimants Complain before the IACHR
The 1998 Capitalization Order ³⁹⁰	The 1998 Capitalization Order ³⁹¹
The 1998 Value Reduction Order ³⁹²	The 1998 Value Reduction Order ³⁹³
The 2011 Constitutional Court Judgment ³⁹⁴	The 2011 Constitutional Court Judgment ³⁹⁵
The 2014 Confirmatory Order ³⁹⁶	The 2014 Confirmatory Order ³⁹⁷

³⁸⁹ RLA-0001, TPA, Art. 10.18.2(b).

³⁹⁰ See Claimants’ Memorial (PCA), p. 12, ¶¶ 5–22.

³⁹¹ See Ex. R-0118, Petition to the Inter-American Commission for Human Rights, 6 June 2012, p. 7.

³⁹² See Claimants’ Memorial (PCA), p. 12, ¶¶ 5–22.

³⁹³ See Ex. R-0118, Petition to the Inter-American Commission for Human Rights, 6 June 2012, p. 7.

³⁹⁴ See Claimants’ Memorial (PCA), p. 14, ¶¶ 42–77.

³⁹⁵ See Ex. R-0118, Petition to the Inter-American Commission for Human Rights, 6 June 2012, p. 1.

³⁹⁶ See Claimants’ Memorial (PCA), ¶¶ 1, 78–101.

³⁹⁷ See Ex. R-0119, Supplementary Petition to the Inter-American Commission for Human Rights, 20 July 2016, p. 12.

209. The chart above demonstrates that the claims that Claimants are asserting in each of the two proceedings relate to the very same measures. It is precisely this scenario that the waiver requirement was intended to preclude.

210. For the reasons articulated above, Claimants' attempt to excuse their failure to satisfy the waiver requirement under TPA Article 10.18.2(b) is futile. Their claims must therefore be dismissed for failure to comply with that requirement.

e. Colombia asserted in good faith its objections concerning the TPA's conditions of consent

211. Claimants also argue that Colombia's objections based on the three TPA conditions of consent discussed above are "abusive"³⁹⁸ and constitute an "attempt to negate Claimants' access to justice."³⁹⁹ In its Answer, and again in the preceding sections, Colombia has articulated the well-founded legal and factual bases for its objections. Therefore, there is no basis whatsoever for Claimants' assertion that Colombia's exercise of its right to raise jurisdictional objections on the basis of consent conditions is "abusive."

2. Claimants cannot submit fair and equitable treatment claims under Chapter 12 because Chapter 12 does not contemplate any fair and equitable treatment obligation

212. Claimants have asserted fair and equitable treatment claims in this arbitration.⁴⁰⁰ In the following sections, Colombia will demonstrate that Claimants cannot submit a fair and equitable treatment claim under Chapter 12, for two reasons: (i) because Chapter 12 neither includes directly nor incorporates by reference any fair and equitable treatment obligation; and (ii) because Claimants cannot import such an obligation from other treaties using the Chapter 12 MFN Clause.

³⁹⁸ Claimants' Reply (PCA), ¶ 579.

³⁹⁹ Claimants' Reply (PCA), ¶ 580.

⁴⁰⁰ See Claimants' Memorial (PCA), ¶¶ 424, 433-37.

- a. Chapter 12 neither includes nor incorporates by reference any fair and equitable treatment obligation

213. The claims advanced in this arbitration by Claimants are being asserted under TPA Chapter 12. However, Chapter 12 does not include a fair and equitable treatment provision.⁴⁰¹ For that reason, Claimants have invoked the fair and equitable treatment provision of TPA Chapter 10 (i.e., Article 10.5).⁴⁰² However, that is impermissible because Article 10.5 is not incorporated by reference in Chapter 12. As explained by Colombia in its Answer,⁴⁰³ Article 12.1 (which defines the “Scope and Coverage” of Chapter 12) provides an exhaustive list of the provisions from other Chapters of the TPA that are incorporated by reference into Chapter 12:

2. Chapters Ten (Investment) and Eleven (Cross-Border Trade in Services) apply to measures described in paragraph 1 **only to the extent** that such Chapters or Articles of such Chapters are **incorporated into this Chapter**.

(a) Articles 10.7 (**Expropriation and Compensation**), 10.8 (Transfers), 10.11 (**Investment and Environment**), 10.12 (Denial of Benefits), 10.14 (**Special Formalities and Information Requirements**), and 11.11 (**Denial of Benefits**) are hereby incorporated into and made a part of this Chapter.⁴⁰⁴ (Emphasis added)

214. Accordingly, Article 12.1.2(a) identifies the only four substantive protections (highlighted in bold type above) that are incorporated by reference into Chapter 12 from Chapter 10. The drafting of this clause makes it clear that such list of four protections is an exhaustive one. Because Article 10.5 (fair and equitable treatment)

⁴⁰¹ See generally **RLA-0001**, TPA, Ch. 12.

⁴⁰² See Claimants’ Memorial (PCA), ¶ 424 (“Colombia was under an obligation to treat US investors and investments in compliance with the customary international law minimum standard of treatment. That obligation arises . . . through the express provision under Article 10.5 of the TPA . . .”).

⁴⁰³ See Colombia’s Answer (PCA), ¶¶ 309–10.

⁴⁰⁴ **RLA-0001**, TPA, Art. 12.1.2(a).

is not included in the list, that provision is not incorporated into Chapter 12. This means that Claimants cannot invoke Article 10.5 as a basis to assert fair and equitable claims in the present arbitration.

215. In their Reply, Claimants concede that pursuant to Article 12.1.2(a), “only four provisions from Chapter 10 are incorporated into Chapter 12.”⁴⁰⁵ However, Claimants contradict themselves when, elsewhere in their Reply, they assert that “[f]air and [e]quitable [t]reatment is a [c]ore Chapter 12 [o]bligation,”⁴⁰⁶ and that “Chapter 12 is laced with protection standards akin to *both* the customary international law and the convention international law iterations of the Fair and Equitable Treatment (‘FET’) protection standard”⁴⁰⁷ (emphasis in original).
216. Claimants’ position thus is not clear at all, but in any event the text of the TPA is abundantly clear: Chapter 12 does not include a free-standing fair and equitable treatment obligation, and it does not incorporate by reference the fair and equitable treatment obligation established in Article 10.5. Claimants therefore cannot submit any claim under Chapter 12 for violation of the fair and equitable treatment standard.

b. Claimants cannot use the Chapter 12 MFN Clause to incorporate by reference the fair and equitable treatment clause of the Colombia-Switzerland BIT

217. Because Chapter 12 does not impose any fair and equitable treatment obligation, Claimants seek to use the Chapter 12 MFN Clause to import into the TPA the fair and equitable treatment provision of the Colombia-Switzerland BIT.
218. As discussed in Colombia’s Answer, a claimant cannot import into a treaty (“primary treaty”) an entirely different substantive protection contained in some other treaty, in circumstances in which no similar protection exists in the primary

⁴⁰⁵ Claimants’ Reply (PCA), ¶ 158.

⁴⁰⁶ Claimants’ Reply (PCA), p. 287.

⁴⁰⁷ Claimants’ Reply (PCA), ¶ 458.

treaty.⁴⁰⁸ Claimants therefore cannot import a fair and equitable treatment provision using the MFN clause.

219. In their Reply, Claimants attempt to get around the absence of an FET protection in Chapter 12 by advancing a new and creative argument. Claimants argue that they are not using the Chapter 12 MFN Clause to import a right that does not exist in Chapter 12, because Chapter 12 includes something like a fair and equitable treatment obligation. However, such argument is fatally flawed.
220. Claimants' new argument is predicated on the fanciful notion that because other protections in Chapter 12 have what Claimants consider to be "FET-like" features, it must be deemed that Chapter 12 does in fact contain a fair and equitable treatment clause: "Chapter 12 is laced with protection standards akin to *both* the customary international law and the conventional international law iterations of the Fair and Equitable Treatment ('FET') protection standard."⁴⁰⁹ Specifically, Claimants point to Articles 12.4 (Market Access for Financial Institutions), 12.5 (CrossBorder Trade), 12.10(4) (Exceptions), and 12.11 (Transparency and Administration of Certain Measures) as provisions that assertedly "command treatment conceptually indistinguishable from FET."⁴¹⁰ Claimants conclude from this that "these provisions demonstrate[] that they supply Financial Services investors with rights that directly comport with the technical workings and

⁴⁰⁸ See Colombia's Answer (PCA), ¶¶ 374-79. See also **RLA-0059**, *Ickale Insaat Ltd. Sirketi v. Turkmenistan*, ICSID Case No. ARB/10/24 (Heiskanen, Lamm, Sands), Award, 8 March 2016 ("**Ickale (Award)**"), ¶ 332 ("The Claimant's argument that it is entitled to import substantive standards of protection not included in the Treaty from other investment treaties concluded by Turkmenistan, and to rely on such standards of protection in the present arbitration, must be rejected."); **RLA-0060**, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S A. v. Argentine Republic*, ICSID Case No. ARB/09/01 (Buergenthal, Alvarez, Hossain), Award, 21 July 2017, ¶¶ 884-85; **RLA-0056**, *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31 (Lowe, Brower, Thomas), Decision on Jurisdiction, 24 October 2011 ("**Hochtief (Decision on Jurisdiction)**"), ¶ 79.

⁴⁰⁹ Claimants' Reply (PCA), ¶ 458.

⁴¹⁰ Claimants' Reply (PCA), ¶ 459.

content of FET.”⁴¹¹ Hence, Claimants say, “[t]he importation of FET is hardly the incorporation of non-existing rights that would violate the Parties’ consent.”⁴¹²

221. Aside from the fact that it is strained and contorted, Claimants’ new argument fails for the simple reason that it is inconsistent with elemental principles of treaty interpretation. A treaty either does or does not include within its text a given substantive protection. Chapter 12 of the TPA does not include a fair and equitable treatment provision. Claimants cannot simply posit the existence of a non-existent treaty provision by pointing to other provisions of the same treaty which, in Claimants’ imagination, share certain features or qualities with the non-existent provision. The fact that Chapter 12 contains protections that Claimants consider in some way similar or analogous in some way to fair and equitable treatment does not suffice as a basis to conclude that Chapter 12 in fact contains a fair and equitable treatment clause.

222. In sum, Claimants’ new “creation by analogy” argument does not enable Claimants to get around a single, unavoidable reality: there is no fair and equitable treatment provision in Chapter 12, and Claimants therefore cannot use the Chapter 12 MFN Clause to import such a provision. Such claims must be dismissed.

3. Claimants cannot submit to arbitration either fair and equitable treatment claims or national treatment claims because the States did not consent to arbitrate such claims under Chapter 12

223. The fact that Claimants are barred from asserting fair and equitable treatment claims because there is no fair and equitable treatment clause in Chapter 12 is confirmed by the limited scope of consent to arbitration delineated in TPA Article 12.1.2(b).⁴¹³

⁴¹¹ Claimants’ Reply (PCA), ¶ 460.

⁴¹² Claimants’ Reply (PCA), ¶ 463.

⁴¹³ **RLA-0001**, TPA, Art. 12.1.2(b) (“Section B (Investor-State Dispute Settlement) of Chapter Ten (Investment) is hereby incorporated into and made a part of this Chapter solely for claims that a

224. As discussed in more detail below, Article 12.1.2(b) does not extend to fair and equitable treatment claims, since such provision provides consent to the arbitration of claims only for the violation of certain specified treaty protections, which do not include fair and equitable treatment.
225. Such protections also do not include national treatment. Therefore, aside from confirming that Claimants cannot assert any FET claims, Article 12.1.2(b) serves to bar Claimants' claims under Article 12.2 ("Chapter 12 National Treatment") as well.⁴¹⁴
226. In its Answer, Colombia had already demonstrated that Claimants' fair and equitable treatment and national treatment claims fall outside of the scope of Colombia's consent under TPA Chapter 12. In their Reply, Claimants respond by arguing that Claimants are free to submit to arbitration claims for violation of *any* provision of TPA Chapter 12.⁴¹⁵
227. In the following sections, Colombia will explain why Claimants are not entitled to submit any fair and equitable treatment or national treatment claims under Chapter 12. Specifically, that is so for the following reasons:
- a. The exhaustive list of protections for which Colombia provided consent to arbitration in TPA Article 12.1.2(b) does not include fair and equitable treatment or national treatment (**Section 3.a**); and
 - b. Claimants cannot create consent to arbitration of such claims by means of

Party has breached Articles 10.7 (Expropriation and Compensation), 10.8 (Transfers), 10.12 (Denial of Benefits), or 10.14 (Special Formalities and Information Requirements), as incorporated into this Chapter.").

⁴¹⁴ See Claimants' Memorial (PCA), ¶¶ 424, 433–37.

⁴¹⁵ See Claimants' Reply (PCA), ¶ 138 ("Art. 12.1.2(b) renders enforceable all substantive protections in Chapter 12, including Art. 12.2 (National Treatment) . . . Hence, it is here established that the Parties consented to submitting to investor-State arbitration the treatment protection standards contained in Chapter 12."). See also *id.*, p. 117, heading 1.

the Chapter 12 MFN Clause (**Section 3.b**).

- a. Article 12.1.2(b) excludes fair and equitable treatment and national treatment claims from the scope of Colombia's consent to arbitration under Chapter 12

228. As discussed above, Claimants have submitted their claims under Chapter 12, but such chapter does not include its own investor-State dispute settlement mechanism. Instead, Article 12.1.2(b) imports the investor-State dispute settlement mechanism from Chapter 10, providing consent to arbitration *for a limited category of claims*:

Section B (Investor-State Dispute Settlement) of Chapter Ten (Investment) is hereby incorporated into and made a part of this Chapter **solely** for claims that a Party has breached Articles 10.7 (**Expropriation and Compensation**), 10.8 (**Transfers**), 10.12 (**Denial of Benefits**), or 10.14 (**Special Formalities and Information Requirements**), as incorporated into this Chapter.⁴¹⁶ (Emphasis added)

229. Accordingly, Colombia provided consent to arbitration under Chapter 12 only of claims for the violation of four specific protections contained in Chapter 10 (which are the four protections highlighted above in bold type). Claimants concede that Article 12.1.2(b) “limits the number of substantive protection standards that are imported from Chapter 10 to Chapter 12 for which the Chapter 10 dispute resolution procedural rights are available.”⁴¹⁷

230. As with the clause relating to the substantive protections incorporated by reference into Chapter 12 from Chapter 10 (i.e., Article 12.1.2(a), which was discussed above), the drafting of the clause quoted above ((Article 12.1.2(b)) renders it clear that the list contained therein is exhaustive. Importantly for present purposes, such list does **not** include either of the following two protections from Chapter 10: the fair and equitable treatment obligation (Article 10.5); or the

⁴¹⁶ RLA-0001, TPA Art. 12.1.2(b).

⁴¹⁷ Claimants' Reply (PCA), ¶ 163.

national treatment obligation (Article 12.2). Consequently, Claimants cannot submit claims under Chapter 12 for asserted violations of fair and equitable treatment or national treatment.

231. The Parties also disagree as to the broader import of Article 12.1.2(b). In Claimants' view, a claimant can submit to arbitration under Chapter 12 a claim not only under the Chapter 10 provisions that are specifically identified and incorporated by reference in Article 12.1.2(b),⁴¹⁸ *but also* a claim under any of the substantive protections set forth in Chapter 12.⁴¹⁹

232. In the sections that follow, Colombia will demonstrate that Article 12.1.2(b) identifies the full universe of types of claims that can be submitted to arbitration under Chapter 12. Given the heavy emphasis placed by Claimants on the interpretation of a similar provision of NAFTA, Colombia begins with a discussion of the sole NAFTA case that has squarely addressed the interpretation of that provision. Thereafter, Colombia discusses the interpretation of the text of Article 12.1.2(b) in the light of customary rules of treaty interpretation, and rebuts Claimants' attempt to use other, unauthorized means of interpretation to support their anti-textual interpretation of Article 12.1.2(b).

i. The NAFTA jurisprudence supports Colombia's interpretation of Article 12.1.2(b) of the TPA

233. Claimants devote almost the entirety of their analysis of the text and effects of Article 12.1.2(b) to an interpretation of the analogous (and nearly identical) provision in NAFTA, which is Article 1401(2). That provision states: "Articles 1115 through 1138 [(i.e., the dispute resolution provisions of Chapter 11 (the investment chapter))] are hereby incorporated into and made a part of this Chapter solely for

⁴¹⁸ See Claimants' Reply (PCA), ¶ 163.

⁴¹⁹ See Claimants' Reply (PCA), ¶ 164 ("Article 12.1.2(b) does not contain any language referencing a limitation on Chapter 12 substantive protection standards. This Article expressly limits only the Chapter 10 (Investment) provisions imported into Chapter 12 and enforceable pursuant to the Chapter 10 dispute mechanism that were not present in Chapter 12.").

breaches by a Party of Articles 1109 through 1111, 1113 and 1114, as incorporated into this Chapter.”⁴²⁰

234. The only investment tribunal that has interpreted NAFTA Article 1401(2) so far was that in *Fireman’s Fund v. Mexico*.⁴²¹ There, the tribunal adopted an interpretation that is consistent with Colombia’s position in this arbitration—and directly demonstrates that Claimants’ interpretation of Article 12.1.2(b) is mistaken. Notably, the *Fireman’s Fund* tribunal based its interpretation in part on the express views of Mexico and Canada (i.e., two of the three States Parties to NAFTA).⁴²²
235. Claimants and Colombia agree that the structure and text of the relevant NAFTA provisions are similar to those of the TPA, insofar as:
- a. NAFTA Chapter 11 governs investments and includes an investor-State dispute settlement mechanism.⁴²³
 - b. NAFTA Chapter 14, which governs financial services, does not include its own investor-State dispute settlement mechanism.⁴²⁴
 - c. NAFTA Article 1401 (the “Scope and Coverage” provision of Chapter 14) incorporates by reference certain substantive protections from the investment chapter (Chapter 11).⁴²⁵
 - d. NAFTA Article 1401 also incorporates by reference the investor-State dispute settlement mechanism from the investment chapter (Chapter 11),

⁴²⁰ **CLA-0113**, NAFTA, Art. 1401(2).

⁴²¹ See generally **RLA-0112**, *Fireman’s Fund* (Decision).

⁴²² See generally **RLA-0113**, *Fireman’s Fund* (Mexico’s Submission); **RLA-0114**, *Fireman’s Fund* (Canada’s Submission).

⁴²³ See generally **CLA-0113**, NAFTA, Ch. 11.

⁴²⁴ See generally **CLA-0113**, NAFTA, Ch. 14.

⁴²⁵ See **CLA-0113**, NAFTA, Art. 1401(2) (“Articles 1109 through 1111, 1113, 1114 and 1211 are hereby incorporated into and made a part of this Chapter.”).

but “solely” for a limited set of claims.⁴²⁶ Specifically, Article 1401(2) provides: “Articles 1115 through 1138 are hereby incorporated into and made a part of this Chapter **solely for breaches** by a Party **of Articles 1109 through 1111, 1113 and 1114**, as incorporated into this Chapter”⁴²⁷ (emphasis added).

236. The structure and relevant provisions of the TPA are thus nearly identical to those of NAFTA:
- a. TPA Chapter 10 governs investments and includes an investor-State dispute settlement mechanism.⁴²⁸
 - b. TPA Chapter 12, which governs financial services, does not include its own investor-State dispute settlement mechanism.⁴²⁹
 - c. TPA Article 12.1 (the “Scope and Coverage” provision of Chapter 12) incorporates by reference certain substantive protections from the investment chapter (Chapter 10).⁴³⁰
 - d. TPA Article 12.1 also incorporates by reference the investor-State dispute settlement mechanism from the investment chapter (Chapter 10), but “solely” for a limited set of claims.⁴³¹ Specifically, Article 12.1.2(b) provides: “Section B (Investor-State Dispute Settlement) of Chapter Ten (Investment) is hereby incorporated into and made a part of this Chapter **solely for claims** that a Party has breached Articles 10.7 (**Expropriation and**

⁴²⁶ See **CLA-0113**, NAFTA, Art. 1401(2).

⁴²⁷ **CLA-0113**, NAFTA, Art. 1401(2).

⁴²⁸ See generally **RLA-0001**, TPA, Ch. 10.

⁴²⁹ See generally **RLA-0001**, TPA, Ch. 12.

⁴³⁰ See **RLA-0001**, TPA, Art. 12.1.2(a) (“Articles 10.7 (Expropriation and Compensation), 10.8 (Transfers), 10.11 (Investment and Environment), 10.12 (Denial of Benefits), 10.14 (Special Formalities and Information Requirements), and 11.11 (Denial of Benefits) are hereby incorporated into and made a part of this Chapter.”).

⁴³¹ See **RLA-0001**, TPA, Art. 12.1.2(b).

Compensation), 10.8 (**Transfers**), 10.12 (**Denial of Benefits**), or 10.14 (**Special Formalities and Information Requirements**), as incorporated into this Chapter.”⁴³² (emphasis added).

237. The *Fireman’s Fund v. Mexico* tribunal interpreted NAFTA in exactly the same manner that Colombia is interpreting the TPA herein. In *Fireman’s Fund*, the claimant had asserted claims under Chapter 11. The respondent, Mexico, had argued that the claimant should have brought its claims under Chapter 14, because the claimant had invested in a financial institution.⁴³³ The tribunal therefore had to determine: (i) whether the claimant’s claims were properly governed by Chapter 14; and (ii) whether such claims fell within the scope of the tribunal’s jurisdiction under Chapter 14.⁴³⁴
238. The latter legal issue is the same that arises in the present case. In *Fireman’s Fund*, the claimant had submitted claims alleging violations of the fair and equitable treatment and national treatment obligations. The tribunal considered whether these claims fell within the scope of the States Parties’ consent under NAFTA Chapter 14.
239. The tribunal was aided in its analysis by the written submissions of Mexico and Canada (the latter as a non-disputing party under NAFTA Article 1138).⁴³⁵ Mexico and Canada agreed that the fair and equitable treatment obligation fell outside of the scope of consent to arbitration under Chapter 14.
240. Mexico, relying on the text of Article 1401(2) (the “Scope and Coverage” provision), argued the following:

[I]f a claim relates to an investment in a financial institution, only Chapter XIV applies, in accordance with the above.

⁴³² **RLA-0001**, TPA, Art. 12.1.2(b).

⁴³³ See **RLA-0112**, *Fireman’s Fund* (Decision), ¶ 78.

⁴³⁴ See **RLA-0112**, *Fireman’s Fund* (Decision), ¶¶ 67, 79.

⁴³⁵ The United States also filed a written submission, but it did not address the subject of the scope of consent to arbitration under Chapter 14.

Article 1401(2) expressly incorporates the entire section B of Chapter XI (the provisions that establish and regulate the investor-State procedure), but with the important reservation that these provisions “are hereby incorporated . . . solely for breaches by a Party of Articles 1109 through 1111, 1113 and 1114, as incorporated into” Chapter XIV. In other words, **an investor in a financial institution can only resort to investor-State dispute settlement procedure with respect to those provisions of Chapter XI that have been expressly incorporated into Chapter XIV**, and may not invoke any of the remaining obligations from Chapter XI or Chapter XIV in such proceeding.⁴³⁶ (Emphasis added)

241. Relying on the text of NAFTA Article 1402(2), Mexico explained that “[r]egarding investments in the financial sector, Mexico has only consented to submit itself to

⁴³⁶ **RLA-0113**, *Fireman's Fund* (Mexico's Submission), ¶ 24(e) (Spanish Original: “[S]i se trata de una reclamación relativa a una inversión en una institución financiera, rige únicamente el capítulo XIV, acorde con lo señalado. El artículo 1401(2) incorpora expresamente toda la sección B del capítulo XI (las disposiciones que establecen y regulan el procedimiento inversionista-Estado), pero con la importante reserva de que esas disposiciones “se incorporan... sólo para el caso de que una Parte incumpla los artículos 1109 a 1111, 1113 y 1114, en los términos de su incorporación” al capítulo XIV. En otras palabras, un inversionista en una institución financiera sólo puede recurrir al procedimiento de solución de controversias inversionista-Estado respecto de aquellas disposiciones del capítulo XI que han sido expresamente incorporadas al capítulo XIV, y no puede invocar ninguna de las obligaciones restantes del capítulo XI o del capítulo XIV en tal procedimiento.”). See also *id.* ¶ 13 (English Translation: “In the case of measures relating to investors and their investments in financial institutions in Mexican territory, Mexico consented to submit itself to investor-State arbitration only in cases where it is alleged that Mexico has violated Articles 1109 through 1111, 1113 and 1114. Mexico did not consent, and does not consent, to the submission to investor-State arbitration of claims that deal with measures relating to an investment in a financial institution, based on alleged violations of obligations that are not incorporated into Chapter XIV of NAFTA through Article 1401(2), such as Articles 1102 and 1105. Nor did it consent, and does not consent, to submit itself to arbitration in accordance with the provisions of Articles 1115 to 1138, incorporated in Chapter XIV, for claims based on alleged violations of Article 1405, since recourse to the investor-State mechanism is explicitly excluded.”) (Spanish Original: “[T]ratándose de medidas relativas a inversionistas y sus inversiones en instituciones financieras en territorio mexicano, México consintió en someterse al arbitraje inversionista-Estado sólo en los casos en que se alegue que México ha violado los artículos 1109 al 1111, 1113 y 1114. México no consintió, y no consiente, en someter al arbitraje inversionista-Estado las reclamaciones que versen sobre medidas relativas a una inversión en una institución financiera, sustentadas en supuestas violaciones a preceptos que no están incorporados en el capítulo XIV del TLCAN a través del artículo 1401(2), como es el caso de los artículos 1102 y 1105. Tampoco consintió, y no consiente, en someterse a arbitraje conforme a las disposiciones de los artículos 1115 al 1138, incorporadas en el capítulo XIV, respecto de reclamaciones sustentadas en supuestas violaciones al artículo 1405, puesto que el recurso al mecanismo inversionista-Estado está explícitamente excluido.”).

investor-State arbitration on a limited basis.”⁴³⁷ Thus, in Mexico’s view, the claimant’s fair and equitable treatment and national treatment claims fell outside of the “limited” scope of consent to investor-State arbitration under Chapter 14.

242. Canada aligned with Mexico in its interpretation of NAFTA Article 1402(2), explaining in its non-disputing party submission that the NAFTA Parties had intended “to create a separate regime to govern measures relating to financial services,”⁴³⁸ and that “a comparison of the protection afforded to investors under Chapters Eleven and Fourteen is irrelevant.”⁴³⁹ Instead, Canada recalled that “the issues in dispute are to be decided in accordance with the express provisions of the NAFTA.”⁴⁴⁰ Canada emphasized that the express provision of Chapter 14 limits the scope of consent to arbitration:

The NAFTA Parties incorporated into Chapter Fourteen the investor-state dispute settlement provisions of Section B of Chapter Eleven (Articles 1116 through 1138) solely for breaches of Articles 1109 through 1111, 1113 and 1114, as incorporated into Chapter Fourteen by Article 1401(2).⁴⁴¹ (Emphasis in original)

243. The *Fireman’s Fund* tribunal agreed with Mexico’s and Canada’s interpretation of the NAFTA equivalent of Article 12.1.2(b) of the TPA. Specifically, the tribunal held that Article 1401(2) lists the only substantive obligations that can be submitted to investor-State arbitration under Chapter 14.⁴⁴² The tribunal accordingly held that it “lack[ed] jurisdiction” over the claimant’s fair and

⁴³⁷ **RLA-0113**, *Fireman’s Fund* (Mexico’s Submission), ¶ 18 (Spanish Original: “*En materia de inversiones en el sector financiero, México sólo ha consentido en someterse al arbitraje inversionista-Estado en forma limitada*”).

⁴³⁸ **RLA-0114**, *Fireman’s Fund* (Canada’s Submission), ¶ 10.

⁴³⁹ **RLA-0114**, *Fireman’s Fund* (Canada’s Submission), ¶ 17.

⁴⁴⁰ **RLA-0114**, *Fireman’s Fund* (Canada’s Submission), ¶ 17.

⁴⁴¹ **RLA-0114**, *Fireman’s Fund* (Canada’s Submission), ¶ 16.

⁴⁴² See **RLA-0112**, *Fireman’s Fund* (Decision), ¶ 66 (rejecting the claimant’s claim under Article 1405 because “Article 1405 is not included among the provisions to which the procedural provisions of Chapter Eleven apply (Articles 1115-1138)”).

equitable treatment and national treatment claims, because such claims were not listed in Article 1401(2).⁴⁴³

244. Given the similarities in the treaty text of NAFTA Article 1401 and TPA Article 12.1.2, respectively, as well as their analogous design and structure, the interpretation of such provisions according to the VCLT rules of treaty interpretation (discussed in the following section) should be the same. Claimants appear to concur in that regard.⁴⁴⁴ The reasoning and conclusion of the *Fireman's Fund* tribunal, therefore, offer useful guidance for the present case: a claimant can submit to arbitration under Chapter 12 of the TPA only claims that are based on substantive provisions that are expressly listed in TPA Article 12.1.2(b). Since such list does not include fair and equitable treatment or national treatment provisions, claims based on those protections cannot be submitted to investor-State arbitration under Chapter 12.

ii. Colombia's interpretation of Article 12.1.2(b) is consistent with customary principles of treaty interpretation

245. The Parties agree that TPA Article 12.1.2(b) must be interpreted in accordance with the customary principles of treaty interpretation set forth in Articles 31 and 32 of the VCLT.⁴⁴⁵ Such principles provide that a treaty must be interpreted (a) in accordance with the plain meaning to be given to its terms, (b) in their context, and

⁴⁴³ **RLA-0112**, *Fireman's Fund* (Decision), ¶ 66 ("Several provisions of Chapter Eleven are incorporated into Chapter Fourteen, including, as here relevant, Article 1110 concerning Expropriation and Compensation, and Articles 1115-1138 concerning the procedural aspects of dispute resolution by a tribunal such as the present one. Article 1102 on National Treatment and Article 1105 on Minimum Standard of Treatment are not incorporated into Chapter Fourteen. Accordingly, if the measures alleged to have been taken on behalf of the Government of Mexico are covered by Chapter Fourteen, this Tribunal lacks jurisdiction of the claims under Articles 1102 and 1105.").

⁴⁴⁴ See, e.g., Claimants' Reply (PCA), ¶ 270 (relying on NAFTA to interpret the TPA).

⁴⁴⁵ See Claimants' Reply (PCA), ¶ 278.

(c) in the light of the treaty's object and purpose.⁴⁴⁶ In the event that the meaning remains ambiguous or unreasonable, the preparatory works may be consulted.⁴⁴⁷ In the sections that follow, Colombia will apply each of these principles of interpretation to Article 12.1.2(b), and will also rebut the arguments related to these principles that Claimants scattered throughout their Reply.

246. As noted above, Claimants devoted much time and energy to an interpretation of NAFTA – as did Claimants' experts.⁴⁴⁸ In light of that, although the sub-sections that follow immediately below address those of Claimants' arguments that were specific to the TPA, Colombia will subsequently address Claimants' arguments concerning NAFTA.

1) The ordinary meaning of Article 12.1.2(b)

247. The "starting point of all treaty interpretation is the elucidation of the meaning of the text."⁴⁴⁹ Such elucidation in turn is achieved principally by reference to the plain text of the relevant treaty, construing its terms in their ordinary meaning.⁴⁵⁰

248. The text of Article 12.1.2(b) provides:

Section B (Investor-State Dispute Settlement) of Chapter Ten (Investment) is hereby incorporated into and made a part of this Chapter **solely for claims that a Party has breached Articles 10.7 (Expropriation and Compensation), 10.8 (Transfers), 10.12 (Denial of Benefits), or 10.14 (Special**

⁴⁴⁶ **CLA-0124**, VCLT, Art. 31(1).

⁴⁴⁷ **CLA-0124**, VCLT, Art. 32.

⁴⁴⁸ See generally First and Second Wethington Reports.

⁴⁴⁹ **CLA-0095**, *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14 (Narimann, Bernárdez, Bernardini), Award, 8 December 2008 ("**Wintershall (Award)**"), ¶ 78. See also **CLA-0202**, *Methanex Corporation v. United States of America*, UNCITRAL (Rowley, Reisman, Veeder), Final Award, 3 August 2005, Part II, Ch. B, ¶ 22 ("[T]he approach of the Vienna Convention is that the text of the treaty is deemed to be the authentic expression of the intentions of the parties; and its elucidation, rather than wide-ranging searches for the supposed intentions of the parties, is the proper object of interpretation.").

⁴⁵⁰ See **CLA-0124**, VCLT, Art. 31(1).

Formalities and Information Requirements), as incorporated into this Chapter.⁴⁵¹ (Emphasis added)

249. As Colombia noted in its Answer, the word “solely” limits the type of claims that can be submitted to investor-State dispute settlement under Chapter 12.⁴⁵² The result is that a financial services investor can only submit to arbitration claims that the State has breached Articles 10.7 (Expropriation and Compensation), 10.8 (Transfers), 10.12 (Denial of Benefits), and/or 10.14 (Special Formalities and Information Requirements). Conversely, a financial services investor *cannot* submit to arbitration claims that the State has breached any other type of substantive protection (such as fair and equitable treatment, or national treatment).
250. As explained in the previous section, this analysis of the ordinary meaning of the terms of Article 12.1.2(b) has been confirmed by the *Fireman’s Fund* tribunal.⁴⁵³ Notably, Claimants did not mention the *Fireman’s Fund* decision, either in their Memorial or in their Reply.
251. Another tribunal that gave effect to a provision limiting the States’ consent to arbitration to certain types of claims was that in *Telenor v. Hungary*. Article XI of the Norway-Hungary BIT, which was the relevant treaty in that case, provided:

1. This Article shall apply to any legal disputes between an Investor of one Contracting Party and the other Contracting Party in relation to an investment of the former either concerning the amount or payment of compensation under Article V and VI of the present Agreement, or concerning any other matter consequential upon an act of expropriation in accordance with Article VI of the present Agreement or concerning the consequences of the non-implementation or of

⁴⁵¹ **RLA-0001**, TPA, Art. 12.1.2(b).

⁴⁵² See Colombia’s Answer (PCA), ¶ 304.

⁴⁵³ See **RLA-0112**, *Fireman’s Fund* (Decision), ¶ 66.

the incorrect implementation of Article VII of the present agreement.⁴⁵⁴

252. The *Telenor* tribunal held in no uncertain terms that “in article XI of their BIT[,] Hungary and Norway have made a deliberate choice to limit arbitration to the categories specified in that Article and have eschewed the wide form of dispute resolution clause adopted in many of their other BITs.”⁴⁵⁵ On that basis, and stressing that the scope of the relevant dispute resolution clause was limited to expropriation claims, the *Telenor* tribunal dismissed the claimant’s fair and equitable claims.⁴⁵⁶ Accordingly, it reached a similar conclusion to that espoused herein by Colombia with respect to Article 12.1.2(b) of the TPA.
253. Notwithstanding the plain meaning of Article 12.1.2(b), and the relevant case law discussed above, Claimants insist that they can indeed submit claims to arbitration even for violations of substantive protections that are not listed in Article 12.1.2(b). Claimants concede that Article 12.1.2(b) limits the Chapter 10 claims that can be submitted to arbitration,⁴⁵⁷ but argue that Article 12.1.2(b) does not apply to the rest of Chapter 12, and therefore does not prevent them from forcing arbitration of claimed violations of other substantive protections contained in Chapter 12.⁴⁵⁸ Thus, Claimants posit that “Article 12.1.2(b) supplements and does not restrict” the set of claims under Chapter 12 that can be submitted to arbitration.⁴⁵⁹ In other

⁴⁵⁴ **CLA-0088**, *Telenor* (Award), ¶ 25.

⁴⁵⁵ **CLA-0088**, *Telenor* (Award), ¶ 97. *See also id.*, ¶ 81 (discussing “the Tribunal’s jurisdiction, which is limited by Article XI to expropriation claims”).

⁴⁵⁶ *See* **CLA-0088**, *Telenor* (Award), ¶ 81.

⁴⁵⁷ Claimants’ Reply (PCA), ¶ 163 (“Article 12.1.2(b) limits the number of substantive protection standards that are imported from Chapter 10 to Chapter 12 for which the Chapter 10 dispute resolution procedural rights are available.”).

⁴⁵⁸ *See* Claimants’ Reply (PCA), ¶ 163 (“Article 12.1.2(b) does not provide that Financial Services investors cannot enforce Chapter 12 substantive rights.”), ¶ 285 (“Claimants do not read into the word ‘solely’ as extending in *any* matter to *any* substantive provision contained in Chapter 12.”); Second Mistelis Expert Report, ¶ 76 (“[W]ithout doubt, Article 12.1 cannot apply to Articles 12.2 (National Treatment) and 12.3 (Most-Favoured-Nation Treatment).”).

⁴⁵⁹ Claimants’ Reply (PCA), ¶ 137.

words, Claimants contend that a claimant can submit to arbitration under Chapter 12 claims not only for breach of the protections set forth in Articles 10.7, 10.8, 10.12, or 10.14 (which are the ones expressly identified in the Article 12.1.2(b) list), *but in addition* for breach of any of the substantive provisions contained in Chapter 12 itself.⁴⁶⁰ Colombia agrees with the former prong, but not the latter.

254. Claimants' proposed interpretation fails for at least three reasons. First, Claimants' interpretation runs counter to the plain meaning of Article 12.1.2(b). As discussed above, Article 12.1.2(b) incorporates the investor-State dispute mechanism of Chapter 10 "solely" for four (specifically identified) types of claims.⁴⁶¹ Accordingly, the list set forth in Article 12.1.2(b) is an exhaustive one. In arguing that such provision merely "supplements and does not restrict" the types of claims that can be submitted to arbitration,⁴⁶² Claimants are depriving the word "solely" of any meaning.⁴⁶³
255. Second, there is simply no other treaty interpretation basis for Claimants' argument. Claimants have not identified any aspect of the TPA text that supports their interpretation. Since they cannot identify a single word or phrase in the treaty that supports their proposition that Article 12.1.2(b) merely "supplements and does not restrict" the types of protections that are subject to arbitrable claims,⁴⁶⁴ Claimants content themselves with proclaiming what they "understand,"⁴⁶⁵ and

⁴⁶⁰ See Claimants' Reply (PCA), ¶¶ 285–86.

⁴⁶¹ **RLA-0001**, TPA, Art. 12.1.2(b).

⁴⁶² Claimants' Reply (PCA), ¶ 137.

⁴⁶³ Notably, Claimants' interpretation is contradicted by one of their own experts. In his "expert declaration" (which is a document separate from his expert report), Professor Coe recognizes that it is at least "plausible" that the word "solely" in Article 12.1.2(b) could mean that the four types claims listed in Article 12.1.2(b) are the only four claims that a Chapter 12 investor can assert against a respondent State. Expert Declaration of Jack Coe, p. 6. Of course, given the plain text of Article 12.1.2(b), such thesis is more than merely "plausible."

⁴⁶⁴ Claimants' Reply (PCA), ¶ 137.

⁴⁶⁵ Claimants' Reply (PCA), ¶ 285.

what they “read”⁴⁶⁶ into the provision. The irony appears to be lost on Claimants that the “plain meaning interpretation”⁴⁶⁷ that they purport to offer in their Reply is completely divorced from the plain meaning of the actual terms of the treaty.

256. Third, Claimants criticize Colombia’s analysis of the plain meaning of the text of the TPA on the asserted basis that such interpretation “depriv[es]” Claimants of their alleged right to enforce the substantive obligations of Chapter 12.⁴⁶⁸ Claimants’ argument appears to be predicated on the erroneous assumption that an investor has an inherent right to submit claims against a State. However, no such inherent right exists: rather, a claimant may only submit claims to the extent that a State has provided its consent for such claims.⁴⁶⁹
257. Previous tribunals have consistently applied provisions that limited the scope of consent to certain claims, even though the effect of such determination was to leave certain asserted substantive rights without enforcement.⁴⁷⁰ For example, the *Emmis v. Hungary* tribunal interpreted and applied two treaties, both of which

⁴⁶⁶ Claimants’ Reply (PCA), ¶ 285.

⁴⁶⁷ Claimants’ Reply (PCA), ¶ 285.

⁴⁶⁸ See Claimants’ Reply (PCA), ¶ 153 (“Respondent’s plain meaning analysis is foundationally flawed when extended to its necessary and legal consequences. ***It ignites a dynamic that renders unenforceable and unworkable all of the Chapter 12 substantive provisions*** while inviting tortured constructions of the Chapter’s procedural provisions: Articles 12.18 (Dispute Settlement), and 12.19 (Investment Dispute in Financial Services).”) (emphasis added).

⁴⁶⁹ See, e.g., **RLA-0034**, *ICS* (Award on Jurisdiction), ¶ 280 (“Consent to the jurisdiction of a judicial or quasi-judicial body under international law is either proven or not according to the general rules of international law governing the interpretation of treaties. The burden of proof for the issue of consent falls squarely on a given claimant who invokes it against a given respondent. Where a claimant fails to prove consent with sufficient certainty, jurisdiction will be declined”); **RLA-0079**, *Certain Questions of Mutual Assistance* (Judgment), ¶ 62 (“[W]hatever the basis of consent, the attitude of the respondent State must ‘be capable of being regarded as ‘an unequivocal indication’ of the desire of that State to accept the Court’s jurisdiction in a ‘voluntary and indisputable’ manner””) (internal citations omitted).

⁴⁷⁰ See, e.g., **CLA-0088**, *Telenor* (Award), ¶ 97 (“It therefore seems clear that in Article XI of their BIT Hungary and Norway have made a deliberate choice to limit arbitration to the categories specified in that Article and have eschewed the wide form of dispute resolution clause adopted in many of their other BITs.”).

contained dispute resolution provisions that limited the scope of consent to arbitrate solely to expropriation claims.⁴⁷¹ In its analysis, the *Emmis* tribunal noted that, although the substantive protections offered in the treaty “go well beyond the protection from expropriation,”⁴⁷² “the Contracting States decided to limit the scope of the right of an investor to invoke the jurisdiction of an international arbitral tribunal to a single cause of action [i.e., expropriation].”⁴⁷³ On this basis, the *Emmis* tribunal concluded that “the Tribunal lacks jurisdiction over all claims except expropriation.”⁴⁷⁴ Thus, in *Emmis* the fact that the other substantive protections could not be the subject of investor-State arbitration claims did not in and of itself constitute an impediment to dismissal of the claims, given the plain language of the treaty and the limits on consent set forth therein. The same reasoning and result should obtain here.

2) The context of Article 12.1.2(b)

258. Article 31 of the VCLT also requires that the terms of a treaty be interpreted “in their context.”⁴⁷⁵ The Parties herein agree that the “context” of a treaty term includes the surrounding terms and provisions.⁴⁷⁶
259. Claimants argue that Article 12.1.2(b) does not apply to the substantive protections that are indigenous to Chapter 12 itself, and that therefore a claimant can submit to arbitration under Chapter 12 claims for violation of *any* of the Chapter 12

⁴⁷¹ **RLA-0115**, *Emmis International Holding, B.V. et al. v. Hungary*, ICSID Case No. ARB/12/2 (McLachlan, Lalonde, Thomas), Award, 16 April 2014 (“*Emmis (Award)*”), ¶ 142 (“[I]t is a striking feature of the investor-state arbitration agreements in both Treaties that they limit the scope of disputes capable of submission to arbitration by an investor to expropriation claims only”).

⁴⁷² **RLA-0115**, *Emmis (Award)*, ¶ 143.

⁴⁷³ **RLA-0115**, *Emmis (Award)*, ¶ 143.

⁴⁷⁴ **RLA-0115**, *Emmis (Award)*, ¶ 144. *See also id.*, ¶ 142 (“Disputes concerning any other [substantive obligation (other than expropriation)] may be submitted to arbitration only with the consent of both disputing parties. Hungary gave no such consent in the case of the present dispute.”).

⁴⁷⁵ **CLA-0124**, VCLT, Art. 31(1).

⁴⁷⁶ *See Claimants’ Reply (PCA)*, ¶ 11.

substantive provisions. However, the context of Article 12.1.2(b) shows that Claimants' theory is misguided, and that Claimants are interpreting Article 12.1.2(b) in a vacuum. The foregoing is demonstrated by the following contextual factors:

- a. The title of Article 12.1 is "Scope and Coverage," which is a clear indication that the Article governs the content and defines the scope of Chapter 12 (in its entirety).
- b. Article 12.1.2 (which is the *chapeau* of Article 12.1.2(b)) provides: "Chapters Ten (Investment) and Eleven (Cross-Border Trade in Services) apply to measures described in paragraph 1 **only to the extent** that such Chapters or Articles of such Chapters are incorporated into this Chapter"⁴⁷⁷ (emphasis added). Put differently, the investor-State dispute resolution provisions of Chapter 10 apply to Chapter 12 "only to the extent" provided for in Article 12.1.2(b). Thus, Article 12.1.2(b) restricts the set of claims that can be submitted to arbitration under Chapter 12.

260. Despite the foregoing, Claimants assert that the context of Article 12.1.2(b) supports their interpretation. Claimants present two arguments in this respect, both of which fail. First, Claimants point to the allegedly "wide and generous panoply of substantive and procedural rights" set forth in Chapter 12.⁴⁷⁸ Specifically, Claimants argue that Article 12.1.2(b) must be interpreted in such a way as to "accord[] meaning, textual relevance, and enforcement" to the other provisions of Chapter 12.⁴⁷⁹

261. However, contrary to what Claimants suggest, neither the VCLT nor customary international law requires a treaty provision to be interpreted in such a way as to

⁴⁷⁷ RLA-0001, TPA, Art. 12.1.2.

⁴⁷⁸ Claimants' Reply (PCA), ¶ 167.

⁴⁷⁹ Claimants' Reply (PCA), ¶ 167.

“enforce” other provisions of the treaty. Indeed, the International Court of Justice has affirmed that the interpretation of a treaty provision must be based on the ordinary meaning of the relevant text, even if that meaning deprives a party of a remedy. For example, in the case concerning *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, the Court was called upon to interpret the dispute resolution provision of a treaty. The Court noted that by a “plain meaning” interpretation of such provision, either party could unilaterally derail the dispute settlement process, thereby preventing the other party from enforcing its rights.⁴⁸⁰ Notwithstanding the foregoing, the Court refused to deviate from the plain meaning of the treaty terms, observing that “[i]t is the duty of the Court to interpret the treaties, not to revise them.”⁴⁸¹

262. The above-referenced *Emmis v. Hungary* tribunal adopted a similar approach when assessing its jurisdiction. In that case there were two applicable treaties, both of which contained dispute resolution provisions that provided consent to arbitrate only for claims of expropriation. Consistent with these provisions, the *Emmis* tribunal dismissed all but the claimants’ expropriation claims, for lack of jurisdiction.⁴⁸² Claimants’ argument that Colombia’s interpretation of Article 12.1.2(b)—in accordance with its plain meaning—would leave other provisions without enforcement therefore is inapposite.
263. Second, Claimants call attention to Footnote 1 of Chapter 11 (the “Cross-Border Trade in Services” Chapter), which states:

The Parties understand that nothing in this Chapter [11], including this paragraph, is subject to investor-state dispute

⁴⁸⁰ See **RLA-0117**, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, ICJ, Advisory Opinion, 18 July 1950 (“*Interpretation of Peace Treaties (Second Phase Advisory Opinion)*”), pp. 228–29.

⁴⁸¹ **RLA-0117**, *Interpretation of Peace Treaties (Second Phase Advisory Opinion)*, p. 229.

⁴⁸² See **RLA-0115**, *Emmis (Award)*, ¶¶ 142–43.

settlement pursuant to Section B of Chapter Ten (Investment).⁴⁸³

264. Claimants argue that if the Treaty Parties had intended for the substantive provisions of Chapter 12 not to be subject to investor-State dispute settlement, then Chapter 12 would have included a footnote similar to the above-quoted one contained in Chapter 11.
265. However, Claimants' observation is misguided. Whereas Chapter 11 excludes investor-State dispute settlement for *all* substantive protections, Chapter 12 enables dispute settlement for certain substantive protections explicitly listed in Article 12.1.2(b). A footnote similar to Footnote 1 of Chapter 11 was not needed in Chapter 12 because Colombia and the United States did not want to exclude investor-State dispute settlement for *all* substantive protections—as they did in respect of Cross-Border Trade in Services— but rather wishes to exclude only those protections that were not explicitly listed in Article 12.1.2(b).
266. In light of the foregoing analysis, the context of Article 12.1.2(b) confirms that investor-State dispute settlement under Chapter 12 is limited to the four types of claims listed in Article 12.1.2(b).

3) The object and purpose of the TPA

267. Article 12.1.2(b) must also be interpreted “in light of [the TPA’s] object and purpose.”⁴⁸⁴ Claimants' assertions about the object and purpose of the TPA do not support their interpretation of Article 12.1.2(b).
268. Claimants argue that Chapter 12 of the TPA, and the TPA as a whole, must not be interpreted as if it were a BIT.⁴⁸⁵ According to Claimants, “[t]he policies attendant

⁴⁸³ **RLA-0001**, TPA, Ch. 11, fn. 1.

⁴⁸⁴ **CLA-0124**, VCLT, Art. 31(1).

⁴⁸⁵ Claimants' Reply (PCA), ¶ 142.

to an agreement that covers both trade *and* investment protection objectives are broader than those incident to most BITs.”⁴⁸⁶

269. However, the rules of treaty interpretation are the same in respect of any and all treaties, and apply equally to free trade agreements as they do to international investment treaties. The cardinal rule of interpretation is that a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty, in their context and *in the light of its object and purpose*.⁴⁸⁷ However, nothing in the object and purpose of the TPA either requires or justifies disregarding the ordinary meaning to be given to the terms therein (including in Article 12.1.2), nor does it justify expanding the scope of consent of the State Parties to provide investor-State dispute settlement for *all* substantive protections (either from Chapter 10 or Chapter 12). Yet that it is precisely what Claimants are attempting to do herein.
270. Claimants appear to be arguing that the object and purpose of the TPA supports their interpretation because providing a mechanism for the submission of claims for investors is necessary to effectuate the TPA’s general purpose of protecting investments.⁴⁸⁸ However, this argument ignores the very “cornerstone” of investment arbitration: “An arbitral tribunal owes its jurisdiction solely to the consent of the parties.”⁴⁸⁹ Consistent with the fundamental principle of consent, States are free to limit the scope of their consent to arbitration. States often do so through the dispute resolution clauses in their treaties, including by expressly

⁴⁸⁶ Claimants’ Reply (PCA), ¶ 281.

⁴⁸⁷ See **CLA-0124**, VCLT, Art. 31(1).

⁴⁸⁸ See Claimants’ Reply (PCA), p. 16 (“Respondent’s interpretive analysis of Art. 12.1.2(b) carves out of Chapter 12 (Financial Services) the conceptual content and practical application of Articles 12.2 (National Treatment) and 12.3 (MFN), reducing these and all other substantive provisions in Chapter 12 to the status of rights without remedies, a result that frustrates the workings, purpose and objectives of that Chapter.”).

⁴⁸⁹ **RLA-0115**, *Emmis* (Award), ¶ 140. See also ICSID Convention, Art. 25 (“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment . . . which the parties to the dispute consent in writing to submit to the Centre”).

limiting the types of claims that investors can submit to arbitration. For example, the *A11Y Ltd. v. Czech Republic* interpreted and applied a dispute resolution clause that limited consent to arbitration to claims under four specified substantive provisions of the treaty.⁴⁹⁰ The tribunal dismissed for lack of jurisdiction all but the claims made under those four specified substantive provisions.⁴⁹¹

271. Similarly, as discussed above, the *Emmis v. Hungary* interpreted the Netherlands-Hungary BIT, which provided consent to arbitrate “[a]ny dispute between either Contracting Party and the investor of the other Contracting Party **concerning expropriation or nationalization** of an investment”⁴⁹² (emphasis added). By Claimants’ reasoning, such an express limitation would contravene the general purpose of a treaty to protect investments, which obviously is not the case.
272. Importantly, in interpreting jurisdictional provisions, previous tribunals have explicitly affirmed that the general object of protecting investments does not translate into a presumption in favor of jurisdiction.⁴⁹³ To the contrary, tribunals

⁴⁹⁰ **RLA-0072**, *A11Y Ltd. v. Czech Republic*, ICSID Case No. UNCT/15/1 (Fortier, Alexandrov, Joubin-Bret), Decision on Jurisdiction, 9 February 2017 (“**A11Y (Decision on Jurisdiction)**”), ¶ 65.

⁴⁹¹ **RLA-0072**, *A11Y* (Decision on Jurisdiction), ¶ 90 (“In summary, the Tribunal concludes that it has jurisdiction over alleged violations of Articles 2(3), 4, 5 and 6 of the Treaty but not over violations of other Articles of the Treaty.”).

⁴⁹² **RLA-0115**, *Emmis* (Award), ¶ 142.

⁴⁹³ See, e.g., **RLA-0112**, *Fireman’s Fund* (Decision), ¶ 64 (“Claimant submits that, as a general policy consideration, direct investor recourse to arbitration has become the rule in modern investment agreements, although there may be exceptions, and that the value of investor-state arbitral mechanism is so substantial that it should only be foreclosed when that result is unmistakably required by treaty provision. Whilst it is correct that there are more than 1,400 (some say more than 2,000) Bilateral Investment Treaties which contemplate investor-state arbitration (albeit under differing conditions) and that the value of investor-state arbitral mechanism is substantial, the Tribunal does not believe that under contemporary international law a foreign investor is entitled to the benefit of the doubt with respect to the existence and scope of an arbitration agreement.”); **CLA-0055**, *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7 (Veeder, Fortier, Stern), Award, 3 April 2014, ¶ 117 (“As was decided by the International Court of Justice in *Bosnia-Herzegovina v Yugoslavia*, there must be an “unequivocal indication’ of a ‘voluntary and indisputable’ acceptance” of consent; and, as was also decided by a NAFTA arbitration tribunal, in the case *Fireman’s Fund v. Mexico*, a claimant ‘is not entitled to the benefit of the doubt with respect to the existence and scope of an arbitration agreement’”).

have adopted a neutral approach to the question of jurisdiction,⁴⁹⁴ basing their analysis – as they should – on the terms of the treaty, as required by the VCLT.

4) The *travaux préparatoires* of the TPA

273. Pursuant to Article 32 of the VCLT, the *travaux préparatoires* of a treaty provide a supplementary means of interpretation of such treaty. Specifically, the *travaux préparatoires* are to be consulted only “when the interpretation according to article 31 [of the VCLT]: (a) [l]eaves the meaning ambiguous or obscure; or (b) [l]eads to a result which is manifestly absurd or unreasonable.”⁴⁹⁵

274. As demonstrated in the preceding sections, a plain text interpretation of the relevant TPA provisions does not yield a result that is “ambiguous or obscure,” nor to one that is absurd or unreasonable. To the contrary, the plain language of Article 12.1.2(b) and its context fully substantiate Colombia’s interpretation. Resort to the *travaux préparatoires* for the purpose of interpreting Article 12.1.2(b), as Claimants attempt to do, is therefore not necessary or justified.

iii. Claimants’ attempt to use other means of interpretation should be rejected

275. Perhaps because their arguments based upon the customary principles of interpretation are manifestly insufficient, Claimants in their Reply proffer other asserted means of interpretation. In particular, Claimants (i) rely on the alleged “treaty practice” of the United States and Colombia;⁴⁹⁶ and (ii) purport to interpret

⁴⁹⁴ See, e.g., **RLA-0116**, *El Paso Energy International Co. v. The Argentine Republic*, ICSID Case No ARB/03/15 (Caflisch, Stern, Bernardini), Decision on Jurisdiction, 27 April 2006 (“*El Paso Energy (Decision on Jurisdiction)*”), ¶¶ 68, 70 (“[I]nvestors often contend that, as a BIT’s purpose is to protect them, the interpretation of treaties for the promotion and the protection of investments, viewed in their context and according to their object and purpose, leads to an interpretation in favour of the investors. . . . This Tribunal considers that a balanced interpretation is needed, taking into account both State sovereignty and the State’s responsibility to create an adapted and evolutionary framework for the development of economic activities, and the necessity to protect foreign investment and its continuing flow.”).

⁴⁹⁵ **CLA-0124**, VCLT, Art. 32.

⁴⁹⁶ Claimants’ Reply (PCA), ¶ 141.

the TPA but in doing so substitutes NAFTA for the TPA. Colombia will briefly address below each of these unorthodox (and ill-founded) interpretive arguments.

1) The States Parties' alleged "treaty practice"

276. Claimants (and their expert⁴⁹⁷) rely upon the alleged "treaty practice" of the United States and Colombia in their analysis of Article 12.1.2(b).⁴⁹⁸ Referring to treaties concluded by the United States and Colombia with other States, Claimants posit that, as a rule, "the US and Colombia explicitly state in writing any qualifications or restrictions to a right or obligation in a treaty or agreement."⁴⁹⁹ Claimants allege that Article 12.1.2(b) must be interpreted in light of this alleged "treaty practice."⁵⁰⁰ According to Claimants, such practice supports their interpretation of Article 12.1.2(b) as a provision that "supplements and does not restrict" the claims that can be submitted to arbitration under Chapter 12.⁵⁰¹
277. Colombia notes, as a threshold matter, that there is no such thing as a rule of treaty interpretation based on States' alleged "treaty practice." As observed by the *Rompetrol v. Romania* tribunal:

There is nothing in the Vienna Convention that would authorize an interpreter to bring in as interpretative aids when construing the meaning of one bilateral treaty the provisions of other treaties concluded with other partner States.⁵⁰²

278. In any event, in the TPA, Colombia and the United States have explicitly stated in writing certain qualifications and restrictions concerning (a) the rights that an

⁴⁹⁷ See Second Wethington Expert Report, ¶ 32 (discussing the Parties' "treaty practice").

⁴⁹⁸ Claimants' Reply (PCA), ¶ 141.

⁴⁹⁹ Claimants' Reply (PCA), ¶ 288.

⁵⁰⁰ Claimants' Reply (PCA), ¶ 293.

⁵⁰¹ Claimants' Reply (PCA), ¶ 137.

⁵⁰² **CLA-0089**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3 (Berman, Donovan, Lalonde), Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008 ("**Rompetrol (Decision)**"), ¶ 108.

investor may invoke in respect of measures covered by Chapter 12, and (b) the scope of their consent to submit claims to investor-State arbitration. For instance, Article 12.1.2(b) explicitly articulates such a restriction, by narrowly limiting the scope of investor-State dispute settlement under Chapter 12 to four specific types of claims: claims under Articles 10.7, 10.8, 10.12, and 10.14.

2) Claimants base their interpretation on NAFTA rather than the TPA

279. In their Reply, Claimants explicitly state that they “interpret Art. 12.1.2(b), Chapter 12 (Financial Services), and the entirety of the TPA in accordance with Art. 102 (Objectives) of the NAFTA.”⁵⁰³ In other words, Claimants openly admit that they are substituting the object and purpose of NAFTA—a trilateral agreement negotiated decades before the TPA—for the object and purpose of the TPA when interpreting the TPA. Claimants also assert—bizarrely, since Colombia is not a party to NAFTA—that “[t]he NAFTA is in effect the *travaux préparatoires* of the TPA.”⁵⁰⁴ Parting from this erroneous premise, Claimants and their expert set out to analyze what they consider to be relevant strands of the NAFTA *travaux*. Tellingly, however, Claimants failed to submit *any* documentary evidence related to the negotiation of the TPA. Instead, Claimants and their expert focus exclusively on the NAFTA negotiating history. For example, Mr. Wethington posits that the drafting history of NAFTA “derivatively applies to Chapter 12 of the TPA.”⁵⁰⁵ Claimants, for their part, submitted as “evidence” U.S. congressional testimony

⁵⁰³ Claimants’ Reply (PCA), ¶ 281. *See also id.*, ¶ 282 (citing Article 102 of NAFTA in support of arguments about the object and purpose of the TPA).

⁵⁰⁴ Claimants’ Reply (PCA), fn. 210.

⁵⁰⁵ Claimants’ Reply (PCA), ¶ 404.

from the 1990's concerning NAFTA,⁵⁰⁶ excerpts of a book about the drafting of NAFTA, and academic articles on the history of NAFTA.⁵⁰⁷

280. However, none of that is at all relevant in this proceeding. Neither the VCLT nor customary international law authorizes the interpretative exercise that Claimants have undertaken. The object and purpose and drafting history of NAFTA cannot be imported into the analysis of the TPA, which is a separate treaty.
281. In any event, there are a variety of problems with Claimants' interpretation of NAFTA. For the sake of brevity, Colombia will highlight below three illustrative examples.
282. First, Claimants appear to rely upon Mr. Wethington's testimony as if that testimony itself were part of the drafting history of NAFTA. However, as discussed in Colombia's Answer, and despite Claimants' bizarre statements in their Reply,⁵⁰⁸ Mr. Wethington's personal recollections about the NAFTA negotiations do not constitute either a primary or supplementary means of interpretation under the VCLT.⁵⁰⁹ Moreover, Claimants impermissibly blur the line between an expert and a fact witness, asserting for example that "Mr. Wethington has offered this testimony as a matter of expert legal opinion . . . [but] has testified to this proposition *also* as a matter of factual personal knowledge."⁵¹⁰

⁵⁰⁶ See **Ex. C-0030**, Hearing before the Committee on Banking, House of Representatives, 28 September 1993; **Ex. C-0031**, Report of the Services Policy Advisory Committee (SPAC), 11 September 1992. See also Second Wethington Expert Report, fns. 3, 6.

⁵⁰⁷ See Second Wethington Expert Report, fn. 4 (citing **CLA-0365**, Jennifer A. Heindl, "Toward a History of NAFTA's Chapter Eleven," Berkeley J. Int'l Law, 2006).

⁵⁰⁸ See Claimants' Reply (PCA), ¶ 308 ("When stripped to its core meaning, Respondent asserts that because Mr. Wethington is a natural person and not an inanimate draft piece of paper, his testimony is of no moment. This proposition speaks for itself and defies characterization."). To the contrary, what should "speak for itself" is the self-evident fact that a *person* cannot qualify as part of "the preparatory work of [a] treaty." **CLA-0124**, VCLT, Art. 32.

⁵⁰⁹ Colombia's Answer (PCA), ¶ 352.

⁵¹⁰ Claimants' Reply (PCA), ¶ 299.

283. Second, Mr. Wethington’s views on the meaning of the “Scope and Coverage” provision of NAFTA Chapter 14 are directly contradicted by the written submissions of Mexico and Canada on the same subject in the *Fireman’s Fund* arbitration, as discussed above. (The United States did not address this issue in its written submission in that case.)
284. Third, the documentary evidence upon which Claimants rely does not substantiate Claimants’ interpretation of NAFTA Chapter 14. For instance, Claimants, Mr. Wethington, and Professor Mistelis all place great emphasis on statements by U.S. Deputy Assistant Secretary for International Affairs Barry Newman before the U.S. Congress in the early 1990s.⁵¹¹ In particular Claimants and their experts assert that Mr. Newman’s testimony proves that the substantive protections of NAFTA Chapter 14 are indeed subject to investor-State arbitration (as Claimants contend herein with respect to Chapter 12 of the TPA). However, Mr. Newman’s testimony does no such thing.
285. For example, Mr. Wethington relies on the following statement by Mr. Newman:
- ‘The benefits that Mexico gets in the financial services area – I can only speak to that – is the guarantee that the provisions for national treatment, for transparency, and so and so forth will apply to them when they are in the United States market. And, in addition, if we perchance violate those, they have a dispute settlement arrangement where they will be able to redress their grievances for US violations.’⁵¹²
286. Mr. Wethington argues that this statement by Mr. Newman proves that *all* financial services protections are subject to investor-State dispute settlement.⁵¹³ However, the context reveals that Mr. Newman was referring to the *State-to-State* dispute settlement provisions of Chapter 14, not to the investor-State dispute

⁵¹¹ See, e.g., Claimants’ Reply (PCA), ¶ 387; Second Wethington Expert Report, ¶¶ 43–44; Second Mistelis Expert Report, ¶¶ 82–83.

⁵¹² Second Wethington Expert Report, ¶ 43.

⁵¹³ See Second Wethington Expert Report, ¶ 44.

settlement provisions. Indeed, he discussed “[t]he benefits that **Mexico** gets” (emphasis added), and then observed that “if we [(i.e., the United States)] perchance violate those, they [(i.e., Mexico)] have a dispute settlement arrangement”⁵¹⁴ Thus, even if they were relevant herein (which they are not), Claimants’ arguments about the drafting history of NAFTA would not withstand scrutiny.

287. In sum, Article 12.1.2(b) excludes from the scope of Colombia’s consent to arbitration under Chapter 12 all but the four types of claims specifically listed therein. Consequently, Claimants cannot submit to arbitration under Chapter 12 any claims for violation of fair and equitable treatment.

b. Claimants cannot use the Chapter 12 MFN Clause to create consent to arbitrate fair and equitable treatment or national treatment claims under Chapter 12

288. In their Reply, Claimants insist that no matter how Article 12.1.2(b) is interpreted, they can submit their fair and equitable treatment and national treatment claims by using the Chapter 12 MFN Clause of the TPA to import more favorable provisions from the Colombia-Switzerland BIT. Indeed, Claimants devote much of their Reply to arguments proclaiming the seemingly unending potential of the Chapter 12 MFN Clause. However, in that discussion, Claimants fail to distinguish between the three different ways that they are attempting to use the Chapter 12 MFN Clause:

a. First, Claimants seek to use the Chapter 12 MFN Clause to import more favorable conditions of consent to arbitration (e.g., by replacing the TPA’s

⁵¹⁴ Second Wethington Expert Report, ¶ 43. *See also* Claimants’ Reply (PCA), ¶ 387. Claimants quote the following statement: “Mr. Newman: They will have assurances that in the future we will not take discriminatory actions [national treatment protection] against Mexican firms as a result of the NAFTA and that, if we were to do so, they will have a mechanism by which to resolve any disputes.” The context of this statement reveals that when Mr. Newman observed that “**they** will have a mechanism by which to resolve any disputes” (emphasis added), he was referring to the Mexican Government.

three-year limitations period with the Colombia-Switzerland BIT's five-year limitations period) (discussed in **Section II.A.3** above);

- b. Second, Claimants seek to use the Chapter 12 MFN Clause to import and invoke a substantive protection contained under the Colombia-Switzerland BIT that is not contained in the TPA (discussed in **Section II.B.2** above); and
- c. Third, Claimants seek to use the Chapter 12 MFN Clause to create consent to arbitrate, under Chapter 12, claims with respect to obligations beyond those contained in the exhaustive list set forth in Article 12.1.2(b).

289. Claimants' third and final purported use of the Chapter 12 MFN Clause is discussed in this section. Claimants seek to use the Chapter 12 MFN Clause to import the dispute resolution provisions of the Colombia-Switzerland BIT. Such provisions do not limit the types of claims that can be submitted to arbitration.

290. Claimants cannot use the Chapter 12 MFN Clause to submit their fair and equitable treatment and national treatment claims. In the following sections, Colombia will demonstrate that (i) Claimants cannot use the Chapter 12 MFN Clause to manufacture consent to arbitration; (ii) Claimants' attempt to use the Chapter 12 MFN Clause in this way contravenes the text of the TPA; and (iii) in any event, even if Claimants could import the dispute resolution provisions of the Colombia-Switzerland BIT, they failed to satisfy the conditions of consent contained therein. For these reasons, Claimants' fair and equitable treatment and national treatment claims remain outside of the jurisdiction *ratione voluntatis* of this Tribunal.

- i. The Chapter 12 MFN Clause cannot be used to *create* consent to arbitrate a claim

291. For the reasons discussed above, Colombia did not consent to the submission of claims under Chapter 12 for violations of the TPA's fair and equitable treatment

provision (Article 10.5) or national treatment provision (Article 12.2).⁵¹⁵ Claimants are invoking the Chapter 12 MFN Clause in an attempt to create consent for the submission of those categories of claims.

292. As Colombia explained in its Answer, the clear rule that emerges from the jurisprudence is that an MFN clause cannot be used to create consent to arbitrate where it otherwise did not exist.⁵¹⁶ In other words, if the TPA does not provide Colombia's consent to arbitrate fair and equitable treatment claims, Claimants cannot use the Chapter 12 MFN Clause to create such consent.
293. In their Reply, Claimants insist that they indeed use the Chapter 12 MFN Clause in that manner. Specifically, they argue that they are using the Chapter 12 MFN Clause to import the entire dispute resolution provision (i.e., Article 11) of the Colombia-Switzerland BIT.⁵¹⁷ Article 11 of that BIT does not limit the types of claims that can be submitted to arbitration.⁵¹⁸ Claimants thus believe that, having invoked Article 11 of the Colombia-Switzerland BIT via the Chapter 12 MFN Clause, they can assert arbitration claims for violations of any and all of the TPA's substantive protections.
294. Claimants' argument fails for the following three reasons: (i) the Chapter 12 MFN Clause cannot be used to *create* consent to arbitrate a claim, where no such consent exists otherwise; (ii) Claimants cannot use the Chapter 12 MFN Clause in a manner that contradicts the plain text of the TPA; and (iii) in any event, Claimants failed to satisfy the conditions of consent in Article 11 of the Colombia-Switzerland BIT.

⁵¹⁵ See Section II.B.2; **RLA-0001**, TPA, Art. 12.1.2(b).

⁵¹⁶ Colombia's Answer (PCA), ¶¶ 326–41.

⁵¹⁷ Claimants' Reply (PCA), ¶ 569 ("Colombia has offered Swiss investors more favorable dispute resolution protection. As also explained and argued in other sections of this Reply, the present dispute must be settled pursuant to the provisions of Article 11 of the Colombia-Switzerland BIT").

⁵¹⁸ See generally **RLA-0004**, Colombia-Switzerland BIT, Art. 11.

295. As Colombia explained in its Answer, an MFN clause cannot be used to create consent to arbitrate where consent otherwise does not exist. This is firmly established by the jurisprudence. For example, as discussed above, the *Telenor v. Hungary* tribunal applied a BIT that limited the States' consent to arbitrate only to claims for expropriation. The *Telenor* tribunal rejected the claimant's attempt to use the MFN clause to expand its claims to other types of investment treaty protection:

[I]n Article XI of their BIT Hungary and Norway made a deliberate choice to limit arbitration to the categories specified in that Article and have eschewed the wide form of dispute resolution clause adopted in many of their other BITs.

. . . The Tribunal therefore concludes that in the present case the MFN clause cannot be used to extend the Tribunal's jurisdiction to categories of claim other than expropriation, for this would subvert the common intention of Hungary and Norway in entering into the BIT in question.⁵¹⁹

296. Similarly, the *A11Y Ltd. v. Czech Republic* tribunal refused to allow the claimant to use the MFN clause to circumvent the provision in the applicable treaty that restricted the States' consent to arbitration of only certain types of claims. The *A11Y* tribunal held as follows:

Arbitral rulings draw a distinction between the application of an MFN clause to a more favorable dispute resolution provision where the investor has the right to arbitrate under the basic treaty, albeit under less favorable conditions, and the substitution of nonexistent consent to arbitration by virtue of an MFN clause. While case law confirms that the former is possible, it has almost consistently found that the latter is not.⁵²⁰

297. The other cases discussed in Colombia's Answer reached similar conclusions.⁵²¹

⁵¹⁹ **CLA-0088**, *Telenor* (Award), ¶¶ 97, 100.

⁵²⁰ **RLA-0072**, *A11Y* (Decision on Jurisdiction), ¶ 98.

⁵²¹ See, e.g., **RLA-0032**, *Sanum Investments Ltd. v. Government of the Lao People's Democratic Republic*, PCA Case No. 2013-13 (Rigo Suerda, Hanotiau, Stern), Award on Jurisdiction, 13 December 2013,

298. In response, Claimants seem to argue that (i) Article 12.1.2(b) does not actually limit the scope of Colombia’s consent to arbitration, and (ii) that therefore the case law cited by Colombia on the use of an MFN clause to expand the scope of consent is inapposite.⁵²² However, Claimants’ argument directly contradicts the plain text of Article 12.1.2(b). As discussed above, Article 12.1.2(b) *does* in fact explicitly limit Colombia’s consent to arbitration – specifically, to the set of four types of claims listed therein (*viz.*, Articles 10.7, 10.8, 10.12, and 10.14). Decisions such as *Telenor* and *A11Y* are therefore squarely apposite.

ii. Claimants’ argument contravenes the text of the TPA

299. Furthermore, the use of the Chapter 12 MFN Clause in the manner suggested by Claimants would deprive Article 12.1.2 of any meaning, and would thus contradict the basic principle of effectiveness (*effet utile*) in treaty interpretation. As discussed above, Article 12.1.2(b) lists the “sole[]” types of claims that can be submitted to investor-State arbitration under Chapter 12.⁵²³ If the MFN clause could be used to create consent to arbitration for other types of claims (beyond those expressly listed in Article 12.1.2(b)), such provision would be rendered meaningless. Such cannot be a correct interpretation.

¶ 358 (“[T]o read into that clause a dispute settlement provision to cover all protections under the Treaty when the Treaty itself provides for very limited access to international arbitration would result in a substantial re-write of the Treaty and an extension of the States Parties’ consent to arbitration beyond what may be assumed to have been their intention, given the limited reach of the Treaty protection and dispute settlement clauses.”).

⁵²² See Claimants’ Reply (PCA), ¶ 456 (“Respondent’s analysis is misplaced for two fundamental reasons. First, Respondent mistakenly assumes that Art. 12.1.2(b) renders unenforceable all of the Financial Services investor protection standards in Chapter 12. Hence, Respondent concludes that Art. 12.2 (National Treatment) and other provisions in Chapter 12 (Financial Services) are not subject to Section B as incorporated into Chapter 12 by dint of Art. 12.1.2(b).”). See also *id.*, p. 284 (“Respondent Conflates the Importation of Procedural Rights with the Exercise of an MFN Clause to Create Consent”).

⁵²³ RLA-0001, TPA, Art. 12.1.2(b).

- iii. In any event, Claimants do not satisfy the jurisdictional requirements of the dispute resolution clause of the Colombia-Switzerland BIT

300. In its Answer, Colombia observed that even if Claimants could rely upon the Chapter 12 MFN Clause to create consent for the submission of their fair and equitable treatment and national treatment claims (*quod non*), this Tribunal would still lack jurisdiction *ratione voluntatis*, because Claimants failed to satisfy the conditions of consent contained in the dispute resolution provision of the Colombia-Switzerland BIT.⁵²⁴ In particular, as Colombia explained, Claimants failed to comply with the fork-in-the-road provision and the six-month waiting period set forth in Article 11 of the Colombia-Switzerland BIT. Such provisions are applicable here because Claimants purport to be incorporating by reference *the entirety* of the dispute resolution clause of that BIT (i.e., Article 11 thereof), and therefore must comply with the requirements imposed by that clause.

301. Claimants' responses to these arguments in their Reply are somewhat difficult to follow. As far as Colombia can discern, Claimants are contending (a) that Article 11 of the Colombia-Switzerland BIT does not impose any conditions that a claimant must satisfy before submitting a claim to arbitration,⁵²⁵ and (b) that the fork-in-the-road provision of the Colombia-Switzerland BIT does not apply here.⁵²⁶ (Claimants do not address the issue of the six-month waiting period.) In the following subsections, Colombia will demonstrate that (i) the Colombia-Switzerland BIT contains conditions of consent; (ii) Claimants failed to comply with the fork-in-the-road provision of that BIT; and (iii) Claimants failed to observe the six-month waiting period of that BIT.

- 1) The Colombia-Switzerland BIT sets forth conditions of consent to arbitration

⁵²⁴ Colombia's Answer (PCA), ¶¶ 351–69.

⁵²⁵ See Claimants' Reply (PCA), ¶ 577.

⁵²⁶ See Claimants' Reply (PCA), ¶ 720.

302. Throughout their Reply, Claimants repeatedly assert that they have brought their claims under Article 11 of the Colombia-Switzerland BIT.⁵²⁷ Yet Claimants simultaneously assert that “no provision under Article 11 can be seen or should be understood as creating a condition precedent for a dispute to be validly submitted.”⁵²⁸ In other words, Claimants seek to import the entire dispute resolution provision of the Colombia-Switzerland BIT in order to escape the conditions of consent contained in the TPA,⁵²⁹ and thereby be able to submit to arbitration a broader range of claims than those to which Colombia consented under the TPA.⁵³⁰ At the same time, however, Claimants disregard the conditions of consent set forth in the Colombia-Switzerland BIT. Claimants’ convoluted effort to ‘have their cake and eat it too’ fails.
303. If Claimants were entitled to submit their claims under Article 11 of the Colombia-Switzerland BIT, as they erroneously argue, then the conditions of consent set forth in that treaty would apply to their claims. For the reasons discussed below, Claimants failed to satisfy two of those conditions: the fork-in-the-road provision, and the six-month consultation period requirement.

⁵²⁷ See, e.g., Claimants’ Reply (PCA), ¶ 569 (“As also explained and argued in other sections of this Reply, the present dispute must be settled pursuant to the provisions of Article 11 of the Colombia-Switzerland BIT.”), ¶ 683 (“Claimants apologize to the Tribunal for having to repeat that the present claim is brought pursuant to Chapter 12 of the TPA and not Chapter 10. Pursuant to Article 12.3 of the TPA, Claimant imports the more favorable dispute resolution provisions offered under Articles 11–12 of the Colombia-Switzerland BIT.”), ¶ 637 (“As already pointed out many times, the dispute resolution provisions under Chapter 10 of the TPA are not applicable to this case. This dispute is being arbitrated under the dispute resolution provisions (Articles 11 and 12) of the Colombia-Switzerland BIT.”).

⁵²⁸ Claimants’ Reply (PCA), ¶ 577.

⁵²⁹ For example, Claimants seek to shirk the notice of intent requirement, waiver requirement, and three-year limitations period of the TPA.

⁵³⁰ See Claimants’ Reply (PCA), ¶ 569 (“Colombia has offered Swiss investors more favorable dispute resolution protection. As also explained and argued in other sections of this Reply, the present dispute must be settled pursuant to the provisions of Article 11 of the Colombia-Switzerland BIT.”).

- 2) Claimants failed to comply with the fork-in-the-road provision of the Colombia-Switzerland BIT

304. Article 11(4) of the Colombia-Switzerland BIT provides:

Once the investor has referred the dispute to either national tribunal or any of the international arbitration mechanisms provided for in paragraph 2 above, the choice of the procedure shall be final.⁵³¹

305. In their Reply, Claimants invent a test for the application of this fork-in-the-road provision, without any citation or legal basis.⁵³² Specifically, Claimants assert that “[t]here are two elements to a fork-in-the-road objection: (i) an action commenced by the party against whom the fork-in-the-road provision is intended to be enforced; and (ii) the existence of an actual judicial alternative (the two alternative jurisdictions constituting the fork-in-the-road allegory).”⁵³³ Claimants then declare that “[n]either element is present here.”⁵³⁴

306. As discussed at length in Colombia’s Answer,⁵³⁵ previous tribunals have interpreted and applied similar fork-in-the-road provisions in a consistent manner. Such fork-in-the-road provisions preclude the exercise of jurisdiction when (i) the claimant itself or companies owned or controlled by it⁵³⁶ (ii) has

⁵³¹ **RLA-0004**, Colombia-Switzerland BIT, Art. 11(4).

⁵³² See Claimants’ Reply (PCA), ¶ 723.

⁵³³ Claimants’ Reply (PCA), ¶ 723.

⁵³⁴ Claimants’ Reply (PCA), ¶ 723.

⁵³⁵ Colombia’s Answer (PCA), ¶¶ 354–66.

⁵³⁶ Colombia’s Answer (PCA), ¶ 365. See also **RLA-0050**, *Supervisión y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4 (von Wobeser, Klock, Romero), Award, 18 January 2017 (“*Supervisión (Award)*”), ¶¶ 324–325 (holding that it suffices for a “corporate vehicle that acts according to the interests and instructions of Claimant” to have pursued the local court claim).

submitted for resolution to domestic courts⁵³⁷ (iii) claims that share the same fundamental basis of the treaty claims.⁵³⁸

307. These three elements are satisfied in the present case. First, Claimants' Holding Companies submitted claims to Colombian courts. Although Claimants in their Reply now emphasize that they themselves were not named parties to the relevant domestic litigation, in their previous submissions they had explicitly (and repeatedly) taken responsibility for the domestic litigation. For example, in their Memorial on Jurisdiction, the section on the start of local proceedings is entitled "**Claimants Commence Judicial Proceedings** Against FOGAFIN and the Superintendency of Banking"⁵³⁹ (emphasis added). Second, there is no dispute between the parties that claims relating to Claimants' shares in Granahorrar were in fact submitted to Colombian courts. Third, such domestic claims share the same fundamental basis as Claimants' claims under the TPA. Before the Colombian courts, Claimants sought compensation for the alleged harm to the value of their shares in Granahorrar caused by the Colombian Government. Claimants have characterized the dispute that they submitted to this Tribunal as follows: "In a nutshell, Colombia's financial regulatory authorities unlawfully expropriated

⁵³⁷ See **RLA-0004**, Colombia-Switzerland BIT, Art. 11(4).

⁵³⁸ See **RLA-0073**, *Pantehniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21 (Paulsson), Award, 30 July 2009 ("**Pantehniki (Award)**"), ¶ 61 ("It is common ground that the relevant test is the one expressed by the America-Venezuela Mixed Commission in the Woodruff case (1903): whether or not 'the fundamental basis of a claim' sought to be brought before the international forum, is autonomous of claims to be heard elsewhere. This test was revitalized by the ICSID Vivendi annulment decision in 2002. It has been confirmed and applied in many subsequent cases. The key is to assess whether the same dispute has been submitted to both national and international fora."); **RLA-0050**, *Supervisión* (Award), ¶¶ 308, 310 ("In order to determine whether the proceedings before the local tribunals relate to the same dispute submitted to arbitration, the Tribunal will apply the fundamental basis of a claim test. . . . One can only consider that the dispute submitted before the national tribunals is the same as the one submitted to arbitration if both of them share the fundamental cause of the claim and seek for the same effects.").

⁵³⁹ Claimants' Memorial (PCA), § II.A. See also *id.*, ¶¶ 28, 31.

Claimants' investment in that jurisdiction."⁵⁴⁰ Moreover, as explained at length by Claimants' damages expert, Claimants are seeking compensation in the present arbitration for alleged damages to their shares in Granahorrar.⁵⁴¹ The domestic and international claims thus share a fundamental normative source, and ultimately pursue the same purpose.⁵⁴²

308. The fork-in-the-road provision of the Colombia-Switzerland BIT thus precludes Claimants' claims.

3) Claimants have failed to comply with the six-month consultation requirement of the Colombia-Switzerland BIT

309. Article 11 of the Colombia-Switzerland BIT also contains a six-month consultation requirement as a condition of consent to arbitration:

(1) If an investor of a Party considers that a measure applied by the other Party is inconsistent with an obligation of this Agreement, thus causing loss or damage to him or his

⁵⁴⁰ Claimants' Memorial (PCA), p. 12.

⁵⁴¹ See First Argiz Expert Report, ¶ 1 ("I, Antonio L. Argiz, of Morrison, Brown, Argiz & Farra, LLC ("MBAF") was retained by the law firm Bryan Cave Leighton Paisner LLP, counsel for Alberto Carrizosa Gelzis, Felipe Carrizosa Gelzis and Enrique Carrizosa Gelzis ("Carrizosa" or "Claimants") to provide expert opinions on damages incurred by the Claimants as a result of the Colombian government's ("Respondent") actions through its agencies (e.g. Central Bank, FOGAFIN and Superintendency of Banking) to expropriate Corporacion Colombiana de Ahorro y Vivienda ("Granahorrar"), resulting in loss of value of Claimants' interest in Granahorrar").

⁵⁴² See **RLA-0050**, *Supervisión* (Award), ¶ 315 ("The Tribunal considers that the actions filed in the local proceeding and in the arbitration share a fundamental normative source and pursue ultimately the same purposes. The fundamental normative source is the same because compensation was claimed for lost profits derived from the failure of Costa Rica to adjust the VTI service rates according to what Claimant alleges was established in the Contract, notwithstanding that the specific administrative acts alleged in each proceeding may not be exactly the same"); **RLA-0073**, *Pantehniki* (Award), ¶¶ 64-68 ("To the extent that this prayer was accepted it would grant the Claimant exactly what it is seeking before ICSID - and on the same 'fundamental basis'. The Claimant's grievances thus arises out of the same purported entitlement that it invoked in the contractual debate it began with the General Roads Directorate. The Claimant chose to take this matter to the Albanian courts. It cannot now adopt the same fundamental basis as the foundation of a Treaty claim.").

investment, he may request consultations with a view to resolving the matter amicably.

(2) **Any such matter which has not been settled within a period of six months from the date of written request for consultations** [with a view to resolving the matter amicably] **may be referred to** the courts or administrative tribunals of the Party concerned or **to international arbitration**.⁵⁴³ (Emphasis added)

310. Claimants devote only one paragraph of their Reply to this objection, and alleges therein that the six-month consultation period in Article 11 amounts merely to a “suggestion,” because of the “permissive” language contained therein.⁵⁴⁴
311. However, as explained in Colombia’s Answer (and ignored in Claimants’ Reply), the provision is not merely hortatory. Interpreting this very provision of the Colombia-Switzerland BIT, the tribunal in *Glencore v. Colombia* determined that “consultations with [Colombia] under Art. 11(1) of the Treaty” constituted “a measure **necessary** to start a claim for breach of the BIT”⁵⁴⁵ (emphasis added). The interpretation in *Glencore* is consistent with the language and structure of the relevant treaty language, which makes clear that a claimant cannot file an arbitration claim until six months after the date of the claimant’s request for consultations.
312. In their Reply, Claimants do not deny that, prior to filing for arbitration, they did not request consultations *at all*—let alone six months before commencing the arbitration (as required by Article 11).
313. Thus, even if the dispute resolution provision of the Colombia-Switzerland BIT applied in the present case, as Claimants mistakenly argue, Claimants’ claims

⁵⁴³ **RLA-0004**, Colombia-Switzerland BIT, Art. 11.

⁵⁴⁴ Claimants’ Reply (PCA), ¶ 572.

⁵⁴⁵ **RLA-0057**, *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6 (Fernández-Armesto, Garibaldi, Thomas), Award, 27 August 2019 (“*Glencore (Award)*”), ¶ 907.

would still be precluded, due to Claimants' failure to comply with the fork-in-the-road provision and the six-month consultation requirement of that BIT.

314. For all of the foregoing reasons, Claimants' claims of violation of the TPA's fair and equitable treatment provision (Article 10.5) and national treatment provision (Article 12.2) fall outside of the jurisdiction *ratione voluntatis* of this Tribunal.

C. The Tribunal lacks jurisdiction *ratione personae*

315. In its Answer, Colombia demonstrated that the Tribunal lacks jurisdiction *ratione personae* because Claimants' dominant and effective nationality was that of Colombia at all relevant times.⁵⁴⁶ The dominant and effective nationality test is applicable to Claimants by virtue of Article 12.20 of the TPA, which provides that "a natural person who is a dual citizen shall be deemed to be exclusively a citizen of the State of his or her dominant and effective nationality."⁵⁴⁷
316. As Colombia has explained, the purpose of the dominant and effective nationality test is to ensure that the protections of the TPA apply only to investors of the *other* State Party (i.e., to *foreign* investors).⁵⁴⁸ Here, the Parties agree that both of Claimants' nationalities (U.S. and Colombian) are effective. The only question therefore is which of those nationalities was their dominant one.⁵⁴⁹ As discussed in greater detail below, international law and practice mandate that such determination must be made as of two particular points in time ("**Critical Dates**"): (i) the date of the alleged treaty violations, and (ii) the date of submission of the claim to arbitration. Claimants explicitly agree that those are the critical dates: "In

⁵⁴⁶ Colombia's Answer (PCA), § III.D.

⁵⁴⁷ **RLA-0001**, TPA, Art. 12.20. Chapter 10 of the TPA contains a virtually identical definition. *See id.* at Art. 10.28.

⁵⁴⁸ Colombia's Answer (PCA), ¶¶ 381-91.

⁵⁴⁹ Colombia's Answer (PCA), ¶¶ 393-96.

the case before this Tribunal the relevant dates are (i) June 25, 2014 (date of violation) (ii) January 24, 2018 (date of filing claim).”⁵⁵⁰

317. Further, international tribunals and courts have identified certain factors that must be considered in assessing which of a person’s nationalities is the dominant one.⁵⁵¹ In applying such factors to the facts of the present case, Colombia demonstrated in its Answer that Claimants’ dominant nationality on the Critical Dates was indeed that of Colombia,⁵⁵² and that therefore a lack of jurisdiction *ratione personae* bars Claimants’ claims.
318. In their Reply, Claimants dispute the legal standard articulated by Colombia in its Answer.⁵⁵³ They also insist that their dominant and effective nationality at all relevant times was their US nationality,⁵⁵⁴ but Claimants failed to produce any documentary evidence (or even additional witness testimony) in support of that proposition. Instead, in their Reply Claimants merely continue to rely on the four self-serving witness statements that they had submitted with their Memorial.
319. Claimants’ arguments in their Reply fail for the following reasons: (i) Colombia has identified the correct legal standard applicable to the determination of Claimants’ dominant and effective nationality (**Section II.C.1** below); Claimants have failed to meet their burden of proof, because they have not provided any documentary evidence to establish that their US nationality was dominant on the Critical Dates (**Section II.C.2** below); and the documentary evidence on the record in this case indicates that Claimants’ dominant nationality on the Critical Dates was indeed that of Colombia (**Section II.C.3** below). Consequently, the Tribunal lacks jurisdiction *ratione personae*.

⁵⁵⁰ Claimants’ Reply (PCA), fn. 403; *see also id.* at ¶ 974.

⁵⁵¹ Colombia’s Answer (PCA), ¶¶ 397-409.

⁵⁵² Colombia’s Answer (PCA), ¶¶ 410-65.

⁵⁵³ *See* Claimants’ Reply (PCA), § ¶¶ 779-844.

⁵⁵⁴ Claimants’ Reply (PCA), § V.

1. *Colombia has identified the correct legal standard applicable to the determination of Claimants' dominant and effective nationality*

320. In its Answer, Colombia identified the legal standard that must be applied to determine Claimants' dominant and effective nationality on the Critical Dates. Specifically, Colombia explained that the Tribunal (i) need only determine which of Claimants' two nationalities is the *dominant* one, because the Parties already agree that both such nationalities are effective;⁵⁵⁵ (ii) should make the "dominance" determination by applying the set of factors that have been applied by previous international tribunals and courts and that are relevant to the present case;⁵⁵⁶ and (iii) must determine Claimants' dominant nationality as of the two Critical Dates (i.e., the date of the alleged breaches of the TPA, and the date of submission of Claimants' claims to arbitration).⁵⁵⁷
321. In their Reply, Claimants challenge the foregoing articulation of the legal standard by (i) arguing that, despite the Parties' agreement that both of Claimants' nationalities are effective, the Tribunal must nevertheless conduct an analysis of the "effectiveness" requirement;⁵⁵⁸ (ii) proposing a list of ten factors that they claim are dictated by customary international law for the determination on dominant and effective nationality;⁵⁵⁹ and (iii) asserting that Claimants' entire lives must be considered to determine their dominant and effective nationality on the Critical Dates.⁵⁶⁰ In the sections that follow, Colombia rebuts these contentions by Claimants and confirms that the correct legal standard for the determination of

⁵⁵⁵ Colombia's Answer (PCA), ¶¶ 393-96.

⁵⁵⁶ Colombia's Answer (PCA), ¶¶ 397-401.

⁵⁵⁷ Colombia's Answer (PCA), ¶¶ 402-09.

⁵⁵⁸ Claimants' Reply (PCA), ¶¶ 822; 826(v).

⁵⁵⁹ Claimants' Reply (PCA), ¶ 833; *see also id.* at ¶ 827 (wherein Claimants identify 11 factors, which they then compress into 10).

⁵⁶⁰ Claimants' Reply (PCA), ¶¶ 798–99, 826(ii).

Claimants' dominant and effective nationality is the one that was delineated by Colombia in its Answer.

- a. The dominant and effective nationality test is composed of two distinct requirements, and only the dominance requirement is relevant in the present case

322. The Parties appear to agree (i) that there are two prongs to the dominant and effective nationality test,⁵⁶¹ and (ii) that both of Claimants' nationalities (US and Colombian) are effective.⁵⁶² In its Answer, Colombia had argued that, since the Parties agree that both of Claimants' nationalities are effective, there is no need for the Parties to debate that issue at all, or for the Tribunal to consider it;⁵⁶³ rather, the Tribunal may simply proceed to determine which of Claimants' nationalities was the *dominant* one at the relevant times.⁵⁶⁴ Nevertheless, in their Reply, Claimants argue that the Tribunal *must* conduct an effectiveness analysis in the present case.⁵⁶⁵ In justifying their request for such an analysis, they blur the lines between the "dominant" and "effective" prongs of the test.⁵⁶⁶

323. According to Claimants, "it is not conceptually possible to extract from the elements of the 'dominant' prong the legitimacy and *bona fide* nature of those

⁵⁶¹ Colombia's Answer (PCA), ¶¶ 393-94; Claimants' Reply (PCA), ¶¶ 784, 819.

⁵⁶² See Colombia's Answer (PCA), ¶ 395 ("[T]he Tribunal need not concern itself with the 'effectiveness' prong of the test. This is so because (a) Claimants concede that their Colombian nationality is indeed an effective nationality (along with that of the US)[, Claimants' Reply (PCA), ¶ 822]; and (b) Colombia does not dispute the effectiveness of Claimants' US nationality.").

⁵⁶³ Colombia's Answer (PCA), ¶ 395; see **RLA-0105**, *Manuel García Armas et al. v. The Bolivarian Republic of Venezuela*, CPA Case No. 2016-08 (Nunes Pinto, Gómez-Pinzón, Torres Bernárdez) Award on Jurisdiction, 13 December 2019 ("**Manuel García Armas (Award on Jurisdiction)**"), ¶ 697 (Spanish original: "[N]o se le ha solicitado al Tribunal que juzgue si las nacionalidades de los Demandantes son efectivas y genuinas. Para el Tribunal, no hay duda de que los Demandantes poseen efectivamente las nacionalidades venezolana y española.").

⁵⁶⁴ Colombia's Answer, ¶ 395.

⁵⁶⁵ Claimants' Reply (PCA), ¶ 842 ("Any analysis of the dominant and effective nationality test entails, contrary to Respondent's argument . . . analysis of the 'effectiveness' component from a qualitative perspective.")

⁵⁶⁶ Claimants' Reply (PCA), ¶¶ 784, 819, 822; 835-844.

deeply factual factors comprising the ‘effective’ component.”⁵⁶⁷ Instead, Claimants argue the following:

In a factual setting, such as the one before this Tribunal, the *genuineness, longstanding, and bona fide*, standing of dual nationals will pervade the Tribunal’s qualitative analysis of the ‘dominant’ prong . . . If the ‘effective’ prong bespeaks fraud and abuse of process, or *bona fide* and legitimacy, such findings necessarily shall contextualize the ‘dominant’ component.⁵⁶⁸

324. Thus, Claimants appear to be suggesting that the fact that their US nationality is *effective* is somehow relevant to the Tribunal’s determination of whether their US nationality was similarly their *dominant* nationality at the relevant times.⁵⁶⁹ However, Claimants cite no support (because there is none) for the fanciful notion that the “effectiveness” factor somehow infuses or suffuses, or is otherwise relevant to, the “dominance” factor. “Dominance” and “effectiveness” are two entirely separate and discrete inquiries, as investment tribunals⁵⁷⁰ and other

⁵⁶⁷ Claimants’ Reply (PCA), ¶ 842.

⁵⁶⁸ Claimants’ Reply (PCA), ¶ 842.

⁵⁶⁹ Claimants’ Reply (PCA), ¶ 842, 845-850.

⁵⁷⁰ See **RLA-0105**, *Manuel García Armas* (Award on Jurisdiction), ¶ 696 (English translation: “[T]his standard [of effective or genuine nationality] is not relevant in the present case. What is relevant in this case is the principle of dominant nationality, which concerns those situations in which a person has more than one nationality and it is necessary to determine which of the two (or more) nationalities is the preponderant one.”) (Spanish original: “[E]ste estándar [de nacionalidad efectiva o genuina] no es relevante en el presente caso. Lo relevante en este caso es el principio de la nacionalidad dominante, que concierne aquellas situaciones en que una persona posee más de una nacionalidad y hay que determinar cuál de las dos (o más) nacionalidades es la preponderante.”); **RLA-0088**, *Michael Ballantine and Lisa Ballantine v. the Dominican Republic*, PCA Case No. 2016-17 (Ramírez Hernández, Cheek, Vinuesa), Final Award, 3 September 2019 (“**Ballantine (Final Award)**”), ¶¶ 538-39 (“The Tribunal agrees that the word ‘dominant’ conveys the notion of strength and precedence of one thing over another and that closeness between an individual and a State can indicate such attributes . . . The word ‘effective’ on the other hand seems to refer to something that produces a specific effect, something that is actually operative or functioning . . . There must be significance in the fact that Article 10.28 does not simply require nationality to exist, it requires that nationality complies with two specific qualities that should be different from the existence of that legal bond.”).

international tribunals⁵⁷¹ have consistently held, and as Colombia explained in its Answer.⁵⁷²

325. The “effectiveness” requirement seeks merely to determine whether “the claimant possess[es] genuine, real, or effective ties to the State whose nationality the claimant h[olds] de jure”⁵⁷³—i.e., to confirm that the nationality in question is not merely one of convenience.⁵⁷⁴ If the claimant’s ties to the subject State are so tenuous that it appears evident that the nationality is a mere formality, or constitutes evidence of fraud or abuse of process, that nationality is not deemed to be an “effective” one.⁵⁷⁵ The effectiveness analysis is one that must be done

⁵⁷¹ See **CLA-0047**, *Mergé Case – Decision No. 55*, UN Italian-United States Conciliation Commission, Decision, 10 June 1955 (“*Mergé*”), p. 247 (stating that dominant and effectiveness “does not mean only the existence of a real bond [i.e., effectiveness], but means also the prevalence of that nationality over the other [i.e., dominance].”).

⁵⁷² Claimants mischaracterize Colombia’s argument as being “that because . . . Claimants are dual nationals, the ‘effective’ component, need not be considered.” Claimants’ Reply (PCA), ¶ 836. That is not only incorrect but also makes no sense, as it is precisely in cases of dual nationality that both the effectiveness and dominant components are relevant. Rather, the reason that Colombia asserts that the effectiveness requirement need not be considered *in the present case* is simply that the effectiveness of Claimants’ two nationalities is not being challenged: the Parties agree that both of the nationalities invoked by Claimants are indeed effective. It is inexplicable therefore that Claimants are insisting on having the Tribunal conduct an inquiry the answer to which is not in dispute between the Parties.

⁵⁷³ **RLA-0105**, *Manuel García Armas* (Award on Jurisdiction), ¶ 696 (English translation: “[T]he Nottebohm case was about determining the claimant’s effective or genuine nationality, which is why the ICJ inquired as to whether the claimant possessed genuine, real, or effective ties to the State whose nationality the claimant held de jure.”) (Spanish original: “[E]l caso Nottebohm se trataba de determinar la nacionalidad efectiva o genuina del demandante razón por la cual la CIJ indagó si el demandante poseía vínculos genuinos, reales, o efectivos con el Estado cuya nacionalidad detentaba de jure.”).

⁵⁷⁴ Here again, Claimants mischaracterize Colombia’s argument as being “a yet-to-be articulated proposition that ‘effective’ is limited only to the issue of whether there is nationality, without more.” Claimants’ Reply (PCA), ¶ 841. On the contrary, Colombia has repeatedly stated that “the effectiveness requirement demands that the bond of an individual nationality go beyond a formality with no apparent further effect, such that the nationality is of substance rather than merely declaratory.” Colombia’s Answer (PCA), ¶ 394 (internal quotation marks omitted).

⁵⁷⁵ See **CLA-0040**, *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20 (Lévy, Alexandrov, Ehlermann), Decision on Jurisdiction and Admissibility, 24 September 2008 (“*Ioan Micula (Decision on Jurisdiction and Admissibility)*”), ¶¶ 104–05.

separately for each nationality, and does not have a comparative dimension (i.e., a given nationality either is or is not “effective;” the other nationality has no bearing on that assessment). If a claimant’s various nationalities are effective, the inquiry then turns to which of them is the “dominant” one.⁵⁷⁶

326. The “dominance” assessment is separate and distinct from that of “effectiveness.” The dominance prong entails a comparative analysis, insofar as a tribunal must weigh and compare the claimant’s genuine ties to each of the two States, to “determine which of the two . . . nationalities is the preponderant one.”⁵⁷⁷ The dominance analysis does not relate in any way to legitimacy, fraud, treaty-shopping, or abuse of process, as these considerations will have already been addressed in the effectiveness analysis. Instead, for the “dominance” determination, a tribunal is tasked solely with determining with which of the two relevant States the claimant’s genuine ties are stronger.

327. In support of their attempt to conflate the effectiveness and dominance analyses, Claimants cite to *Micula v. Romania*. They contend that the *Micula* tribunal, in the context of an analysis of the *effectiveness* of the claimants’ Swedish nationality, compared the claimants’ ties to Sweden and Romania. Specifically, in their Reply, Claimants summarize the *Micula* decision as follows:

[N]otwithstanding virtually constant presence in the host-State as well as meaningful social, family, and cultural connections in Romania, the Claimants’ qualitative nexus to Sweden was more meaningful.⁵⁷⁸

⁵⁷⁶ See **RLA-0105**, *Manuel García Armas* (Award on Jurisdiction), ¶ 696 (English translation: “[T]his standard [of effective or genuine nationality] is not relevant in the present case. What is relevant in this case is the principle of dominant nationality”) (Spanish original: “[E]ste estándar [de nacionalidad efectiva o genuina] no es relevante en el presente caso. Lo relevante en este caso es el principio de la nacionalidad dominante”), ¶ 697.

⁵⁷⁷ **RLA-0105**, *Manuel García Armas* (Award on Jurisdiction), ¶ 696. (Spanish Original: “determinar cuál de las dos . . . nacionalidades es la preponderante”).

⁵⁷⁸ Claimants’ Reply (PCA), ¶ 813.

328. However, the above summary mischaracterizes that decision. Contrary to what Claimants assert, the *Micula* tribunal did *not* compare the relative strength of the claimants' ties to each of the two countries (as would be done in a "dominance" analysis). Instead, the *Micula* tribunal assessed whether the claimants' ties to Sweden were strong enough for their Swedish nationality to be deemed "effective," and based on that analysis determined that "the links of [the claimants] with Sweden are not of such nature as to require that the Tribunal question the effectiveness of the Swedish nationality."⁵⁷⁹

329. In any event, the *Micula* decision is inapposite because there the tribunal only examined the claimants' effective nationality (and did so in *dicta*). Here, in contrast, the concern is Claimants' dominant nationality.⁵⁸⁰

b. Colombia has identified the relevant factors that tribunals in previous cases have applied to determine dominant nationality

330. In its Answer, Colombia explained that Claimants' dominant nationality should be assessed by applying the factors relied upon by international courts and tribunals (including the ICJ).⁵⁸¹ As discussed in greater detail below, that jurisprudence indicates that the factors to be applied will depend on the facts of each case. In the present case, those relevant factors are: (i) the location of Claimants' permanent and habitual residence; (ii) the center of Claimants' economic lives; (iii) the center of Claimants' family, social, personal, and political lives; and (iv) how Claimants have identified themselves in terms of nationality.

⁵⁷⁹ See **CLA-0040**, *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20 (Lévy, Alexandrov, Ehlermann), Decision on Jurisdiction and Admissibility, 24 September 2008 ("**Ioan Micula (Decision on Jurisdiction and Admissibility)**"), ¶ 104. The *Micula* tribunal did discuss the claimants' residency in Romania, but it did not state that the claimants' links to Sweden such were "more meaningful" than their residency in Romania. Instead, the *Micula* tribunal stated that claimants' residence in Romania did not call into question the claimants' links to Sweden. *See id.* at ¶¶ 104-05.

⁵⁸⁰ Colombia's Answer (PCA), ¶ 425.

⁵⁸¹ Colombia's Answer (PCA), ¶ 398.

Colombia did not rely on the other factors identified in the jurisprudence that are not relevant to the present case. For example, Colombia did not include the “naturalization” factor considered by the *Ballantine* tribunal,⁵⁸² for the simple reason that Claimants obtained both their US and Colombian nationalities at birth, and therefore never naturalized.

331. In their Reply, Claimants argue (i) that the Tribunal is obligated to apply the ten specific factors that they propose (rather than those identified by Colombia), because, according to them, those ten factors constitute customary international law,⁵⁸³ and (ii) that the set of factors identified by Colombia is improperly “abbreviated.”⁵⁸⁴ These arguments fail, for the reasons explained below.
332. As to Claimants’ first argument, the Parties agree that international tribunals have recognized as a part of customary international law a factor-based approach to the analysis of dominant nationality.⁵⁸⁵ However, contrary to Claimants’ contention, customary international law does not dictate a closed list of ten specific factors. In fact, none of the cases cited by either of the Parties—not even those cited by Claimants—applied each of the specific ten factors invoked by Claimants.⁵⁸⁶

⁵⁸² **RLA-0088**, *Michael Ballantine and Lisa Ballantine v. the Dominican Republic*, PCA Case No. 2016-17 (Ramírez Hernández, Cheek, Vinuesa), Final Award, 3 September 2019 (“**Ballantine (Final Award)**”), ¶¶ 578-580.

⁵⁸³ Claimants’ Memorial (PCA), ¶¶ 788, 832-833; *see also id.* at pp. 11-12 (identifying the ten factors as (1) “‘How’ and ‘Why’ the Dual Nationals-Citizens Arrived at That Status,” (2) “Subjective Considerations,” (3) “Claimants’ Family Matrix,” (4) “Education,” (5) “Residence,” (6) “Language,” (7) “Financial,” (8) “Healthcare,” (9) “Cultural Affinities,” and (10) “The Absence or Presence of a Scheme or Single Purpose and TPA Policy.”).

⁵⁸⁴ Claimants’ Memorial (PCA), ¶¶ 829, 787.

⁵⁸⁵ **RLA-0088**, *Michael Ballantine and Lisa Ballantine v. the Dominican Republic*, PCA Case No. 2016-17 (Ramírez Hernández, Cheek, Vinuesa), Final Award, 3 September 2019 (“**Ballantine (Final Award)**”), ¶ 547 (“The Tribunal is persuaded that customary international law has developed and crystalized relevant factors to determine, in cases dealing with dual nationality, which is the dominant and effective one.”).

⁵⁸⁶ *See e.g.*, **RLA-0088**, *Michael Ballantine and Lisa Ballantine v. the Dominican Republic*, PCA Case No. 2016-17 (Ramírez Hernández, Cheek, Vinuesa), Final Award, 3 September 2019 (“**Ballantine (Final Award)**”) (wherein the tribunal did not consider, *inter alia*, the healthcare or the single-

Instead, adjudicatory bodies have articulated a non-exhaustive list of factors that allows some flexibility in the application of the dominant nationality test to the unique set of facts in a given case.⁵⁸⁷ For example, the *García Armas v. Venezuela* tribunal recently noted that “an international tribunal is free to consider other similar factors that are pertinent, a conclusion reaffirmed by the ICJ’s assertion that “[d]ifferent elements are taken into consideration, and their importance will vary from case to case.”⁵⁸⁸ Also, the ICJ added the abbreviation of *et cetera* (Latin for “and the rest”) at the end of the list of applicable factors that it identified in *Nottebohm*, thereby signaling that the list was merely illustrative and not exhaustive.⁵⁸⁹

purpose treaty-shopping factors), §X.C; see also **RLA-0118**, *Heemsen* (Award on Jurisdiction), ¶ 441 (wherein the tribunal did not consider, *inter alia*, the healthcare, single-purpose treaty-shopping, education, language, or subjective considerations factors); **RLA-0090**, *Benny Diba and Wilfred J. Gaulin v. Islamic Republic of Iran*, et al., IUSCT Case No. 940 (Briner, Aldrich, Khalilian), Award, 31 October 1989 (“**Diba (Award)**”), ¶¶ 13-27 (wherein the Iran U.S. Claims tribunal did not consider, *inter alia*, the healthcare, single-purpose treaty-shopping, language, education, or subjective considerations factors).

⁵⁸⁷ See e.g., **CLA-0057**, *Nottebohm Case*, ICJ, Second Phase (Hackworth, et al.), Judgment, 6 April 1955 (“**Nottebohm**”), p. 22 (“[T]he habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.”); **RLA-0089**, Case No. A/18, IUSCT Case No. 940 (Lagergren, et al.), Decision, 6 April 1984, p. 12 (wherein the Iran-United States Claims Tribunal stated that it would consider the claimant’s “habitual residence, center of interests, family ties, participation in public life and other evidence of attachment”); **CLA-0050**, *Michael Ballantine v. The Dominican Republic*, PCA Case No. 2016-17 (Ramírez Hernández, Cheek, Vinuesa), Procedural Order No. 2, 21 April 2017 (“**Ballantine PO No. 2**”), ¶ 25 (stating that the tribunal would consider “among others, the State of habitual residence, the circumstances in which the second nationality was acquired, the individual’s personal attachment for a particular country, and the center of the person’s economic, social and family life.”).

⁵⁸⁸ **RLA-0105**, *Manuel García Armas* (Award on Jurisdiction), ¶ 736 (Spanish original: “[U]n tribunal internacional es libre de considerar otros factores similares que sean pertinentes, conclusión reafirmada por la aseveración de la CIJ de que “[d]istintos elementos se toman en consideración, y su importancia variará de caso en caso.”).

⁵⁸⁹ See e.g., **CLA-0057**, *Nottebohm Case*, ICJ, Second Phase (Hackworth, et al.), Judgment, 6 April 1955 (“**Nottebohm**”), p. 22 (“[T]he habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation

333. Tribunals generally apply a base set of factors and then consider such other factors as appear relevant to the specific case before them.⁵⁹⁰ This approach is a flexible one; consistent with the ICJ’s approach in *Nottebohm*, the list of applicable factors is non-exhaustive. Claimants’ assertion that customary international law mandates the application of a closed list of the ten factors that Claimants have identified is therefore baseless, as it finds no support in the jurisprudence or doctrine.
334. Moreover, and contrary to Claimants’ argument, Colombia in fact has *not* relied on an “abbreviated” set of factors.⁵⁹¹ The case law establishes that each tribunal

in public life, attachment shown by him for a given country and inculcated in his children, *etc.*”) (emphasis added); **RLA- 0090**, *Benny Diba and Wilfred J. Gaulin v. Islamic Republic of Iran*, et al., IUSCT Case No. 940 (Briner, Aldrich, Khalilian), Award, 31 October 1989 (“**Diba (Award)**”), ¶ 11 (holding that the Iran-United States Claims Tribunal was required to scrutinize “Claimants’ habitual residence, center of interests, family ties, participation in public life, and other evidence of attachment”) (emphasis added).

⁵⁹⁰ See e.g., **RLA-0088**, *Michael Ballantine and Lisa Ballantine v. the Dominican Republic*, PCA Case No. 2016-17 (Ramírez Hernández, Cheek, Vinuesa), Final Award, 3 September 2019 (“**Ballantine (Final Award)**”), § X.C (considering – in addition to the claimants’ habitual residence; the center of the claimants’ economic, social, and family life; and the claimants’ personal attachment for the Dominican Republic – the following factors: claimants’ naturalization; the reason for the claimants’ naturalization; the conduct of the host State and other authorities; and how the claimants presented themselves); **RLA-0118**, *Heemsen* (Award on Jurisdiction), ¶ 441 (considering – in addition to residency, the center of the claimants’ economic lives, and the center of the claimants’ family lives – the fact that the claimants had registered their interest in Venezuelan companies in their capacity as Venezuelan nationals; had not registered their investment as a foreign investment; and had not registered themselves as foreign investors).

⁵⁹¹ Claimants allege that both Colombia and the tribunal in *Ballantine v. Dominican Republic*. “omitted application of customary international law in its analysis, and instead substituted its own limited four-part test.” Claimants’ Reply (PCA), ¶ 987. In reality, the *Ballantine* majority analyzed seven factors, because it considered that such factors were the ones that were relevant in that case. See **RLA-0088**, *Michael Ballantine and Lisa Ballantine v. the Dominican Republic*, PCA Case No. 2016-17 (Ramírez Hernández, Cheek, Vinuesa), Final Award, 3 September 2019 (“**Ballantine (Final Award)**”), § X.C (wherein the majority in *Ballantine* considered (1) the claimants’ habitual residence, (2) the claimants’ personal attachment for a particular country, (3) the center of the claimants’ economic, social, and family life, (4) naturalization, (5) the reason for the claimants’ naturalization, (6) the conduct of the host State and other authorities, and (7) how the claimants presented themselves). In their Reply (PCA), at ¶¶ 977-1003, Claimants criticize the majority in *Ballantine* on grounds that are either incorrect or irrelevant to the present proceeding.

should apply those factors that are relevant to the specific facts of each case. Here, Colombia has identified and applied those factors that are relevant to the circumstances of this particular case.

335. In any event, Claimants exaggerate the differences between the Parties' respective proposed factors. In fact, only the following two factors proposed by Claimants are not contained in Colombia's set: (i) "'How' and 'Why' the Dual Nationals-Citizens Arrived at That Status";⁵⁹² and (ii) what Claimants cryptically describe as the "Absence or Presence of a Scheme or Single Purpose and TPA Policy."⁵⁹³
336. With respect to the first of those two purported factors, Claimants advance an unsupported and untenable argument, namely that because they were born with US nationality, their assertion that US nationality is their dominant one should be *presumed* to be true.⁵⁹⁴ However, the "dominance" test is objective and purely fact-based; it is not self-judging or based on the subjective perception of the relevant person. Further, Claimants' purported "factor" above entails, not a factual inquiry, but rather a legal argument concerning the weight of evidence. In any event, as explained in **Section II.C.2c.i** below, Claimants' "'How' and 'Why'" factor is illogical, unfounded, and inappropriate.
337. The second purported additional factor that Claimants posit relates to what they refer to as the "Absence or Presence of a Scheme or Single Purpose and TPA

To the extent that Claimants' critiques involve defining the legal standard applicable to the present proceeding (as opposed to *how* the majority in *Ballantine* applied the legal standard to the facts of that case), Colombia has answered such criticisms through its exposition above (and in the Answer) of the appropriate legal standard applicable to the determination of Claimants' dominant and effective nationality in the present proceeding.

⁵⁹² Claimants' Reply (PCA), ¶¶ 845-850.

⁵⁹³ Claimants' Reply (PCA), ¶¶ 945-976.

⁵⁹⁴ Claimants' Reply (PCA), ¶ 849 ("Claimants' testimony concerning the multiple factors to be explored carry with it the legitimacy of a lifetime of exposure to US culture and history . . . Here too, probative value, weight ascribed, and credibility findings are triggered."), ¶ 850 ("The Tribunal is respectfully asked to consider the extent to which its understanding of the 'how' and 'why' may give rise to rebuttable *presumptions* and as part of the analysis, the extent to which such *presumptions* have or have not been rebutted.") (emphasis added).

Policy.”⁵⁹⁵ On this point, Claimants contend that the dominant and effective nationality test serves as a “litmus test” to filter out instances of treaty-shopping.⁵⁹⁶ But, as explained in **Section II.C.1.a** above, the concept of treaty-shopping is only relevant to the “effectiveness” prong of the analysis, not to the “dominance” one. Moreover, as Colombia explained in its Answer, the purpose of the dominant and effective nationality test is broader than the one Claimants advance; such purpose is to ensure that only truly *foreign* investors receive treaty protection.⁵⁹⁷ While the treaty-shopping motive is relevant to the “effectiveness” prong of the analysis, the “Absence or Presence of a Scheme or Single Purpose and TPA Policy” factor is irrelevant here because the effectiveness of Claimants’ nationalities in this case is not being challenged.⁵⁹⁸

338. In sum, Colombia has identified the specific factors that are relevant to the determination of Claimants’ dominant nationality in this case, and respectfully submits that it is those factors that the Tribunal should apply.

c. Claimants’ dominant nationality must be determined as of the Critical Dates

339. In its Answer, Colombia demonstrated that the dominant nationality must be assessed as of (i) the date(s) of the alleged breach(es) and (ii) the date of the submission of the claim to arbitration (i.e., the Critical Dates).⁵⁹⁹ Claimants had

⁵⁹⁵ See Claimants’ Memorial (PCA), ¶ 211 (“Their respective dual-citizenship status is paradigmatically genuine and *bona fide*, the type of dual citizenship that the TPA seeks to protect and to foster.”); see also *id.* at ¶¶ 945-976.

⁵⁹⁶ Claimants’ Reply (PCA), ¶ 961.

⁵⁹⁷ Colombia’s Answer (PCA), ¶¶ 387-90.

⁵⁹⁸ Colombia’s Answer (PCA), ¶ 395 (“Claimants concede that their Colombian nationality is indeed an effective nationality (along with that of the US); and . . . [conversely] Colombia does not dispute the effectiveness of Claimants’ US nationality.”); Claimants’ Reply (PCA), ¶ 822.

⁵⁹⁹ Colombia’s Answer (PCA), ¶¶ 402-406.

originally alleged three separate breaches of the TPA.⁶⁰⁰ Accordingly, in its Answer, Colombia identified a first *set* of critical dates, comprised of the dates of the three alleged breaches, and a second critical date, which was the date of Claimants' submission to arbitration of their claim.⁶⁰¹

340. In their Reply, however, Claimants pivot; they are now saying that the *only* measure that they are challenging in this arbitration is the 2014 Confirmatory Order.⁶⁰² That being the case, for the purposes of Colombia's present *ratione personae* objection, the Critical Dates in the present case are: (i) 25 June 2014, which was the date of issuance of the 2014 Confirmatory Order ("**First Critical Date**"); and (ii) 24 January 2018, which was the date on which Claimants submitted their claim to arbitration ("**Second Critical Date**"). In their Reply, Claimants explicitly concede that the above-cited dates are in fact the Critical Dates for purposes of the dominance analysis herein: "In the case before this Tribunal the relevant dates are (i) June 25, 2014 (date of violation) (ii) January 24, 2018 (date of filing claim)."⁶⁰³ Nevertheless, Claimants insist that the Tribunal should rely on a "broad and temporally unrestricted analysis [to] . . . understand best the Claimant's [sic] status

⁶⁰⁰ See *e.g.*, Notice of and Request for Arbitration, ¶ 199 (asserting that Fogafín's financial support of Granahorrar violated Article 12.2 (the national treatment obligation) of the TPA); see also *id.*, ¶ 232 ("The underlying expropriation artificially compromising Granahorrar's solvency, reducing its share value to COP 0.01 . . . deprived the U.S. shareholders in absolute terms of the value of their investments."); ¶ 233 (claiming that the "Constitutional Court's issuance of its May 26, 2011 ruling and June 24, 2014 order also illicitly and permanently deprived the U.S. shareholders of their property").

⁶⁰¹ Colombia's Answer (PCA), ¶ 406

⁶⁰² Claimants' Reply (PCA), ¶ 3 ("Here, Claimants' claims arise from Order 188/14, the Constitutional Court's June 25, 2014 denial of the motion for annulment of its May 26, 2011 opinion."). In truth, Claimants are challenging a series of measures, including the 1998 Regulatory Measures and 2011 Constitutional Court Judgment, under the guise of a challenge only to the 2014 Confirmatory Order. See Section II.A.1. However, for the sake of their argument about the jurisdiction *ratione temporis* of the Tribunal, Claimants insist that the only measure they are challenging is the 2014 Confirmatory Order. See Claimants' Reply (PCA), ¶ 38. Colombia will demonstrate herein that even if the 2014 Confirmatory Order were indeed the only measure that Claimants are challenging (quod non), the Tribunal would still lack jurisdiction *ratione personae*.

⁶⁰³ Claimants' Reply (PCA), fn. 403; see also *id.* at ¶ 974.

at the time that the claim matured”⁶⁰⁴ (emphasis added). Additionally, Claimants argue that “[b]oth dates must be considered *in the context of Claimants’ entire lives*”⁶⁰⁵ (emphasis added). The foregoing assertions by Claimants are incorrect.

341. As emphasized in the jurisprudence, an investor’s dominant nationality is determined exclusively as of the Critical Dates.⁶⁰⁶ The Tribunal’s sole task is thus to determine whether, *on the Critical Dates*, Claimants’ connections to Colombia were stronger than their connections to the United States. Hence, evidence is only relevant if it addresses the nature of Claimants’ connections to both countries on or closely proximate to the Critical Dates; evidence that relates to events that took place long before or after the Critical Dates is irrelevant.
342. Claimants’ request that the Tribunal consider their “entire lives” is therefore erroneous and self-serving. For example, Claimants emphasize events that occurred long before – even *decades* before – the Critical Dates. They evidently do so because (i) Claimants’ connections to the US were arguably stronger when they were children and young adults⁶⁰⁷ than they were at the Critical Dates, which post-

⁶⁰⁴ Claimants’ Reply (PCA), ¶ 800.

⁶⁰⁵ Claimants’ Reply (PCA), fn. 403.

⁶⁰⁶ See **RLA-0088**, *Michael Ballantine and Lisa Ballantine v. the Dominican Republic*, PCA Case No. 2016-17 (Ramírez Hernández, Cheek, Vinuesa), Final Award, 3 September 2019 (“**Ballantine (Final Award)**”), ¶¶ 556 (“Rather an analysis should be performed to examine how, at that particular time [i.e., the time of the alleged breach and the time of the submission of the claim], the connections to both States could be characterized in terms of dominance and effectiveness.”); **RLA- 0090**, *Benny Diba and Wilfred J. Gaulin v. Islamic Republic of Iran, et al.*, IUSCT Case No. 940 (Briner, Aldrich, Khalilian), Award, 31 October 1989 (“**Diba (Award)**”), ¶ 13 (“The pertinent issue thus becomes one of determining, in accordance with the various criteria set forth in the A18 Decision, the dominant and effective nationality of the Claimant at the relevant time [i.e., from the time the claim arose until 19 January 1981, the date of the signing of the Algiers Declarations].”).

⁶⁰⁷ Of the limited time during which Claimants lived in the United States, most of it was while they were minors and young adults. See Witness Statement of Alberto Carrizosa Gelzis, 24 May 2019 (“**Alberto Carrizosa Gelzis Witness Statement**”), ¶¶ 11-32; Witness Statement of Enrique Carrizosa Gelzis, 24 May 2008 (“**Enrique Carrizosa Gelzis Witness Statement**”), ¶¶ 6-18; Witness Statement of Felipe Carrizosa Gelzis, May 24 2019 (“**Felipe Carrizosa Gelzis Witness Statement**”), ¶¶ 10-15.

date their return to Colombia; and (ii) Claimants' claims about such earlier events consist of subjective assertions about how Claimants were raised, which, by their nature, makes them difficult to rebut.⁶⁰⁸

343. Claimants are hoping that the Tribunal will consider their "entire lives" also because many of their allegations (i) do not reference any particular time period, or (ii) relate to time periods that are far removed from the Critical Dates. For instance, Alberto Carrizosa Gelzis states that "[a]ll of [his] pension funds and [his] main bank accounts are located in the United States."⁶⁰⁹ However, he does not state for how long this has been the case. Claimants' witness statements are replete with similarly vague assertions,⁶¹⁰ as well as claims about events in the distant past.⁶¹¹ Neither of these categories of factual allegations are relevant in determining Claimants' dominant nationality *on the Critical Dates*.
344. While Claimants would prefer that the Tribunal adopt a standard that would confer some probative value to their vague, unsupported, and/or atemporal statements, the Tribunal should adopt the standard that calls for the determination of the Claimants' dominant nationality on the basis of objective evidence and in relation to the Critical Dates.

⁶⁰⁸ See Alberto Carrizosa Gelzis Witness Statement, ¶¶ 7, 10, 31-35; Enrique Carrizosa Gelzis Witness Statement, ¶¶ 6, 9, 30; Felipe Carrizosa Gelzis Witness Statement, ¶ 11, 23. Indeed, like Claimants here, the claimant in *Ladjevardi* claimed that "her mother fully espoused American values at an early age and inculcated them in her children." See **RLA-0119**, *Ninni Ladjevardi (Formerly Burgel) v. The Islamic Republic Of Iran*, IUSCT Case No. 118 (Broms, Holtzmann, Noori) Award, 8 December 1993 ("**Ladjevardi (Award)**"), ¶ 10. However, the Iran-U.S. Claims Tribunal dismissed such arguments, noting that "[t]here is no specific evidence that she was exposed to American custom or culture at home, or that she participated in, or considered herself part of, the American community in Tehran." See **RLA-0119**, *Ladjevardi (Award)*, ¶ 42.

⁶⁰⁹ Alberto Carrizosa Gelzis Witness Statement, ¶ 43.

⁶¹⁰ See *e.g.*, Alberto Carrizosa Gelzis Witness Statement, ¶¶ 38-40, 43-46, 50; Enrique Carrizosa Gelzis Witness Statement, ¶¶ 25, 28, 33-37, 38, 40; Felipe Carrizosa Gelzis Witness Statement, ¶¶ 22, 24, 26, 30, 31, 32-36.

⁶¹¹ See *e.g.*, Alberto Carrizosa Gelzis Witness Statement, ¶¶ 11-14; Enrique Carrizosa Gelzis Witness Statement, ¶¶ 8-11; Felipe Carrizosa Gelzis Witness Statement, ¶ 10-14.

2. *Claimants have failed to meet their burden of establishing that their dominant nationality at the Critical Dates was that of the United States*

345. As Colombia noted in its Answer, Claimants bear the burden of proving the facts necessary to establish jurisdiction.⁶¹² However, in the three written submissions that Claimants have submitted in this proceeding, the *only* evidence that they have presented on the issue of their dominant nationality is testimonial evidence—specifically, the four witness statements (theirs and their mother’s) which they submitted with their Memorial.⁶¹³ Those self-serving assertions in their own witness statements have no evidentiary value.

346. In the following sections, Colombia will explain further that (i) Claimants have failed to submit any *documentary* evidence whatsoever, in any of the three pleadings (**Section II.C.2.a** below); (ii) in any event, many of Claimants’ factual assertions are affirmatively contradicted by the documentary evidence that is in the record (**Section II.C.2.b** below); and (iii) Claimants unsuccessfully attempt, through various tactics, to divert attention from their evidentiary deficiencies (**Section II.C.2.c** below).

a. Claimants have failed to satisfy their burden of proving their dominant nationality through documentary evidence

347. On the issue of dominant and effective nationality, it is Claimants’ burden to prove they are “more foreign than national . . . that is, [that their] dominant and effective nationality is not that of the State against which a claim has been submitted.”⁶¹⁴

⁶¹² Colombia’s Answer (PCA), § II.A.1

⁶¹³ See Alberto Carrizosa Gelzis Witness Statement, ¶¶ 1-50; Felipe Carrizosa Gelzis Witness Statement, ¶¶ 1-37; Enrique Carrizosa Gelzis Witness Statement, ¶¶ 1-41; Astrida Carrizosa Witness Statement, ¶¶ 10-17.

⁶¹⁴ See **RLA-0118**, *Heemsen* (Award on Jurisdiction), ¶ 433 (English translation: “[I]t would have to be considered that only the dual national who is more foreign than national may submit a claim, that is, the investor whose dominant and effective nationality is not that of the State against which a claim has been submitted.”) (Spanish original: “[S]e tendría que considerar que solo podrá reclamar el doble nacional que sea más extranjero que nacional, esto es, el inversor cuya nacionalidad

The extensive jurisprudence of the Iran-United States Claims Tribunal (“**Iran-U.S. Claims Tribunal**”) on the application of the dominant and effective nationality test confirms that “the determination of dominant and effective nationality . . . requires the claimant to carry its burden of proof and present the Tribunal with adequate evidence, including documentary proof.”⁶¹⁵

348. There is a marked and incontrovertible difference, in terms of probative value, between (1) a document prepared by an interested party in the course of an adjudicatory proceeding for the purpose of advancing his or her claims (such as, here, Claimants’ witness statements), and (2) documentary evidence that is prepared in the ordinary course of life or business (such as the documents produced by Colombia). Accordingly, tribunals have chosen to give credence to the documentary evidence when such evidence contradicts witness testimony. Indeed, as Claimants admit, the Iran-U.S. Claims Tribunal based its decision in *Diba* in part “on a credibility issue arising from an inconsistency between [the] claimant’s representation and [the documentary evidence].”⁶¹⁶
349. The Iran-U.S. Claims Tribunal has held, in numerous cases, that the claimant failed to satisfy its burden of proof when it relied exclusively on the testimony of witnesses. For example, in *Mohajer-Shojaee v. Iran*, the tribunal stated:

[B]ecause the evidence on the basis of which Shahnaz Mohajer-Shojaee seeks to establish the dominance of her United States nationality consists almost exclusively of

dominante y efectiva no es la del Estado en contra del cual reclama”); see also **CLA-0014**, *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB 12/20 (Söderlund, Bermann, Malintoppi), Award, 26 April 2017, ¶ 66 (“All facts that are dispositive for purposes of jurisdiction must be proven at the jurisdictional stage. In this regard, the Claimant bears the burden of proving the facts required to establish jurisdiction, insofar as they are contested by the Respondent.”); **RLA-0065**, *Abaclat et al. v. Argentine Republic*, ICSID Case No. ARB/07/5 (Pierre, Abi-Saab, van den Berg), Decision on Jurisdiction and Admissibility, 4 August 2011, ¶ 678; **RLA-0063**, *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005 (Runeland, Söderlund, Cremades), Final Award, 26 March 2008, ¶ 64.

⁶¹⁵ **RLA-0120**, *Mohajer-Shojaee* (Award), ¶ 9.

⁶¹⁶ Claimants’ Reply (PCA), ¶ 399.

affidavits by her husband, also a Claimant in this Case, the bulk of the evidence before the Tribunal remains unsupported by such proof. In these circumstances, the Tribunal concludes that Shahnaz Mohajer-Shojaee has failed to prove that her United States nationality is the dominant and effective nationality, and that she therefore lacks standing before this Tribunal.⁶¹⁷

In sum, a dual national claimant cannot meet its burden of proof on dominant nationality by resorting solely to testimonial allegations that are unsupported by objective evidence.

350. In their Memorial, Claimants failed to submit any documentary evidence whatsoever to support their assertion that their dominant nationality is that of the United States.⁶¹⁸ In contrast, Colombia in its Answer provided extensive documentary evidence demonstrating Claimants' closer ties to Colombia, and disproving many of Claimants' factual allegations.⁶¹⁹ Colombia also challenged

⁶¹⁷ **RLA-0120**, *Mohajer-Shojaee* (Award), ¶ 9. See also **RLA-0090**, *Benny Diba and Wilfred J. Gaulin v. Islamic Republic of Iran*, IUSCT Case No. 940 (Briner, Aldrich, Khalilian), Award, 31 October 1989 ("*Diba*"), ¶ 24 (stating that a claimant in that case had not met his burden of proving the dominance of his US nationality, *inter alia*, because "Mr. Diba has failed to document the extent of the business interests he claims to have maintained in the United States during [the relevant] years."); **RLA-0119**, *Ladjevardi* (Award), ¶ 48 (holding that the witness statements submitted by the claimant were "not . . . sufficient to prove the dominance and effectiveness of her United States nationality at the time the claim arose and consequently during the relevant period."); **RLA-0121**, *Alex Arjad v. Islamic Republic Of Iran*, IUSCT Case No. 413 (Arango-Ruiz, Allison, Aghahosseini) Award, 22 April 1991 ("*Arijad (Award)*"), ¶ 10 ("Although the Tribunal has provided the Claimant with adequate opportunities to submit such evidence, the record is devoid of documentary evidence supporting the Claimant's United States nationality or, for that matter, the dominance of that nationality. Therefore, the Tribunal concludes that the Claimant has failed to establish his United States nationality").

⁶¹⁸ While Claimants presented as exhibits their US passports and US birth certificates (see **CWS-1-1**, Certificate of Birth and U.S. Passport, 9 March 1966, p. 1; **CWS-2-1**, U.S. Passport and Birth Certificate, 20 July 1968, p. 1; **CWS-3-1**, US Passport, US Certificate of Birth, and Report of Birth Abroad, 28 August 1974, p. 1), such documents prove only the existence and effectiveness of Claimants' US nationality (neither of which Colombia contests), but in and of themselves they have no bearing at all on the issue of which of Claimants' nationalities is *dominant*.

⁶¹⁹ See, e.g., **Ex. R-0369**, Allegations Made by Claimants that have been Disproven by Documentary Evidence, 16 March 2020 (providing examples of some of the documentary evidence submitted by Colombia).

Claimants to provide objective (i.e., documentary) evidence on the relevant issues, including on Claimants' financial connections to the United States and Colombia, respectively.⁶²⁰ Claimants failed to rise to that challenge and did not submit any documentary evidence whatsoever on issues concerning their dominant nationality; instead, they continued to rely exclusively on the four witness statements that they had already submitted.

351. As affirmed by the Iran-U.S. Claims Tribunal,⁶²¹ unsupported witness statements are insufficient to satisfy a claimant's burden of proving that it is "more foreign than national."⁶²² Having thus failed to satisfy their burden of proof, Claimants' claims should be dismissed for lack of jurisdiction *ratione personae*.

b. In any event, many of Claimants' allegations are directly contradicted by the documentary evidence on the record

352. Leaving aside the absence of documentary evidence supporting Claimants' position, many of the allegations in Claimants' witness statements are affirmatively *contradicted* by the considerable amount of documentary evidence that Colombia has introduced into the record on the issue of Claimants' dominant nationality. For example, Claimants assert that they have only identified as Colombian where required to do so by Colombian law.⁶²³ However, this assertion is belied by their pleadings to the Inter-American Commission of Human Rights ("IACHR") (a body to which Colombian law does not apply, and before which

⁶²⁰ Colombia's Answer (PCA), ¶¶ 437 ("As Claimants bear the burden of proof on the issue of their nationality, they should fully disclose the extent to which they and their companies own assets in Colombia."); *see also id.* at ¶ 441.

⁶²¹ *See e.g., RLA-0120, Mohajer-Shojaee* (Award), ¶ 9; *RLA-0090, Benny Diba and Wilfred J. Gaulin v. Islamic Republic of Iran*, IUSCT Case No. 940 (Briner, Aldrich, Khalilian), Award, 31 October 1989 ("*Diba*"), ¶ 24; *RLA-0119, Ladjevardi* (Award), ¶ 48; *RLA-0121, Arijad* (Award), ¶ 10.

⁶²² *See RLA-0118, Heemsen* (Award on Jurisdiction), ¶ 433 (stating that the only type of claimant who can submit a claim against a State is one who is "more foreign than national" ("*más extranjero que nacional*").

⁶²³ Alberto Carrizosa Gelzis Witness Statement, ¶ 50; Felipe Carrizosa Gelzis Witness Statement, ¶ 37.

any natural person—irrespective of nationality—can file a claim⁶²⁴). In such pleadings, Claimants consistently and exclusively (i) have identified themselves as “*colombiano[s]*”, (ii) have confirmed their Colombian identity number, and (iii) have attached their Colombian identity cards.⁶²⁵ Other examples are included in the tables included at **Exhibit R-0369**, which provide a non-exhaustive list of allegations made in Claimants’ witness statements which are disproven by documentary evidence in the record. Thus, many of Claimants’ allegations concerning their dominant nationality have been affirmatively disproven by Colombia’s documentary evidence.

c. Claimants unsuccessfully seek to divert attention from their evidentiary deficiency

353. In their Reply, Claimants attempt to distract the Tribunal’s attention from the absence of any documentary evidence supporting their claim of dominance of their US nationality, by resorting to three tactics, each of which fails.

i. Claimants argue—inexplicably—that their US citizenship by birth renders their testimony more credible than that of naturalized US citizens

354. First, and bizarrely, Claimants advance the thesis that because they were born US nationals, their testimony is *ipso facto* more credible than that of a hypothetical *naturalized* US national:

⁶²⁴ See **RLA-0097**, *Castillo Petruzzi et al. v. Peru*, IACHR (Salgado-Pesantes *et al.*), Preliminary Objections Judgment, 4 September 1998.

⁶²⁵ See **Ex. R-0118**, Petition to the Inter-American Commission on Human Rights, 6 June 2012, p. 43; **Ex. R-0119**, Supplementary Pleading to the Inter-American Commission on Human Rights, 20 July 2016, pp. 1-2; **Ex. R-0010**, Colombian Identification Card of Alberto Carrizosa Gelzis, 30 May 1984; **Ex. R-0189**, Colombian Identification Card of Enrique Carrizosa Gelzis, 27 October 1992; **Ex. R-0012**, Colombian Identification Card of Felipe Carrizosa Gelzis, 26 September 1986; **Ex. R-0120**, Revision Petition to the Inter-American Commission on Human Rights, 20 March 2017, pp. 3-4; **Ex. R-0122**, Third Revision Petition to the Inter-American Commission on Human Rights, 4 July 2018, pp. 1, 7; **Ex. R-0121**, Second Revision Petition to the Inter-American Commission on Human Rights, 4 October 2017, pp. 4, 5, 7, 17.

[Claimants'] testimony must carry greater weight, legitimacy, presumption of *bona fide*, and genuineness coming from declarants who were US citizens all of their lives, than when asserted by someone who became a naturalized citizen, by way of example, as a young adult.⁶²⁶

355. Claimants even go so far as to suggest that their birth status should somehow generate a *presumption* of truthfulness of their assertions:

In this same vein, the Claimants' testimony concerning the multiple factors to be explored carry with it the legitimacy of a lifetime of exposure to US culture and history that simply cannot be replicated under most naturalization scenarios. Here too, probative value, weight ascribed, and credibility findings are triggered. . . . [The] Tribunal is respectfully asked to consider the extent to which its understanding of the 'how' and 'why' may give rise to rebuttable *presumptions* and as part of the analysis, the extent to which such *presumptions* have or have not been rebutted.⁶²⁷ (Emphasis added)

356. The Tribunal should dismiss this argument summarily. There is no legal basis whatsoever for Claimants' proposed evidentiary principle, which is predicated on the strange notion that natural-born citizens are somehow more truthful or credible than naturalized citizens. Such assertion not only defies common sense, but is offensive. Not surprisingly, Claimants do not cite to any legal authority for their thesis.
357. Moreover, Claimants' proposed presumption would amount to a direct inversion of the burden of proof (which, as noted above, rests on them).
358. Claimants' first diversion tactic thus fails.
- ii. Claimants attempt to rely on evidence that by its nature does not lend itself to rebuttal

⁶²⁶ Claimants' Reply (PCA), ¶ 847; see also generally ¶¶ 846-49.

⁶²⁷ Claimants' Reply (PCA), ¶¶ 847, 849. See also generally *id.* at ¶¶ 847-50.

359. Claimants' second diversion tactic is to rely on "evidence" that by its very nature is not rebuttable. For example, they rely heavily on witness testimony as support for points that, by virtue of their vintage (e.g., dating from Claimants' childhood), or of their nature (Claimants' own subjective thoughts and feelings), are virtually impossible to disprove.⁶²⁸
360. Claimants contend that the Tribunal should consider their testimony "qualitatively"⁶²⁹—which is a euphemism for blindly accepting Claimants' assertions.⁶³⁰ Moreover, according to Claimants:

The *only* kind of testimony, beyond a party-admission, that at all could credibly challenge these premises would be from a declarant having personal knowledge that in effect Claimants when being raised in their household were not in fact exposed to U.S. culture as the predominant cultural influence.⁶³¹
[Emphasis in original]

361. In other words, under Claimants' standard, the only way that Colombia could rebut the testimonial assertions of Claimants would be by means either of (i) an admission by one or more of the Claimants themselves, or (ii) testimony from a witness with personal knowledge of Claimants' upbringing or thoughts.⁶³²

⁶²⁸ See e.g., Alberto Carrizosa Gelzis Witness Statement, ¶¶ 33-36; Felipe Carrizosa Gelzis Witness Statement, ¶¶ 9, 22, 23; Enrique Carrizosa Gelzis Witness Statement, ¶¶ 29, 30; Astrida Benita Carrizosa Witness Statement, ¶¶ 10-17.

⁶²⁹ See Claimants' Reply (PCA), ¶¶ 796, 800, 801, 806, 811, 817, 818.

⁶³⁰ See e.g., Claimants' Reply (PCA), ¶¶ 884-85 ("The requisite analysis for a dominant and effective nationality determination requires a qualitative understanding of each factor. Here, Mr. Alberto Carrizosa Gelzis testifies that he does not reside in Colombia because he is primarily Colombian [T]he testimony on this point is materially no different with respect to Mr. Felipe Carrizosa Gelzis, or Mr. Enrique Carrizosa Gelzis."); see also *id.* at ¶¶ 866-74 (reciting allegations made in the four witness statements submitted by Claimants, and then stating that "[t]hese facts bespeak dominant and effective links with the United States that are qualitatively deep.").

⁶³¹ Claimants' Reply (PCA), ¶ 941.

⁶³² Claimants' Reply (PCA), ¶¶ 941-42.

Claimants assert that “[a]bsent such testimony . . . the Tribunal should find that Claimants met and surpassed a *prima facie* showing.”⁶³³

362. However, the standard advanced by Claimants has no basis in law. Moreover, it is a standard that is virtually impossible to meet, as it would require that the Tribunal accept as true all of Claimants’ subjective and self-serving allegations about their upbringing and feelings, unless either Claimants themselves or someone close to them were to provide testimony to the contrary. Such a standard is untenable, and the jurisprudence—as well as sheer logic—instead support Colombia’s position, which is that the Tribunal should decide the issue on the basis of the available objective, documentary evidence.⁶³⁴ The latter evidence disproves Claimants’ allegations, as a result of which Claimants’ second diversion tactic similarly fails.

iii. Claimants mischaracterize many of Colombia’s arguments

363. Third, Claimants distort or mispresent many of Colombia’s arguments, and on that basis seek to undermine Colombia’s credibility. Due to the number of such mischaracterizations, Colombia does not attempt herein to identify or respond to each of them individually. Instead, in the following paragraphs Colombia will limit itself to providing a single representative example.

364. In the section of Claimants’ Reply that discusses their place of residence, Claimants purport to challenge two pieces of evidence from Colombia’s Answer: (i) **Felipe Carrizosa Gelzis’s** membership in a golf club,⁶³⁵ and (ii) a photograph of **Enrique Carrizosa Gelzis** attending a Colombian folk music festival with his family.⁶³⁶

⁶³³ Claimants’ Reply (PCA), ¶ 943.

⁶³⁴ See e.g., **RLA-0120**, *Mohajer-Shojaee* (Award), ¶ 9; **RLA-0090**, *Benny Diba and Wilfred J. Gaulin v. Islamic Republic of Iran*, IUSCT Case No. 940 (Briner, Aldrich, Khalilian), Award, 31 October 1989 (“*Diba*”), ¶ 24; **RLA-0119**, *Ladjevardi* (Award), ¶ 48; **RLA-0121**, *Arijad* (Award), ¶ 10.

⁶³⁵ Claimants’ Reply (PCA), ¶¶ 887-93.

⁶³⁶ Claimants’ Reply (PCA), ¶¶ 894-98.

Claimants allege – incorrectly – that Colombia presented these items as evidence of Claimants’ place of habitual residence, and then proceed to argue that such evidence is not relevant to the residence analysis.⁶³⁷

365. However, Colombia had submitted those facts *not* as evidence of Claimants’ place of residence, but rather merely as evidence that Claimants’ family, social, and political lives were centered in Colombia – specifically, as evidence of Claimants’ social integration in, and cultural connections with, Colombia.⁶³⁸ Consistent with the foregoing, Colombia did not discuss the above-referenced evidence in the section of its Answer that analyzed Claimants’ permanent and habitual residence.⁶³⁹ Instead, Colombia discussed the above-referenced evidence in Section III.D.2.c of its Answer, which was entitled “Claimants elected to make Colombia the center of their family, social, and political lives.”⁶⁴⁰

366. By mischaracterizing Colombia’s evidence in this fashion, Claimants unfairly question Colombia’s credibility, while at the same time failing even to attempt to rebut Colombia’s arguments on the issue of their place of residence (as discussed below).

3. *The evidence in the record shows that Claimants’ dominant nationality was that of Colombia on the Critical Dates*

367. In the following subsections, Colombia will address the documentary evidence concerning each of the factors relevant to the determination of Claimants’ dominant nationality, namely: (i) the place of Claimants’ permanent and habitual residence (**Section II.C.3.a** below); (ii) the center of Claimants’ economic lives

⁶³⁷ Claimants’ Reply (PCA), ¶ 892 (“Club membership is not material to residing in a jurisdiction”); *see also id.* at ¶¶ 899-900 (“Respondent has sought recourse to two rather bizarre and questionable references to externalities that are not relevant or material to the core considerations.”).

⁶³⁸ Colombia’s Answer (PCA), ¶¶ 452, 455.

⁶³⁹ *See* Colombia’s Answer (PCA), § III.D.2.a (addressing place of residence factor).

⁶⁴⁰ *See* Colombia’s Answer, ¶¶ 452, 455.

(Section II.C.3.b below); (iii) the center of Claimants' family, social, personal and political lives (Section II.C.3.c below); and (iv) how Claimants have self-identified with respect to their nationality (Section II.C.3.d below).

368. The evidence in the record on these factors demonstrates that Claimants' dominant nationality on the Critical Dates (i.e., 25 June 2014 and 24 January 2018) was that of Colombia.

a. Colombia was Claimants' permanent and habitual place of residence on the Critical Dates

369. A person's permanent and habitual residence reflects his or her "decision to settle in a specific place, as a long-standing decision."⁶⁴¹ Here, Colombia was clearly Claimants' permanent and habitual residence on the Critical Dates.

370. **Alberto Carrizosa Gelzis** was residing in Colombia on both of the Critical Dates.⁶⁴² He has permanently and habitually resided in Colombia since 2007,⁶⁴³ and thus by the time of the First Critical Date, he had been living in Colombia uninterruptedly for 7 years (and for 11 years by the time of the Second Critical Date). During 2014—the year of the First Critical Date—Alberto Carrizosa Gelzis spent 325 days in Colombia, and only 39 days abroad.⁶⁴⁴ And during 2018—the year of the Second Critical Date—he spent 300 days in Colombia, and only 65 days abroad.⁶⁴⁵ From 2007 to 2018, Alberto Carrizosa Gelzis spent 3,406 days in

⁶⁴¹ **RLA-0088**, *Ballantine* (Final Award), ¶ 563.

⁶⁴² See Alberto Carrizosa Gelzis Witness Statement, ¶ 32.

⁶⁴³ See Alberto Carrizosa Gelzis Witness Statement, ¶ 32 (He states: "In 2007 I went back to Colombia to work at I.C. Investments Group." He does not assert that he moved back to the United States at any point after that (which presumably he would have done if he had, given the present context)).

⁶⁴⁴ **Ex. R-0261**, Summary of Information from Official Immigration Records, 21 October 2019, p. 1; see generally **Ex. R-0201**; Migratory Records for Alberto Carrizosa Gelzis, 2001–2019.

⁶⁴⁵ **Ex. R-0261**, Summary of Information from Official Immigration Records, 21 October 2019, p. 1; see generally **Ex. R-0201**; Migratory Records for Alberto Carrizosa Gelzis, 2001–2019.

Colombia, far longer than the 948 days he spent abroad.⁶⁴⁶ (Importantly, as evinced by Alberto Carrizosa Gelzis's Colombian migratory records, not all of those 948 days were spent in the United States.⁶⁴⁷)

371. **Enrique Carrizosa Gelzis**, for his part, also was residing in Colombia on both of the Critical Dates.⁶⁴⁸ Colombia has been his permanent and habitual residence since 2004.⁶⁴⁹ Hence, Enrique Carrizosa Gelzis had been living in Colombia without interruption for 10 years as of the First Critical Date, and for 14 years as of the Second Critical Date. In 2014, he spent 286 days in Colombia, but only 78 days abroad.⁶⁵⁰ And in 2018, he spent 237 days in Colombia, and 127 days abroad.⁶⁵¹ From 2004 to 2018, Enrique Carrizosa Gelzis spent 4,220 days in Colombia, versus 1,206 days abroad.⁶⁵² (As evinced by Enrique Carrizosa Gelzis's

⁶⁴⁶ **Ex. R-0261**, Summary of Information from Official Immigration Records, 21 October 2019, p. 1; *see generally* **Ex. R-0201**; Migratory Records for Alberto Carrizosa Gelzis, 2001–2019. In total, Alberto Carrizosa Gelzis has resided in Colombia for 37 years, in the United States for 15 years, and in Europe for approximately one year. *See* Alberto Carrizosa Gelzis Witness Statement, ¶¶ 1, 3, 12–17.

⁶⁴⁷ **Ex. R-0261**, Summary of Information from Official Immigration Records, 21 October 2019, p. 1; *see generally* **Ex. R-0201**; Migratory Records for Alberto Carrizosa Gelzis, 2001–2019.

⁶⁴⁸ *See* Enrique Carrizosa Gelzis Witness Statement, ¶ 17 (stating that he moved to Colombia in 2004, and not asserting that he has moved elsewhere since that time).

⁶⁴⁹ Enrique Carrizosa Gelzis Witness Statement, ¶ 17.

⁶⁵⁰ **Ex. R-0261**, Summary of Information from Official Immigration Records, 21 October 2019, p. 2; *see generally* **Ex. R-0202**; Migratory Records for Enrique Carrizosa Gelzis, 2002–2019.

⁶⁵¹ **Ex. R-0261**, Summary of Information from Official Immigration Records, 21 October 2019, p. 2; *see generally* **Ex. R-0202**; Migratory Records for Enrique Carrizosa Gelzis, 2002–2019.

⁶⁵² **Ex. R-0261**, Summary of Information from Official Immigration Records, 21 October 2019, p. 2; *see generally* **Ex. R-0202**; Migratory Records for Enrique Carrizosa Gelzis, 2002–2019. Enrique Carrizosa Gelzis claims that he “spend[s] at least 70 days per year in the United States.” Enrique Carrizosa Gelzis Witness Statement, ¶ 29. However, Colombia's documentary evidence disproves that assertion, as it shows that after returning to Colombia in 2004, Enrique Carrizosa Gelzis has spent less than 70 days per year in the United States every year (except for in 2007 and 2018). *See* **Ex. R-0261**, Summary of Information from Official Immigration Records, 21 October 2019, note xii. In total, Enrique Carrizosa Gelzis has resided in Colombia for 31 years and in the United States for only 14 years. *See* Enrique Carrizosa Gelzis Witness Statement, ¶¶ 1, 7–17.

Colombian migratory records, not all of those 1,206 days were spent in the United States.⁶⁵³)

372. The third brother, **Felipe Carrizosa Gelzis**, likewise was residing in Colombia on both of the Critical Dates.⁶⁵⁴ Felipe Carrizosa Gelzis has made Colombia his permanent and habitual residence since 1994.⁶⁵⁵ As of the First Critical Date, he had been living in Colombia for 20 years; as of the Second Critical Date, he had been living in Colombia for 24 years. In 2014, he spent 311 days in Colombia, but only 53 days abroad.⁶⁵⁶ And in 2018, he spent 302 days in Colombia, and only 62 days abroad.⁶⁵⁷ From 2001⁶⁵⁸ to 2018, he spent 5,270 days in Colombia, dwarfing the 643 days he spent abroad (not all of which were spent in the United States, as shown by Colombia's migratory records).⁶⁵⁹
373. In their Reply, Claimants chose simply to stick their heads in the sand and completely ignore all of the evidence cited above. Instead, as noted in **Section II.C.2.c.iii** above, they dedicate the majority of their analysis (on the issue of permanent residence) to commenting on evidence provided by Colombia on a *different* subject (namely, the center of Claimants' social, family, and political lives).⁶⁶⁰

⁶⁵³ **Ex. R-0261**, Summary of Information from Official Immigration Records, 21 October 2019, p. 2; *see generally* **Ex. R-0202**; Migratory Records for Enrique Carrizosa Gelzis, 2002–2019.

⁶⁵⁴ *See* Felipe Carrizosa Gelzis Witness Statement, ¶ 17.

⁶⁵⁵ *See* Felipe Carrizosa Gelzis Witness Statement, ¶ 17 (stating that he moved to Colombia in 1994, and not asserting that he has moved elsewhere since that time).

⁶⁵⁶ **Ex. R-0261**, Summary of Information from Official Immigration Records, 21 October 2019, p. 3; *see generally* **Ex. R-0203**; Migratory Records for Felipe Carrizosa Gelzis, 2001–2019.

⁶⁵⁷ **Ex. R-0261**, Summary of Information from Official Immigration Records, 21 October 2019, p. 3; *see generally* **Ex. R-0203**; Migratory Records for Felipe Carrizosa Gelzis, 2001–2019.

⁶⁵⁸ 2001 is the first year for which migratory records are available for Felipe Carrizosa Gelzis.

⁶⁵⁹ **Ex. R-0261**, Summary of Information from Official Immigration Records, 21 October 2019, p. 3; *see generally* **Ex. R-0203**; Migratory Records for Felipe Carrizosa Gelzis, 2001–2019. In total, Felipe Carrizosa Gelzis has resided in Colombia for 40 years, in the United States for seven years, and in Germany for three years. *See* Felipe Carrizosa Gelzis Witness Statement, ¶¶ 1, 10–21.

⁶⁶⁰ *See* Claimants' Reply (PCA), ¶¶ 886–98.

374. Claimants also repeat their argument that they moved to Colombia simply because their businesses required their physical presence.⁶⁶¹ However, under similar circumstances, the majority in *Ballantine* concluded that the claimants’ assertion that the purpose of their move to the Dominican Republic was to oversee their investment when “it became apparent that they needed to be present,”⁶⁶² was unconvincing. Instead, the majority in *Ballantine* held that the claimants’ voluntary decision to move to the Dominican Republic – irrespective of their motivation for doing so – suggested that their dominant nationality was the Dominican at the relevant time:

[B]eing nationals [of the Dominican Republic] from 2010 to 2014, most of [the Claimants’] time was spent in that country. We view this evidence as confirming the legal status [of permanent residents] the Claimants voluntarily chose to acquire. Consequently, although the Claimants maintained ties with the United States, their permanent residence at the relevant time was centered in the Dominican Republic.⁶⁶³

375. Moreover, it is inconsistent for Claimants (i) to have taken advantage of their Colombian nationalities to move to Colombia, where they have engaged in business ventures (for profit), only (ii) to now claim that they are “foreign” investors for the purpose of pursuing claims under the TPA. Indeed, Claimants assert that “[i]t is no secret, nor is it a sin, that Claimants are high net worth individuals and part of a family that lawfully and ethically worked hard to earn whatever assets they own.”⁶⁶⁴ Yet now Claimants seek to distance themselves from their native country, where they chose to reside and work. The *Ballantine* majority took issue a similar inconsistency in the claimants’ pleadings in that case:

Whilst the Claimants have mentioned that discriminatory treatment was one of the reasons for becoming Dominican,

⁶⁶¹ See Claimants’ Reply (PCA), ¶¶ 878-881, 882, 885.

⁶⁶² **RLA-0088**, *Ballantine* (Final Award), ¶ 206.

⁶⁶³ **RLA-0088**, *Ballantine* (Final Award), ¶ 566.

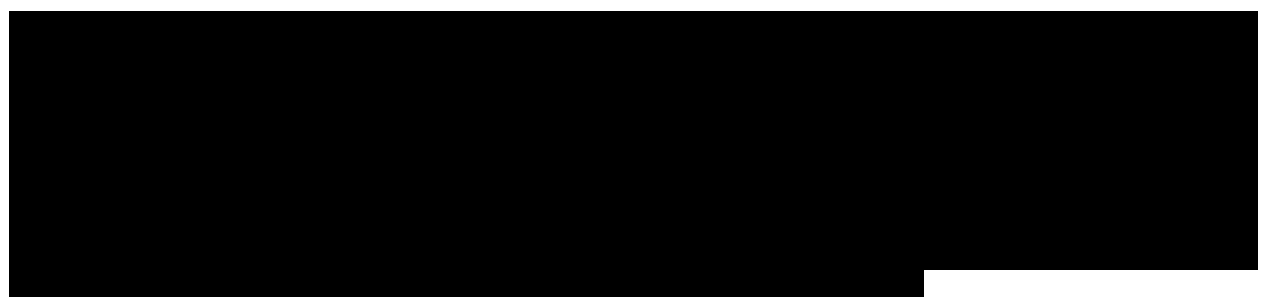
⁶⁶⁴ Claimants’ Reply (PCA), ¶ 919.

the Claimants have expressed that their motives were *for protection of the investment*, as a business decision for commercial aspects, an economic decision. The sole reason for becoming Dominican and *domestic investors* was the *investment*. The Tribunal finds trouble reconciling the fact that the Claimants' desire was to be viewed as Dominicans for purposes of bolstering their investment and yet, regarding the application of the protections designed for foreign investors, they contend such nationality is not as important.⁶⁶⁵ (Emphasis in original)

376. Ultimately, the key issue here is *whether* Claimants were residing in Colombia on the Critical Dates – not their reasons for doing so.⁶⁶⁶ One can choose to shift one's residence and entire life to another country, and such country's nationality can thereby become one's dominant nationality, irrespective of one's *motivation* for the shift.⁶⁶⁷ Here, the fact is that **Alberto** and **Enrique Carrizosa Gelzis** decided to

⁶⁶⁵ **RLA-0088**, *Ballantine* (Final Award), ¶ 584.

⁶⁶⁶ See Colombia's Answer (PCA), ¶¶ 417-18. Even assuming that Claimants' motivation were relevant (quod non), Colombia explained in its Answer that Claimants' allegations were disproven by documentary evidence, and by the witness statement provided by Claimants' mother, which demonstrate that Claimants were active in their Colombian business ventures even when they were residing abroad. See Colombia's Answer (PCA), ¶¶ 419-23; see also Astrida Benita Carrizosa Witness Statement, ¶ 27 (stating that "Alberto, who was attending University [in the United States] participated *very actively* in Granahorrar. The same thing was true with Felipe") (emphasis added).



⁶⁶⁷ For example, in *Diba*, the Iran U.S. Claims Tribunal noted that "between 1950 and 1967 the claimant] became integrated into American society so that by 1967 his dominant and effective nationality was probably that of the United States, although the Tribunal does not have to reach a decision on this question." In 1967, the claimant chose to move back to Iran. The Iran U.S. Claims Tribunal held that, "[a]fter weighing all the evidence before it, the Tribunal finds that [the claimant's] business activities and family life were so dominantly centered in Iran from 1967 to

leave behind their professional lives in the United States, to reside and pursue business ventures in Colombia. **Felipe Carrizosa Gelzis**, for his part, never had any professional life in the United States to begin with, as his entire professional life was conducted in Colombia.

377. In sum, the documentary evidence provided by Colombia demonstrates that Colombia was indeed the place of permanent and habitual residence of each of the three Claimants on the Critical Dates. Since the Claimants in their Reply failed to produce any documentary evidence in response, Colombia's evidence on that point stands unrebutted.

b. Colombia was the center of Claimants' economic lives on the Critical Dates

378. Here, the documentary evidence shows that the center of Claimants' economic lives on the Critical Dates was also Colombia.

379. Thus, with respect to **Alberto Carrizosa Gelzis's** economic life, he has worked at Colombian entity *IC Investments Group* since 2007, and is President of another Colombian entity, *IC Inversiones*.⁶⁶⁸ He served as liquidator of *Vanguardia Asesorías SAS*, a Colombian entity, in 2017.⁶⁶⁹ In 2010, he was the legal representative of another Colombian entity, *Manufacturas de Oriente*.⁶⁷⁰ Further, he has been a board member of *Gas Gombel SA*, also a Colombian entity, since 2015.⁶⁷¹ Conversely,

1979 as to compel it to hold that his dominant and effective nationality at the time the Claim arose, whether on 27 November 1978 or in the summer of 1979, was that of Iran." **RLA-0090**, *Benny Diba and Wilfred J. Gaulin v. Islamic Republic of Iran, et al.*, IUSCT Case No. 940 (Briner, Aldrich, Khalilian), Award, 31 October 1989 ("**Diba (Award)**"), ¶¶ 23-24.

⁶⁶⁸ Alberto Carrizosa Gelzis Witness Statement, ¶ 32; **Ex. R-0011**, LinkedIn Profile of Alberto Carrizosa Gelzis.

⁶⁶⁹ **Ex. R-0210**, Certificate of Liquidation of *Vanguardia Asesorías SAS*, 9 October 2017, p. 5 (certifying Alberto Carrizosa Gelzis as Liquidator of *Vanguardia Asesorías SAS*).

⁶⁷⁰ **Ex. R-0258**, Minutes of Industrias y Construcciones Shareholders Assembly, 13 September 2010, p. 1.

⁶⁷¹ **Ex. R-0211**, Certificate of Existence of Gas Gombel SA, 9 June 2019, p. 6 (certifying that Alberto Carrizosa Gelzis is a member of the Board of Directors).

Alberto Carrizosa Gelzis has not been employed in the United States since 2007.⁶⁷² Thus, it appears clear that the center of Alberto Carrizosa Gelzis’s economic life was Colombia for the 7 years that preceded the First Critical Date, and for 11 years preceding the Second Critical Date.⁶⁷³

380. Additionally, documentary evidence [REDACTED] [REDACTED] further confirms that Colombia was the center of Alberto Carrizosa Gelzis’s economic life on the Critical Dates. For example, in the years straddling the Critical Dates, he was:

a. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁶⁷⁴

b. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁶⁷⁵ and

⁶⁷²See Alberto Carrizosa Gelzis Witness Statement, ¶¶ 19–23, 29–32.

⁶⁷³ Further, even if one were to take Alberto Carrizosa Gelzis’s entire life into consideration, Colombia demonstrated in its Answer that the multitude of executive-level positions he has held in Colombia throughout his life vastly outweigh Alberto Carrizosa Gelzis’s three US jobs, which he held many years before either Critical Date. See Colombia’s Answer (PCA), ¶ 431.

⁶⁷⁴ Ex. R-0344, [REDACTED]
[REDACTED]

⁶⁷⁵ Ex. R-0344, [REDACTED]
[REDACTED].

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381. With respect to **Enrique Carrizosa Gelzis**, Colombia was similarly the center of his economic life on and around both Critical Dates. In April 2004, he began working at the *IC Group* in Colombia;⁶⁷⁷ the *IC Group* is a conglomerate of Colombian companies owned or controlled by the Carrizosa Family.⁶⁷⁸ Enrique Carrizosa Gelzis is currently the Chairman of the Board of that entity.⁶⁷⁹ He is also the Chairman of the Board at *IC Inversiones*, which is a Colombian entity.⁶⁸⁰ In 2013, he was the representative of *Vanguardia Inversiones*, *Compto*, *Exultar*, and *Fultiplex* (all Colombian entities) at shareholder assemblies of the Banco Davivienda (Colombia's third largest bank).⁶⁸¹ In 2017, Enrique Carrizosa Gelzis served as liquidator of *Vanguardia Asesorías SAS*, which is likewise a Colombian entity.⁶⁸² Importantly, he has not been employed in the United States since 2004. Colombia thus has been the center of his economic life for the 10 years that preceded the First Critical Date, and for 14 years preceding the Second Critical Date.⁶⁸³

⁶⁷⁶ Ex. R-0344, [REDACTED].

⁶⁷⁷ Enrique Carrizosa Gelzis Witness Statement, ¶ 17.

⁶⁷⁸ Ex. R-0347, History of Suzuki Medellín/Concesionario de la Sierra, last accessed 11 October 2019, p. 1.

⁶⁷⁹ Enrique Carrizosa Gelzis Witness Statement, ¶ 17. Claimants refer to "*IC Investments Group*" and "*IC Group*," but do not indicate whether these are the same entity. See Alberto Carrizosa Gelzis Witness Statement, ¶ 32; Enrique Carrizosa Gelzis Witness Statement, ¶ 17. For the avoidance of confusion, Colombia will rely on the names provided by Claimants.

⁶⁸⁰ Ex. R-0212, LinkedIn Profile of Enrique Carrizosa Gelzis.

⁶⁸¹ See Ex. R-0213, Minutes No. 7356 of Shareholder Assembly of Banco Davivienda, 21 June 2013, p. 3.

⁶⁸² Ex. R-0210, Certificate of Liquidation of Vanguardia Asesorías SAS, 9 October 2017, p. 5 (certifying Enrique Carrizosa Gelzis as Liquidator of *Vanguardia Asesorías SAS*).

⁶⁸³ Indeed, even if Enrique Carrizosa Gelzis's entire life were taken into consideration, in its Answer Colombia showed that his fourteen-year professional trajectory in Colombia (which

382. The *IC Group*, which Enrique Carrizosa Gelzis leads,⁶⁸⁴ has three strategic areas of focus: (i) construction; (ii) energy; and (iii) investments in the financial, automotive, mining, telecommunications, food, and technology fields.⁶⁸⁵ In the automotive field, the *IC Group* owns what has been the largest Suzuki and Mitsubishi vehicle dealership by sales in Colombia during the last 12 years (a period that encompasses both of the Critical Dates).⁶⁸⁶

383. Records [REDACTED] further show Enrique Carrizosa Gelzis's deep involvement in Colombian corporations on and around both of the Critical Dates. For instance, in the years straddling the Critical Dates, Enrique Carrizosa Gelzis was:

a. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED];⁶⁸⁷

b. [REDACTED]
[REDACTED]
[REDACTED]

encompasses both Critical Dates) outweighs the maximum of four years that Enrique Carrizosa Gelzis worked in the United States, which preceded either Critical Date. *See* Colombia's Answer (PCA), ¶ 435; *see also* Enrique Carrizosa Gelzis Witness Statement, ¶¶ 13-17.

⁶⁸⁴ Ex. R-0347, History of Suzuki Medellín/Concesionario de la Sierra, last accessed 11 October 2019, p. 1.

⁶⁸⁵ Ex. R-0347, History of Suzuki Medellín/Concesionario de la Sierra, last accessed 11 October 2019, p. 1.

⁶⁸⁶ Ex. R-0347, History of Suzuki Medellín/Concesionario de la Sierra, last accessed 11 October 2019, p. 1.

⁶⁸⁷ Ex. R-0345, [REDACTED].

[REDACTED]

[REDACTED],⁶⁸⁸ and

c.

[REDACTED]

[REDACTED]

[REDACTED].⁶⁸⁹

384. Finally, with respect to the third brother, **Felipe Carrizosa Gelzis**, the same is true: the center of his economic life on and around both of the Critical Dates was Colombia. Thus, from 2005 to 2018, he “served as President and CEO of *IC Constructora SAS*, a real estate development corporation.”⁶⁹⁰ The referenced company is Colombian. He is also the President of another Colombian company, *I.C. Inmobiliaria*.⁶⁹¹ In these roles, he has developed multiple large-scale real estate developments in Colombia.⁶⁹² Felipe Carrizosa Gelzis has never been employed in the United States. Colombia was thus the center of Felipe Carrizosa Gelzis’s economic life on and around both Critical Dates.

385. Like the other Claimants, Felipe Carrizosa Gelzis had an active involvement in Colombian corporations on and around both Critical Dates. For example, in the years of and straddling the Critical Dates, he was:

a.

[REDACTED]

[REDACTED]

⁶⁸⁸ Ex. R-0345, [REDACTED]

⁶⁸⁹ Ex. R-0345, [REDACTED]

⁶⁹⁰ Felipe Carrizosa Gelzis Witness Statement, ¶ 21.

⁶⁹¹ Ex. R-0214, “*En Cúcuta se construye Altovento; en el proyecto se invertirán más de \$25.000 millones,*” PORTAFOLIO, 19 June 2009, p. 2 (Identifying Felipe Carrizosa Gelzis as President of *I.C. Inmobiliaria*).

⁶⁹² Ex. R-0214, “*En Cúcuta se construye Altovento; en el proyecto se invertirán más de \$25.000 millones,*” PORTAFOLIO, 19 June 2009; Ex. R-0215, “Vendido 80% de Capital Park 93 en Bogotá,” EL TIEMPO, 28 August 2009.

[REDACTED]
[REDACTED] ⁶⁹³

b. [REDACTED]
[REDACTED]
[REDACTED] ⁶⁹⁴ and

c. [REDACTED]
[REDACTED]
[REDACTED] ⁶⁹⁵

386. Moreover, Claimants’ own witness statements and Reply reveal that Claimants maintained their direct shareholding in the six (Colombian) Holding Companies through the Critical Dates, until the present.⁶⁹⁶ And Claimants have been indirect shareholders in Banco Davivienda, Colombia’s third largest bank, since before the Critical Dates, and all the way through to the present.⁶⁹⁷

387. Claimants fail to address—let alone rebut—the documentary evidence and other facts presented in Colombia’s Answer, which demonstrate that Colombia was

⁶⁹³ Ex. R-0346, [REDACTED]
[REDACTED]

⁶⁹⁴ Ex. R-0346, [REDACTED]
[REDACTED]

⁶⁹⁵ Ex. R-0346, [REDACTED]
[REDACTED].

⁶⁹⁶ See Alberto Carrizosa Gelzis Witness Statement, ¶ 52 (identifying his shareholding in the Holding Companies in 1998); Felipe Carrizosa Gelzis Witness Statement, ¶ 38 (identifying his shareholding in the Holding Companies in 1998); Enrique Carrizosa Gelzis Witness Statement, ¶ 42 (identifying his shareholding in the Holding Companies in 1998); Claimants’ Reply (PCA), ¶ 931 (“Certainly the three Claimants have shareholder interests in [*inter alia*, the six Holding Companies that own Banco Davivienda shares]”).

⁶⁹⁷ Claimants do not deny that in 2010 they had, and today continue to have, an indirect interest in Banco Davivienda. To the contrary, they admit that they have an shareholding interest in the seven companies that hold a direct interest in Banco Davivienda. Claimants’ Reply (PCA), ¶ 931. Further, Claimants admit that an updated accounting would establish that the seven companies continue to have an interest in Banco Davivienda. Claimants’ Reply (PCA), ¶ 932.

indeed the center of Claimants' economic lives on the Critical Dates. Such evidence established, for example:

- a. that between 1999 and the present, Claimants' Holding Companies purchased at least 10 plots of land in Colombia,⁶⁹⁸ and that Claimants still hold an interest in those plots;⁶⁹⁹
- b. that the Carrizosa Family (of which Claimants are members) was the majority shareholder of at least 29 corporations in Colombia between 1997 and 1999,⁷⁰⁰ and that many if not all of those corporations have remained in operation, without Claimants alleging that they have divested themselves of their interests therein;⁷⁰¹
- c. that it is quite common for Latin Americans with financial means to use the United States as a safe haven for their investments (without such deposits in the United States signaling anything at all about the center of their economic lives);⁷⁰²
- d. that property records from the State of Florida confirm that a British Virgin Islands company—and not Claimants—owns the condominium in

⁶⁹⁸ Colombia's Answer (PCA), ¶ 437; *see also id.* fn. 931.

⁶⁹⁹ Colombia's Answer (PCA), ¶ 437; *see also id.* fn. 931.

⁷⁰⁰ Colombia's Answer (PCA), ¶ 437.

⁷⁰¹ Colombia's Answer (PCA), ¶ 437; *see generally* **Ex. R-0250**, Registry of Corporations Controlled by the Carrizosa Family, 27 September 1999; *see also* **Ex. R-0251**, Balcones de Iguazu Financial Report, August 2010, p. 21 (showing that *Balcones de Iguazu* owned shares in *Covitotal*, *Industrial de Construcciones*, *Industrias y Construcciones IC Inmobiliaria*, and *Prodesic*, all Carrizosa Family companies); **Ex. R-0254**, Industrial de Construcciones Financial Report, December 2011, p. 37 (showing that the shareholders of *Industrial de Construcciones* included *Balcones de Iguazu*, *IC Constructora*, *Industrias y Construcciones*, and *IC Inmobiliaria*, all Carrizosa Family companies); **Ex. R-0255**, *Industrias y Construcciones* Financial Report, August 2010, p. 17 (showing that among the debtors of *Industrias y Construcciones* were *Asesorías e Inversiones*, *Balcones de Iguazu*, *Covitotal*, and *Prodesic*, all Carrizosa Family companies); *see also id.* at 23 (showing that among the creditors of *Industrias y Construcciones* were *Asesoría e Inversiones*, *Balcones de Iguazu*, *Covitotal*, *Exultar*, *Fultiplex*, *IC Inmobiliaria*, *IC Inversiones*, *Industrial de Construcciones*, *Inversiones Burgos Monserrat*, and *Inversiones Lieja*, all Carrizosa Family companies).

⁷⁰² Claimants' Reply (PCA), ¶ 438.

Florida⁷⁰³ which Claimants invoke as evidence of property ownership in the United States;⁷⁰⁴ and

- e. that compliance with a legal requirement to file income taxes in the United States is not evidence of the dominance of their US nationality, for the simple reason that all United States citizens are required by law to file tax returns in the United States (irrespective of their country of residence, of where their income originated, or of which of their nationalities—if they have more than one—is dominant).⁷⁰⁵

388. Claimants simply disregard Colombia’s evidence, and attempt to buttress their position with vague and unsubstantiated allegations in their witness statements and pleadings. However, such self-serving statements have no probative value, and are therefore insufficient for Claimants to meet their burden of proof.⁷⁰⁶

389. The bottom line is that the *only* evidence on the record that is of any use to the Tribunal in assessing the relative strength of Claimants’ economic ties to the United States and Colombia, respectively, is the documentary evidence submitted by Colombia. And that evidence demonstrates unequivocally that the center of Claimants’ economic lives on and around the Critical Dates was Colombia.

⁷⁰³ **Ex. R-0208**, Special Warranty Deed for 17475 Collins Avenue, Unit 1102, 25 August 2015, **Ex. R-0209**, Miami-Dade Property Appraiser Records for 17475 Collins Avenue, Unit 1102, 2 September 2019.

⁷⁰⁴ Claimants’ Reply (PCA), ¶ 904.

⁷⁰⁵ See **Ex. R-0223**, Publication No. 54, United States Department of the Treasury–Internal Revenue Service, 25 January 2019, p. 3 (“If you are a U.S. citizen or resident alien, the rules for filing income, estate, and gift tax returns and for paying estimated tax are generally the same whether you are in the United States or abroad”); see also Colombia’s Answer (PCA), ¶ 440.

⁷⁰⁶ In their witness statements, Claimants only make vague claims that the “majority” of their assets are in the United States; or that they have “few personal assets in Colombia.” See Alberto Carrizosa Gelzis Witness Statement, ¶¶ 45, 38; Felipe Carrizosa Gelzis Witness Statement, ¶ 32, 33; Enrique Carrizosa Gelzis Witness Statement, ¶ 33-35. However, these assertions are unsupported by any documentary evidence, and therefore are insufficient for the Tribunal to conclude that the United States is the center of Claimants’ economic lives.

c. Colombia was the center of Claimants' family, social, civic, personal, and political lives on the Critical Dates

390. The question for the Tribunal on the issue of the center of Claimants' family, social, civic, personal, and political lives is the following: Where, in a physical/geographic sense, were the majority of those facets of Claimants' lives unfolding on the Critical Dates? In this case, the documentary evidence (which is described further below) shows that the center of the referenced aspects of Claimants' lives on and around the Critical Dates was Colombia.

i. Colombia was the center of Claimants' *family lives* on the Critical Dates

391. All of Claimants' nuclear families have lived in Colombia since before each of the Critical Dates.⁷⁰⁷ **Alberto Carrizosa Gelzis** does not have any children. However, **Enrique** and **Felipe Carrizosa Gelzis** each have two daughters, and all four of the daughters were born in Colombia, are Colombian nationals, and have been raised in Colombia.⁷⁰⁸ **Felipe Carrizosa Gelzis's** ex-wife is a Colombian national, whom he married in Colombia.⁷⁰⁹ **Enrique Carrizosa Gelzis's** wife and children also live in Colombia.⁷¹⁰

392. Claimants have spent important holidays in Colombia, including during the years of the Critical Dates. For example, **Alberto Carrizosa Gelzis** has spent 9 out of the past 12 Christmases in Colombia, including in 2014 (the year of the first Critical

⁷⁰⁷ See e.g., Enrique Carrizosa Gelzis Witness Statement, ¶¶ 2, 17; Felipe Carrizosa Gelzis Witness Statement, ¶¶ 3, 17; Astrida Benita Carrizosa Witness Statement, ¶¶ 3, 18; Alberto Carrizosa Gelzis Witness Statement, ¶¶ 3, 32.

⁷⁰⁸ See Ex. R-0229, [REDACTED]; Ex. R-0230, [REDACTED]; Ex. R-0237, [REDACTED]; Ex. R-0238, [REDACTED].

⁷⁰⁹ Ex. R-0236, Marriage Certificate of Felipe Carrizosa Gelzis and [REDACTED], 21 July 2002.

⁷¹⁰ Enrique Carrizosa Gelzis Witness Statement, ¶ 18.

Date).⁷¹¹ **Felipe Carrizosa Gelzis**, for his part, spent Christmas in Colombia during each of the years of the two Critical Dates: 2014 and 2018; in fact, he has spent every single Christmas since 2001 in Colombia.⁷¹² And with respect to **Enrique Carrizosa Gelzis**, he states in his witness statement that Thanksgiving is a “big deal” to his family,⁷¹³ and that his family “is dedicated to Halloween,”⁷¹⁴ yet over the last 15 years he has spent 12 Thanksgivings (including in 2014) in Colombia, and every Halloween since 2004 (including in 2014 and 2018) in Colombia.⁷¹⁵

393. Claimants do not challenge the accuracy of the facts recited above. It is thus clear that Claimants’ family lives were centered in Colombia at the time of both of the Critical Dates.

ii. Colombia was the center of Claimants’ *social, civic, and personal lives* on the Critical Dates

394. **Alberto Carrizosa Gelzis** has been involved with social causes in Colombia. Since at least 2014 (the year of the First Critical Date), he has served as the President of *IC Fundación*, a Colombian non-profit corporation that provides lines of credit to Colombian companies.⁷¹⁶

395. The center of **Enrique Carrizosa Gelzis’s** social life, including the place of his family’s network of friends, is also Colombia. Since moving to Colombia in 2004, his wife has become involved in the preservation of historic property in Colombia.⁷¹⁷ Enrique Carrizosa Gelzis and his family attended the *Festival de la*

⁷¹¹ **Ex. R-0261**, Summary of Information from Official Immigration Records, 21 October 2019, p. 1; *see generally* **Ex. R-0201**; Migratory Records for Alberto Carrizosa Gelzis, 2001–2019.

⁷¹² **Ex. R-0261**, Summary of Information from Official Immigration Records, 21 October 2019, p. 3; *see generally* **Ex. R-0203**; Migratory Records for Felipe Carrizosa Gelzis, 2001–2019.

⁷¹³ Enrique Carrizosa Gelzis Witness Statement, ¶ 30.

⁷¹⁴ Enrique Carrizosa Gelzis Witness Statement, ¶ 30.

⁷¹⁵ **Ex. R-0261**, Summary of Information from Official Immigration Records, 21 October 2019, p. 2; *see generally* **Ex. R-0202**; Migratory Records for Enrique Carrizosa Gelzis, 2002–2019.

⁷¹⁶ **Ex. R-0225**, Transforming Philanthropy 2014 Annual Report, 2014, p. 20.

⁷¹⁷ **Ex. R-0235**, *Impiden obras en una casa de Chapinero*, EL TIEMPO, 30 October 2008.

Leyenda Vallenata, a Colombian music festival.⁷¹⁸ According to a photo posted on Facebook, Enrique Carrizosa Gelzis wore a traditional Colombian hat and a shirt that read, “*El rock de mi Pueblo*” (*My People’s Rock*) (emphasis added), while [REDACTED] [REDACTED] wore traditional Colombian attire.⁷¹⁹

396. For his part, **Felipe Carrizosa Gelzis** has been a member of the Colombian Golf Federation since 2013, and of the exclusive *La Pradera de Potosí* Residential Club.⁷²⁰ In their Reply, Claimants themselves concede that this membership evidences Felipe Carrizosa Gelzis’s “**social integration** in the jurisdiction”⁷²¹ (emphasis added).
397. Notwithstanding the foregoing, Claimants attempt to minimize their deep social and civic connections to Colombia, with unconvincing arguments. For instance, Claimants assert that (1) they have healthcare and retirement plans in the United States,⁷²² and that (2) “it is uncommon for people whose dominant and effective nationality is not that of the United States to have US-based healthcare insurance.”⁷²³ However, Claimants have produced no documentation demonstrating the first point, and no support whatsoever for the second proposition.
398. In any event, having asserted that insurance and retirement plans are relevant to the analysis of dominant nationality, Claimants omit to mention the fact that they have multiple types of *Colombian* insurance and contribute to their Colombian pensions. Thus, **Alberto Carrizosa Gelzis** is currently covered by Colombian

⁷¹⁸ Ex. R-0231, Post on the Facebook Page of [REDACTED], 5 May 2018, pp. 1-2.

⁷¹⁹ Ex. R-0231, Post on the Facebook Page of [REDACTED], 5 May 2018, pp. 1-2.

⁷²⁰ Ex. R-0245, History for Felipe Carrizosa Gelzis at the Colombian Golf Federation, 8 September 2019.

⁷²¹ Claimants’ Reply (PCA), ¶ 891.

⁷²² Claimants’ Reply (PCA), ¶ 935; Alberto Carrizosa Gelzis Witness Statement, ¶ 43; Felipe Carrizosa Gelzis Witness Statement, ¶ 24; Enrique Carrizosa Gelzis Witness Statement, ¶ 36.

⁷²³ Claimants’ Reply (PCA), ¶ 935.

medical insurance, and has been since 2018;⁷²⁴ he has contributed to his Colombian pension since 2004; he has been insured against labor risk in Colombia since 2008; and he has had life insurance in Colombia since 2005.⁷²⁵ **Enrique Carrizosa Gelzis**, for his part, has had Colombian medical insurance since 2014; he has contributed to his Colombian pension since 2005; he has been insured against labor risk in Colombia since 2010; and he has had life insurance in Colombia since 2005.⁷²⁶ All of these plans were in effect on both of the Critical Dates. **Felipe Carrizosa Gelzis**, in turn, has had Colombian medical insurance since 2013, and has contributed to his Colombian pension since 2004.⁷²⁷ These plans were in effect on both Critical Dates. Further, in 2019 he obtained labor and life insurance in Colombia.⁷²⁸

399. Claimants also point to their education in US schools during their childhood and early adulthood as evidence of their assertedly predominant US nationality.⁷²⁹ However, the fact that Claimants may have attended US schools *decades before* the Critical Dates says nothing at all about which of their nationalities was dominant on or around the Critical Dates. What the Tribunal needs to determine is the geographic location that constitutes the center of Claimants' social and civic lives *on the Critical Dates*.⁷³⁰

⁷²⁴ **Ex. R-0348**, Record of Affiliation of Alberto Carrizosa Gelzis, Ministry of Health, 29 October 2019, p. 1.

⁷²⁵ **Ex. R-0348**, Record of Affiliation of Alberto Carrizosa Gelzis, Ministry of Health, 29 October 2019, pp. 1-2.

⁷²⁶ **Ex. R-0349**, Record of Affiliation of Enrique Carrizosa Gelzis, Ministry of Health, 29 October 2019, pp. 1-2.

⁷²⁷ **Ex. R-0350**, Record of Affiliation of Felipe Carrizosa Gelzis, Ministry of Health, 29 October 2019, p. 1.

⁷²⁸ **Ex. R-0350**, Record of Affiliation of Felipe Carrizosa Gelzis, Ministry of Health, 29 October 2019, pp. 1-2.

⁷²⁹ Claimants' Reply (PCA), ¶¶ 866-875.

⁷³⁰ In any event, at least one Claimant, Felipe Carrizosa Gelzis, obtained a master's degree in Colombia in 2006, which is far closer in time to the Critical Dates than Claimants' schooling decades ago. *See* Felipe Carrizosa Gelzis Witness Statement, ¶ 15.

400. Finally, Claimants assert that English is their primary language.⁷³¹ However, the evidence shows that Claimants are native Spanish speakers. To illustrate, in a Spanish-language interview, a video copy of which is appended as **Ex. R-0343**, **Alberto Carrizosa Gelzis** can be heard not only speaking perfect Spanish, but with a Colombian accent.⁷³² Claimants' fluency in Spanish is further demonstrated by statements and documents written in that language by Alberto Carrizosa Gelzis,⁷³³ and interviews that **Felipe Carrizosa Gelzis** has given in Spanish.⁷³⁴

iii. Colombia was the center of Claimants' *political* lives on the Critical Dates

401. The documentary evidence also confirms that Claimants have actively participated in the democratic process in Colombia for many years, including the years of both of the Critical Dates. [REDACTED]

⁷³¹ Claimants' Reply (PCA), ¶ 901.

⁷³² See **Ex. R-0343**, *Los Pasos del Viento o Colombia en el Everest*, 2002, minute: 0:06:15-45, 1:06:01-36, 1:57:10-12, 1:56:29-32.

⁷³³ **Ex. R-0225**, Transforming Philanthropy 2014 Annual Report, 2014, p. 20; **Ex. R-0121**, Second Revision Petition to the Inter-American Commission on Human Rights, 4 October 2017, p. 1.

⁷³⁴ **Ex. R-0214**, "En Cúcuta se construye Altovento; en el proyecto se invertirán más de \$25.000 millones," PORTAFOLIO, 19 June 2009.

⁷³⁵ **Ex. R-0352**; [REDACTED] ; **Ex. R-0353**, [REDACTED] **Ex. R-0354**, [REDACTED]

⁷³⁶ **Ex. R-0355**, [REDACTED] ; **Ex. R-0356**, [REDACTED] ; **Ex. R-0357**, [REDACTED]

[REDACTED]

[REDACTED] In contrast, it does not appear that Claimants are even registered to vote in the United States.⁷⁴¹

402. Claimants have also contributed to political causes in Colombia for years. For example, in 2018 **Alberto Carrizosa Gelzis** donated to the presidential campaign of Iván Duque Márquez, the current President of Colombia.⁷⁴² In 2011, **Felipe Carrizosa Gelzis** made a donation to the campaign for Bogotá city council of Domingo Perez Abrajín.⁷⁴³ Claimants do not challenge such evidence, and there is

⁷³⁷ **Ex. R-0358**, [REDACTED] **Ex. R-0359**, [REDACTED] **Ex. R-0360**, [REDACTED]

⁷³⁸ **Ex. R-0361**, [REDACTED] **Ex. R-0362**, [REDACTED]

⁷³⁹ **Ex. R-0363**, [REDACTED] **Ex. R-0364**, [REDACTED]

⁷⁴⁰ **Ex. R-0365**, [REDACTED] **Ex. R-0366**, [REDACTED] **Ex. R-0367**, [REDACTED]

⁷⁴¹ **Ex. R-0239**, Search Results for Voter Registration of Alberto Carrizosa Gelzis in the State of Florida, 26 August 2019; **Ex. R-0240**, Search Results for Voter Registration of Alberto Carrizosa Gelzis in Miami-Dade County, 8 September 2019; **Ex. R-0241**, Search Results for Voter Registration of Enrique Carrizosa Gelzis in the State of Florida, 26 August 2019; **Ex. R-0242**, Search Results for Voter Registration of Enrique Carrizosa Gelzis in Miami-Dade County, 8 September 2019; **Ex. R-0243**, Search Results for Voter Registration of Felipe Carrizosa Gelzis in the State of Florida, 8 September 2019; **Ex. R-0244**, Search Results for Voter Registration of Felipe Carrizosa Gelzis in Miami-Dade County, 8 September 2019.

⁷⁴² **Ex. R-0224**, Report on Donations to Ivan Duque Marquez, Electoral Council of Colombia, p. 11.

⁷⁴³ **Ex. R-0249**, Record of Donations to Domingo Perez Abrajín, p. 3.

no evidence in the record that any of Claimants have donated to any political campaign in the United States.

403. In short, it appears incontrovertible based on the evidence discussed above that Colombia was the center of Claimants' family, social, civic, personal, and political lives on and around the Critical Dates.

d. Claimants consistently have identified themselves as Colombian, including on and around the Critical Dates

404. Finally, Claimants have consistently, and over a long period of time, identified themselves as Colombian nationals, including during and near the years of the Critical Dates. In its Answer, Colombia submitted as exhibits Claimants' pleadings to the IACHR (which date from the period from 2012 to 2018),⁷⁴⁴ in which Claimants (i) identified themselves as "*colombiano*," (ii) referenced their Colombian identity numbers, and (iii) submitted copies of their Colombian identity cards.⁷⁴⁵ Claimants likewise identified themselves as Colombian when they registered their shares in their Holding Companies.⁷⁴⁶

⁷⁴⁴ See Colombia's Answer (PCA), § III.D.2.d; **Ex. R-0118**, Petition to the Inter-American Commission on Human Rights, 6 June 2012; **Ex. R-0119**, Supplementary Pleading to the Inter-American Commission on Human Rights, 20 July 2016; **Ex. R-0120**, Revision Petition to the Inter-American Commission on Human Rights, 20 March 2017; **Ex. R-0121**, Second Revision Petition to the Inter-American Commission on Human Rights, 4 October 2017; **Ex. R-0122**, Third Revision Petition to the Inter-American Commission on Human Rights, 4 July 2018.

⁷⁴⁵ **Ex. R-0118**, Petition to the Inter-American Commission on Human Rights, 6 June 2012, p. 43; **Ex. R-0119**, Supplementary Pleading to the Inter-American Commission on Human Rights, 20 July 2016, pp. 1-2; **Ex. R-0010**, Colombian Identification Card of Alberto Carrizosa Gelzis, 30 May 1984; **Ex. R-0189**, Colombian Identification Card of Enrique Carrizosa Gelzis, 27 October 1992; **Ex. R-0012**, Colombian Identification Card of Felipe Carrizosa Gelzis, 26 September 1986; **Ex. R-0120**, Revision Petition to the Inter-American Commission on Human Rights, 20 March 2017, pp. 3-4; **Ex. R-0122**, Third Revision Petition to the Inter-American Commission on Human Rights, 4 July 2018, pp. 1, 7; **Ex. R-0121**, Second Revision Petition to the Inter-American Commission on Human Rights, 4 October 2017, pp. 4, 5, 7, 17.

⁷⁴⁶ See **Ex. R-0154**, Shareholders Registry of: (i) Asesorías e Inversiones C.G. S.A.; (ii) Exultar S.A.; (iii) Compto S.A.; (iv) Inversiones Lieja Ltda; (v) Fultiplex S.A.; and (vi) I.C Interventorias y Construcciones Ltda., pp. 2-4, 8-10, 19-21, 29-32; **Ex. R-0010**, Colombian Identification Card of

405. In their Reply, Claimants fail to acknowledge the evidence referenced above, much less to rebut it. Instead, they simply reiterate their contention that the only reason that they identify as Colombian when they are in Colombia is because they are required to do so by Law 43 of 1993 (“**Law 43**”), in which Article 22 requires dual nationals to enter and exit Colombia and perform their civil and political acts in Colombia in their capacity as Colombian.⁷⁴⁷ However, (i) Law 43 is a Colombian domestic law that does not apply to IACHR proceedings, and (ii) Claimants registered in Colombia the shares that they obtained in their Holding Companies *prior* to the promulgation of Law 43. In other words, Claimants have self-identified as Colombian even when they were under no legal obligation to do so.
406. Additionally, since submitting its Answer, Colombia has obtained further evidence of Claimants’ self-identification as Colombian. Although in his witness statement Alberto Carrizosa Gelzis states that “[t]he U.S. is the country that I am most closely connected to,”⁷⁴⁸ in 2002 he made statements that contradict that assertion (which in turn suggests that the assertion was made solely for the purposes of the arbitration). The 2002 statements were made in an interview that he gave for a documentary, entitled *Los Pasos del Viento o Colombia en el Everest*, which included of a series of interviews with members of a Colombian team that climbed Mount Everest in 2001.⁷⁴⁹ Over the years, Alberto Carrizosa Gelzis has

Alberto Carrizosa Gelzis, 30 May 1984; Ex. R-0012, Colombian Identification Card of Felipe Carrizosa Gelzis, 26 September 1986; Ex. R-0189, Colombian Identification Card of Enrique Carrizosa Gelzis, 27 October 1992.

⁷⁴⁷ See Claimants’ Reply (PCA), ¶¶ 853, 856; Alberto Carrizosa Gelzis Witness Statement, ¶ 50; Felipe Carrizosa Gelzis Witness Statement, ¶ 37. Enrique Carrizosa Gelzis also claims that he has had Global Entry since 2016. See Claimants’ Reply (PCA), ¶ 857. However, US nationality is not required to obtain Global Entry, and – crucially for present purposes – Enrique Carrizosa Gelzis waited to obtain Global Entry until 2016 – the year in which Global Entry membership was expanded to include to Colombian nationals. See **Ex. R-0351**, CBP Announces Expansion of Global Entry to Colombian Citizens, United States Customs and Border Protection, 27 July 2016.

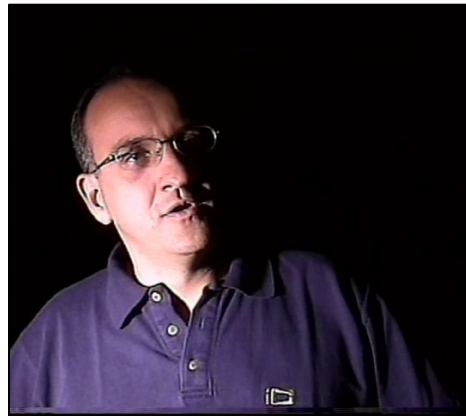
⁷⁴⁸ Alberto Carrizosa Gelzis Witness Statement, ¶ 35.

⁷⁴⁹ See generally **Ex. R-0343**, *Los Pasos del Viento o Colombia en el Everest*, 2002.

sponsored various Colombian mountaineering expeditions, including the one to Mount Everest in 2001 and another to K2 in 2004.⁷⁵⁰

407. In the documentary, Alberto Carrizosa Gelzis explained his reason for sponsoring the 2001 Colombian expedition to Mount Everest as being an act of Colombian identity, patriotism, and pride:

**Figure 1: Alberto Carrizosa Gelzis's Testimony in
*Los Pasos del Viento o Colombia en el Everest***



I, through my relationships with certain of the companies that I work with, I saw that this could be an opportunity for a **national display**, because for me this was a purpose. For me, this was not placing three guys on the peak of Mount Everest. **For me, this was placing the Colombian flag on the top of the world.**⁷⁵¹ (emphasis added)

408. Although this statement was made before the Critical Dates, it is a powerful declaration of Alberto Carrizosa Gelzis's self-identification as Colombian, which evinces an enduring loyalty to Colombia. As discussed above, between 2001 and

⁷⁵⁰ Ex. R-0343, *Los Pasos del Viento o Colombia en el Everest*, 2002, minute: 1:06:01-36; see also *id.* at 1:12:10; see also Ex. R-0368, *Ve por tu cumbre*, Fernando González-Rubio and Luis Eduardo Yepes, 7 April 2013, p. 8.

⁷⁵¹ Ex. R-0343, *Los Pasos del Viento o Colombia en el Everest*, 2002, minute: 1:06:01-36 (Spanish original: Yo, a través de mis relaciones con ciertas de las empresas con las que trabajo, vi que podía ser una oportunidad de hacer un **despliegue nacional** porque para mí esto era un propósito. Para mí esto no era montar a tres tipos en la cumbre del Everest. **Para mí esto era poner la bandera colombiana en la cima del mundo.**) (emphasis added).

2004 Alberto Carrizosa Gelzis was living in the United States, and yet despite that fact, he was devoting financial resources to these expeditions representing Colombia, to “plac[e] the Colombian flag on the top of the world.”⁷⁵²

* * *

409. For the foregoing reasons, and based on the documentary evidence in the record, it must be concluded that Claimants’ dominant nationality was that of Colombia on and around both of the Critical Dates. As a result, and pursuant to the terms of the TPA, the Tribunal lacks jurisdiction *ratione personae*, and all of Claimants’ claims must be dismissed.

D. The Tribunal lacks jurisdiction *ratione materiae*

410. Claimants initially argued in this arbitration that the investment that had been allegedly harmed by Colombia’s actions consisted of their indirect shareholding interest in Granahorrar.⁷⁵³ But after Colombia noted that it would be raising jurisdictional objections, and perhaps realizing that identifying their indirect interest in Granahorrar as the relevant investment would inevitably lead to the dismissal of their case on *ratione temporis* and *ratione materiae* grounds, Claimants pivoted in their Memorial. Therein they advanced instead – for the first time – the thesis that the investment that was allegedly harmed by Colombia’s actions consisted of the 2007 Council of State Judgment:

⁷⁵² Ex. R-0343, *Los Pasos del Viento o Colombia en el Everest*, 2002, minute: 1:06:01-36.

⁷⁵³ Claimants’ Request for Arbitration (PCA), p. 1 (“In the case before this Tribunal the respective investments of three U.S. citizens in one of the Republic of Colombia’s leading financial institutions [Granahorrar] was reduced to the peppercorn value of COP1 0.01 based upon discriminatory, irregular, and unprecedented treatment on the part of the Central Bank of Colombia . . . FOGAFIN . . . and Superintendency of Banking.”); Witness Statement of Alberto Carrizosa Gelzis, ¶ 51 (“Attached to this statement is a copy of the Shareholders Registries evidencing my investments in GRANAHORRAR as of October 2, 1998”); Witness Statement of Enrique Carrizosa Gelzis, § II (“Investment in Granahorrar”); Witness Statement of Felipe Carrizosa Gelzis, § II (“The Investment in Granahorrar”).

Claimants' ownership of shares in GRANAHORRAR, as set forth in paragraphs 411 through 417 above, meet the Art. 10.28(b) definition of an investment. More importantly, however, **for purposes of pleading and/or proof of *ratione materiae*, the Council of State's November 1, 2007 Judgment represents and constitutes Claimants' investment as alleged and demonstrated in this proceeding.**⁷⁵⁴ (Emphasis added)

411. Despite this tactical *volte face*, Claimants' revised theory of the affected investment yields the same result as their original theory. In its Answer, Colombia explained that the 2007 Council of State Judgment, too, is not a qualifying investment under the TPA. Specifically, Footnote 15 of Article 10.28 of the TPA ("**Judgment Exclusion Provision**") explicitly excludes judicial orders and decisions from the scope of qualifying investments: "**The term 'investment' does not include an order or judgment entered in a judicial or administrative action**"⁷⁵⁵ (emphasis added).
412. The above-quoted provision unequivocally excludes the 2007 Council of State Judgment from the scope of the TPA. This is so because the 2007 Council of State Judgment is a judgment issued by the Council of State of Colombia, which is the highest judicial body that hears cases concerning administrative matters.⁷⁵⁶ The Judgment was issued in response to an appeal in a judicial action filed by Claimants (through their six Holding Companies)⁷⁵⁷ against an unfavorable ruling by the first instance court. The 2007 Council of State Judgment was subsequently overturned by another judicial body—the Constitutional Court—in the latter's 2011 Constitutional Court Judgment.⁷⁵⁸ The 2007 Council of State Judgment is therefore incontrovertibly a judicial decision, issued in a judicial action. It thus falls

⁷⁵⁴ Claimants' Memorial (PCA), ¶ 420.

⁷⁵⁵ **RLA-0001**, TPA, Art. 10.28, fn. 15.

⁷⁵⁶ Colombia's Answer (PCA), § II.E.1.

⁷⁵⁷ See Claimants' Request for Arbitration (PCA), ¶¶ 16–40. See also **Ex. R-0050**, Nullification and Reinstatement Action, pp. 1–3.

⁷⁵⁸ See generally **Ex. C-0023**, 2011 Constitutional Court Judgment.

squarely within the Judgment Exclusion Provision, and does not qualify as an investment under the TPA.

413. Colombia also demonstrated in its Answer that even if Claimants were to revert to their original theory of investment—according to which it was their indirect interest in Granahorrar that constituted the relevant investment (whether in addition to, or in lieu of, the 2007 Council of State Judgment)—that investment would not constitute a qualifying investment under the TPA, because such shares were obtained in violation of Colombian law.⁷⁵⁹
414. In their Reply, Claimants once again pivot on the elemental issue of what investment forms the basis of their claim in this arbitration. Thus, Claimants advance yet another thesis, which is that “the investment was transformed into different modes at different times.”⁷⁶⁰ Claimants’ theory now appears to be that the Granahorrar shares constituted their “original investment,” but that somehow those shares then “transformed” into the 2007 Council of State Judgment.⁷⁶¹
415. Claimants’ latest characterization of their investment is somewhat confusing, and appears to amount to a conceptually untenable amalgam of the Granahorrar shares and the 2007 Council of State Judgment. In any event, this fanciful new theory does not help Claimants to overcome the *ratione materiae* jurisdictional hurdle, for the following reasons:

⁷⁵⁹ Colombia’s Answer (PCA), § II.E.2.

⁷⁶⁰ Claimants’ Reply (PCA), p. 19.

⁷⁶¹ Claimants’ Reply (PCA), ¶ 1021 (“[T]his is a case in which an original investment was made in the financial services sector. That investment was subject to the illegal, inappropriate and discriminatory actions of various organs of the Colombian government, **which resulted in that investment being transformed into a judgment.**”) (emphasis added).

- a. The 2007 Council of State Judgment is not a qualifying investment under the TPA because it falls within the Judgment Exclusion Provision (**Section II.D.1** below); and
 - b. Claimants' indirectly-owned Granahorrar shares also do not constitute a qualifying investment under the TPA, because (i) Granahorrar and its shares—and therefore Claimants' interest in such shares—had ceased to exist before the critical jurisdictional dates for purposes of the TPA (**Section II.D.2** below), and (ii) such shares were obtained in violation of Colombian law (**Section II.D.3** below).
416. For the foregoing reasons, discussed in greater detail below, the Tribunal lacks jurisdiction *ratione materiae*. In any event, if the 2007 Council of State Judgment was not a qualifying investment, and the Granahorrar shares also were not a qualifying investment, then *a fortiori* an amalgam of such decision and such shares cannot amount to an investment.
1. *The 2007 Council of State Judgment is not a qualifying investment under the TPA because it falls within the TPA's Judgment Exclusion Provision*
417. To the extent that Claimants are still asserting that their purported investment is the 2007 Council of State Judgment, such investment is not a qualifying investment under the TPA, by direct application of the exception contained in the Judgment Exclusion Provision (i.e., Footnote 15 of Article 10.28 of the TPA), which to recall, states as follows: "The term 'investment' does not include an order or judgment entered in a judicial or administrative action."⁷⁶² As explained above, the 2007 Council of State Judgment is clearly a judgment entered in a judicial action, and it is therefore excluded from the definition of "investment" under the TPA.
418. In their Reply, Claimants attempt to circumvent the Judgment Exclusion Provision by arguing that (i) notwithstanding the text of such provision, certain

⁷⁶² **RLA-0001**, TPA, Art. 10.28, fn. 15.

jurisprudence nevertheless permits them to rely on the 2007 Council of State Judgment as the requisite investment;⁷⁶³ (ii) the Judgment Exclusion Provision does not apply to the 2007 Council of State Judgment;⁷⁶⁴ and (iii) Colombia cannot rely on its own (allegedly) wrongful conduct (i.e., the 1998 Regulatory Measures) to argue that the 2007 Council of State Judgment does not qualify as an investment.⁷⁶⁵ Each of Claimants' foregoing arguments is addressed and rebutted in the sub-sections below. In any event, Claimants cannot invoke any TPA protections with respect to the 2007 Council of State Judgment for the simple reason that such decision had already been overturned before the critical jurisdictional dates.

a. Claimants' reliance on jurisprudence cannot override the plain text of the TPA

419. Claimants' first argument is that certain jurisprudence permits them to rely on the 2007 Council of State Judgment as their qualifying investment, despite the TPA's Judgment Exclusion Provision.⁷⁶⁶ Specifically, Claimants and their expert rely on *Saipem v. Bangladesh* as alleged support for Claimants' assertion that the 2007 Council of State Judgment can serve as their qualifying investment because it represents their Granahorrar shares in the form of an "entitlement to money."⁷⁶⁷ Claimants also assert that *Mondev v. United States* supports the proposition that the Judgment Exclusion Provision does not preclude "claims arising out of failed 'investments' that continue to be unresolved."⁷⁶⁸ However, Claimants' attempt to circumvent the Judgment Exclusion Provision by relying on those (and any other) legal authorities is hopeless.

⁷⁶³ Claimants' Reply (PCA), ¶¶ 1015–18.

⁷⁶⁴ Claimants' Reply (PCA), ¶¶ 1019–21.

⁷⁶⁵ Claimants' Reply (PCA), ¶¶ 1022–28.

⁷⁶⁶ Claimants' Reply (PCA), ¶¶ 1015–18.

⁷⁶⁷ Claimants' Reply (PCA), ¶ 1015.

⁷⁶⁸ Claimants' Reply (PCA), ¶ 1018.

420. As a threshold matter, Claimants ignore the simple fact that no amount of jurisprudence can override the plain text of the applicable treaty.⁷⁶⁹ In the present case, the Judgment Exclusion Provision expressly and unequivocally excludes from the concept of “investment under the TPA” any and all judgments issued in judicial actions.⁷⁷⁰ Importantly, the Judgment Exclusion Provision contains no exceptions, provisos, or qualifications. Accordingly, the *Sapiem* decision, the *Mondev* award, and any other legal authority invoked by Claimants are simply irrelevant, insofar as they cannot alter the plain text of the Judgment Exclusion Provision.
421. The *Saipem* decision and *Mondev* award are inapposite for an additional reason, which is that the applicable treaty in each of those cases contains a definition of investment that is materially different than that in the TPA. The *Saipem* tribunal applied the Italy-Bangladesh BIT, which does *not* contain any provision equivalent to the Judgment Exclusion Provision excluding judicial or administrative decisions from the definition of “investment.”
422. In *Saipem*, a previous commercial arbitration award had found that a State entity of the respondent had breached an underlying contract that required such State entity to make certain payments to the claimant.⁷⁷¹ The *Saipem* tribunal held that “the parties’ rights and obligations under the original contract” constituted an investment, as a credit for sums of money.⁷⁷² Importantly, however, the *Saipem*

⁷⁶⁹ See **RLA-0099**, *Case Concerning The Territorial Dispute*, ICJ, Judgment, 3 February 1994, ¶ 41 (“Interpretation must be based above all upon the text of the treaty.”).

⁷⁷⁰ **RLA-0001**, TPA, Art. 10.28, fn. 15.

⁷⁷¹ **CLA-0074**, *Saipem* (Decision on Jurisdiction), ¶ 34.

⁷⁷² **CLA-0074**, *Saipem* (Decision on Jurisdiction), ¶ 127. Further, the *Saipem* tribunal held: “[The] view . . . that the Award itself does constitute an investment under Article 25(1) of the ICSID Convention, [is a view] **which the Tribunal is not prepared to accept**” (emphasis added). *Id.*, ¶ 113; see also **RLA-0100**, Agreement between the Government of the Republic of Italy and the Government of the People’s Republic of Bangladesh on the Promotion and Protection of Investment, 20 March 1990 (“Italy-Bangladesh BIT”), Art. 1(1)(c).

tribunal did not hold that the previous commercial arbitration award constituted an investment.

423. In *Mondev*, the claimant asserted claims under NAFTA. Unlike the TPA, NAFTA does not expressly exclude judicial decisions from qualifying as investments. As in *Saipem*, the *Mondev* tribunal did not hold that an adjudicatory ruling (in that case, a judicial decision by a United States court) constituted an investment. Instead, the *Mondev* tribunal held that it was the claimant's domestic claims arising out of a failed contract that qualified as an investment.⁷⁷³

424. The *Saipem* and *Mondev* tribunals applied entirely different treaty language to a very different sets of facts, and reached a conclusion entirely different from the one Claimants are proposing here. As a result, the reasoning and findings of the *Saipem* and *Mondev* tribunals is simply inapposite.

425. In sum, Claimants cannot rely on any jurisprudence – and certainly not the specific two cases that they cite – to circumvent the Judgment Exclusion Provision's express limitation on the definition of investment, by virtue of which the 2007 Council of State Judgment is excluded as a qualifying investment.

b. Contrary to Claimants' argument, the TPA excludes from its definition of qualifying investments all judgments entered in judicial actions

426. Claimants next argue that the Judgment Exclusion Provision only concerns certain types of judgments or orders, and that it does not encompass the 2007 Council of State Judgment. Specifically, Claimants allege that the Judgment Exclusion

⁷⁷³ Article 1139(h) of NAFTA defines investments as encompassing "interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory." NAFTA excludes "claims to money" as a qualifying investment if they "do not involve the kinds of interests set out in [Article 1139] subparagraphs (a) through (h)." **CLA-0113**, North American Free Trade Agreement, 1 January 1994, Arts. 1139(h), 1139(j). The *Mondev* tribunal held that the claimant's domestic law claims arising out of the failed contract "were not caught by the exclusionary language" in the NAFTA because they were claims for money that did involve the kind of interests included in Article 1139(h). **CLA-0051**, *Mondev* (Award), ¶ 80.

Provision is “intended to cover orders and court judgments as investments in their own right” (such as a judgment rendered in favor of a different party that is then “acquire[d] at a discount” by the investor).⁷⁷⁴

427. However, there is simply no basis in the TPA for Claimants’ argument. The Judgment Exclusion Provision precludes *all* judgments entered in judicial actions from qualifying as an investment, since as noted above it contains no exceptions, provisos, or qualifications. Once again, the Judgment Exclusion Provision provides in sweeping terms that “[t]he term ‘investment’ does not include an order or judgment entered in a judicial or administrative action.”⁷⁷⁵
428. Beyond their *ipse dixit*, Claimants fail to provide any support whatsoever for their assertion that the Judgment Exclusion Provision only applies to court judgments that are “acquire[d]” by the investor.⁷⁷⁶ Because the actual text of the Judgment Exclusion Provision is unambiguous and so self-evidently lethal to their argument, Claimants unsurprisingly do not even attempt to engage in any discussion of the text of such provision. Nor do they make any reference to the context of that provision, or more generally to the TPA’s object and purpose. Indeed, Claimants do not offer a single citation in support of their interpretation of the Judgment Exclusion Provision. They do not do so because there simply is no basis whatsoever for the distinction that they purport to draw between different types of judgments.
429. The TPA must be interpreted in accordance with the rules of treaty interpretation under customary international law, as reflected in the VCLT, starting with the ordinary meaning to be given to its terms.⁷⁷⁷ Since (i) the text of the Judgment Exclusion Provision is unequivocal, and (ii) Claimants do not deny that the 2007

⁷⁷⁴ Claimants’ Reply (PCA), ¶ 1020.

⁷⁷⁵ **RLA-0001**, TPA, Art. 10.28, fn. 15.

⁷⁷⁶ Claimants’ Reply (PCA), ¶ 1020.

⁷⁷⁷ **CLA-0124**, VCLT, Art. 31(1).

Council of State Judgment is a judgment entered in a judicial action, such decision does not qualify as an investment under the TPA.

c. Colombia is not estopped from objecting to the absence of a qualifying investment

430. Claimants' third and final argument is that Colombia should be estopped from relying on what they characterize as Colombia's own "wrongful actions" (i.e., the 1998 Regulatory Measures) to argue that the 2007 Council of State Judgment is not a qualifying investment.⁷⁷⁸ According to Claimants, "[Colombia] itself caused [the Judgment Exclusion Provision] to become effective through the unlawful expropriation of Claimants' [Granahorrar shares]," because the 1998 Regulatory Measures led to the issuance of the 2007 Council of State Judgment.⁷⁷⁹ Claimants contend that such history estops Colombia from invoking the Judgment Exclusion Provision as a defense in the present proceeding.⁷⁸⁰ Claimants' argument fails for at least three reasons.
431. First, Claimants' estoppel argument would require that the Tribunal make a ruling on the merits at the jurisdictional stage. Claimants essentially are asking the Tribunal to assume jurisdiction on the basis that (according to Claimants) Colombia committed a "wrongful act" under public international law.⁷⁸¹ Specifically, Claimants' argument would require a Tribunal finding that the 1998 Regulatory Measures constituted an internationally "wrongful act."⁷⁸² Accordingly, Claimants are not asking the Tribunal merely to assume facts for the purpose of determining whether it has jurisdiction; rather, they are asking the

⁷⁷⁸ Claimants' Reply (PCA), § VI.A.3.

⁷⁷⁹ See Claimants' Reply (PCA), ¶¶ 1023-24.

⁷⁸⁰ See generally Claimants' Reply (PCA), § VI.A.3.

⁷⁸¹ Claimants' Reply (PCA), ¶¶ 1026-28.

⁷⁸² Claimants' Reply (PCA), ¶¶ 1026-28.

Tribunal to assume *liability*.⁷⁸³ It hardly needs stating that jurisdictional requirements must be independently satisfied before the Tribunal can embark on any analysis of whether the State has committed a wrongful act giving rise to liability under international law.⁷⁸⁴ Claimants cannot bypass that logical sequence in the legal analysis by asking the Tribunal to conclude or simply assume that Colombia has committed a wrongful act. The issue of whether the 2007 Council of State Judgment is covered by the TPA is an issue of consent and jurisdiction, not of liability. The issue of consent and jurisdiction must be decided *before* the Tribunal can make any determination on liability.

432. Second, even assuming *arguendo* that the Tribunal could rule at this jurisdictional phase on the lawfulness of the 1998 Regulatory Measures (*quod non*), the Tribunal lacks jurisdiction *ratione temporis* to do so. As Colombia explained in **Section II.A.1** above, the 1998 Regulatory Measures fall outside the temporal scope of the TPA.⁷⁸⁵

⁷⁸³ Tribunals have affirmed that they cannot assume any facts to be true for the purpose of finding the respondent's conduct to be unlawful. *See, e.g., CLA-0080, SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29 (Alexandrov, Donovan, Mexía), Decision on Jurisdiction, 12 February 2010 ("*SGS-Paraguay (Decision on Jurisdiction)*"), ¶¶ 51–52 ("[A]t the jurisdictional stage, the Tribunal need not decide whether, assuming the factual allegations were proven, the claim would prevail as a matter of law If the rule were otherwise, the inquiry could not properly be considered jurisdictional. A determination that a given set of alleged facts, even if proven, would not constitute a violation of a legal right is, in effect, a holding on the merits Thus, so long as the objection goes only to the authority of the Tribunal to hear claims for the breach of the legal right identified by the Claimant, the Tribunal's review of the sufficiency of the legal allegations, like its review of the factual allegations, is limited."); **CLA-0059, Pan American Energy LLC and BP Argentina Exploration Company v. the Argentine Republic**, ICSID Case No. ARB/03/13 (Caflich, Stern, van den Ber), Decision on Preliminary Objections, 27 July 2006, ¶ 50 ("[I]f everything were to depend on characterisations made by a claimant alone, the inquiry to jurisdiction and competence would be reduced to naught, and tribunals would be bereft of the *compétence de la compétence* enjoyed by them under Article 41(1) of the ICSID Convention.").

⁷⁸⁴ *See e.g., RLA-0101, Getma International et al. v. The Republic of Guinea*, ICSID Case No. ARB/11/29 (Van Houtte, Cremades, Tercier), Decision regarding Jurisdiction, 19 December 2012, ¶ 96 ("[T]he Arbitral Tribunal is also of the opinion that its decision regarding jurisdiction is to be made independently of any issue regarding the merits.").

⁷⁸⁵ *See* Section II.A.1.

Even Claimants recognize this.⁷⁸⁶ Because Claimants' estoppel argument would require a finding that the 1998 Regulatory Measures were a "wrongful act" and constituted an "unlawful expropriation,"⁷⁸⁷ such argument would require the Tribunal to make a legal determination on liability despite not having jurisdiction *ratione temporis* to do so, which is an untenable proposition.

433. Third, the Judgment Exclusion Provision applies to the 2007 Council of State Judgment *irrespective of the 1998 Regulatory Measures*. To assess the applicability of the Judgment Exclusion Provision in the present case, the only determination that the Tribunal needs to make is whether the alleged investment constitutes a judgment entered in a judicial or administrative action. If the answer is yes, the Judgment Exclusion Provision indeed applies and summarily disqualifies Claimants' alleged investment from protection under the TPA. The foregoing means that the 1998 Regulatory Measures have no bearing at all on whether the 2007 Council of State Judgment falls within the scope of the Judgment Exclusion Provision. That the 2007 Council of State Judgment is a judgment entered in a judicial action is undeniable, and it is therefore excluded from protection under the TPA.

434. For all of the foregoing reasons, the 2007 Council of State Judgment is not a qualifying investment under the TPA.

d. Claimants cannot invoke protections under the TPA in relation to the 2007 Council of State Judgment because it was overturned before the critical jurisdictional dates

435. Aside from the reasons articulated above, the 2007 Council of State Judgment is not a qualifying investment under the TPA because such decision had already

⁷⁸⁶ Claimants' Reply (PCA), ¶ 117 ("Thus, nothing in the TPA alters the general rule that the treaty does not impose obligations with respect to *acts* (as opposed to disputes) that predated its entry into force.").

⁷⁸⁷ Claimants' Reply (PCA), ¶¶ 1028, 1024.

been overturned by the time of the critical jurisdictional dates. As Colombia further elaborates in **Section II.D.2** below, pursuant to Article 12.1 of the TPA, Article 28 of the VCLT, and Article 13 of the ILC Articles on State Responsibility,⁷⁸⁸ an investment must have existed on two critical jurisdictional dates for the purposes of a TPA claim: (i) the date on which the TPA entered into force⁷⁸⁹ (i.e., 15 May 2012), and (ii) the date of the challenged measure⁷⁹⁰ (in this case, 25 June 2014, which is the date of the 2014 Confirmatory Order).⁷⁹¹ The 2007 Council of State Judgment was overturned by the Constitutional Court on 26 May 2011⁷⁹²—nearly a year before the entry into force of the TPA. Thus, even if the 2007 Council

⁷⁸⁸ See **RLA-0001**, TPA, Art. 12.1.1 (“This Chapter applies to measures adopted or maintained by a Party relating to . . . (b) investors of another Party, and investments of such investors, in financial institutions in the Party’s territory”); **CLA-0124**, VCLT, Art. 28 (“Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to . . . any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.”); **RLA-0010**, ILC Articles on State Responsibility, Art. 13 (“An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.”).

⁷⁸⁹ See Section II.D.2.a. See also **RLA-0001**, TPA, Art. 12.1; **CLA-0124**, VCLT, Art. 28; **RLA-0010**, ILC Articles on State Responsibility, Art. 13.

⁷⁹⁰ See Section II.D.2.b. See also **RLA-0001**, TPA, Art. 12.1; **CLA-0061**, *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, (Stern, Bucher, Fernández-Armesto) (“**Phoenix Action (Award)**”), ¶ 70 (“[T]he Tribunal lacks jurisdiction for [State] acts directed against BP and its subsidiary BG, after the sale of BP – and consequently of its interests in BG . . . as it is not contested that there was no longer any investment of the Claimant after that date [i.e., the date of the State acts.]”); **RLA-0103**, *Peter Franz Voecklinghaus v. The Czech Republic*, UNCITRAL (Beechey, Klein, Lévy), Final Award, 19 September 2011 (“**Voecklinghaus (Final Award)**”), ¶ 165 (“The Tribunal concludes that [the claimant] retained no legal or beneficial ownership interest in [a Czech entity] after 8 March 2001, some seven months prior to . . . any alleged wrongdoing by the Czech Republic. Accordingly, the Tribunal holds that it has no jurisdiction to hear [the claimant’s] claims in respect of receivables owed to [the Czech entity].”).

⁷⁹¹ Claimants have challenged a series of measures, including the 1998 Regulatory Measures and 2011 Constitutional Court Judgment. See Section II.A.1. However, for the sake of their argument about the jurisdiction *ratione temporis* of the Tribunal, Claimants insist that the only measure that they are challenging herein is the 2014 Confirmatory Order. See Claimants’ Reply (PCA), ¶ 38. For the purpose of its *ratione materiae* objection, Colombia will demonstrate that even if the 2014 Confirmatory Order were in fact the only challenged measure (quod non), the Tribunal would lack jurisdiction *ratione materiae*.

⁷⁹² **Ex. C-0023**, Judgment No. SU-447/11 (Constitutional Court), 26 May 2011 (“**2011 Constitutional Court Judgment**”).

of State Judgment could in principle be regarded as a qualifying investment under the TPA (quod non), such decision had already ceased to exist by the time of each of the critical jurisdictional dates. For that reason, too, the 2007 Council of State Judgment does not constitute a qualifying investment subject to the TPA's protection.

2. *Claimants' indirect interest in Granahorrar shares does not constitute a qualifying investment under the TPA because such shares ceased to exist before the critical jurisdictional dates*

436. In the event that Claimants are still alleging that their indirectly owned Granahorrar shares (rather than the 2007 Council of State Judgment) constitute their qualifying investment, their claims would also need to be dismissed on jurisdictional grounds, because they did not have an interest in those shares at the critical jurisdictional dates. Specifically, as explained below, Claimants did not have an interest in the shares either on (i) the date of entry into force of the TPA, or (ii) the date of the challenged measure. As a result, Claimants' indirect interest in Granahorrar shares is not a qualifying investment under the TPA, and the Tribunal lacks jurisdiction *ratione materiae*.

a. Claimants no longer had an interest in Granahorrar shares at the time that the TPA entered into force

437. For an alleged investment to be protected by Chapter 12 of the TPA, it must have existed at the time that the TPA entered into force (i.e., 15 May 2012). To the extent that Claimants allege that their indirect interest in Granahorrar shares constitutes their investment for purposes of their TPA claims, such interest ceased to exist before the entry into force of the TPA, and therefore cannot constitute a qualifying investment under the TPA.

438. As mentioned above, the text of Chapter 12 of the TPA, Article 28 of the VCLT, and Article 13 of the ILC Articles on State Responsibility confirm that for an investment to qualify for protection under the TPA, such investment must have

existed at or after the time that the TPA entered into force. Thus, Article 12.1 of the TPA (entitled “Scope and Coverage”) provides that the set of protections contained in Chapter 12 “applies to measures adopted or maintained by a Party relating to . . . investors of another Party, and **investments of such investors**”⁷⁹³ (emphasis added). Article 28 of the VCLT for its part establishes that “[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to . . . any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.”⁷⁹⁴ And Article 13 of the ILC Articles on State Responsibility, which codifies the intertemporal principle of customary international law, provides that “[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.”⁷⁹⁵

439. Thus, Article 12.1 of the TPA makes the existence of an investment a condition precedent for the application of TPA Chapter 12. If a claimant no longer held an interest in its alleged investment by the time of the TPA’s entry into force, such condition precedent has not been met. Similarly, an investment that ceased to exist before the entry into force of a treaty would constitute a “situation which ceased to exist before the date of entry into force of the treaty” for purposes of Article 28 of the VCLT.⁷⁹⁶ In accordance with these rules, TPA Chapter 12 will not apply to an investment that had already ceased to exist before the TPA’s entry into force. Such being the case, and in accordance with Article 13 of the ILC Articles on State Responsibility, a measure implemented by Colombia after the investment had

⁷⁹³ **RLA-0001**, TPA, Art. 12.1.1(b).

⁷⁹⁴ **CLA-0124**, VCLT, Art. 28. Notably, Claimants accept that Article 28 of the VCLT applies to Chapter 12 of the TPA. *See* Claimants’ Reply (PCA), ¶¶ 99, 116-17.

⁷⁹⁵ **RLA-0010**, ILC Articles on State Responsibility, Art. 13.

⁷⁹⁶ **CLA-0124**, VCLT, Art. 28.

already ceased to exist could not possibly “constitute a breach of an international obligation” with respect to such investment.⁷⁹⁷

440. In the present case, Claimants’ indirect interest in Granahorrar ceased to exist – at the latest – when Granahorrar ceased to exist in 2006 (i.e., 6 years before the entry into force of the TPA in 2012).⁷⁹⁸ As the tribunal will recall, Claimants held an interest in Granahorrar indirectly: they owned shares in six Holding Companies, which in turn owned shares in Granahorrar.⁷⁹⁹ On 3 October 1998, Granahorrar underwent a process called *oficialización*, through which Fogafín became Granahorrar’s majority shareholder.⁸⁰⁰ Under Colombian law, Fogafín has the power to capitalize, via the acquisition of new shares, a financial institution that

⁷⁹⁷ **RLA-0010**, ILC Articles on State Responsibility, Art. 13.

⁷⁹⁸ **Ex. R-0288**, Certificate of Existence and Legal Representation of BBVA, Chamber of Commerce of Colombia, 12 February 2020, p. 7 (“English Translation: “CERTIFIES: That by Public Deed No. 1177 of April 28, 2006 of Notary 18 of Bogotá DC, registered on April 28, 2006, under No. 1052635 of Book IX, the referenced company absorbs by fusion the company GRANAHORRAR BANCO COMERCIAL SA, which dissolves without liquidation.”) (Spanish Original: “CERTIFICA: Que por Escritura Pública No. 1177 del 28 de abril de 2006 de la Notaría 18 de Bogotá D.C., inscrita el 28 de abril de 2006 bajo el No. 1052635 del libro IX, la sociedad de la referencia absorbe mediante fusión a la sociedad GRANAHORRAR BANCO COMERCIAL S.A., que se disuelve sin liquidarse.”).

⁷⁹⁹ Claimants’ Memorial (PCA), ¶ 417. Claimants allege that before the *oficialización* their six Holding Companies owned shares in Granahorrar in the following amounts: *Asesorías e Inversiones C.G. Ltda* owned 6,511,830,512 Granahorrar shares; *Inversiones Lieja Ltda* owned 3,717,567,931 Granahorrar shares; *Interventorías y Construcciones Ltda.* owned 176,720,030 Granahorrar shares; *Exultar S.A.* owned 4,676,795,978 Granahorrar shares; *Compto S.A.* owned 4,465,586,371 Granahorrar shares; and *Fultiplex Ltda.* owned 1,859,220,529 Granahorrar shares out of 36,427,121,681 Granahorrar shares in circulation. See Claimants’ Memorial (PCA), ¶ 417. Claimants do not provide any financial statements establishing the number of Granahorrar shares their Holding Companies owned in October of 1998. Thus, Colombia reserves the right to challenge the amount of Claimants’ shareholding in Granahorrar at a subsequent phase of this proceeding.

⁸⁰⁰ **Ex. C-0003**, Minutes of Fogafín Board of Directors Minutes, 3 October 1998, p. 9; **Ex. R-0163**, *La Oficialización de Granahorrar*, EL TIEMPO, 5 October 1998; **Ex. R-0162**, *El Gobierno Oficializó el Banco Uconal*, EL TIEMPO, p. 2; **Ex. R-0047**, Minutes of Granahorrar Shareholders Assembly, 16 October 1998, p. 1 (showing that Fogafín, owning 15,700,000,000,000 shares, was Granahorrar’s majority shareholder).

has failed to comply with a capitalization order issued by the Superintendency.⁸⁰¹ In exchange for the acquisition, Fogafín deposits the value of the acquired shares into the financial institution's account, thereby capitalizing it.⁸⁰² However, Fogafín does not dispossess the financial institution's shareholders of their existing shares.

441. As Colombia explained in its Answer, on 2 October 1998, the Superintendency issued an order directing Granahorrar to raise new capital to offset its insolvency ("**Capitalization Order**").⁸⁰³ Granahorrar and its shareholders failed to comply with the Capitalization Order.⁸⁰⁴ Therefore, Fogafín capitalized Granahorrar via the *oficialización* procedure.⁸⁰⁵ New Granahorrar shares were created, and Fogafín became Granahorrar's majority shareholder in exchange for capitalizing

⁸⁰¹ Second Ibáñez Expert Report, ¶¶ 70-73. *See also* Ex. R-0129, Decree No. 633, President of Colombia, 2 April 1993 ("**Financial Act**"), Art. 320(4)(2) (English Translation: "When a financial institution fails to comply with a capitalization order issued by the Banking Superintendency, in accordance with the provisions of numeral 2. of article 113 of this Statute, [Fogafín] may carry out capital increases without the need of a decision of the assembly, a subscription regulation, or acceptance by the legal representative. The capital increase will be understood as having been perfected with the payment of the same via a deposit into the financial institution's account by the Fund.") (Spanish Original: "*Cuando una entidad financiera incumpla una orden de capitalización expedida por la Superintendencia Bancaria, de conformidad con las disposiciones del numeral 2. del artículo 113 de este Estatuto, [Fogafín] podrá efectuar las ampliaciones de capital sin que para el efecto se requiera decisión de la asamblea, reglamento de suscripción o aceptación del representante legal. La ampliación de capital se entenderá perfeccionada con el pago del mismo mediante consignación en cuenta a nombre de la institución financiera por parte del Fondo.*").

⁸⁰² Ex. R-0129, Decree No. 633, President of Colombia, 2 April 1993 ("**Financial Act**"), Art. 320(4)(2).

⁸⁰³ *See* Colombia's Answer (PCA), ¶ 91. *See also* Ex. R-0038, 1998 Capitalization Order.

⁸⁰⁴ Colombia's Answer (PCA), ¶ 94.

⁸⁰⁵ Colombia's Answer (PCA), ¶¶ 96-97.

Granahorrar.⁸⁰⁶ Claimants' Holding Companies retained the same number of shares that they had held in Granahorrar before the *oficialización*.⁸⁰⁷

442. Several years later, in late 2005, BBVA purchased Granahorrar from Fogafín and became Granahorrar's majority shareholder.⁸⁰⁸ Granahorrar continued operating as a distinct legal entity until 28 April 2006, when BBVA merged with Granahorrar.⁸⁰⁹ Through this merger, BBVA dissolved Granahorrar and absorbed

⁸⁰⁶ See **Ex. R-0299**, Certificate of Granahorrar Share Structure as of 2 October 1998, Granahorrar, 8 October 2002 (showing that on 2 October 1998 Granahorrar had a total of 36,427,121,681 shares in circulation); **Ex. R-0047**, Minutes of Granahorrar Shareholders Assembly, 16 October 1998, p. 1 (showing that after *oficialización* the total number of Granahorrar shares in circulation had increased to over 15.7 trillion); see also *id.* (showing that Fogafín, owning 15,700,000,000,000 shares, was Granahorrar's majority shareholder).

⁸⁰⁷ Claimants allege that before the *oficialización* their six Holding Companies owned shares in Granahorrar in the following amounts: *Asesorías e Inversiones* owned 6,511,830,512 Granahorrar shares; *Inversiones Lieja* owned 3,717,567,931 Granahorrar shares; *IC Interventorías y Construcciones* owned 176,720,030 Granahorrar shares; *Exultar* owned 4,676,795,978 Granahorrar shares; *Compto* owned 4,465,586,371 Granahorrar shares; and *Fultiplex* owned 1,859,220,529 Granahorrar shares out of 36,427,121,681 Granahorrar shares in circulation. Assuming those numbers are accurate, Claimants' Holding Companies maintained the same number of shares after the *oficialización*. See **Ex. R-0297**, Certification of Number of Granahorrar Shares Owned by *Asesorías e Inversiones* C.G. on 3 October 1998, Granahorrar, 24 July 2000 (showing that *Asesorías e Inversiones* owned 6,511,830,512 shares out of the more than 15.7 trillion in circulation after *oficialización*); **Ex. R-0298**, Certification of Number of Granahorrar Shares Owned by *Inversiones Lieja* Ltda. on 3 October 1998, Granahorrar, 24 July 2000 (showing that *Inversiones Lieja* owned 3,717,567,931 shares out of the more than 15.7 trillion in circulation after *oficialización*); **Ex. R-0302**, Certification of Number of Granahorrar Shares Owned by I.C. *Interventorías y Construcciones* Ltda. on 3 October 1998, Granahorrar, 24 July 2000 (showing that *IC Interventorías y Construcciones* owned 176,720,030 shares out of the more than 15.7 trillion in circulation after *oficialización*); **Ex. R-0341**, Certification of Number of Granahorrar Shares Owned by *Exultar* on 3 October 1998, Granahorrar, 24 July 2000 ("showing that *Exultar* owned 4,676,795,978 shares out of the more than 15.7 trillion in circulation after *oficialización*"); **Ex. R-0340**, Certification of Number of Granahorrar Shares Owned by *Compto* on 3 October 1998, Granahorrar, 24 July 2000 ("showing that *Compto* owned 4,465,586,371 shares out of the more than 15.7 trillion in circulation after *oficialización*"); **Ex- R-0342**, Certification of Number of Granahorrar Shares Owned by *Fultiplex* on 3 October 1998, Granahorrar, 24 July 2000 ("showing that *Fultiplex* owned 1,859,220,529 shares out of the more than 15.7 trillion in circulation after *oficialización*").

⁸⁰⁸ See **Ex. R-0300**, Resolution No. 0568 of 2006, Financial Superintendency, 21 March 2006, p. 1.

⁸⁰⁹ See **Ex. R-0300**, Resolution No. 0568 of 2006, Financial Superintendency, 21 March 2006, pp. 1-2. See also **Ex. R-0312**, Certificate of Existence and Legal Representation of Granahorrar, Financial Superintendency, 18 February 2020, p. 2 (English Translation: "That through Resolution

all of the latter's assets.⁸¹⁰ Thus, Granahorrar, Granahorrar's shares, and Claimants' indirect interest in such shares ceased to exist in 2006, and all that remained was BBVA.⁸¹¹

443. As a result, Claimants' alleged investment (i.e., their indirect interest in Granahorrar shares) is a "situation that ceased to exist before the date of entry into force"⁸¹² of the TPA on 15 May 2012. Colombia is therefore not bound by the provisions of the TPA in relation to Claimants' former indirect interest in Granahorrar shares, nor can Colombia's actions constitute a breach of an obligation under the TPA with respect to such shares.

S.B. 0568 March 21, 2006, the Financial Superintendency did not object to the proposed merger operation pursuant to which GRANAHORRAR BANCO COMERCIAL S.A. was dissolved without liquidation to be absorbed by BANCO BILBAO VIZCAYA ARGENTARIA COLOMBIA S.A. - BBVA COLOMBIA S.A., formalized by Public Deed No. 1177 of April 28, 2006, Notary 18 of Bogotá D.C.") (Spanish Original: "*Que mediante Resolución S.B. 0568 de marzo 21 de 2006, la Superintendencia Financiera, no objetó la operación de fusión propuesta en virtud de la cual GRANAHORRAR BANCO COMERCIAL S.A., se disolvió sin liquidarse para ser absorbido por el BANCO BILBAO VIZCAYA ARGENTARIA COLOMBIA S.A. - BBVA COLOMBIA S.A., protocolizada mediante Escritura Pública No. 1177 del 28 de abril de 2006, Notaria 18 de Bogotá D.C.*").

⁸¹⁰ See **Ex. R-0288**, Certificate of Existence and Legal Representation of BBVA, Chamber of Commerce of Colombia, 12 February 2020, p. 7 ("English Translation: "CERTIFIES: That by Public Deed No. 1177 of April 28, 2006 of Notary 18 of Bogotá DC, registered on April 28, 2006, under No. 1052635 of Book IX, the referenced company absorbs by merger the company GRANAHORRAR BANCO COMERCIAL SA, which dissolves without liquidation.") (Spanish Original: "*CERTIFICA: Que por Escritura Pública No. 1177 del 28 de abril de 2006 de la Notaría 18 de Bogotá D.C., inscrita el 28 de abril de 2006 bajo el No. 1052635 del libro IX, la sociedad de la referencia absorbe mediante fusión a la sociedad GRANAHORRAR BANCO COMERCIAL S.A., que se disuelve sin liquidarse.*"). See also **Ex. R-0129**, Decree No. 633, President of Colombia, 2 April 1993 ("**Financial Act**"), Art. 60(3) (English Translation: "Once formalized, the merger will have the following effects . . . the absorbing entity . . . fully acquires the totality of the assets, rights, and obligations of the dissolved entity, without the need for further proceedings.") (Spanish Original: "*Una vez formalizada, la fusión tendrá los siguientes efectos . . . la entidad absorbente . . . adquiere de pleno derecho la totalidad de los bienes, derechos y obligaciones de las entidades disueltas, sin necesidad de trámite adicional alguno.*").

⁸¹¹ **Ex. R-0301**, *BBVA Colombia a story of 60 years*, BBVA, 18 April 2016, p. 12 ("In May 2006, the two institutions merged under the brand BBVA Colombia").

⁸¹² **CLA-0124**, VCLT, Art. 28.

444. Claimants attempt to overcome this fatal jurisdictional flaw in their case by arguing that their interest in Granahorrar shares somehow “transformed” (to use Claimants’ term) into the 2007 Council of State Judgment.⁸¹³ However, this argument fails, for at least two reasons.
445. First, as Colombia explained above, the Judgment Exclusion Provision expressly excludes judgments in judicial actions from qualifying as an investment, and therefore the 2007 Council of State Judgment does not qualify as an investment. The Judgment Exclusion provision applies regardless of the subject matter of the judgment (in this case, regulatory action concerning Granahorrar shares).
446. Second, and in any event, the 2007 Council of State Judgment was overturned by the Constitutional Court on 26 May 2011—a year before the TPA entered into force.⁸¹⁴ As a result, and for the reasons discussed above, the 2007 Council of State Judgment no longer existed by the time of the TPA’s entry into force, and for that reason too it cannot constitute a qualifying investment.⁸¹⁵
447. In sum, Granahorrar, its shares, and Claimants’ indirect interest in those shares ceased to exist in 2006.⁸¹⁶ Thus, when the TPA entered into force in May of 2012, Claimants no longer held any qualifying investment in Colombia. Further, Claimants’ fanciful theory that their Granahorrar shares somehow metamorphosed into the 2007 Council of State Judgment leads to the same result;

⁸¹³ Claimants’ Reply (PCA), ¶ 1021.

⁸¹⁴ **Ex. C-0023**, 2011 Constitutional Court Judgment.

⁸¹⁵ See Section II.D.1.d. See also **RLA-0001**, TPA, Art. 12.1.1(b); **CLA-0124**, VCLT, Art. 28; **RLA-0010**, ILC Articles on State Responsibility, Art. 13.

⁸¹⁶ See **Ex. R-0288**, Certificate of Existence and Legal Representation of BBVA, Chamber of Commerce of Colombia, 12 February 2020, p. 7 (“English Translation: “CERTIFIES: That by Public Deed No. 1177 of April 28, 2006 of Notary 18 of Bogotá DC, registered on April 28, 2006, under No. 1052635 of Book IX, the referenced company absorbs by fusion the company GRANAHORRAR BANCO COMERCIAL SA, which dissolves without liquidation.”) (Spanish Original: “CERTIFICA: Que por Escritura Pública No. 1177 del 28 de abril de 2006 de la Notaría 18 de Bogotá D.C., inscrita el 28 de abril de 2006 bajo el No. 1052635 del libro IX, la sociedad de la referencia absorbe mediante fusión a la sociedad GRANAHORRAR BANCO COMERCIAL S.A., que se disuelve sin liquidarse.”).

the 2007 Council of State Judgment ceased to exist on 26 May 2011. Accordingly, the provisions of TPA Chapter 12 do not apply to Claimants' alleged investment, and Claimants cannot assert claims of breach of the TPA on the basis thereof.

448. Because Claimants did not have a qualifying investment at the time the TPA entered into force, the Tribunal lacks jurisdiction *ratione materiae*.

b. Claimants no longer had an interest in Granahorrar shares at the time of the challenged measure

449. The preceding section centered on the fact that Claimants no longer had an interest in Granahorrar shares by the time of the TPA's entry into force. In addition, however, TPA Article 12.1 and Article 13 of the ILC Articles on State Responsibility also require that a qualifying investment exist *as of the date of the challenged measure*.⁸¹⁷ In the present case, Claimants insist that the only measure that they are challenging in this arbitration is the 2014 Confirmatory Order.⁸¹⁸ That being the case, Claimants' claims should be dismissed for lack of jurisdiction *ratione materiae* because they no longer possessed any interest in Granahorrar shares at the time that the 2014 Confirmatory Order was rendered by the Constitutional Court.

450. As explained above, Article 12.1 of the TPA provides that Chapter 12 "**applies to measures adopted or maintained by a Party relating to . . . investors of another Party, and investments of such investors**"⁸¹⁹ (emphasis added). The existence of an investment at the time of the challenged measure is thus a condition precedent

⁸¹⁷ See **RLA-0001**, TPA, Art. 12.1; **RLA-0010**, ILC Articles on State Responsibility, Art. 13.

⁸¹⁸ Claimants' Reply (PCA), ¶ 3 ("Here, Claimants' claims arise from Order 188/14, the Constitutional Court's June 25, 2014 denial of the motion for annulment of its May 26, 2011 opinion."). In truth, Claimants have challenged a series of measures, including the 1998 Regulatory Measures and 2011 Constitutional Court Judgment. See Section II.A.1. However, for the sake of their argument about the jurisdiction *ratione temporis* of the Tribunal, Claimants insist that the only measure they are challenging is the 2014 Confirmatory Order. See Claimants' Reply (PCA), ¶ 38. For the purpose of its present *ratione materiae* objection, Colombia will demonstrate that even if the 2014 Confirmatory Order were Claimants' only challenged measure (quod non), the Tribunal would lack jurisdiction *ratione materiae*.

⁸¹⁹ **RLA-0001**, TPA, Art. 12.1.1(b).

for the application of TPA Chapter 12. If no investment exists at the time of the challenged measure, by definition that measure cannot be one “relating to” an investment, as required by Chapter 12. The 2014 Confirmatory Order therefore falls outside the scope of Chapter 12, since by the time of such order, Claimants’ interest in the Granahorrar shares (i.e., their investment) had already ceased to exist.

451. The correctness of the above legal analysis, based on the application of TPA Article 12.1 and rules of customary international law,⁸²⁰ is confirmed by international arbitration jurisprudence,⁸²¹ including in the *Cementownia v. Republic of Turkey* award:

The investor must evidence all the necessary conditions for the Arbitral Tribunal to affirm its jurisdiction. **The first condition in that regard is the Claimant’s ownership of the share certificates at the time of the alleged [breach].** The Claimant must therefore prove: - that it had effectively and validly acquired the share certificates . . . and - that it acquired them before **the alleged [breach] . . . and that it still was the owner of the shares on that date.**⁸²² (Emphasis added)

⁸²⁰ **RLA-0010**, ILC Articles on State Responsibility, Art. 13.

⁸²¹ **RLA-0093**, *Mesa Power Group LLC v. Government of Canada*, UNCITRAL (Kaufmann-Kohler, Brower, Landau), Award, 24 March 2016 (“*Mesa Power (Award)*”), ¶ 325 (“[T]here is no jurisdiction if disputed measures are not ‘relating to investors’ or to ‘investments of an investor.’ In addition to these express provisions of Chapter 11 [of the NAFTA], the same conclusion arises as a general matter from the principle of nonretroactivity of treaties. State conduct cannot be governed by rules that are not applicable when the conduct occurs.”); **RLA-0092**, *Cementownia “Nowa Huta” S.A. v. Republic of Turkey*, ICSID Case No. ARB/06/8 (Tercier, Lalonde, Thomas), Award, 17 September 2009 (“*Cementownia (Award)*”), ¶¶ 112–13 (“It is undisputed that an investor seeking access to international jurisdiction pursuant to an investment treaty must prove that it was an investor at the relevant time, i.e., at the moment when the events on which its claim is based occurred . . . [claimant] bore the burden of proving that it owned or controlled the [companies’] shares at all relevant times.”).

⁸²² **RLA-0092**, *Cementownia (Award)*, ¶ 114.

Investment arbitration tribunals have repeatedly dismissed claims on the same basis, i.e., that a claimant had already lost its interest in the alleged investment by the time of adoption of the challenged measures.⁸²³

452. Accordingly, Claimants must prove that their indirect interest in Granahorrar shares still existed on the date that the Constitutional Court issued the 2014 Confirmatory Order. However, as explained above, Granahorrar and its shares – and therefore Claimants’ indirect interest in such shares – ceased to exist in 2006.⁸²⁴ Accordingly, that investment no longer existed by the time of issuance of the 2014 Confirmatory Order. Therefore, Claimants’ indirect interest in Granahorrar shares is not a qualifying investment under the TPA.
453. For the foregoing reasons, Claimants’ indirect interest in Granahorrar shares does not constitute a qualifying investment, and the Tribunal lacks jurisdiction *ratione materiae*.

3. *Claimants acquired their indirect interest in Granahorrar in violation of Colombian law*

454. An investment made in violation of the host State’s laws is not eligible to enjoy protection under an investment treaty. In its Answer, Colombia demonstrated that

⁸²³ See e.g., **CLA-0061**, *Phoenix Action* (Award), ¶ 70 (“[T]he Tribunal lacks jurisdiction for acts directed against BP and its subsidiary BG, after the sale of BP – and consequently of its interests in BG . . . as it is not contested that there was no longer any investment of the Claimant after that date.”); **RLA-0103**, *Voelckinghaus* (Final Award), ¶ 165 (“The Tribunal concludes that [the claimant] retained no legal or beneficial ownership interest in [a Czech entity] after 8 March 2001, some seven months prior to . . . any alleged wrongdoing by the Czech Republic. Accordingly, the Tribunal holds that it has no jurisdiction to hear [the claimant’s] claims in respect of receivables owed to [the Czech entity].”).

⁸²⁴ **Ex. R-0288**, Certificate of Existence and Legal Representation of BBVA, Chamber of Commerce of Colombia, 12 February 2020, p. 7 (“English Translation: “CERTIFIES: That by Public Deed No. 1177 of April 28, 2006 of Notary 18 of Bogotá DC, registered on April 28, 2006, under No. 1052635 of Book IX, the referenced company absorbs by fusion the company GRANAHORRAR BANCO COMERCIAL SA, which dissolves without liquidation.”) (Spanish Original: “CERTIFICA: Que por Escritura Pública No. 1177 del 28 de abril de 2006 de la Notaría 18 de Bogotá D.C., inscrita el 28 de abril de 2006 bajo el No. 1052635 del libro IX, la sociedad de la referencia absorbe mediante fusión a la sociedad GRANAHORRAR BANCO COMERCIAL S.A., que se disuelve sin liquidarse.”).

in obtaining their interest in Granahorrar shares, Claimants failed to comply with Colombian laws governing the establishment of foreign investments, which required them to: (i) seek and obtain approval to make the investment; and (ii) register the investment.⁸²⁵ Colombia thus demonstrated that the Tribunal lacks jurisdiction *ratione materiae* because Claimants' indirect interest in Granahorrar was not made in accordance with Colombia's laws.

455. In their Reply, Claimants raised the following arguments in response: (i) that there is no general jurisdictional requirement under international law that an investment be made in accordance with the host State's law;⁸²⁶ (ii) that even if there is a jurisdictional requirement of conformity with local law, Claimants' violations were not severe enough to warrant dismissal of their claims;⁸²⁷ (iii) that Claimants either were precluded from seeking approval for and registering their alleged investment, or that Colombia has not proved that their alleged investment was subject to such requirements;⁸²⁸ and (iv) that Colombia is estopped from relying on Claimants' violations of local law.⁸²⁹
456. The arguments delineated above fail for the following reasons: (i) pursuant to international law, an investment made in violation of the host State's laws is not eligible to enjoy the protections of an investment treaty (**Section II.D.3.a** below); (ii) an investment made in violation of a host State's laws governing the establishment of foreign investments will not be subject to investment treaty protection (**Section II.D.3.b** below); (iii) Claimants in fact made their alleged investment in Granahorrar in violation of Colombian law governing the establishment of foreign investments (**Section II.D.3.c** below); and (iv) Colombia is not estopped from raising a jurisdictional objection on the basis of Claimants'

⁸²⁵ Colombia's Answer (PCA), ¶¶ 477-97.

⁸²⁶ See Claimants' Reply (PCA), ¶¶ 1030-95.

⁸²⁷ See Claimants' Reply (PCA), ¶¶ 1097-1109.

⁸²⁸ See Claimants' Reply (PCA), ¶¶ 1110-13.

⁸²⁹ See Claimants' Reply (PCA), ¶¶ 1120-30.

violation of Colombian law (**Section II.D.3.d** below). As a result, the Tribunal lacks jurisdiction *ratione materiae*. Each of the strands identified above is developed in greater detail below.

- a. International law requires that an investment be made in compliance with the host State's law for such investment to be eligible for treaty protection

457. As Colombia noted in its Answer, international law establishes that an investment made in violation of the law of the host State is not eligible to receive protection under the relevant treaty (“**Conformity Requirement**”).⁸³⁰ This is so irrespective of the presence or absence of explicit treaty language to that effect (“**conformity clause**”).⁸³¹ In their Reply, Claimants assert that given the absence of an express conformity clause in the TPA, a violation of Colombian law is not a jurisdictional matter but rather one that goes to the merits.⁸³² Claimants are mistaken, however, for the reasons discussed below.

- i. The weight of the jurisprudence confirms the existence of a Conformity Requirement under international law

458. Numerous investment arbitral tribunals have confirmed the existence of the Conformity Requirement under international law (including in the absence of a conformity clause in the relevant treaty). For instance, in 2003, the *Yuang Chi OO v. Myanmar* tribunal recognized “the general rule that for a foreign investment to enjoy treaty protection it must be lawful under the law of the host State.”⁸³³ In its Answer, Colombia cited four cases (*Phoenix Action v. the Czech Republic*, *Hamester v. Republic of Ghana*, *SAUR v. Republic of Argentina*, and *Plama v. Bulgaria*) in which

⁸³⁰ Colombia’s Answer (PCA), ¶¶ 471-76.

⁸³¹ Colombia’s Answer (PCA), ¶ 471.

⁸³² Claimants’ Reply (PCA), ¶¶ 1030, 1097.

⁸³³ **RLA-0104**, *Yaung Chi OO Trading PTE Ltd., v. Government of the Union of Myanmar*, ASEAN I.D. Case No. ARB/01/1 (Sucharitkul, Crawford, Delon), Award, 31 March 2001 (“*Yuang Chi OO (Award)*”), ¶ 58.

tribunals confirmed the existence of the Conformity Requirement.⁸³⁴ In addition to those cases, the tribunals in *Oxus Gold v. Uzbekistan* and *Achmea v. Slovak Republic* have also confirmed the existence of the Conformity Requirement.⁸³⁵ In four of those cases, the applicable treaty did *not* include a conformity clause;⁸³⁶ in the remaining three, the treaties included conformity clauses but the tribunals affirmed the existence of the Conformity Requirement irrespective of the existence of such clause.⁸³⁷

459. In support of their position, Claimants now cite the minority view represented by three tribunals – *Bear Creek Mining v. Peru*, *Stati v. Kazakhstan*, and *Liman Caspian Oil v. Kazakhstan* – for the proposition “that there is no jurisdictional requirement that an investment be made in accordance with the laws of the host State in the absence of express treaty language to that effect.”⁸³⁸ On this basis, Claimants allege

⁸³⁴ **CLA-0061**, *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5 (Stern, Bucher, Fernández-Armesto), Award, 15 April 2009 (“**Phoenix Action (Award)**”), ¶¶ 101; **RLA-0036**, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24 (Stern, Cremades, Landau), Award, 18 June 2010 (“**Hamester (Award)**”), ¶¶ 123–24 (“[An investment] will also not be protected if it is made in violation of the host State’s law (as elaborated, e.g. by the tribunal in Phoenix) **These are general principles that exist independently of specific language to this effect in the Treaty.**”) (emphasis added); **RLA-0038**, *SAUR International S.A. v. Republic of Argentina*, ICSID Case No. ARB/04/4 (Fernández-Armesto, Hanotiau, Tomuschat), Decision on Jurisdiction and Liability, 6 June 2012 (“**SAUR (Decision on Jurisdiction and Liability)**”), ¶ 308; **RLA-0037**, *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24 (Salans, van den Berg, Veeder), Award, 27 August 2008 (“**Plama (Award)**”), ¶¶ 138, 143.

⁸³⁵ **RLA-0094**, *Achmea B.V. v. The Slovak Republic*, PCA Case No. 2008-13 (Lowe, van den Berg, Veeder), Final Award, 7 December 2012 (“**Achmea (Final Award)**”), ¶¶ 166, 170; **RLA-0106**, *Oxus Gold v. The Republic of Uzbekistan*, UNCITRAL (Tercier, Lalonde, Stern), Final Award, 17 December 2015 (“**Oxus Gold (Final Award)**”), ¶¶ 698, 706-08.

⁸³⁶ See **RLA-0038**, *SAUR (Decision on Jurisdiction and Liability)*, ¶ 308; **RLA-0037**, *Plama (Award)*, ¶¶ 138, 143; **RLA-0094**, *Achmea (Final Award)*, ¶ 166; **RLA-0106**, *Oxus Gold (Final Award)*, ¶¶ 698, 706-08.

⁸³⁷ See **RLA-0104**, *Yaung Chi OO (Award)*, ¶ 58; **CLA-0061**, *Phoenix Action (Award)*, ¶ 101; **RLA-0036**, *Hamester (Award)*, ¶¶ 123–24.

⁸³⁸ Claimants’ Reply (PCA), ¶¶ 1036, 1037-38.

that any alleged violation of domestic law by them should be considered only at the merits phase.⁸³⁹

460. However, the majority view in the investment arbitration jurisprudence recognizes the existence of a Conformity Requirement in international law *even in the absence of an express treaty provision to that effect*.⁸⁴⁰ The three tribunals relied upon by Claimants did not analyze or address that consistent line of jurisprudence confirming the existence of the Conformity Requirement, and instead made summary conclusions about the perceived irrelevance (in those cases) of compliance with domestic law for the tribunals' analysis of jurisdiction.⁸⁴¹ Moreover, the decision on this issue in all three of those cases appears to have been driven by the opinion of a single arbitrator—Dr. Karl-Heinz Böckstiegel—who was the presiding arbitrator in each of those cases.⁸⁴²
461. Several other tribunals have addressed the question as to whether to address the subject of compliance with domestic law as a jurisdictional or merits issue. In particular, a number of tribunals have held that: (i) a violation of domestic law in the *making* of an investment (as is the case here) is a jurisdictional matter, whereas

⁸³⁹ Claimants' Reply (PCA), ¶¶ 1030, 1097.

⁸⁴⁰ See **RLA-0104**, *Yaung Chi OO* (Award), ¶ 58; **CLA-0061**, *Phoenix Action* (Award), ¶ 101; **RLA-0036**, *Hamester* (Award), ¶¶ 123–24; **RLA-0038**, *SAUR* (Decision on Jurisdiction and Liability), ¶ 308; **RLA-0037**, *Plama* (Award), ¶¶ 138, 143; **RLA-0094**, *Achmea* (Final Award), ¶¶ 166, 170; **RLA-0106**, *Oxus Gold* (Final Award), ¶¶ 698, 706–08.

⁸⁴¹ **CLA-0171-A**, *Bear Creek Mining Corp v. Republic of Peru*, ICSID Case No. ARB/14/21 (Böckstiegel, Pryles, Sands), Award, 30 November 2017, ¶ 320; **CLA-0195-A**, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14 (Böckstiegel, Hobér, Crawford), Award, 22 June 2010, ¶ 187; **CLA-0165-A**, *Antolie Stati et al. v. The Republic of Kazakhstan*, SCC Arbitration V No. 116/2010 (Böckstiegel, Haigh, Lebedev), Award, 19 December 2013, ¶ 812.

⁸⁴² **CLA-0171-A**, *Bear Creek Mining Corp v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017 (Böckstiegel, Pryles, Sands), ¶ 320; **CLA-0195-A**, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14 (Böckstiegel, Hobér, Crawford), Award, 22 June 2010, ¶ 187; **CLA-0165-A**, *Antolie Stati et al. v. The Republic of Kazakhstan*, SCC Arbitration V No. 116/2010 (Böckstiegel, Haigh, Lebedev), Award, 19 December 2013, ¶ 812.

(ii) a post-establishment violation of domestic law (i.e., during the life of the investment) could be relevant to the merits of a claim.⁸⁴³ Such tribunals drew this distinction not only in circumstances in which the applicable treaty included a conformity clause,⁸⁴⁴ but also in circumstances in which it did not.⁸⁴⁵ Claimants failed to address this distinction or the underlying case law that supports it.

462. In rejecting the notion that Claimants were required to comply with Colombian law in making their investment in order for such investment to qualify for TPA protection, Claimants also point to the existence of conformity clauses in other Colombia treaties. According to Claimants, the fact that the TPA does not include a conformity clause, whereas other treaties concluded by Colombia do feature such a clause, demonstrates a “policy choice made by the State parties [to the TPA] not to impose a limitation on covered investments.”⁸⁴⁶ However, recourse to the text of other treaties is not an appropriate means of treaty interpretation under the VCLT.⁸⁴⁷ Moreover, the Conformity Requirement *always* applies—regardless of the text of the applicable treaty.⁸⁴⁸ To illustrate, other principles of international law (e.g., the principle of non-retroactivity) likewise apply implicitly, even in

⁸⁴³ See, e.g., **RLA-0036**, *Hamester* (Award), ¶ 127; **RLA-0041**, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2 (Kaufmann-Kohler, Lalonde, Stern), Decision on Jurisdiction, 27 September 2012 (“**Quiborax (Decision on Jurisdiction)**”), ¶ 266; **RLA-0042**, *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3 (Kaufmann-Kohler, Townsend, von Wobeser), Award, 4 October 2013 (“**Metal-Tech (Award)**”), ¶ 193; **RLA-0039**, *Vladislav Kim et. al v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6 (Caron, Fortier, Landau), Decision on Jurisdiction, 8 March 2017 (“**Kim (Decision on Jurisdiction)**”), ¶ 375; **RLA-0106**, *Oxus Gold* (Final Award), ¶ 707.

⁸⁴⁴ See **RLA-0036**, *Hamester* (Award), ¶ 127; **RLA-0041**, *Quiborax* (Decision on Jurisdiction), ¶ 266; **RLA-0042**, *Metal-Tech* (Award), ¶ 193; **RLA-0039**, *Kim* (Decision on Jurisdiction), ¶ 375.

⁸⁴⁵ See **RLA-0106**, *Oxus Gold* (Final Award), ¶ 707.

⁸⁴⁶ Claimants’ Reply (PCA), ¶ 1041.

⁸⁴⁷ See generally **CLA-0124**, VCLT, Arts. 31–32.

⁸⁴⁸ See **RLA-0104**, *Yaung Chi OO* (Award), ¶ 58; **CLA-0061**, *Phoenix Action* (Award), ¶ 101; **RLA-0036**, *Hamester* (Award), ¶¶ 123–24; **RLA-0038**, *SAUR* (“Decision on Jurisdiction and Liability, ¶ 308; **RLA-0037**, *Plama* (Award), ¶¶ 138, 143; **RLA-0094**, *Achmea* (Final Award), ¶¶ 166, 170; **RLA-0106**, *Oxus Gold* (Final Award), ¶¶ 698, 706–08.

instances in which the relevant treaty does not make explicit reference to the relevant principle.⁸⁴⁹

- ii. Claimants mischaracterize Colombia's arguments and the relevant case law concerning the Conformity Requirement

463. Claimants repeatedly mischaracterize Colombia's arguments, as well as the relevant case law, with respect to the Conformity Requirement. Three illustrative examples are provided below.

464. First, Claimants assert that Colombia is relying on cases for a certain proposition, when Colombia in fact cited such cases for an entirely different proposition. For example, Claimants devote 10 pages of their Reply to an analysis of three cases cited by Colombia: *Fraport v. Philippines*, *Inceysa v. El Salvador*, and *Salini v. Morocco*.⁸⁵⁰ In that segment of their brief, Claimants seek to establish that none of those cases supports the existence of a general Conformity Requirement under international law (i.e., even in the absence of a conformity clause in the relevant treaty).⁸⁵¹ However, Colombia did not cite those cases for that proposition, but rather for the proposition that an investment made in violation of a host State's law is not eligible to enjoy treaty protection when the treaty at issue does include a conformity clause.⁸⁵² Colombia cited a different and separate set of cases (*Phoenix*

⁸⁴⁹ See **RLA-0001**, TPA, Art. 10.22(a) (requiring tribunals to "decide the issues in dispute in accordance with . . . applicable rules of international law"). See also **RLA-0105**, *Manuel García Armas* (Award on Jurisdiction), ¶ 704 ("Los principios importados de la costumbre internacional general se aplican salvo derogación expresa. En otras palabras, el arbitraje internacional de inversiones no es una esfera enteramente divorciada del derecho internacional general."); **CLA-0199**, *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3 (Mazon, Mikva, Mustill), Award, 26 June 2003, ¶ 160 ("An important principle of international law should not be held to have been tacitly dispensed with by international agreement, in the absence of words making clear an intention to do so."); **CLA-0182**, *Elettronica Sicula S.p.A.*, ICJ, Judgment, 20 July 1989, ¶ 50.

⁸⁵⁰ Claimants' Reply (PCA), pp. 546-56.

⁸⁵¹ See Claimants' Reply (PCA), ¶ 1066.

⁸⁵² Colombia's Answer (PCA), ¶ 471.

Action v. the Czech Republic, Hamester v. Republic of Ghana, SAUR v. Republic of Argentina, and Plama v. Bulgaria)⁸⁵³ in support of the existence of the Conformity Requirement even in the absence of a conformity clause in the relevant treaty.⁸⁵⁴

465. Second, Claimants mischaracterize the reasoning and decisions of certain tribunals. For instance, Claimants state that the *Hamester v. Ghana* award “shows that there is no general requirement of conformity.”⁸⁵⁵ But the *Hamester* award states precisely the opposite: “[An investment] will also not be protected if it is made in violation of the host State’s law . . . **independently of specific language to this effect in the Treaty**”⁸⁵⁶ (emphasis added).
466. Similarly, according to Claimants, the *Phoenix Action* tribunal decided that in the absence of a Conformity Clause, only violations of “core principles of domestic and international law, rising to the level of public policy or *ordre public*,” can preclude investments from enjoying treaty protection.⁸⁵⁷ Yet the *Phoenix Action* tribunal said no such thing; to the contrary, it explicitly confirmed the existence of a broader Conformity Requirement in the section of its award titled “The protection of foreign investments made in accordance with the laws of the host State:”⁸⁵⁸

States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws . . . These are illegal investments according to the national law of the host State and cannot be protected through an ICSID arbitral process . . . **[T]he conformity of the**

⁸⁵³ See Colombia’s Answer (PCA), ¶ 471.

⁸⁵⁴ See **CLA-0061** *Phoenix Action* (Award), ¶¶ 101; **RLA-0036**, *Hamester* (Award), ¶¶ 123–124 (“[An investment] will also not be protected if it is made in violation of the host State’s law (as elaborated, e.g. by the tribunal in Phoenix) . . . **These are general principles that exist independently of specific language to this effect in the Treaty.**”) (emphasis added); **RLA-0038**, *SAUR* (Decision on Jurisdiction and Liability), ¶ 308; **RLA-0037**, *Plama* (Award), ¶¶ 138, 143.

⁸⁵⁵ Claimants’ Reply (PCA), ¶ 1072.

⁸⁵⁶ **RLA-0036**, *Hamester* (Award), ¶¶ 123–24.

⁸⁵⁷ Claimants’ Reply (PCA), ¶ 1079.

⁸⁵⁸ **CLA-0061**, *Phoenix Action* (Award), § V.C.1.

establishment of the investment with the national laws – is implicit even when not expressly stated in the relevant BIT
. . . . The core lesson is that the purpose of the international protection through ICSID arbitration cannot be granted to investments that are made contrary to law.⁸⁵⁹ (Emphasis added)

Moreover, one of the categories of local law violation identified by the *Phoenix Action* tribunal as precluding an investment from enjoying treaty protection is the violation of a host State’s law governing the establishment of foreign investments.⁸⁶⁰

467. Likewise, because the specific violation of domestic law at issue in *Plama* involved fraud, Claimants erroneously interpret that case to mean that only “a breach of fundamental principles of domestic law,” such as fraud, would deprive an investment of treaty protection.⁸⁶¹ However, the *Plama* tribunal clearly referred to violations of domestic law more broadly:

[T]he Tribunal has decided that the investment was obtained by deceitful conduct **that is in violation of Bulgarian law**. The Tribunal is of the view that granting the ECT’s protections to Claimant’s investment would be contrary to the principle *nemo auditor propriam turpitudinem allegans*⁸⁶² (Emphasis added)

Nowhere in its award did the *Plama* tribunal state that a breach of a “fundamental” principle of domestic law is the only category of violation of domestic law that could deprive an investment of treaty protection.

468. Finally, Claimants incorrectly attribute to *SAUR* the assertion that “in order to affect an investor’s ability to rely on the protection of a BIT, there must have been

⁸⁵⁹ **CLA-0061**, *Phoenix Action* (Award), ¶¶ 101–02.

⁸⁶⁰ **CLA-0061**, *Phoenix Action* (Award), ¶ 101 (“If a State, for example, restricts foreign investment in a sector of its economy and a foreign investor disregards such restriction, the investment concerned cannot be protected under the ICSID/BIT system.”).

⁸⁶¹ Claimants’ Reply (PCA), ¶ 1087.

⁸⁶² See **RLA-0037**, *Plama* (Award), ¶ 143.

a serious breach of the judicial system.”⁸⁶³ However, the SAUR tribunal merely referred to “serious” violations as part of a broader requirement to comply with domestic law:

The Tribunal understands that the object of the investment arbitration system **is to protect only legal and bona fide investments**. The fact that the BIT between France and Argentina mentions or fails to mention the requirement that the investor have acted in accordance with domestic law is not a relevant factor. The requirement of not having incurred a serious violation of the legal system is a tacit condition, implicit in every BIT, since **it cannot be understood in any case that a State is offering the benefit of protection through investment arbitration, when the investor, to achieve that protection, has taken an unlawful action.**⁸⁶⁴ (Emphasis added)

Thus, the SAUR tribunal was alluding to unlawful actions – generally – of which serious violations are a subset. Contrary to what Claimants argue, nowhere does the SAUR award state that *only* “serious” breaches of domestic law preclude an investment from enjoying treaty protection.

469. In sum, the cases discussed by Colombia confirm that the Conformity Requirement is indeed a principle of international law, irrespective of the presence of an express conformity clause in the relevant treaty. Such principle applies fully to Claimants and their alleged investment, which means that such alleged

⁸⁶³ Claimants’ Reply (PCA), ¶ 1093.

⁸⁶⁴ See **RLA-0038, SAUR** (Decision on Jurisdiction and Liability), ¶ 308 (Spanish Original: “El Tribunal entiende que la finalidad del sistema de arbitraje de inversión radica **en proteger únicamente inversiones legales y bona fide**. El hecho de que el APRI entre Francia y la Argentina mencione o deje de mencionar la exigencia de que el inversor haya actuado en conformidad con la legislación interna, no constituye un factor relevante. El requisito de no haber incurrido en una violación grave del ordenamiento jurídico es una condición tácita, ínsita en todo APRI, pues **no se puede entender en ningún caso que un Estado esté ofreciendo el beneficio de la protección mediante arbitraje de inversión, cuando el inversor, para alcanzar esa protección, haya incurrido en una actuación antijurídica.**”) (énfasis agregado).

investment must have been made in compliance with Colombian law to be eligible to enjoy the investment protections conferred by the TPA.

- b. A foreign investment violates the Conformity Requirement if the investment did not comply with host State law governing the establishment of foreign investments

470. The Parties appear to agree that not every violation of a host State's law will preclude an investment from enjoying treaty protection, but they disagree as to what type of violations will suffice. The jurisprudence has identified multiple categories of violations of domestic law that would prevent an investment from qualifying for treaty protection.⁸⁶⁵ In its Answer, Colombia demonstrated that Claimants' violation of Colombian law falls into one of those categories: the violation of domestic laws governing the establishment of foreign investments.⁸⁶⁶

471. In their Reply, Claimants contend that, to the extent that a Conformity Requirement does exist, there are only two circumstances in which an investment is not subject to treaty protection: (i) if the applicable treaty *does not* include a conformity clause, where the violation of domestic law infringes fundamental principles of domestic or international law;⁸⁶⁷ and (ii) if the applicable treaty does include a conformity clause, where the violation of domestic law compromises a significant interest of the host State.⁸⁶⁸ According to Claimants, neither of those two circumstances is present here, and their alleged investment is thus subject to the TPA's protection.⁸⁶⁹ Contrary to what Claimants argue, however, it is simply not true that an investment is precluded from enjoying treaty protection *only* if the

⁸⁶⁵ Colombia's Answer (PCA), ¶ 498.

⁸⁶⁶ Colombia's Answer (PCA), ¶¶ 498-504.

⁸⁶⁷ See Claimants' Reply (PCA), ¶ 1098.

⁸⁶⁸ Claimants' Reply (PCA), ¶ 1104.

⁸⁶⁹ Claimants' Reply (PCA), ¶¶ 1101-03, 1107-08.

violation of domestic law infringes fundamental principles of domestic or international law or compromises a significant interest of the host State.

472. There are at least four categories of violations of domestic law that can preclude an investment from enjoying treaty protection. The *Quiborax* and *Metal-Tech* tribunals, compiling the then-existing jurisprudence,⁸⁷⁰ identified the following three:

- a. “non-trivial violations of the host State’s legal order”;
- b. “violations of the host State’s foreign investment regime”; and
- c. “fraud – for instance, to secure the investment[] or profits.”⁸⁷¹

473. The fourth category was identified by the *Kim v. Uzbekistan* tribunal, which concluded that a denial of treaty protection is warranted only when “noncompliance with a law . . . results in a compromise of a correspondingly significant interest of the Host State.”⁸⁷²

474. Hence, while the *severity* of a given violation can certainly prevent an investment from enjoying treaty protection,⁸⁷³ so can the *nature* of the violation. In that respect,

⁸⁷⁰ See **RLA-0041**, *Quiborax* (Decision on Jurisdiction), ¶ 266 (citing **RLA-0055**, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18 (Weil, Bernadini, Price), Decision on Jurisdiction, 29 April, 2004, ¶ 86; **RLA-0077**, *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. République Algérienne Démocratique et Populaire*, ICSID Case No. ARB/05/3 (Tercier, Faurès, Gaillard), Decision, 12 July 2006, ¶ 83;); **CLA-0180-D**, *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17 (Tercier, Paulsson, El-Kosheri), Award, 6 February 2008, ¶ 104; **RLA-0078**, *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20 Award, 14 July 2010, (van Houtte, Lévy, Gaillard) (“**Saba Fakes (Award)**”), ¶ 119; **RLA-0076**, *Inceysa* (Award), ¶¶ 236–38; **RLA-0036**, *Hamester* (Award), ¶¶ 129, 135; **RLA-0037**, *Plama* (Award), ¶¶ 133–35; **RLA-0040**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25 (Fortier, Cremades, Reisman), Award, 16 August 2007 (“**Fraport (Award)**”), ¶ 396); **RLA-0042**, *Metal-Tech* (Award), ¶ 165.

⁸⁷¹ **RLA-0041**, *Quiborax* (Decision on Jurisdiction), ¶ 266. See also **RLA-0042**, *Metal-Tech* (Award), ¶ 165.

⁸⁷² **RLA-0039**, *Kim* (Decision on Jurisdiction), ¶ 396.

⁸⁷³ In any event, Claimants’ argument is rendered moot by the fact that their failure to obtain approval or register their alleged investment (detailed below) does in fact violate fundamental principles of Colombian law. Thus, even under the higher standard proposed by Claimants, their

a number of tribunals (including those in *Saba Fakes*, *Phoenix Action*, *Quiborax*, *Metal-Tech*, and *Achmea*) have concluded that a violation of the host State's law regulating the establishment of foreign investments will preclude an investment from enjoying treaty protection.⁸⁷⁴

475. Claimants did not address this issue in their Reply, nor did they address the above-referenced case law concerning violations of a host State's laws governing foreign investments. Claimants have thus failed to rebut Colombia's argument that the *nature* of their violation deprives their investment of the TPA's protections.

alleged investment would still be deprived of the TPA's protection. While Claimants cite to *Hochtief v. Argentina* for the proposition that tribunals have denied treaty protection when an investment was made in violation of fundamental principles of domestic law (*see* Claimants' Reply (PCA), ¶ 1099), Claimants elide the important fact that the *Hochtief* tribunal held that a failure to obtain the government approvals required for making an investment is a violation of a fundamental principle of domestic law: "[I]n previous cases, tribunals have focused upon compliance with '**fundamental principles of the host State's law**'. This Tribunal considers that to be the correct focus when the question is addressed in the context of questions of jurisdiction and admissibility. Investments that are forbidden, or **dependent upon government approvals that were not in fact obtained** [should be denied treaty protection]" (emphasis added). **RLA-0056**, *Hochtief* (Decision on Jurisdiction), ¶ 199.

⁸⁷⁴ *See* **RLA-0078**, *Saba Fakes* (Award), ¶ 119 (applying the following conformity clause: "It is the Tribunal's view that the legality requirement contained therein concerns the question of the compliance with the host State's domestic laws governing the admission of investments in the host State."); **RLA-0041**, *Quiborax* (Decision on Jurisdiction), ¶ 266; **RLA-0042**, *Metal-Tech* (Award), ¶ 193; **RLA-0094**, *Achmea* (Final Award), ¶ 170 ("[I]t is wholly unreasonable to suppose that the Parties could have intended to protect investments that violate, for example, a prohibition on foreign investment in a specified sector of the economy. The terms of the Treaty could not be interpreted in good faith to require such protection."); **CLA-0061**, *Phoenix Action* (Award), ¶ 101 ("States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws. If a State, for example, restricts foreign investment in a sector of its economy and a foreign investor disregards such restriction, the investment concerned cannot be protected under the ICSID/BIT system.").

c. Claimants made their alleged investment in violation of Colombian law governing the establishment of foreign capital investments

476. In the present case, Claimants violated specific Colombian laws governing the establishment of foreign investments.⁸⁷⁵ As Colombia detailed in its Answer, at the time that Claimants obtained their indirect interest in Granahorrar, they violated a series of provisions of Colombian law that required the approval and registration of foreign capital investments (“**Foreign Capital Investment Framework**”).
477. In their Reply, Claimants seek to rebut Colombia’s evidence with two allegations. First, Claimants assert that Law 43 prevented them from seeking approval for and registering their indirect interest in Granahorrar.⁸⁷⁶ Second, Claimants allege that Colombia merely assumes that their indirect interest in Granahorrar qualified as a foreign capital investment that was subject to the Foreign Capital Investment Framework.⁸⁷⁷ Importantly, however, Claimants never take a position on the critical issue of whether they made their investment using foreign or Colombian capital.
478. In the following sections, Colombia will demonstrate that (i) Claimants’ reliance on Law 43 is a red herring, because Law 43 was promulgated after Claimants made their investment in Granahorrar; (ii) Claimants in fact violated the Foreign Capital Investment Framework; and (iii) Claimants cannot bypass their burden of proof on this issue.

⁸⁷⁵ Colombia’s Answer (PCA), ¶¶ 479–97.

⁸⁷⁶ Claimants’ Reply (PCA), ¶ 1115 (“[G]iven the existence of article 22 of Law 43, it is clear that Claimants acted fully in compliance with Colombian law in not seeking approval or registering their investments with the Central Bank, if such requirement over existed regarding these investments in Granahorrar.”), ¶ 1108 (“Claimants were actually unable to comply with the registration requirements under applicable Colombian law.”).

⁸⁷⁷ Claimants’ Reply (PCA), ¶ 1113.

- i. Claimants' reliance on Law 43 is ill founded because it was promulgated after Claimants obtained their interest in Granahorrar

479. In their Reply, Claimants contend that Law 43 precluded them from complying with the Foreign Capital Investment Framework's approval and registration requirements.⁸⁷⁸ According to Claimants, Law 43 requires dual nationals, like them, to identify as Colombian while in Colombia.⁸⁷⁹ That requirement, Claimants contend, "compelled [them] to comply with one set of Colombia's laws applicable to dual nationals [i.e. Law 43] and not register their investments in Granahorrar."⁸⁸⁰ However, Claimants' argument fails because Law 43 was promulgated after Claimants obtained their interest in Granahorrar.

480. As Colombia explained in its Answer,⁸⁸¹ Law 43 was promulgated in 1993, meaning that its strictures were not in force before 1993. Here, documentary evidence produced by Colombia proves that Claimants obtained their indirect interest in Granahorrar in 1988.⁸⁸² For their part, Claimants allege that they obtained their interest in Granahorrar as early as 1991 – i.e., two years before Law 43 was promulgated and entered into force.⁸⁸³ Thus, even assuming *arguendo* that

⁸⁷⁸ Claimants' Reply (PCA), ¶ 1115 ("[G]iven the existence of article 22 of Law 43, it is clear that Claimants acted fully in compliance with Colombian law in not seeking approval or registering their investments with the Central Bank, if such requirement ever existed regarding these investments in Granahorrar."); *see also id.* ¶¶ 1111-12.

⁸⁷⁹ Claimants' Reply (PCA), ¶ 1112.

⁸⁸⁰ Claimants' Reply (PCA), ¶ 1130; *see also id.* at ¶ 1108 ("Claimants were actually unable to comply with the registration requirements under applicable Colombian law").

⁸⁸¹ Colombia's Answer (PCA), ¶ 463.

⁸⁸² **Ex. R-0110**, *Composición de Capital de personas jurídicas que posean más del 5% del capital de acciones de la entidad*, 31 December 1989 (showing that in 1989, *Inversiones Carrizosa Gelzis y CIA S.C.S.* owned 30.5944% of the shares of Granahorrar, and that Claimants each owned 33.33% of the former entity.); *see also Ex. C-0001*, Granahorrar Information Memorandum (Lehman Brothers), August 1998, p. 25 ("[p]ursuant to the nationalization of Banco de Colombia in 1986, Granahorrar was sold to a group comprised of some of Colombia's leading building contractors," and "[i]n 1988 . . . the Carrizosas assumed the leadership.").

⁸⁸³ *See e.g.*, Alberto Carrizosa Gelzis Witness Statement, ¶ 52(d); Enrique Carrizosa Gelzis Witness Statement, ¶ 42(c), (f); Felipe Carrizosa Gelzis Witness Statement, ¶ 38(c), (f).

Law 43 would prevent a dual national from complying with the Foreign Capital Investment Framework, such conflict did not exist when Claimants obtained their interest in Granahorrar. In short, Claimants' reliance on Law 43 is simply a red herring intended to distract from their violation of Colombian law.

481. Importantly, in their discussion of Law 43, Claimants repeatedly admitted that they *did not* seek approval for or register their investment in Granahorrar as required by the Foreign Capital Investment Framework.⁸⁸⁴ Having made this admission, the only remaining question therefore is whether Claimants' failure to do so constitutes a violation of the Foreign Capital Investment Framework. As Colombia will demonstrate in the following subsection, it does.

ii. Claimants violated the Foreign Capital Investment Framework

482. In its Answer, Colombia provided a detailed explanation of the foreign investment and capital regime that was in force in Colombia at the time that Claimants made their investment in Granahorrar.⁸⁸⁵ To recall, Colombia's Foreign Capital Investment Framework consisted of a series of laws whose object was to "promote foreign capital investments, in harmony with the general interests of the national economy."⁸⁸⁶ Among other things, the Foreign Capital Investment Framework

⁸⁸⁴ Claimants' Reply (PCA), ¶¶ 1108 ("[A]s discussed below, Claimants were actually unable to comply with the registration requirements under applicable Colombian law."), ¶ 1115 ("[G]iven the existence of article 22 of Law 43, it is clear that Claimants acted fully in compliance with Colombian law in not seeking approval or registering their investments with the Central Bank, if such requirement ever existed regarding these investments in Granahorrar."); *see also id.* at ¶¶ 1120, 1130 ("Claimants were compelled to comply with one set of Colombia's laws applicable to dual nationals and not register their investments in Granahorrar as a foreign investor.").

⁸⁸⁵ Colombia's Answer (PCA), ¶¶ 479-92.

⁸⁸⁶ **Ex. R-0114**, Decree No. 444, President of Colombia, 22 March 1967, Art. 1.d (Spanish Original: "*d) Estímulo a la inversión de capitales extranjeros, en armonía con los intereses generales de la economía nacional.*").

regulated investments made with foreign capital.⁸⁸⁷

483. Between 1967 and 1991, the Foreign Capital Investment Framework required that foreign capital investments be (i) submitted to and approved by the *Departamento Administrativo de Planeación* (“**Planning Department**”) of Colombia, and (ii) if approved, registered at the *Oficina de Cambios* (“**Exchange Office**”) of the Central Bank.⁸⁸⁸ In 1991, the Planning Department approval requirement was removed from the Foreign Capital Investment Framework; however, the registration requirement before the Exchange Office was retained.⁸⁸⁹
484. The Foreign Capital Investment Framework was in force (i) at the time that the evidence indicates that Claimants obtained their interest in Granahorrar (i.e., 1988),⁸⁹⁰ as well as (ii) at the time that Claimants allege that they obtained their interest in Granahorrar via the Holding Companies (i.e., 1991).⁸⁹¹ Accordingly, if

⁸⁸⁷ **Ex. R-0114**, Decree No. 444, President of Colombia, 22 March 1967, Art. 105 (English Translation: “The rules in this chapter shall apply to foreign capital investments in Colombia, to foreign currency credits granted in favor of a natural person or legal person resident in the country, and to investments or loans that the latter may grant to a natural person or legal person abroad.”) (Spanish Original: “*Las normas de este capítulo se aplicarán a las inversiones de capital extranjero en Colombia, a los créditos en moneda extranjera otorgados a favor de personas naturales o jurídicas residentes en el país y a las inversiones o préstamos que estas últimas hagan o concedan a favor de personas naturales o jurídicas del Exterior.*”).

⁸⁸⁸ **Ex. R-0114**, Decree No. 444, President of Colombia, 22 March 1967, Arts. 107, 109, 113, 120; **Ex. R-0109**, Decision No. 24, Special Commission, 14–31 December 1970, Art. 37; **Ex. R-0116**, Decree No. 1900, President of Colombia, 15 September 1973, Arts. 2, 4, 5; **Ex. R-0115**, Decree No. 1265, President of Colombia, 10 July 1987, Arts. 1, 5, 6.

⁸⁸⁹ **Ex. R-0111**, Law No. 9, Congress of Colombia, 17 January 1991, Art. 15; **Ex. R-0112**, Resolution No. 49, 28 January 1991, Arts. 19, 21; **Ex. R-0113**, Resolution No. 57, 26 June 1991, Arts. 0.0.0.01; 1.6.1.01; **Ex. R-0117**, External Resolution No. 21, Central Bank, 21 September 1993, Art. 37.

⁸⁹⁰ See **Ex. R-0110**, *Composición de Capital de personas jurídicas que posean más del 5% del capital de acciones de la entidad*, 31 December 1989 (showing that in 1989, *Inversiones Carrizosa Gelzis y CIA S.C.S.* owned 30.5944% of the shares of Granahorrar, and that Claimants each owned 33.33% of the former entity.); see also **Ex. C-0001**, Granahorrar Information Memorandum (Lehman Brothers), August 1998, p. 25 (“[p]ursuant to the nationalization of Banco de Colombia in 1986, Granahorrar was sold to a group comprised of some of Colombia’s leading building contractors,” and “[i]n 1988 . . . the Carrizosas assumed the leadership.”).

⁸⁹¹ See e.g., Alberto Carrizosa Gelzis Witness Statement, ¶ 52(d); Enrique Carrizosa Gelzis Witness Statement, ¶ 42(c), (f); Felipe Carrizosa Gelzis Witness Statement, ¶ 38(c), (f).

Claimants' interest in Granahorrar constituted a foreign capital investment, the Foreign Capital Investment Framework required that the investment be approved and registered.

485. The available evidence indicates that Claimants' interest in Granahorrar was a foreign capital investment. In their witness statements, Claimants have asserted that they have few personal assets in Colombia, and that instead the majority of their assets are located in the United States.⁸⁹² Indeed, at the time Claimants obtained their interest in Granahorrar, they had not yet held a job in Colombia.⁸⁹³ This suggests that Claimants purchased their interest in Granahorrar using foreign capital. Further, Claimants claim that they "always" expected that the TPA would protect their investment in Granahorrar – another indication that Claimants made a "foreign" investment.⁸⁹⁴ Moreover, in spite of such evidence, Claimants never deny that they used foreign capital to obtain their interest in Granahorrar.
486. The evidence thus indicates that Claimants were subject to the Foreign Capital Investment Framework. Yet Claimants admit⁸⁹⁵ (and documentary evidence

⁸⁹² See *e.g.*, Alberto Carrizosa Gelzis Witness Statement, ¶¶ 38–39 ("I have very few personal assets in Colombia . . . most of my assets, overwhelmingly so, are in the US"); Enrique Carrizosa Gelzis Witness Statement, ¶¶ 34–35 ("Most of my income-generating assets are located in the US. Those assets amount to about 90% of my total liquid assets . . . I have very few assets in Colombia. The main asset I own in Colombia is the place where I live with my family"); Felipe Carrizosa Gelzis Witness Statement, ¶ 33 ("My personal liquid assets in the US by far exceed my liquid assets in Colombia. Indeed, I have very few personal assets in Colombia").

⁸⁹³ See Alberto Carrizosa Gelzis Witness Statement, ¶ 18; Enrique Carrizosa Gelzis Witness Statement, ¶ 8; Felipe Carrizosa Gelzis Witness Statement, ¶ 13.

⁸⁹⁴ Witness Statement of Alberto Carrizosa Gelzis, ¶ 92 ("My brothers, my mother and I always expected to receive protection as US investors in Colombia from the investment protection treaty entered into by the US and Colombia."); Witness Statement of Felipe Carrizosa Gelzis, ¶ 61 ("My brothers, my mother and I always had an expectation to receive protection from the TPA, the investment protection treaty entered by the US with Colombia."); Witness Statement of Enrique Carrizosa Gelzis, ¶ 70 ("Together with my brothers and my mother, I always relied on the Treaty between the US and Colombia (the TPA) to receive protection as a US investor in Colombia."); see also Claimants' Memorial (PCA), ¶¶ 239, 253, 265.

⁸⁹⁵ See Claimants' Reply (PCA), ¶¶ 1108, 1115, 1130 ("Claimants were compelled to comply with one set of Colombia's laws applicable to dual nationals and not register their investments in Granahorrar as a foreign investor.").

shows⁸⁹⁶) that they did not seek approval for or register their indirect interest in Granahorrar.

487. For these reasons, Claimants made their investment in violation of Colombian law, and such investment is therefore not protected by the TPA.

iii. Claimants cannot bypass their burden of proving jurisdiction

488. As explained in Colombia's Answer,⁸⁹⁷ it is a basic tenet of investment arbitration that a claimant bears the burden of proving the facts required to establish jurisdiction, including the existence of a qualifying investment. For example, the *Paushok v. Mongolia* tribunal stated that "[c]laimants bear the burden of the proof to demonstrate that their investment is protected by . . . the Treaty."⁸⁹⁸ Similarly, the *Pac-Rim v. El Salvador* tribunal held that a claimant has the burden of proof to establish jurisdiction, and a tribunal cannot simply assume the existence of facts that are disputed by the respondent:

[T]he Tribunal considers that it is impermissible for the Tribunal to found its jurisdiction on any of the Claimant's CAFTA claims on the basis of an assumed fact (i.e. alleged by the Claimant in its pleadings as regards jurisdiction but disputed by the Respondent) [The] Tribunal is here

⁸⁹⁶ **Ex. R-0014**, Letter from Central Bank (A. Boada) from Central Bank to Agencia Nacional de Defensa Jurídica del Estado (A. Ordoñez), 17 October 2019, p. 2 (English Translation: "1. In the Central Bank's database no records were found of foreign investment in . . . [the Holding Companies and Granahorrar] before 2006. 2. The Annexes to this communication contain details of foreign investment made in . . . [the Holding Companies and Granahorrar], that were registered with the Bank in accordance with applicable regulations. 3. There are no records of any foreign investment in Corporación de Ahorro y Vivienda - Granahorrar.") (Spanish Original: "1. En la base de datos del Banco de la República no se encontraron registros de inversión extranjera en las sociedades consultadas antes de 2006. 2. En los Anexos a esta comunicación se encuentra el detalle de la inversión extranjera en las sociedades consultadas que fue registrada ante el Banco conforme la regulación aplicable. 3. No hay registros de inversión extranjera en la sociedad Corporación de Ahorro y Vivienda-Granahorrar.").

⁸⁹⁷ See generally Colombia's Answer (PCA), § III.A.

⁸⁹⁸ **RLA-0016**, *Sergei Paushok, et al. v. The Government of Mongolia*, UNCITRAL (Lalonde, Grigera Naón, Stern), Award on Jurisdiction and Liability, 28 April 2011 ("*Paushok (Award on Jurisdiction and Liability)*") ¶ 200.

required to determine finally whether it has jurisdiction over the Claimant's CAFTA claims on the proven existence of certain facts because all relevant facts supporting such jurisdiction must be established by the Claimant at this jurisdictional stage and not merely assumed in the Claimant's favour.⁸⁹⁹

489. Here, Colombia has objected that Claimants' alleged investment is not subject to the protection of the TPA because Claimants violated Colombian law in the making of their investment. To substantiate such jurisdictional objection, Colombia has relied on evidence in the record to demonstrate the following factual elements:

- a. Colombian laws required foreign capital investments to be approved and registered;
- b. Such laws were in force at the relevant times;
- c. The only available evidence in the record shows that Claimants were indeed subject to those laws;⁹⁰⁰ and
- d. Claimants did not comply with those legal requirements.

490. Having thus supported its objection on the basis of objective evidence, the onus shifted to Claimants to rebut Colombia's objection—specifically, to rebut one or more of the above factual elements. However, Claimants have not produced any responsive evidence that:

⁸⁹⁹ **RLA-0066**, *Pac Rim* (Decision on Jurisdiction), ¶¶ 2.8–2.9.

⁹⁰⁰ See e.g., Alberto Carrizosa Gelzis Witness Statement, ¶¶ 38–39 (“I have very few personal assets in Colombia . . . most of my assets, overwhelmingly so, are in the US”); Enrique Carrizosa Gelzis Witness Statement, ¶¶ 34–35 (“Most of my income-generating assets are located in the US. Those assets amount to about 90% of my total liquid assets . . . I have very few assets in Colombia. The main asset I own in Colombia is the place where I live with my family”); Felipe Carrizosa Gelzis Witness Statement, ¶ 33 (“My personal liquid assets in the US by far exceed my liquid assets in Colombia. Indeed, I have very few personal assets in Colombia”).

- a. The relevant Colombian laws *did not* require foreign capital investments to be approved and registered;
- b. Such requirements *were not* in force at the relevant times; or
- c. Claimants *were not* subject to those requirements.

In fact, Claimants concede that they *did not* comply with the approval and registration requirements.⁹⁰¹

491. Instead of meeting their burden of proving jurisdiction, Claimants' rebuttal is focused on (i) a law that was not in force at the time that Claimants' made their investment (i.e., Law 43) and (ii) a suggestion that it is somehow Colombia's burden to provide further documentary evidence that Claimants used foreign capital to obtain their interest in Granahorrar.⁹⁰² In other words, Claimants seemingly believe—erroneously—that even after Colombia has established a *prima facie* basis for its objection, the burden remains with Colombia to produce even more evidence.
492. Claimants' position is untenable, particularly considering the nature of the objection raised by Colombia. The factual issue is whether Claimants used foreign capital to make their investment. Colombia has explained why it is reasonable to conclude, on the basis of the available evidence, that Claimants indeed did use foreign capital to acquire their alleged investment in Granahorrar. If that were not the case, surely Claimants would have adduced evidence to demonstrate—or at the very least *asserted*—that they made their alleged investment using Colombian rather than foreign capital. However, they did no such thing. The inference that must be drawn from such silence, and from Claimants' failure to adduce evidence, is that Claimants did in fact use foreign capital to obtain their alleged investment.

⁹⁰¹ See Claimants' Reply (PCA), ¶¶ 1108, 1115.

⁹⁰² Claimants' Reply (PCA), ¶ 1113 (“Respondent provides no authority for the assumed proposition that the investments made through Colombian entities by dual-nationals would be considered ‘foreign capital investments’ under these regulations.”).

Claimants also admit that they did not actually comply with the Foreign Capital Investment Framework.

493. In sum, Claimants have failed to rebut Colombia’s objection predicated on Claimants’ failure to make their alleged investment in conformity with domestic law. As a result, the Tribunal lacks jurisdiction *ratione materiae*.

d. Colombia is not estopped from raising a jurisdictional objection on the basis of Claimants’ violation of Colombian law

494. In their Reply, Claimants contend that Colombia is estopped from raising a jurisdictional objection on the basis that Claimants violated Colombian law for two reasons. Each argument fails, for the reasons set forth below.

495. First, Claimants assert that it would be unfair to require them to identify as Colombian pursuant to Law 43 while simultaneously requiring them to “act like a foreigner” pursuant to the Foreign Capital Investment Framework.⁹⁰³ However, as Colombia explained in **Section II.D.3.c.i** above, Law 43, and thus the putative conflict between Law 43 and the Foreign Capital Investment Framework, did not exist at the time that Claimants obtained their interest in Granahorrar. Claimants therefore could—and should—have complied with the Foreign Capital Investment Framework, without any concern about Law 43.

496. Second, Claimants contend that Colombia is estopped from raising their failure to seek approval for and register their alleged investment because Colombia never penalized them for any alleged violation of the Foreign Capital Investment Framework.⁹⁰⁴ However, Claimants are misconstruing the doctrine of estoppel. A State is estopped from raising a violation of its domestic law as a defense only if

⁹⁰³ Claimants’ Reply (PCA), ¶ 1121 (“It is fundamentally unfair to require compliance with article 22 of Law 43, requiring dual nationals to act as Colombian when in Colombia, but at the same time require that such dual nationals act like a foreigner in the face of a claimed “foreign capital investment.”); *see also id.* at ¶ 1124.

⁹⁰⁴ Claimants’ Reply (PCA), ¶¶ 1123, 1125–30.

the State: (i) knowingly overlooked such violation; or (ii) accepted an investment as legal with full knowledge of the relevant circumstances.⁹⁰⁵

497. The cases cited by Claimants themselves confirm the foregoing. For example, the tribunal in *Fraport v. Philippines* held that “a government [is] estopped from raising violations of its own law as a jurisdictional defense when it knowingly overlook[s] them and endorse[s] an investment which was not in compliance with its law.”⁹⁰⁶ Similarly, the *Kardassopoulos v. Georgia* and *Arif v. Moldova* tribunals held that the respondent State in each case was estopped from asserting defenses based on non-compliance with domestic law because the State had been aware of the relevant circumstances surrounding the making of the claimants’ investments, and notwithstanding that it had accepted the legality of such investments.⁹⁰⁷
498. By contrast, a State will not be estopped from objecting to a claimant’s violation of domestic law if the State was unaware of such violation. Such was the holding in *Fraport*, for instance:

[A] covert arrangement, which by its nature is unknown to the government officials who may have given approbation to the project, cannot be any basis for estoppel: the covert character of the arrangement would deprive any legal validity . . . that an expression of approbation or an

⁹⁰⁵ **RLA-0040**, *Fraport* (Award), ¶¶ 346–47; **RLA-0044**, *Ioannis Kardassopoulos v. Republic of Georgia*, ICSID Case No. ARB/05/18 (Fortier, Orrego Vicuña, Watts), Decision on Jurisdiction, 6 July 2007 (“**Kardassopoulos (Decision on Jurisdiction)**”), ¶ 191; **RLA-0045**, *Frank Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23 (Cremades, Hanotiau, Knieper), Award, 8 April 2013 (“**Arif (Award)**”), ¶¶ 374, 376.

⁹⁰⁶ See **RLA-0040**, *Fraport* (Award), ¶ 346.

⁹⁰⁷ See **RLA-0044**, *Kardassopoulos* (Decision on Jurisdiction), ¶ 191 (“The assurances given to Claimant regarding the validity of the JVA and the Concession were endorsed by the Government itself, and some of the most senior Government officials of Georgia . . . were closely involved in the negotiation of the JVA and the Concession. The Tribunal also notes that the Concession was signed and ‘ratified’ by the Ministry of Fuel and Energy, an organ of the Republic of Georgia.”); **RLA-0045**, *Arif* (Award), ¶ 374 (“The reality was that at the time the investment was made, and for many months thereafter, both Parties believed and were allowed to trust that the July 1, 2008 Agreement and the Lease Agreement were valid, and that the investment had been made in accordance with the legislation of Moldova. Both Parties acted in good faith on this basis.”).

endorsement might otherwise have had. There is no indication in the record that the Republic of the Philippines knew, should have known or could have known of the covert arrangements which were not in accordance with Philippine law when Fraport first made its investment in 1999.⁹⁰⁸

499. The *Arif* tribunal, for its part, held that the respondent was estopped from objecting to the claimant's non-compliance with domestic law because the situation was "not a case of a concealed illegality."⁹⁰⁹
500. In the present case, Colombia could not have penalized Claimants for violating Colombian law, for the simple reason that Colombia was not even aware until the present arbitral proceeding that any violation had occurred. As a result, Colombia is not estopped from asserting that the Tribunal lacks jurisdiction *ratione materiae* due to Claimants' violation of the Foreign Capital Investment Framework. Claimants assert that Colombia knew or should have known of any violation of the Foreign Capital Investment Framework on their part, because of Alberto Carrizosa Gelzis's leadership positions in Granahorrar and Colombia's knowledge of Granahorrar's ownership structure.⁹¹⁰ However, neither issue has any bearing on whether Claimants obtained their interest in Granahorrar with foreign capital, and there is no reason that Colombia should have known that Claimants failed to comply with the Foreign Capital Investment Framework.
501. The fact is that Claimants concealed from Colombia their violation of Colombian law. Specifically, they concealed the fact that their interest in Granahorrar was a foreign capital investment that required approval and registration by the relevant Colombian authorities—requirements that they failed to satisfy. It was Claimants' written submissions in this arbitral proceeding that suggested to Colombia, for the first time, that they had obtained their indirect interest in Granahorrar using

⁹⁰⁸ **RLA-0040**, *Fraport* (Award), ¶ 347.

⁹⁰⁹ **RLA-0045**, *Arif* (Award), ¶ 376.

⁹¹⁰ Claimants' Reply (PCA), ¶ 1125.

foreign capital. Hence, Colombia did not and could not have known that Claimants were subject to the Foreign Capital Investment Framework and had violated the provisions of such framework.

502. As a result of the foregoing, Colombia is *not* estopped from objecting to the jurisdiction of the Tribunal *ratione materiae* on the basis of Claimants' violation of Colombian law, and Claimants' argument in that regard must be dismissed.

III. CONCLUSION AND REQUEST FOR RELIEF

503. For the foregoing reasons, Colombia respectfully requests that the Tribunal:

- a. render an award dismissing Claimants' claims in their entirety, for lack of jurisdiction; and
- b. order Claimants to pay all of Colombia's costs, including the totality of the arbitral costs incurred by Colombia in connection with this proceeding, as well as the totality of Colombia's legal fees and expenses, plus interest.

Respectfully submitted,



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