IN THE MATTER OF AN ARBITRATION UNDER THE UNITED STATES – COLOMBIA TRADE PROMOTION AGREEMENT, SIGNED ON 22 NOVEMBER 2006 AND ENTERED INTO FORCE ON 15 MAY 2012

- and -

THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, AS REVISED IN 2013

(the "UNCITRAL Rules")

PCA Case No. 2018-56

- -x

In the Matter of Arbitration Between: :

:

1. ALBERTO CARRIZOSA GELZIS :
2. FELIPE CARRIZOSA GELZIS :
3. ENRIQUE CARRIZOSA GELZIS :

:

Claimants, :

:

and :

:

THE REPUBLIC OF COLOMBIA, :

:

Respondent. :

- -x Volume 4

VIDEOCONFERENCE: HEARING ON JURISDICTION

Friday, December 18, 2020

Washington, D.C.

The hearing in the above-entitled matter convened at 9:00 a.m. (EST) before:

MR. JOHN BEECHEY, CBE, Presiding Arbitrator

PROF. FRANCO FERRARI, Co-Arbitrator

MR. CHRISTER SÖDERLUND, Co-Arbitrator

ALSO PRESENT:

Registry of the Permanent Court of Arbitration:

MR. JOSÉ LUIS ARAGÓN CARDIEL
PCA Secretary of the Tribunal

MR. MARKEL EGUILUZ PARTE
Assistant Legal Counsel

MR. LUIS POPOLI
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C O N T E N T S

P R O C E E D I N G S

PRESIDENT BEECHEY: Ladies and gentlemen, good morning and good afternoon. This is the Hearing of Closing Arguments in PCA Case 2018-56.

Before we embark upon those arguments, are there any matters the Parties wish to raise?

MR. MARTÍNEZ-FRAGA: Good morning, Mr. President and Members of the Tribunal. No matters on Claimants' behalf. Thank you.

PRESIDENT BEECHEY: Thank you.

Mr. Di Rosa? Mr. Grané?

MR. GRANÉ: Good morning, good afternoon, Mr. President, Members of the Tribunal. No preliminary matters on Respondent's side. Thank you.

PRESIDENT BEECHEY: Very well. We have had a word among us, the three of us, before we started. I hope this won't be controversial, but in light of the facts that you have up to two hours each, we thought we would divide the day slightly differently. So, we go one hour now until 3:00 p.m. GMT, then have a 15-minute break; start again at 3:15 p.m., go through to 4:15 p.m., and then have a half hour break; 4:45 p.m. starting again to 5:45 and then a 15-minute break; 6:00 to 7:00, and then 30 minutes or so at the end.

If one side or the other doesn't need all

two hours, then we will obviously pull the timetable forward; but that's what we would propose, just to break it up a bit. All right? Very good.

All right. We've got the list of speakers, active participants, as the expression goes, from both Parties.

Mr. Martínez-Fraga, are you going to be kicking off, or is it going to be Mr. Reetz first, or how are you going to do this?

MR. MARTÍNEZ-FRAGA: I will start kicking off.

PRESIDENT BEECHEY: Very well. All right. In that event, the floor is yours.

CLOSING ARGUMENTS BY COUNSEL FOR CLAIMANTS

MR. MARTÍNEZ-FRAGA: Thank you, Mr. President, Members of the Tribunal, Counsel, Representatives of the Republic of Colombia.

Notwithstanding the proliferation of writings and defenses comprising this Jurisdictional Phase, we believe very respectfully and with significant intellectual humility, that the issues to be addressed are really a handful of issues. And we opine that it, perhaps, would be a little bit helpful to start with having an introduction going through each of the jurisdictional predicates and identifying, from our perspective--from Claimants' perspective--what we analytically believe are likely the

best types of issues to--or the better issues to confront going forward in this closing phase of the Arbitration. And hopefully this will be a benefit to all parties but particularly, of course, to the Tribunal.

We would like to start with ratione personae, and central to any determination, of course, is a preliminary finding on the extent to which Article 10.22.1, Governing Law, applies.

Would you please put it up.

Claimants submit--and we mean it--that the command that "the Tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law," furnishes the Tribunal with guidance. In other words, we believe that the Tribunal has ample guidance on how to interpret the Treaty.

Why? Because 10.22 does precisely that. Therefore, the issue is simple: Does Article 10.22.1 create a directive by referencing this Tribunal to the public international law addressing the formation, transformation, and application of the dominant and effective nationality test? That's the question. If so, then the Tribunal's discretion in applying an abbreviated test, as Respondent suggests, is significantly circumscribed, we believe.

Second, the dominant and effective nationality

test aprioristically is inapplicable where, as here, Claimants' place of residence is the host State. Is that the law? Is it the case that where the primary residence of the Claimants seeking dominant and effective nationality recognition, in effect, are precluded from ever obtaining dominant and effective nationality treatment or status where, as here, they are the residents of the host State?

Is it a fact that, under no analysis whatsoever, can somebody claim a dominant and effective nationality beyond the place of residency?

The Tribunal, of course, will have to make a ruling on this suggestion, because as we will show very shortly, that's what Respondent is proposing.

Is the Tribunal guided by "applicable rules of international law" and what elements are to be considered in determining dominant and effective nationality? Similarly, of course, is the Tribunal guided by applicable rules of international law on how to apply those factors? These are gateway issues that we feel are extremely relevant analytically--

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--of course, is the Ballantine v. Dominican Republic majority award, the majority award, even persuasive, let alone binding authority? Is the separate opinion dissent a better reasoned analytical tool that

should guide this Tribunal?

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Let's look at the issues for ratione voluntatis. The gateway consideration of ratione voluntatis also is very simple. Is there any dispute concerning the State Party's consent to provide Chapter Twelve Financial Services Investors with ISDS rights to arbitrate Article 10.7, which was imported from Chapter 10 to Chapter 12 of the TPA into 12.1.2(a) and (b)? Is this issue at all in dispute? We submit that it isn't, that there is agreement on this issue. There cannot be dispute. That means that the Tribunal will have to consider whether at issue is only a consideration of scope.

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Second, does Article 10.7 incorporate into Chapter 12 Article 10.5, Minimum Standard of Treatment, based upon the ordinary meaning of Article 10.7(b)? Is FET contained in Article 12, Financial Services, as an existing right provided to Financial Services Investors, other than through Article 10.7(b). For example, should the Tribunal consider language contained in Articles 12.4, Market Access for Financial Institutions; 12.5, Cross-Board Trade, 12.10.4, Exceptions; and 12.11, Transparency and Administration of Certain Measures, as providing Financial Services Investors with fair and equitable treatment

substantive rights?

Next one, please.

Do all four of these provisions establish that the Contracting Parties consented to providing Financial Services Investors with FET rights? Does Article 12.1.2(b) limit the enforceability of the Chapter Twelve substantive provisions pursuant to ISDS rights only to Articles 10.7, Expropriation, and 10.8, Transfers? Should the Tribunal interpret the substantive rights provided to Chapter Twelve investors in that chapter as unenforceable pursuant to ISDS procedural rights?

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Is Chapter 12 of the TPA to be construed as of the date on which the Treaty was signed, November 22, 2006, the date on which it entered into force of course, May 15, 2,0,12, and the date on which the NAFTA entered into force, January 1, 1994?

Are those the relevant dates for interpretation?

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Now, the United States, of course, has filed a non-disputing party submission that in considerable measure, does not conflict with Respondent's position on a number of legal issues concerning the interpretation of the TPA.

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Colombia asserts that the overlap on these legal issues constitutes an agreement on the part of the signatory States to the TPA that supersedes, they say, how the Parties may have intended to interpret this Treaty, the TPA, as of the entry into force of the NAFTA template and all the relevant dates that I just shared with the Tribunal.

Is there such an agreement under the facts of this case and--you will hear from Mr. Reetz on this point--can the Tribunal preserve due process and simultaneously pass on this issue? In determining the extent to which Chapter Twelve investors were accorded ISDS enforceable rights, beyond those pertaining to Articles 10.7, 10.8, should the Tribunal consider the Expert and Fact Witness testimony of the United States lead negotiator from Chapter Fourteen of the NAFTA?

In this same vein, should the Tribunal consider evidence contemporaneous with the entry into force of the NAFTA, such as, of course, in the congressional hearing on Chapter Fourteen of the NAFTA held on September 28, 1993, before the United States House Committee on Banking, Finance, and Urban Affairs, and the Report of the Services Policy and Advisory Committee, SPAC.

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Do Articles 12.18.1 and 12.18.2, when read

together with Article 12.1.2(b), establish or otherwise suggest that, but for Articles 10.7 and 10.8, all substantive provisions contained in Chapter Twelve are referred to State-to-State arbitration. This is, of course, a very critical question that we will look at in considerable detail that President Beechey raised.

Does Article 12.19, Investment Disputes and Financial Services--12.19, Investment Disputes and Financial Services, when read together with Article 12.1.2(b) suggest or establish that in addition to Articles 10.7 and 10.8, Chapter Twelve treatment standards are enforceable pursuant to ISDS procedural rights?

Put up the slide, please.

Now, this, I think, is a very important issue that is extremely easy to overlook in both BIT analysis, trade protection agreements, but I think that--and the entire team of Claimants thinks--that it is an extremely important issue critical--critical to the determination of a number of points in this case.

PRESIDENT BEECHEY: Well, if that's the case, Mr. Martínez-Fraga, you're saying "put up the slide." I'm afraid nothing is coming up. We're being presented with the cover sheet.

MR. MARTÍNEZ-FRAGA: I saw that, but I can only do so much from my end.

PRESIDENT BEECHEY: No, I quite understand that. But if you want us to look at something, it better be on the screen.

MR. MARTÍNEZ-FRAGA: I apologize. And ultimately it's a visual. But here's the issue that I want the Tribunal to consider. It's a simple question: What is the law that applies to a claim brought pursuant to Article 12.1.2(b)? What law applies? Does Article 10.4, Footnote 2 MFN limit the scope of Article 12.3 MFN, its Chapter Twelve MFN counterpart? That's another issue.

Next slide, please, if there is one.

Let's look at the ratione voluntatis issues to be determined. The ratione temporis analysis is clear as to which issues structure the difference between the--differences between the Parties. Of course, the Tribunal needs to determine two basic questions.

First, did the Claim arise while the Treaty was in effect? This is temporis. This, of course, is the concept of the intertemporal principle of Treaty application. Put simply, have Claimants alleged a State measure post-dating the May 15, 2012 entry into force of the TPA that would give rise to a breach of the TPA?

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The second issue concerning ratione temporis is whether the Claim was timely brought. Of course, this

second issue rests on the extent the Article 12.3 MFN is sufficiently broad in scope to increase the three-year Limitations Period, an existing right, from three to five years, in order to provide Financial Services Investors under the Colombia-U.S. TPA with the same five-year Limitations Period that Colombia provides to Swiss investors under the Colombia-Switzerland BIT, Article 11.5.

Do we have a slide here?

Is the June 25, 2014, Order denying the Council of States' and the Granahorrar shareholders' petition for annulment of the Constitutional Court's May 26, 2011 Judgment, and reinstatement of the Council of States' November 1, 2007 Final Judgment, a State measure post-dating the entry into force of the TPA that may give rise to a violation under international law of that treaty. So, basically, it is: What is the force or weight of the June 25, 2014 State measure? Is that a real State measure? Are the 93 pages, two dissents, enough? Does that really put an end to all judicial labor? Does that order have any effect or possible effect, in fact, or hypothetically, if it had gone the other way on the November 1, 2007 Council of State's Judgment, or the May 26, 2011 Constitutional Court Final Judgment.

What is that State measure? How significant a

State measure is it? Can it be alleged that that State measure constitutes a breach of the Treaty? Those are the significant issues that I think arise here.

Are Claimants asking the Tribunal to apply international law to a domestic dispute predating the entry of the TPA--i.e., the May 26, 2011 Constitutional Court Judgment? Is that what Claimants are doing? Can this Tribunal consider, consider, pre-treaty domestic disputes in informing its judgment in considering a post-Treaty alleged allegation of a State measure giving rise to a breach of the Treaty? I repeat: Can this Tribunal consider pre-treaty domestic disputes in informing its judgment on an alleged State measure post-dating the entry into force of the Treaty said to be in violation of the Treaty? That's a critical issue. We feel that the cases address it, uniformly, actually, without any type of deviation. But it's a critical gateway issue.

Put up the slide, if we have one, for this.

Is there a two-prong test requiring that an alleged State measure in violation of the Treaty first must give rise to a fundamental change of the status quo ante, and, two, itself be independently actionable? That is the test that Respondent says Spence v. Costa Rica and the other three cases teach us. We say there is no such test. But even if there were, we say, we believe that it would be

met. But, in fact, we will show that the very term "status quo" doesn't even appear. The term doesn't appear in all of the entire Spence case.

Put up the slide, please.

If so, is this test reflected in the textual language of the Colombia-U.S. TPA? This is very important, because one of the issues that we so often come across in this field of ours is where we lose sight of the fact that we are bound first by the textual language of the Treaty and that the "jurisprudence" really can't alter that textual language, so we can't take--even if we find such jurisprudence, we can't take that jurisprudence and import it into the Treaty, where, of course, the issue is analyzed in the Treaty language.

What is the meaning of the term "dispute" that--under Article 11.5 of the--under Article 11.5 of the Colombia-Switzerland BIT? We feel this is an extremely important issue. What is the definition of "dispute" under Article 11.5 of the Colombia-Switzerland BIT? This is a gateway issue, just as important as the other issue we particularly singled out, which is: What law applies to an Article 12.1.2 proceeding, for example, under 10.7?

What is the meaning of "dispute" under Article 11.5 of the Colombia-Swiss BIT? Let's look at ratione materiae for a second. Is Claimants' investment in

the shares of Granahorrar, together with the rights arising out of it, entitled to protection under the TPA, notwithstanding Respondent's transformation of that investment into different forms due to State action.

Let me repeat: Is Claimants' investment in the shares of Granahorrar, together with the rights arising from that investment, entitled to protection under the TPA, notwithstanding Respondent's transformation of that investment into different forms due to State action?

Is there any basis for denying Claimants protection under the TPA due to alleged noncompliance with Colombia's foreign investment registration regulations? This is a defense that Respondent has raised, and has, again, emphasized with a great deal of rigor.

Now, ratione personae. And now we are going to start with the actual post-introduction analysis.

Last we spoke on this subject, Claimants mentioned that, between Claimants' and Respondent's theoretical and practical understanding of the governing law, more salient and stark than with respect to ratione personae, there were very important differences. There are about 27 foundational differences with respect to which this Tribunal will have to exercise its judgment. That is basically what we said, that we are poles apart, even though, of course, as you will learn soon and you heard

from Respondent's Opening Statement, they think otherwise.

The test, according to the Treaty governing customary international law, has two conceptual parts. We said that there was a "what" and there was a "how." The "how" concerns the methodology for applying the "what," the substantive factors themselves.

Put up 10.22.1 only, please.

And Claimants, of course, opine that because Article 10.22.1 governing law applies, and that article in part provides that, again, the Tribunal must interpret the Treaty, in accordance with its terms and rules of international law. In the mandatory applicable international law, the Treaty supplied the Tribunal with ample guidance on "how" and "what." So, we say again, the guidance is supported by public international law. So, this position, again, is a critical one. We believe that, yes, there is guidance for interpreting "dominant and effective nationality" under the Treaty. It is the rules of public international law. That's the guidance.

Moreover, in addition to the explicit reference in Article 10.22.1 the applicable rules of international law, by incorporating the term "dominant and effective nationality," we argue, in Article 12.20, definitions of the TPA and Article 12.28, definitions of the investment chapter counterpart, the signatory States further

underscored their interest in having customary international law, of course, apply to issues in dispute concerning the TPA.

So, it's not only the governing law provision, but also the definitional provision, just by dint of even incorporating the term "dominant" and "effective nationality."

You have in front of you this provision from the Treaty, which we also displayed during the Opening Statement.

Now, Respondent appears to be saying the right things. I must say, they do appear to be saying the right things with regard to the mandatory nature of applicable rules of international law, but Respondent strays from actually applying such rule--such rules and further opines that the reference to these rules does not constitute "guidance on how to interpret the dominant and effective nationality doctrine."

Please put up the next slide.

As you see before you, you have part of a statement to this effect, and indeed, Respondent's comments go further to express bewilderment as to why "Claimants understood Colombia to be disagreeing with those fairly elemental propositions. In fact, our sense," Respondent says, "is that the Claimants have been contorting way more

than they need to on many of these ratione personae issues, because we actually agree on quite a few points that they strain to prove."

I wanted to make sure that the entire pronouncement was recorded.

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What follows are the basic differences. First, in using the word "shall" to decide issues in accordance with applicable rules of international law, Claimants view the Tribunal as having to weigh equally all factors to be considered.

Let me stop here for a second.

There is absolutely no authority that says that one factor is more important than another factor. There is no authority setting forth a test or a methodology for the application of a test that sets forth a hierarchy between and among the various elements to be considered. This is important. But Respondent, of course, sees it otherwise. Not only is Respondent silent on this point, but Respondent seems to be speaking with some confusion on the very related principle of consideration of a habitual place of residence.

Put up Page 17, please. Let's--yeah.

You now see before you Respondent's counsel sharing with us his view that, with respect to "permanent

and habitual place of residence," it is a factor that was mentioned. He goes on to say: "It is always mentioned as the primary factor; right? Everybody says, well, habitual residence is not the only factor--we all agree on that--but it is a critical factor that everybody focuses on first." So, that's the end of that first citation. We are going to look at another citation.

Again, we say that there is no authority for the proposition that it is a primary or a critical factor, but later, during the course of the very same presentation, Respondent tells us that it is its view that it is not just an important factor, permanent place or primary place of residence, but he tells us that it is "exclusive" or "determinant." But, of course, there is absolutely no authority for this proposition, either.

Second, up on the screen is what the law actually says. If you look at Number 4: "Each factual contact is to be afforded equal weight." So, Respondent is wrong in not mentioning this factor, and Respondent equally misses the mark, and actually mischaracterizing this principle, in stating that the primary place of residence is the "exclusive" and "determinant" factor. It's not.

Third, the entire life of the individuals is to be considered in determining dominant and effective nationality. Notwithstanding that particular importance,

of course, may be placed on specific time frames, we do have agreement on those time frames--for example, when the Treaty came into effect, when the action was actually filed, when the cause of action actually accrued; we say June 25, 2014.

You see before you--put up our slide Page 21.

You see before you, again, a slide that identifies this factor with relevant citations. Notably, however, Respondent failed to identify that the entire lifespan is to be considered.

Fourth, you also see on the slide before you that the absence of a fraudulent abuse of process or illicit Treaty-shopping is of significance; again, with relevant citation to Authority.

Respondent, however, disavowed this factor.

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Fifth, the analysis is qualitative in nature and not quantitative. Now, we were told that we made this up.

Put up the slide, please.

You see on the screen before you citation to Authority on this point.

As we mentioned during the Opening Statement, at issue it is more than just a bean-counting exercise. Of course, if someone lives in Colombia, they also do their grocery shopping in Colombia, and they will also walk their

dog in Colombia, and they will also drive their cars on Colombian streets. But that's not the test.

Respondent, however, opines that there is no such distinction.

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Sixth, the relevant factual contexts to be considered are nonexhaustive. They are nonexhaustive, let alone limited to form.

Put up the slide, please.

There's Authority on each and every one of these propositions. There is law. So, this makes the 10.22.1 guidance, applicable law, all the more important. Again, we have provided citation to relevant Authority for this factor. Here, again, Respondent disagrees or disregards, or altogether just simply denies, that the factors to be considered are nonexhaustive.

As to the "what," factual elements, Claimants submit that the dual national profile is to be considered from a treaty policy perspective. We wrote a lot about that, particularly in our initial brief. We talk about a number of dominant and effective premigratory and citizenship recapture statutes, all a number of factors that were taken into account that really fall into this field as well.

There is a policy that underlies the reason why

this test exists. There is an objective that the signatory States which to pursue in expanding protection to dual nationals who have a dominant and effective nationality that allows them to have protection under treaties. There's a reason for it. It is not happenstance. And what we ask the Tribunal to do in its deliberations is to consider this policy, consider these reasons.

You saw the Claimants. You heard them. Consider whether these are the type of individuals that were looked at and were sought by the implementation of these policies.

Of course, health care, where the dual citizen files tax returns, and voluntary application of selective--of military service are three additional "what" factors that need to be considered.

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You can see these factors listed as Numbers 8, 9, and 10 up on the screen before you, hopefully. The testimony before the Tribunal is that all three Claimants filed tax returns and paid federal taxes in the United States. They also paid taxes, of course, in Colombia. That was very clear. But think about it; think about it. How helpful is that? Only someone with very deep ties to the United States who does not reside there on a permanent basis would voluntarily elect the obligation and burden, quite frankly, of paying taxes in exchange for not losing

their citizenship. Think about it. There's a big difference.

How many people would say, "Heck, I really live in Colombia. I'm really a Colombian. Why should I keep the U.S. citizenship if it forces me to pay taxes? That doesn't make any sense. We have the wherewithal to go there anyway, and so what? I mean, we don't need that."

Well, obviously this tells us something. This factor should be considered, and primarily so, I think, because of its long-standing status. In other words, this is something that is forever in terms of these individuals, and of course that is why the test says look at the entire lifespan.

It provides a factual basis from which to infer legitimacy. It provides a factual basis from which to infer genuineness.

Put up the next one, please.

Before you is the--please put Page 8 of our slide on Mr. Carrizosa's Hearing Transcript.

Before you is Mr. Alberto Carrizosa's testimony on direct examination on the issue of volunteering registering for the Selective Service of the Armed Forces of the United States.

Seventh, what does the dual national consider herself to be at a subjective level? This was

Mr. Di Rosa's favorite factor to be considered, you may recall, from Opening Statement. You can see this factor up on the screen in the slide before you. The Tribunal may recall that it was somewhat diminished, but it's firmly established as a matter of law: What a person genuinely thinks of himself/herself in terms of dominant and effective nationality, or predominant nationality, if you will, is important, and part of the exercise, of course, of the testimony. When asked that question, the Tribunal can accord weight to it or accord no weight to it or actually infer that these are duplicitous people who really lie, who really are not--don't see themselves that way. This is a factor to be considered, and it cuts in every direction.

Of course, Respondent omits any reference to this factor except to suggest, naturally, that it does not exist.

Eighth, how the dual citizen, dual national, holds herself out to the world is a factor that, with respect to which, there is--there was ample testimony and a very important one. And there, of course, Colombia pointed out, "Well, look, when you went before the Inter-American Commission on Human Rights, you held yourself out to be a Colombian." Well, yeah, the U.S. is not a signatory to it; plus, Colombia has a very specific reservation pursuant to which that treaty will only be enforceable from Colombia's

perspective if there is reciprocity.

Eighth--I'm sorry, ninth--Claimants testified that they travel with a U.S. passport and have done so all their lives. They add that hardly do they do so merely based on expediency. Now, at this point you may recall the cross-examination of Mr. Enrique Carrizosa on this issue.

Please put up Page 7 of our slides of the Transcript.

And that is Page 259 up on the screen before you, Mr. President, Members of the Tribunal, is Mr. Carrizosa, Enrique Carrizosa's testimony on this issue. And I'd like to read it. He said--the question was, I'm saying, at least until earlier this year it was, in general, "easier to travel internationally with a U.S. passport" than a Colombian one because there weren't as many requirements for visas, for example. That was Mr. Di Rosa's question. Would you agree with that?

And the answer was, "if I understand your question, I choose to travel with an American passport, not just because it's easy, but that's because--how I identify myself. It's something that when I'm in a foreign country, I would rather identify myself as an American traveling abroad. It is not necessarily because it's easy."

Now, you heard the testimony, and part of what the Tribunal does, of course, is assess the credibility of

the Witness when those words are said. Is this something that was said and appears to be genuine and truthful or is it just a rehearsed speech to secure some tactical and technical advantage pursuant to Treaty protection. The Tribunal will have to decide.

Tenth, how and why was nationality obtained? Of course, Respondent also ignores or undermines this element altogether, certainly does not even mention it. We have placed this factor before you with citation to Authority. Again, it's up on your screens, to quote from the Claims Tribunal in Diba v. Republic of Iran at Paragraph 11, "the sincerity of the choice of national allegiance they claim to have made needs to be examined."

Notably Respondent, again, ignores this factor.

Eleventh, where does the dual national have most of her personal net worth? This factor seems to be one that would be revealing, would be eloquent, would be helpful. The Claimants' testimony on this point was beyond reproach. They amply met their burden of proof for purposes of a jurisdictional showing.

Not only did all three testify on direct and cross-examination, but the greater part of their personal financial assets and holdings are in the United States, but also that the family assets physically present in Colombia are held in the United States in a Delaware corporation.

Please put up Page 6 of the cross-examination.

You can see the cross-examination on this point. We have Transcript Page 275, and please put up Page 13 of our slide, direct examination of Felipe Carrizosa, from Page 339 of the Transcript. And you have the slide before you.

Twelfth, Claimants live in Colombia. They do not deny living in Colombia and working in the family business in Colombia. This is 101 percent true, of course. Critical to this analysis, however, are other factors that need to be considered, and, of course, should be considered, including the stated reasons for living in Colombia. The place of residence is not a dispositive factor, moreover, it is understood that this factor is to be considered of equal hierarchy with all other propositions to be analyzed. That's the law.

Put the next slide, please.

And you know, there was some very interesting, I think, testimony on this point. You see before you the examination, part of the examination of Mr. Alberto Carrizosa.

Question: "In Bogotá, do you live in a house or an apartment"?

Answer: "In an apartment."

Question: "Do you own that apartment"?

Answer: "No."

Put up the, Thirteenth. Cultural and--yes. This is Felipe Carrizosa. "Do you live in a house or an apartment in Bogotá"?

"I live in an apartment in Bogotá."

Question: "All right. Do you own or rent the apartment?

"The one I'm in at the moment? It is a family-owned business."

Thirteenth. Cultural and social ties, traditions, holidays, lifestyle, work ethic and general disposition are all part and parcel of this element. Up on the screen is this factor, together with citation to relevant legal Authority, which, again, we always emphasize. Also on your screen is education, place of residence and financial ties. Personal net worth, assets, also with citation to relevant authority.

Respondent, of course, seems to wish to qualify culture and holidays somehow by asserting that if a holiday such as Halloween in particular is not celebrated in the United States, but, rather, in Colombia, then the genuineness of the proposition somehow should be questioned. There was examination on this point. And this was--I believe this was Mr. Enrique Carrizosa. I don't remember.

Let me ask a related question: "Are you aware that, in its submission, Colombia has emphasized that, since 2004, you've spent most of your Thanksgiving and all of your Halloweens in Colombia? If you're aware, to start."

Answer: "Well, it's true. I mean, Halloween is not a national holiday here or in the United States. To do international travel for Halloween would be ridiculous and exhausting, but, nonetheless, the way we celebrate it here is very much in the American fashion. We set up trick or treats and haunted house in our house. It has been contagious, that even our neighbors have now added up to our traditions of enjoying Halloween."

Again, this goes directly also, not just the testimony. The Tribunal heard him testify. Assess his credibility. Please. The three Claimants testified extensively and compellingly on this issue. The Tribunal heard them and can assess that credibility.

Before you is part of Enrique's Carrizosa's testimony.

Fourteenth, education is a revealing factor, all three Claimants primarily were educated in the United States. The limited education received in Colombia, however, was an American school that, in that jurisdiction, Colegio Nuevo Granada, formerly known as the Anglo-American

school. It's a school, an American school in Colombia.

Fifteenth, of course, family matrix constitutes an equally eloquent consideration that is deeply intertwined with cultural affinity, language, and education. We learned on cross-examination beyond the propositions contained in the fact--in the Witness Statements on this category, that Felipe Carrizosa's daughter had just been admitted to Boston University. He and Alberto testified that the children also are American citizens and being raised primarily and predominantly as Americans. Enrique and Felipe testified as such.

Sixteenth. Financial ties, retirement and estate planning constitute a discernible category in the jurisprudence that Respondent additionally omits to mention.

Put up the next slide please.

All three Claimants have testified to having engaged in estate planning in order to retire in the United States. This connection testimony was proffered concerning corporate measures taken to transition control of the family business to a professional Board of Directors primarily in order to give the Claimants the flexibility to retire or to live elsewhere in the United States and not in Colombia. The testimony was not and cannot be meaningfully challenged.

Seventeenth. Participation in public and political life, voting in elections are critical components of an individual's social matrix.

Put up Page 26 of our Slide.

Before you is a slide identifying this factor with appropriate citation to Legal Authority. But I also want to call to the Tribunal's attention the cross-examination of Mr. Enrique Carrizosa, on Page 5 of our slides, please. Transcript Page 242.

You may recall that this was a very interesting exchange with counsel.

Question: "Okay. Let me turn to Page 6 of your Witness Statement, please, and to Paragraph 40, and in that paragraph you say, 'I'm registered to vote in presidential elections in the United States.' Is that a true statement"?

Answer: "Yes, it is."

Question: "Are you aware that Colombia has found no record of your being registered to vote in Florida"?

Answer: "That's because I'm registered to vote in Illinois. I was--I lived in Illinois prior to moving to Colombia."

Put in the Slide 12, cross-examination of Felipe Carrizosa on Page 330, please.

This was an--I think a helpful one too. Yeah.

Question: "Did you vote in the U.S. presidential

elections held last month"?

Answer: "No, I didn't. I haven't voted in the United States. I primarily think that, you know, democracy in the United States is not at risk. I do believe here in Colombia there have been candidates that are at risk, so I felt that I should participate more in Colombian elections, you know, thinking about the family business."

As more fully explained in Paragraphs 801 through 815 of Claimants' Reply Memorial, the qualitative analysis in Micula v. Romania is instructive, of course. There, the Tribunal found that Claimants' retirement plans, voluntary place of pension funds, location of personal assets and family ties to Sweden to outweigh the permanent physical place of residence and professional and economic interests present in the Host State, Romania.

Put up Respondent's view on life on this issue.

This is Respondents' proposed test. Respondent asserts that the test is a very different one. It is what we call the one-divided-by-four test. Respondent, in effect, uses the permanent and habitual place of residence and divides the single factor into four elements, location of permanent or habitual residence, first. Second, center of Claimants' family social, personal and political lives. Third, Claimants' center of economic lives and, four, how the Claimants have identified themselves in terms of

nationality.

You can see that, but for four, one, two, and three will follow and must necessarily follow generally if a person lives in the host State. Therefore, it is a test that is inconsequential.

(Interruption.)

PRESIDENT BEECHEY: Lost you. We lost you for a moment.

MR. MARTÍNEZ-FRAGA: I apologize. Thank you, sir. Let me--

(Overlapping speakers.)

MR. MARTÍNEZ-FRAGA: Yes, sir.

PRESIDENT BEECHEY: Forgive me, Mr. Martínez-Fraga. The sound went. You froze for a few moments. You just said that but for four, one, two, and three will follow, must necessarily follow general physical if the person lives in the host State, therefore, it is a test that is inconsequential. At that point you froze.

MR. MARTÍNEZ-FRAGA: Okay. That was probably a good thing, Mr. President. But the test is not a test that can be met if the Party alleging or seeking the dominant effect of nationality of another State, other than the host State, lives in the Host State. So, it's a test that cannot be passed as structured. Three out of the four elements are not--generally are very difficult to meet if a

person happens to reside primarily in the host State.

We submit that that is not the test. That's not the law, nor is that the intent or the policy at all attaching to the dominant effect of nationality doctrine.

Colombia's abbreviated iteration of the dominant effect of nationality test invites the Tribunal to turn a blind eye to interpreting the Treaty pursuant to Article 10.22.1, governing law, in keeping with rules of customary international law. And to embrace a purely discretionary and ad hoc approach, in effect only consisting of a single factor. Again, to embrace an ad hoc and discretionary approach, in effect really consisting of a single factor. The proposition simply is not sustainable and obviously is wrong.

Please put up the Ballantine Case.

The Tribunal's majority Award in Ballantine v. Dominican Republic does ignore 10.22.1 of the DR-CAFTA. The identical TPA counterpart governing provision to Article 10.22.1. The separate dissenting Opinion in that case is truer to the "how" and the "what" of the dominant and effective nationality test prescribed by actual customary international law.

The separate dissenting Opinion in that case, in part, observed, "looking holistically at Ms. Ballantine's habitual residence during her lifetime, the center of her

personal and professional interests, her family life, and her maintenance of significant ties to the United States, the facts support a finding that, under customary international law, Ms. Ballantine's dominant and effective nationality is that of the United States. Ms. Ballantine's economic ties to the Dominican Republic and her narrow reasons for Dominican citizenship are but two of many relevant factors to be considered in this analysis."

And that's a partial dissent of Ms. Marney L. Cheek on jurisdiction, Paragraphs 18 through 29. Again, Paragraphs 18 through 29.

Put up the 18-29, please.

The similar narrow imperatives commanding Claimants to live in Colombia, support a finding that Claimants' dominant and effective nationality is that of the United States. And with that, we will move on to ratione voluntatis, Mr. President, and Members of the Tribunal. Claimants meet the ratione--

(Interruption.)

MR. MARTÍNEZ-FRAGA: Ratione voluntatis. Claimants meet the ratione voluntatis consent jurisdictional requirement.

Please put up the slides on the two points.

First, in this case, it is not disputed that Article 12.1.2(b) of the TPA provides Chapter 12 Financial

Services Investors with the procedural right to assert ISDS claims. That point is not in dispute. That gateway issue is resolved.

This fact is extremely important.

Second, it is also not disputed because it cannot be contested, that Chapter Twelve, Financial Services Investors, may assert direct ISDS claims against signatory States based upon--a signatory State based upon two treatment protection standards that we have said, 10.7, expropriation, 10.8, transfers.

A foundational issue, however, remains, namely, does the language of Article 12.1.2(b) limit or serve as a carve-out, to use the term that was used yesterday, proscribing Financial Services Investors from enforcing, pursuant to ISDS procedural rights, rights imported from 10 to 12 in the form of Section B, investor-State settlement of Chapter 10 investments.

Put up the next slide, please.

Before you on the screen is the Chapter Twelve Article 12.2, national treatment clause--

(Interpreter clarification.)

MR. MARTÍNEZ-FRAGA: Before you on the screen is the Chapter Twelve, Article 12.2, national treatment clause. Now, we haven't talked a lot in this Arbitration about the 12.2 national treatment clause, but because of

Mr. President Beechey's question yesterday, I think that it is important to bring it up, and we are going to look at the question with greater--with actual rigor--yeah, greater rigor in detail.

Now, I bring it up because this provision is structurally and substantively very, very similar to its Article 10.3, national treatment counterpart in the investment chapter. The principal differences between the two clauses, between 12.2 and the 10.3 counterpart understandably reference "financial institutions" and "cross-border financial services suppliers," that these features that are present in 12.2.

Both clauses, however, serve the identical purpose--and this is important--of providing the signatory States with a treatment protection obligation. I want to restate that. Repeat it. Both clauses have a foundational purpose. They provide the signatory States with an obligation. And the question, of course, becomes who has the right or benefits that constitute the corollary to that obligation.

You will note that the beneficiary of that obligation in the context of 12.2 are specific investors and investments will hold the right to receive this protection.

The gateway issue to be considered is whether

Article 12.2, together with other provisions in Chapter 12, such as 12.3 MFN, and Articles 12.4, market access for financial institutions, 12.5, cross-border trade, 12.6, new financial services, 12.10.1-4 (Exceptions), and 12.11, transparency and administration of certain matters to cite only--to cite only the more notable and salient structural features of Chapter 12, provide investors and their investments with rights but are left as unenforceable rights pursuant to ISDS because Article12.1.2(b) limits the enforceability of Chapter 12 rights pursuant to ISDS only to Articles 10.7 and 10.8.

Mr. President, I see that I have five minutes left to the hour, and this would be a natural break rather than to start something else and just discuss it for five minutes because I want to present to the Tribunal your question and how we analyze it.

PRESIDENT BEECHEY: Very well. In that case, we will stop now and we'll start again at 10 past 3:00, if that's all right, 10 past the hour.

MR. MARTÍNEZ-FRAGA: Thank you.

PRESIDENT BEECHEY: Okay. Thank you very much.

MR. MARTÍNEZ-FRAGA: Thank you, sir.

(Brief recess.)

PRESIDENT BEECHEY: Very well, Mr. Martínez-Fraga. I think we're all set.

MR. MARTÍNEZ-FRAGA: Thank you, Mr. President, Members of the Tribunal.

At the conclusion of Mr. Olin Wethington's cross-examination, President Beechey posed to Mr. Wethington an analytical query that is helpful in understanding whether the signatory States only consented to providing ISDS rights to Chapter Twelve investors with respect exclusively to Articles 10.7 and 10.8, thereby excluding all Chapter Twelve treatment protection standards that explicitly, textually reference investors as the holder of those rights.

I will quote from the Day 3 Transcript at Pages 433 and 434. Page 433, President Beechey: "You're on the right page at 16 at the moment. Thanks for actually--you're on Page 12--9--17, Article 12.18, if you look at that, it says: Section A, 18"--I'm sorry--"a dispute settlement of Chapter 21 applies as modified by this Article to the settlement of disputes arising out of this chapter.

"So, again, now, is it a reasonable or is it an appropriate interpretation on my part that, taking that at face value, that would suggest that, all things being equal, that is the dispute settlement procedure to be adopted in the case of this particular chapter of the TPA?"

So, I'm going to read it again. "Thanks for

actually--you're on Page 12.19. Article 12.18, if you look at it, it says: "Section A, dispute settlement of Chapter 21 applies, as modified by this Article, to the settlement of disputes arising out of this chapter.

"Now, is it a reasonable or is it an appropriate interpretation on my part that, taking that at face value, that would suggest that, all things being equal, that is the dispute settlement procedure to be adopted in the case of this particular chapter of the TPA?"

The Witness, at Page 434, says: "This is State-to-State, isn't it?"

President Beechey: "It is. That's the point. That's why I'm asking the question, because it says that 'this applies as modified by this Article to the settlement of disputes arising under this chapter.'"

"What I'm seeking to do is to reconcile how I read that, if that's right, with the language of 12.1.2(b), which provides--I'm sorry to use the expression--a carve-out as it were for investor-State Dispute Settlement because you are quite right. I mean, Chapter 21 deals at length, at great length, with the way in which State Parties go about resolving disputes."

Seven observations are in order and may be helpful, if not altogether compelled. First, Article 12.18, Dispute Settlement, and specifically

Article 12.18.1, provides that where a TPA party claims a dispute arises, the provisions of Chapter 21 apply.

Article 12.18, in its entirety, of course, does not mention the word "investor claims" or "investor-State Dispute Settlement" or other-related provisions. It, therefore, follows that Article 12.18.1 does not serve to override or at all to qualify the importation of Section B from Chapter 10, now contained in 12.1.2(b).

The two provisions, Article 12.18 and 12.1.2(b) are parallel. They serve two very distinct objectives.

Second, Article 12.18.1, in fact, does not contain any language modifying other provisions of Chapter 12, and it certainly does not contain any qualifications at all pertaining to ISDS.

Third, Chapter 12 has two explicitly and textually distinct dispute settlement mechanisms: first, one for claims of Parties of signatory States; and, two, a second for investor claims for compensatory damages. They operate separately and do not in any way intersect or overlap.

Now, please put up Article 12.19.1.

Fourth, quite notably--

PRESIDENT BEECHEY: Before you go there, forgive me, I'm not quite sure that answers the point that was troubling me. I'm reading to the plain language of

12.18.1, which says: "Section A dispute settlements for Chapter 21, dispute settlement, applies, as modified by this Article"--so, that's Article 12.18--"to the settlement of the disputes arising under this chapter."

And I think really the thrust of my question was, well, that seems to suggest that it applies to the settlement of disputes arising out of this chapter, that being Chapter 12. And reading it that way, I was seeking to inquire whether one should, therefore, look at 12.1.2(b) as being, if you like, an exception to the general rule which is stated under 12.18.1. That's where I was going.

MR. MARTÍNEZ-FRAGA: I see.

PRESIDENT BEECHEY: I'm not sure the point you've raised actually answers my question.

MR. MARTÍNEZ-FRAGA: Okay. No, it may not. It may not answer the question as I now further understand it or understand it for the first time. But in either--let's just focus on the way, Mr. President, you have framed the question now.

That is one way of looking at it, is to say, okay, 12.18 provides this--this is 12.18, and this is the methodology for 12.18, and 12.1.2(b) is an exception to this general mechanism that we see in 12.18. That's one way of looking at it, but what I am trying to say is that they are both parallel--they have different purposes and

different--it seems to be different workings and different aspirations.

And what I was going to say next was that 12.19, which follows 12.18--and not inconsequentially or arbitrarily so--I think helps us in some sense, perhaps, with your question, which is: Well, what does 12.19 teach us? Because 12.19 is obviously not a State-to-State provision; right? It seems to deal with investor-State arbitration.

And there are also some features in 12.19 that I would like to point to the Tribunal if you think it is helpful. If not, I can just skip it altogether and move to something else. But I thought the question was a critical question because what the question does--whether one understands it, misunderstands it, or turns it on its head--is it focuses on a related question, I believe, which is: What is the dispute settlement mechanism of Chapter 12?

And I think the bona fide answer, based on 12.18, 12.19, and 12.1.2(b) just textually is there are two. There are clearly two: one intended for investor-State for compensatory damages and another one for State-to-State.

If you agree that there are two, and if you agree that these are the relevant provisions, then we have a couple of other questions that become fascinating

questions, which is: What law will apply to these proceedings? How do these substantive provisions in the plain language of those substantive provisions apply to these proceedings? And do we have an approach that reconciles the availability of these substantive rights to the investors?

So, that's what I was trying to--that's how I--in my dimwittedness and in viewing the question, that's how I saw the question as being an extremely important fulcrum for exploring all these questions, which I do think are related, unless we just take the surface view that, look, 12.1.2(b) says what it says. It says that 10.7 and 10.8 are in, and even though it doesn't talk about 12, 12 is out. But that leaves us with a very lingering question which is: Well, what do we do with those protections, treatment protection standards? What do we do with 12.19? How does 12.1.2(b) and 19 and 18--12.18 and 12.19--relate to each other? And, by the way, what do we do with all these other protection standards that seem to have explicit carve-outs or non-circumvented provisions like 12.10, for example, explicitly referencing investors. Do we just turn a blind eye to that and say let's forget about it and go home, we've solved this puzzle?

This is what we meant, really, when we said, look, when you look at Fireman's Fund, good, it's helpful,

it has dicta, it tells us--but Fireman's Fund doesn't get into these questions. Fireman's Fund doesn't look at the--this was never presented to that panel.

But that's a different story for another time.

If I may continue with this analysis?

PRESIDENT BEECHEY: Yes, of course.

MR. MARTÍNEZ-FRAGA: Thank you, sir.

Fourth, quite notably, Article 12.19, captioned "Investment Disputes in Financial Services," follows immediately in sequence to Article 12.18. In contrast, 12.19, Investment Disputes in Financial Services, specifically references "an investor of a party submitting a claim to arbitration under Section B of Chapter 10, Investor-State Dispute Settlement, and the Respondent invokes Article 12.10 as a defense, the following provisions shall apply."

Now, we feel that this language is extremely interesting, eloquent, and provocative in terms of the analysis. Notably, disputes pertaining to Financial Services Investors and those Chapter 12 substantive rights concerning Financial Services Investments are treated separately and distinctly from Article 12.18 State-to-State Arbitration arbitral proceedings.

It also is significant to note that 12.19.1 does not place any restrictions on "a claim to arbitrate under

Section B of Chapter 10, Investor-State Dispute Settlement" and, actually, references the application of Article 12.10 exceptions, understandably, as possibly being invoked by a Host State in such a proceeding.

Of course, this is the prudential measures chapter, Article, so this is a critical, critical defense to raise. But now we are looking at something that is happening that I think is fascinating within the working of this chapter. Now, we are seeing a Chapter 12 substantive provision applied to an investor-State proceeding, not a State-to-State proceeding. And I think this is important.

Why? Because 12.19 does not confer a special right or status to 12.10. It assumes that 12.10 applies, and, hence, my identification of what I called--or what we called a threshold issue, what law applies to a 12.1.2(b) proceeding; a question that Fireman's Fund didn't even dream of considering.

In contrast to Respondent's interpretation of Article 12.1.2(b), as rendering all Chapter Twelve substantive provisions of no effect, as rights without remedies, notwithstanding the explicit reference to investors and their rights, Claimants invite the Tribunal to adopt the principle that every treaty provision must be interpreted as having a practical purpose or effect.

We cited to Eureko v. Poland. That's just such a

basic principle, I'll skip it.

Fifth, now, this, I think, is important. It is important to observe that Article 12.19 does not limit or reference any limitation on the claims that may be brought under Chapter 12. Article 12.19 has no textual carve-outs as to the potential application of the prudential defense to the substantive provisions of Chapter 12.

Sixth, similarly, it also follows that Chapter 12, Financial Services Investors, may assert claims, defenses, and affirmative defenses arising from non-circumvention provisions of Article 12.10.1 or 12.10.4.

Seventh, of course, the balance of rights and obligations between the protections of Article 12.10 provides the State Party regulators and the right that 12.10.1 and 12.10.4 grant to investors to protect against excessive exercises of regulatory sovereignty that would run afoul if investors were not provided with the right to enforce the non-circumvention provisions on State regulators.

President Beechey's query casts focus on three provisions, I believe--Article 12.1.2(b), Article 12.18, and Article 12.19--and reveals parallel dispute settlement mechanisms that separately seek to provide microeconomic relief to investors in the form of recoverable compensatory damages and macroeconomic maintenance of the Treaty in its

entirety, not just Chapter 14, pursuant to State-to-State arbitration. I think that's what we're looking at there.

Indeed, the procedure set forth in Article 12.19 culminates at the end of that entire procedure. If you follow 12.19 and you read it to the end or you posit an imaginary case and you work through the--let's say, the arithmetic of 12.19, you end up in an investor-State arbitral proceeding, understandably.

A second way of addressing what we believe to be President Beechey's query, but from yet a different perspective, would be to address the question of what law would apply to a claim filed by a Financial Services Investor, a Chapter 12 investor, for expropriation pursuant to Article 10.7 contained in 12.1.2(b). What law applies?

And, therefore, is the scope of consent in Article 12.1.2(b) with respect to Section B of Chapter 10 limited only to 10.7 and 10.8? Let's look at it closer. Assuming that a Financial Services Investor, Chapter 12 investor, files a claim for expropriation pursuant to Article 10.7--so, this is easy. The law applicable to the Article 10.7 claim Claimants submitted is the law contained that the substantive provisions set forth in Chapter 12 "an applicable Rules of International Law," according to Article 10.22.1., governing law.

Therefore, exploring the hypothetical further,

the Respondent's state to this ISDS Chapter 12 claim under Article 10.7 has the right to raise, for example, the prudential measures exception contained in 12.10.1 exceptions, 12.10.2, 3, and 4. We agree on that.

In this example, what actually happened? The substantive prudential measures exception contained in Article 10.12 can be raised--12.10, I'm sorry--12.10 can be raised as a defense to the Article 10.7 expropriation claim that Chapter 12, financial services--that the Chapter 12 Financial Services Investor has brought against the Host State. It may be raised directly pursuant to an Article 12.1.2(b) proceeding or pursuant to Article 12.19.

Put simply, the Host State has the right--in this case, let's say Colombia--to raise the Article 12.10 prudential measures defense because Article 12.10 is the law that applies to an Article 10.7 expropriation claim brought pursuant to Chapter 12.

But there is more.

The Claimant asserting the Article 10.7 expropriation claim may raise affirmative defenses to Respondent's prudential measures defenses also, by availing itself of Article 12.10.1: "Where such measures"--talking about the regulatory measures that the regulators have taken, for example--"Where such measures do not conform with the provisions of this Agreement referred to in this

paragraph, they shall not be used as a means of avoiding the Parties' commitments or obligations under such provisions."

Article 10--12.10.4, the noncircumvention--the fourth section of 12.10, is even more eloquent. Listen to this: "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail or a disguised restriction on investment and financial institutions or cross-border trade and financial services."

Put up the slide, please.

This language is now before you. It textually provides the Financial Services Investor with this right. The Tribunal will recall that the language in Article 12.19, investment disputes in financial services, does not provide Article 12.10 with any special normative basis for application. It merely assumes that 12.10 would apply to an Article 12.1.2(b) Investor-State Dispute Settlement proceeding.

Put up 12.19.l.

Before you is the relevant language on this point. Now, we have tried, perhaps very inartfully, to address President Beechey's concern within the framework of the very question itself, of course; but also, the

explanation is no different from what in the Opening Statement was identified as a fifth difference between Claimants and Respondent, which is the signatory States agreed and consented to providing Financial Services Investors with enforceable rights beyond Articles 10.7 and 10.8.

Put up the next slide, please.

Now, before you, our--so we want to move on to just the last part of ratione voluntatis. And these are the defenses that really have been raised here ratione voluntatis, many of them, and they need to be addressed. We think that we have addressed them in Opening Statement, but for the sake of completeness, Respondent, aside from relying on the United States' Non-Disputing Party submission to conclude that, notwithstanding the ordinary meaning of Article 10.7.1(a)-(d), asserts that the Parties have not consented to arbitrate fair and equitable treatment in Chapter 12. Claimants' position on this point is clear and very briefly shall be reiterated.

Claimants submit that, even assuming the importation of Articles 10.7, expropriation and compensation, and 10.8 limits Claimants to the exercise of ISDS rights only to those two provisions, Claimants would still have consent to arbitrate fair and equitable treatment, even without having to engage in an Article 12.3

MFN process to do so. And here is how.

Put up Article 10.7.1(a) and (d). Quite significantly, the elements of expropriation and compensation, as we saw of Article 10.7, are materially particular. We talked about how the due process clause has the conjunction that brings in Article 10.5. And, indeed, it reads: "In accordance with due process of law and the conjunction of 10.5"--put up the slide, please.

Article 10.5, minimum standard, 10.5(1), reads: "Each Party shall accord the covered investment treatment in accordance with customary international law, including fair and equitable treatment and full protection and security."

Now, you may recall that the United States talked about this yesterday, but they never explained it. In other words, they told us the "what," which is "we don't think FET applies," but they didn't tell us the "why." And we submit that in every question, not just in law but in life generally, the "why" is generally more important than the "what."

Article 10.2(a) avails itself, but this time in the very text, of very same quote, "for greater certainty" language, that we find in Footnote 2 of Article 10.4 MFN. To state that the obligation in Paragraph 1 provides "fair and equitable treatment" includes the obligation not to

deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world."

Therefore, because Article 10.5, minimum standard, explicitly and textually forms part of 10.7, and 10.7, of course, is incorporated into 12.1.2(a) and (b), it must follow, and it can only follow, therefore, that the Parties consented to submitting ISDS under Chapter 12, FET, and DOJ as part of the Minimum Standard of Treatment set forth in 10.5.

The proposition that Respondent, Mr. President and Members of the Tribunal, asserts, namely that the Parties did not consent to having Financial Services Investors file arbitral claims for violation of fair and equitable treatment, asks the Tribunal to omit the textual, explicit, and uncontroverted reference to and incorporation of Article 10.5 into Article 10.7.1(d). The proposition is simply untenable and not justiciable. The argument, regrettably, never should have been raised.

The Claim that FET is not arbitral simply cannot stand.

Remove FET, please.

The second issue that Respondent has addressed, because, quite frankly, it is conceptually impossible to

salvage, concerns the importation of Article 10.4 Footnote 2 into Chapter 12. We have referred to this principle as "the traveling Footnote 2 of Article 10.4."

A substantial point of disagreement between Claimants and Respondent concerns the extent to which the qualifying Footnote 2 to the MFN clause contained in the investment chapter counterpart 10.4 limits Claimants' right to exercise the broad scope of its Article 12.3 MFN right to import more favorable treatment from the Colombia-Switzerland BIT that would allow for the enhancement of the three-year limitations period by two years so as to provide Chapter 12 Financial Services Investors with equal treatment as to the five-year limitation period that Colombia provides to the Swiss investors under that Treaty.

Put up the slide with 10.4.2, please, Footnote 2.

Footnote 2 to Article 10.4 reads--and we've gone through this. Of course, it has the establishment language and it has the limitation. Now, Respondent's arguments on this point are less than clear. They are most coherently, as we said before in the Opening, set forth on Pages 126 and 127 in Paragraph 268 of Respondent's answer on jurisdiction, and Page 152, Footnote 714, Respondent's answer on jurisdiction.

Now, we, of course, cite chapter, book, and verse

because we want the Tribunal to see how they present the argument, not how we may be re-characterizing it or inartfully restating it. I think--and there is nothing like the real thing.

As best as Claimants can discern, Respondent argues that Footnote 2 qualification to the investment chapter's MFN clause 10.4 must be read as somehow forming part of Article 12.1.2(b) because it was the Treaty Parties' intent, they say, to have Footnote 2 limitation--the Footnote 2 limitation apply to Chapter 12, Article 12.3 MFN. This proposition, of course, is untenable for many reasons, but the simplest and most self-evident reason is that Article 10.4, Footnote 2, no matter how hard one tries, is simply not listed or at all mentioned in 12.1.2(a) and (b), and the Tribunal by now has seen this provision many, many times.

As previously noted, Article 12.1.2(b) only imports the 10.7, 10.8, 10.12, 10.14 and Section B from 10, so it's just not there. And 10.4, Footnote 2 of course does not form a part of Section B from 10. So, it's just impossible to read it into 12.1.2(b). It is just not--not workable.

Please put on the slide of Article 10.2 in relation to the chapter.

In addition to asking the Tribunal to read

12.1.2(b), an entire Article and qualifying language that simply is not present in that provision, Respondent also invites the Tribunal to turn a blind eye to the imperatives contained in Article 10.2.1 and 10.2.3. You have these provisions before you on your screens. And these are the provisions that basically say if there's any conflict between 10 and 12, it will be resolved in favor of 12. If there's any conflict between 10 and anyone else, it will be resolved in favor of everyone else.

Of course, going with the traveling footnote and limiting 12.3 would present a conflict between 12.3 and 10.4. Obviously, even if one were to engage in the fantasy of the traveling footnote, you would still have a conflict that, under this provision, Chapter 12 should and would prevail.

Respondent also argues, but only in conclusory manner--so the traveling footnote has to start disappearing.

Respondent also argues, but only in conclusory manner, that the scope of Article 12.3, the financial services MFN, is limited by its Article 10.4 counterpart and, therefore, equal or of less scope. The argument applies to both ratione voluntatis and, of course, temporis proposition is equally untenable. The Parties have intended for the word "treatment" within the meaning of

12.3 to be broader than that of its 10.4 investment chapter counterpart. Beyond the proposition that Article 10.4 Footnote 2 somehow is contained in chapter 12, Respondent argues fruitlessly that Article 12.3 MFN somehow is no broader than its 10.4 counterpart and, therefore, it must be construed as such as its 10.4 counterpart.

The argument also asks the Tribunal to turn a blind eye, one, to the ordinary meaning of the language forming part of Articles 10.4 and 12.3, respectively; two, to the Parties' treaty practice; and, three, to the majority of Awards--you've heard from Professor Mistelis--holding that MFN provisions, unless specifically restricted, as in the case of Article 10.4 Footnote 2, should extend to procedural rights concerning ISDS.

Put up the slide showing 10.4 and Article 10.4.2.

The term "treatment" applies to the following language contained in Articles 10.4.1 and .2: "With respect to the establishment." That's the establishment language. That qualification is important. And "treatment" in 12.3, the Chapter 12 counterpart, simply does not have that language, so that the ordinary meaning of Article 10.4 Footnote 2 cannot be, under any analysis, engrafted onto Article 12.3.

Again, it's a textual argument because Article 10.4, as we have seen, does not form part of the

substantive provisions in 12.1.2(b) and has different language all the same.

The complete absence of this qualifying language, along with the immediately referenced propositions, based on an ordinary meaning analysis, compellingly establishes that the term "treatment" in 12.3 is broader than its counterpart in Chapter 10, but the Article 12.3 MFN clause does not contain the establishment language. The absent--and does not contain the footnote. The absence of these activities, notably all verbs, mostly intransitive verbs, in Article 12.3 further bolsters the ordinary meaning analysis, suggesting that Article 12.3 has a broader scope than its counterpart.

We also noted that the structural differences between a trade protection agreement and a BIT further inform and contextualize the Footnote 2 qualification to Article 10.4. Again, this is an issue that Respondent totally ignores.

Of relevance with respect to the question of Article 12.3's scope is that the TPA before this Tribunal, again, has no less than three MFN clauses and three national treatment articles, each in very separate and particular chapters. We submit to the Tribunal, yet again, that any analysis of the substantive provisions--particularly MFN, of course, which is of

particular relevance--has to be viewed within the context of the chapter in which it rests. That matters. We just can't engage in the imaginary exercise that this is just a Bilateral Investment Treaty.

It is clear that the Footnote 2 restriction on the scope of 10.4 conflicts with the scope of Article 12.3. Moreover, it is obvious that Chapter 12 already has an MFN provision, as we have discussed, and for this additional reason any restriction on the scope of 10.4, as well as in the very text of 10.4 itself, must be viewed as self-standing and only limited to Chapter 10 investors and investments.

Therefore, it cannot follow that the signatory States did not consent to a Chapter 12 Article 12.3 MFN provision that would be as narrow in scope as the investment chapter, Chapter 10, Article 10.4.

Remove 10.4, please.

What follows are the--what we call the technical defenses. You know, the first one is the fork-in-the-road. We addressed that in Opening Statement. Again, we feel this shouldn't have been brought at all. We talked about ping-ponging between the Swiss--the Colombia-Swiss BIT and the BIT before this Tribunal. Respondent spends a lot of ink--it spills a lot of ink, really--arguing that the Swiss-Colombia BIT doesn't apply, but selectively draws on

it to raise this bizarre fork-in-the-road defense which, chronologically, simply does not fit for reasons that we discussed during Opening Statement.

And I'll just move from it, but most notably: How can Respondent, under any analysis, assert a fork-in-the-road defense regarding proceedings before the Colombian Constitutional Court if the TPA was not in force until May 15, 2012, and the life of the fraudulent tutela lasted until June 25, 2014? There was no need for an alternative forum on November 1, 2007, when the Council of State ruled in favor of the Granahorrar shareholders.

So, if you take the chronology of the case, the undisputed chronology, and you chop it up, it doesn't--there is no alternative forum, because either the Claimants are in litigation, they win the litigation November 1, 2007, they are dragged back into litigation before the Constitutional Court--that has its own life that ends on June 25, 2014--and then we're here. So, there is no alternative forum. It doesn't work. There is no way of making it work.

So, let's move the--take that out, please.

The consultation and negotiation is another one of those technical defenses that has, really, quite frankly, no rhyme or reason. It's bizarre. We gave them an opportunity to settle the case three years ago. It is

in black and white. They didn't take it. Plus, it's in the permissive. Now they say during the Arbitration that, well, it's in the permissive in English, but in Spanish it's the word "debe." The word "debe"--in every treaty in Spanish, the word "debe" means two things that are polar opposites. It is like Perú's. Polar opposites--or sanction. It means two things that can be read differently. It means "should" or "shall." But in most treaties in the Spanish language--in all of the Spanish language, in all of the Spanish language, when it is "shall," it is accompanied with qualifying language.

But it doesn't really matter. That provision is based on the NAFTA counterpart. Look at the NAFTA counterpart. It is also "shall." It is also "should." It's a permissive term. It's in the NAFTA. It's here. It's everywhere. So, it doesn't--it is not a jurisdictional issue. At best, it is directional. Plus, it's a bilateral issue. It says "both."

So they both have to do it. And they never did it. So we told them three years ago, Can you do it? And we then told them--they said no, you know, and whatever, we're not going to talk to you, we're just going to go to the PCA. Then we told them a year ago in our Brief, Do you want to talk? And they said no.

So there--it has to be bilateral. We tried that.

It didn't work. They're raising the defense. The defense is frivolous. It never should have been there. Plus, all the case law identifying the consultation, negotiation--I mean, it's a frivolity. All of it says that--where it's in the permissive, it cannot and has--cannot deprive a Tribunal of jurisdiction. It's a silly defense, quite frankly.

So, that--take that out, please.

Then there is, of course, the Notice of Intent or requirement, the third technical consent defense that Respondent relies upon. That also is not justiciable, groundless, and should never have been raised. That defense fails for three very rudimentary reasons. First, there was no such requirement under Article 11 of the Colombia-Swiss BIT. That should be the end of the analysis.

For the sake of completeness, we'll go through it.

Second, there is no language in Article 10.16.2 of the TPA at all suggesting that the Notice of Intent provision is jurisdictional in nature. That provision, much like the consultation-negotiation provision, is intended to promote settlement by alerting Respondent of a potential claim with respect to which Respondent may likely not have any notice that may then possibly lead to

settlement discussions. It is clear that the provision's intended to promote settlement and not to create jurisdictional hurdles to perfecting a claim.

Third, the Tribunal in Chemtura v. Canada cited in Claimants' Reply at Paragraph 675 observed and held that a notice of intent clause will not be enforced where, one, it is established, as here, that the Parties had been aware of the dispute prior to the filing of the Request for Arbitration--for heaven's sake, that should be the end of it; two, where there is no evidence of a bilateral intent to settle the dispute--couldn't be clearer; and, three, where nonenforcement does not prejudice Respondent--they don't even cry prejudice.

Take it away, please.

Notably, Article 10.16.2 of the TPA is premised on Article 1119 of the NAFTA. That has been arbitrated and, among other things, the Tribunal, I think it's v. Mexico--yeah, it's B-Mex v. México cited in Paragraphs 672, 674 of Claimants' Reply Memorial. It says: "Tribunal in that case provided that the Notice of Intent requirement: 'Does not condition the Respondent's consent to arbitration' and that 'failure to issue a notice of intent, therefore, cannot deprive the Tribunal of jurisdiction over them.'"

Just think about it. What's the point of the

Notice of Intent? Think about it.

Now, this fourth technical defense which is the waiver defense, is--it's also a kind of a bizarre thing. Again, identically to the preceding two defenses, the technical term is not contained under Article 11 of the Colombia-Swiss BIT. Once again, that should be the end of the entire analysis. But, even if it were, the Article 10.18.2(b) stricture applicable, the elements for the waiver condition to attach, are nowhere present. The objective of the waiver defense, quite understandably, is to preclude double recovery arising from identity of Parties, identity of claims, and identity of compensatory damages.

Those elements are not here satisfied. Moreover, as we have said in our Opening Statement, and I'll abbreviate the analysis, the International Commission of Human Rights, even if someone were to ask for the Taj Mahal as damages, cannot award it. It doesn't award compensatory damages. So, the likelihood of double recovery not only is unlikely but actually conceptually impossible. The defense doesn't attach.

Lastly, and for the sake of completeness, that defense as well is actionable or can be effectuated or can be weighed at any point before the Merits Hearing. The authority is extremely clear on that. The doctrine is

extremely clear on that. And guess what? We're in the Jurisdictional Phase. So, that doesn't apply. And we've said in our writing, of course, that we would waive it if it came to that.

I want to talk very--so take that one out, please, from the board.

I want to talk a little bit--now the Board should be clean.

I want to talk just very briefly on the evidence of this case. Respondent has no answer to Mr. Olin Wethington's Expert Witness and fact witness testimony. The--has no answer to the September 28, 1993, hearing before the U.S. House Committee on Banking, Finance, and Urban Affairs concerning the NAFTA Chapter Fourteen counterpart to the TPA's Chapter 12, the Urban--and the Report of the Service Policy Advisory Committee, SPAC, and the factual assertions concerning the availability of ISDS rights with respect to all substantive treaty protections. The Respondent doesn't address any of these--any of the testimony, any of the evidence on any of these points.

Two features of cross-examination, however, merit close attention.

First, with the exception of very minor detours, the examination focused on attempting to elicit from Mr. Wethington that the importation of substantive

provisions from Chapter 11 into Chapter Fourteen in the NAFTA Article 1401 scope provision does not affirmatively state that, in addition to the incorporation of the Chapter 11 treatment protection standard, the importation of language does not affirmatively state that the 14--that the Chapter 14 treatment protection standards also should be rendered enforceable to the imported procedural rights. That was the thrust of the whole thing.

Alternatively, the examination sought to elicit from Mr. Wethington the contrafactual proposition that an importation of rights from one chapter is the conceptual and linguistic equivalent of a carve-out of rights from a different chapter.

A second objective was equally unavailing. Counsel sought to elicit from Mr. Wethington a statement that all three NAFTA Parties agreed that ISDS, under the financial services chapter, applied only to the importation from Chapter 11. Mr. Wethington testified that there was no such agreement by the three NAFTA Parties for the following five reasons.

First, the referenced positions stretch over 17 years. México and Canada's position date from 2003. The U.S. position referenced is May 1, 2020, a reversal of the U.S. position last expressed in Treasury testimony to the U.S. Congress in September 1993, 27 years ago. There

is no indication as to current position concerning México or Canada.

Second, Fireman's Fund, the United States' submission did not address the scope of ISDS under NAFTA financial services chapter. Complete silence. It addressed only whether a bank holding company is a financial institution under U.S. law.

Put the slide up, please.

The Canadian position referenced by Ms. Horne is in Canada's February 27, 2003, non-party submission in Fireman's Fund, Paragraph 16. However, the two sentences in Paragraph 16 do not support the proposition. The first sentence, which states: "As a general rule, disputes under Chapter 14 are subject to the general state-to-state dispute settlement provisions of Chapter 20 as modified by Article 1414" is simply incorrect. Even in this proceeding, Respondents have acknowledged that, at minimum, Claimants' claims for expropriation and violations of transfers obligation are subject to ISDS. Canada also provides no support for this statement.

The second sentence, as Mr. Wethington testified, merely paraphrases language of the NAFTA Article 1401(2). The submission offers no rationale in support of the proposition.

Finally, the chronology that somehow the TPA

negotiating team would have accounted for the Fireman's Fund dicta simply does not work, and here's why: Although the TPA entered into force in 2012, it had already been finalized and signed as of November 22, 2006. The Fireman's Fund Award was rendered on July 17 of that same year, and the Decision on Preliminary Question in that case was rendered on July 17, 2003.

Quite notably, during the entire period, the United States was actively involved in negotiating a wide range of Free Trade Agreements, including with South Korea, that is Claimant's 333; Peru, Claimant's 334; Australia, Claimants' 343; and the CAFTA-DR countries, Claimants' 344; Morocco, Claimants' 347; Oman, Claimants' 348; and a range of other countries.

Having covered ratione voluntatis, I will now turn the floor over to Mr. Reetz. I ask the Tribunal's indulgence for my prompt absence.

PRESIDENT BEECHEY: Mr. Reetz, good afternoon. There's just under 20 minutes to go, I'm told.

MR. REETZ: Thank you, Mr. President, Members of the Tribunal. I will try to be very brief, at least by my standards.

First of all, on the issue of jurisdiction ratione materiae, there are really two questions for the Tribunal to consider. First, whether claimants' investment

in the Shares of Granahorrar, together with the rights arising out of it, is entitled to protection under the TPA notwithstanding Respondent's transformation of that investment into different forms through State action.

And the Tribunal has heard some cherry-picked language from various submissions characterizing the investment, but throughout, Claimant has consistently--Claimants have consistently asserted a single set of jurisdictional facts. Claimants invested in shares of the bank, and that investment underwent several transformations due to actions of the State.

Now, it's important to emphasize we're not asking the Tribunal to put the cart before the horse and make a liability finding at this jurisdictional stage. We submit that it's uncontested that the transformation in shares were the result of actions by the State, and that brings into play, really, the Mondev and Saipem cases that we talked about.

This is a classic form of investment, investment of Shares. And even if we look at the characteristics of an investment identified in Article 10.2(a), as that investment is transformed into a judgment, litigation rights, and the like, it still, from the Claimants' perspective, retains those characteristics. Claimants have made a commitment of capital. They are exposed to risk,

and at least, if Colombia's institutions had functioned properly, Claimants had an expectation of gain notwithstanding the twists and turns of their experiences.

The investment made by Claimants, an investment in shares, left them with rights that they retained. They still had rights incident to that initial investment under Colombian domestic law up until June 25, 2014.

Now, as the Tribunal is aware, we cited Mondev and Saipem. I won't belabor that point. They stand, in our view, to the proposition that once an investment exists, it's protected throughout its lifetime, even though the State's actions may bring about changes in its form--that's for the obvious policy reasons that are stated. Respondent seeks to distinguish them because they do not contain their treaties, do not contain a judgment footnote such as the footnote in the TPA. We submit that that's a distinction without a difference; that's not the proposition that the cases stand for. And the issue there was whether the rights arising out of the original investments remained entitled to protection even after those original investments had been transformed by actions of the State.

A little bit on the Judgment's footnote that Respondent has relied upon. This footnote does not serve to denature Claimants' investment or to place it outside

the protection of Treaty. The simple fact is that the investment made by Claimants was not a judgment; it was an investment in shares of stock. It was only State action that led to some of Claimants' rights being incorporated into or crystallized in the Council of State's judgment for a period of time.

And when we look at the context and placement of the Judgment's footnote, Footnote 15, that shows us that that footnote is best understood as providing that a judgment in isolation and by itself is not an investment under the Treaty. If you buy a judgment, that's not an investment by itself.

What Respondent is apparently asking the Tribunal to find, that the Treaty provides no protection, in connection with judgments regardless of how those judgments came about is not only countertextual but would also undermine the policy considerations expressed by Mondev and Saipem.

And if we look at the definition of "investment" in Article 10.2(a), which is incorporated, that tells us that we can't give the Judgment footnote the construction urged by Respondent.

That definition of "investment" clearly includes a number of contract rights, intellectual property, and other rights as we see from Paragraphs (e), (f), and (g),

and no coherent policy would support the result in which such rights--the rights are investments, but when--once they are violated, upheld by a court, and incorporated into a Judgment, they cease to receive protection under the Treaty. They cease to be an investment.

As a result, Claimants submit that where an order or judgment affirms a legal interest that constitutes an investment, the incorporation of that interest into the order or judgment should not deprive the investment of its status under the Treaty. Significantly, neither Colombia nor the U.S. cited any scholarship or jurisprudence that would apply the Judgment's footnote in a case such as this one. And, in fact, Colombia's indication of the Footnote is particularly puzzling because Colombia also contends--we see this in the hearing Transcript at Page 193--that the 2007 Judgment had ceased to exist by the critical dates, that Claimants had some other set of rights at that point in time.

Therefore, under Colombia's view of the domestic jurisprudence, which is both contested and incomplete, the Judgment's footnote note by its own terms wouldn't apply in any event. Colombia has a final argument about jurisdiction ratione materiae, which is the second real question for the Tribunal. They assert that Claimants' investment's not entitled to protection because it was

supposedly made in violation of Colombia's regulatory regime. That is similarly flawed.

In the interest time, I would refer the Tribunal primarily to our papers on this issue. It is addressed in greatest detail on Pages 534 to 603 in Claimants' Reply.

And the real issue is, is there any requirement that investments be made in conformity with domestic law, what standard applies in the absence of a treaty provision to that effect, as we have an absence here, and would depriving the investment of protection under the Treaty be proportionate.

I would also like to talk briefly about, really, one point raised by the submission of the United States on Tuesday, and it relates to the question of a subsequent agreement. You'll see on the slide I was also going to talk about for greater certainty, but we'll skip that part to keep things moving along.

Now, the question of a subsequent agreement between the Treaty Parties, the U.S. and Colombia, has not been raised in any the Parties' four Memorials submitted to the Tribunal. In fact, the question--we can go back on the slide.

The question was first raised by Colombia in its May 15, 2020, written comments on the United States's written submission two weeks earlier. So, all of this took

place after the Rejoinder. And there were no further opportunities for Claimants to make written submissions after Colombia first raised this question of a subsequent agreement.

So, the cases and Authorities on which we would rely in responding to such an argument are not in the record. As a result, if the Tribunal were to consider Colombia's contention that there is a subsequent Convention under--I'm sorry, a subsequent agreement under Article 31(3) of the Vienna Convention on the Law of Treaties, Claimants would find themselves prejudiced by the Tribunal's rulings that Legal Authorities not on the record may not be cited at this stage of the proceedings.

Now, to bring the issue into starker contrast, on Tuesday morning, the United States made its oral submission and cited for the first time three cases that are not in the record of these proceedings--Mobil Investments, Bilcon, and Canadian Cattlemen--as well as a non-disputing party submission in another case which is also not part of the record.

The United States chose to cite these cases a day after the Tribunal had made its initial ruling on the extra-record citations. This, of course, would further the prejudice to Claimants were the Tribunal to entertain the question of a subsequent agreement.

Accordingly, the Claimants respectfully object to any consideration of a subsequent agreement question by this Tribunal. However, in case the Tribunal should decide to consider the issue notwithstanding Claimants' objections, there are a number of points that should be taken into account that I'll mention briefly.

First, if there were a subsequent agreement between the Treaty Parties within the scope of Article 31(3), we would expect the United States to say so--if not directly to Colombia, which is normally how you form an agreement, then at least to this Tribunal. That would be the easiest thing in the world. You just say, "We had a deal. We have an agreement." That's what we would expect to hear.

And now if we could please put up the slide.

We will see that the United States has been quite careful not to say that it has formed a subsequent agreement with Colombia or that subsequent practice exists. It did not say so in its written submission on May 1 of this year, and it did not say so in its oral submission on Tuesday morning. Instead, Ms. Thornton phrased her submission purely in the hypothetical by saying "if the Tribunal considers that these submissions reflect that."

A second point is that in this case we don't see any of the activity that would normally be associated with

the formation of an agreement, whether in legal terms or in everyday language, especially in light of the interpreted significance that Article 31 gives to subsequent agreements. There is no reason to believe that that provision would confer subsequent agreement status on something that wouldn't even be recognized as an agreement in everyday life or contract connection.

A third point that the Tribunal should consider if it decides to consider this issue is that no Authority has been cited to the Tribunal, and we're not aware of any, that would support treatment of the partial congruities and the positions taken by Colombia and by the U.S. in this proceeding as either forming a subsequent agreement or constituting subsequent practice establishing an agreement.

Indeed, each of the three cases cited by the U.S. in its oral submission on Tuesday, but not in the record of this proceeding, involved a long history of submissions of the State Parties in multiple cases previous to the matter in dispute before they could be considered a subsequent practice establishing an agreement.

A fourth point is that, by pure coincidence, there is one case in the record that addresses this question, which is the Gas Natural v. Argentina Decision, and the Tribunal there expressly rejected the proposition.

I'm sorry, that is CLA-35. The Tribunal

expressly rejected the proposition that an argument made by a Party in the context of an arbitration reflects practice establishing agreement between the Parties to a Treaty within the meaning of Article 31(3).

And, of course, this is just the Authority that, by happenstance, is in the record.

And, finally, even where a subsequent agreement or subsequent practice is shown to exist, that becomes only one element to be taken into account by the Tribunal in carrying out its interpretive task under Article 31.

While Respondent's counsel said on Page 157 of the first day's hearing Transcript that the subsequent agreement is authoritative, I'm sure that Respondent did not mean to suggest that it is binding. It clearly is not.

And, of course, there are particular concerns with attaching substantial weight to an interpretation reached during the course of an arbitration in a matter that would adversely affect the non-State Party to that very arbitration.

And, with that, I will return the floor, with the Tribunal's permission, to Mr. Martínez-Fraga to talk about jurisdiction ratione temporis.

MR. MARTÍNEZ-FRAGA: Mr. President, may I have a time check, please, sir.

SECRETARY ARAGÓN CARDIEL: I think you're on

mute, Mr. President.

PRESIDENT BEECHEY: Since the 20-minute time check, some 13 minutes have been used. So, you are at 7 or 8 minutes left.

MR. MARTÍNEZ-FRAGA: Okay. Sir, because of the time constraints, of course, we would like to reiterate that we rest on our, of course, our written submissions in terms of ratione temporis. There is one issue that I would like to discuss as quickly as possible, which is Respondent's argument concerning the allegation that Tribunal lacks jurisdiction over any "dispute that arose from the TPA" since that TPA entered into force, arose before the TPA entered into force.

Significantly, this argument is not based on any actual language in the TPA, but, rather, upon Respondent's interpretation of a smattering of awards. Once again, a close reading of Respondent's case will reveal that the cases simply do not support Respondent's position. This issue is discussed more fully at Pages 93-104 of Claimants' Reply, but this slide gives a quick overview of Respondent's main cases.

The Lucchetti and Vieira cases cited by Respondent involve unusual express provisions in the relevant Treaties that exclude the application to disputes arising before the entry into force. The TPA has no such

exclusionary provision. And the M.C.I. Power case cited by Respondent made it clear that the relevant standard was whether a dispute involved an alleged violation of the Treaty after it entered into force.

The Tribunal found that it had jurisdiction over such disputes, arising after the Treaty--after the Treaty's entry into force, "independently of whether they have a causal link with, or served as the basis of, allegations concerning acts or disputes prior to the entry into force of the BIT."

Therefore, the M.C.I. Power Decision's discussion of disputes does not concern "disputes in the broad sense contemplated by the Varimates, Lucchetti, and Vieira, but rather in the context of a specific claim that a specific State measure has violated a Bilateral Investment Treaty.

A third--a spurious argument by Respondent is its effort to improperly import a broad interpretation of the word "dispute" to the very specific usage of that term in the Bilateral Investment Treaty between Colombia and Switzerland. The Colombia-Switzerland BIT uses the term "dispute" not for purposes of excluding disputes that began before the Treaty's entry into force, as in Lucchetti and Vieira, but, rather, in the context of the applicable limitations period.

We see this in Article 11.5 of the

Colombia-Switzerland BIT, which provides a five-year limitations period upon which Claimants rely in this case. And when we look at the term "dispute" in the context of Article 11 of the Swiss Treaty, it is clear that, as in M.C.I. Power, the term refers to an investment dispute, a claim that a State Party has violated the Treaty, not a domestic dispute, in connection with an investment. And not the more general sense of the term argued by Colombia of difference of opinion or a domestic dispute.

The title of Article 11, "Settlement of disputes between a party and an investor of the other party," sets the stage. It tells us that that Article only concerns dispute between a State Party on one side and an investor on the other. More importantly, though, Article 11(1) identifies the types of claims that are capable of being submitted to arbitration under the Article. These are claims by an investor "that a measure applied by the other Party is inconsistent with an obligation of this Agreement."

That is a claim of a treaty violation. Article 11(2) tells us that much--that such matters, in other words claims of a treaty violation--are the controversies that may be referred to international arbitration under the Article and, in fact, Article 11(3) specifically refers to the dispute submitted to arbitration

as "an investment dispute."

So, absent a claim that a State has engaged in a measure that is inconsistence with its obligations under the Treaty, there is no dispute to refer to arbitration, and there can be no State measure violating the Treaty, and, therefore, no dispute under this Article until the State has engaged in a challenged measure after the Treaty has entered into force.

The other provisions of Article 11 also consistently use the term "dispute" in the sense of an investor-State dispute. For example, Articles 11(4), 11(5), 11(6) expressly refer to the dispute that is the matter submitted to the arbitration, not in the broader sense of a long-standing disagreement or difference concerning related subject matter.

In Articles 11(6), 11(8), 11(2)(b), which is no longer on the screen, refer to the Parties to dispute as having powers or responsibilities that would make no sense if a broader sense of dispute, and, therefore, of the Parties to the dispute, are intended. So, it is clear from these references that only the Parties to the investment dispute itself, i.e., the arbitration concerning the challenged State measure can be considered "Parties to the dispute."

As a result, the limitations period in

Article 11(5) of the Swiss BIT is triggered by the investor's knowledge of the State measure that gives rise to the investment dispute, not related earlier disagreements among the entities. The only State measure in this case is a Constitutional Court's order of June 25, 2014.

Lastly, in closing, Mr. President, Members of the Tribunal, I want to comment extremely briefly on an observation that Ms. Ordóñez made on Page 105, Line 5. She mentioned that the Republic of Colombia last year alone received $14 billion in Foreign Direct Investment. And we thank her for that information.

Now, the Republic of Colombia has a population of 50 million people, and I don't know if that figure is true or if it's not true, but we'll use it. And that means that such Foreign Direct Investment would have been enough to provide each citizen of Colombia with $287, which is the equivalent of what a Colombian citizen makes for a month.

But such is horrifically not the case, instead, they are 45.5 percent of the population is under poverty, and under the poverty level, as defined by Colombia, 40 percent of the national territory is held by freedom fighters, who are really narco-traffickers. The State is in a complete state of emergency in many regards. But it is not in a state of emergency because it is--it has to pay

for attorneys, expensive Washington insiders to defend them from investor Claims in 14 cases.

The reality is that, as Ferdinand de Sosal (phonetic) taught us, the words sometimes can be deceptive, and words such as "extreme regulatory sovereignty" or "extreme judicial activism," what they really mean, they are really euphemisms for corruption. The reason why Colombia is in trouble is because it has institutionalized corruption, not because people who have been stolen from, and especially in this case, stolen from twice, bring claims before neutral Tribunals in an international venue.

Thank you so much, this Tribunal, and for--to you, Mr. President, for the Tribunal for your grace and patience in carefully listening to our argument and considering the merits of this Jurisdictional Phase.

PRESIDENT BEECHEY: Mr. Martínez-Fraga, thank you. Two points, if I may, at risk of testing your patience. The first is, unless I've missed it, I don't think we've got a soft copy of the presentation materials you have been using today. I may have missed the email coming in to me and--but I know I see we've received the overheads from Respondent, but I think we are still waiting to see yours. So, if you put that right, I'd be grateful.

MR. DI PIETRO: Mr. President, if I may. Yes, we did send the presentation at 8:00 a.m. Miami time, and we

also uploaded at the same time the presentation on the HighQ file sharing platform.

ARBITRATOR FERRARI: I can confirm that I did receive them.

(Overlapping speakers.)

PRESIDENT BEECHEY: Thank you. I don't--well, I'll have to look again. I got your email confirming you would be attending, but I think--all right. Don't worry. I'll sort that out over the break. But if I need to--

(Overlapping speakers.)

MR. DI PIETRO: We can send it again, if you wish, Mr. President.

PRESIDENT BEECHEY: Yes. Of course. Give me a few minutes over the break and I'll just double-check to make sure it hasn't been lost in a string down here somewhere. But your email confirming who will be speaking I've got, and that would have come in at about the same sort of time, I think.

MR. DI PIETRO: And the document should be attached to that message, Mr. President.

PRESIDENT BEECHEY: Very well, I will have another look, make sure I didn't miss it. Thank you very much.

MR. DI PIETRO: Thank you.

PRESIDENT BEECHEY: The second point is simply to

record, as a matter of fact, I don't think, Mr. Reetz, the point you raised about materials used by the United States was actually raised in any sort of objection at the time, was it?

MR. REETZ: No. It was not, Mr. President. It is simply that we would object to consideration of the issue because we do not have an effective opportunity to respond, particularly when none of those materials were ever in the record.

PRESIDENT BEECHEY: No. I understand that. I just want to be absolutely clear that I didn't miss something coming in at the time. That's all.

MR. REETZ: You are absolutely correct, Mr. President.

PRESIDENT BEECHEY: Thank you very much.

All right. Well, we will stop for 15 minutes and start again at 25 to the hour, if we may, please. Thank you very much.

(Brief recess.)

PRESIDENT BEECHEY: Mr. Grané, I think we are all set. I'm conscious I may have shortchanged the Parties out of a slightly longer break than anticipated, but if you're content to proceed, then we're here and ready to go.

MR. GRANÉ: Yes. Mr. President, we are content to proceed. Thank you.

PRESIDENT BEECHEY: Good. All right.

MR. GRANÉ: If it pleases the Tribunal, Mr. President, I will invite Ms. Ana María Ordóñez, on behalf of the Agencia Nacional, to make an introduction, please.

PRESIDENT BEECHEY: Yes. Of course. The floor is also yours.

MR. GRANÉ: And she will do so in Spanish, so this may be a good time to switch to the Spanish channel.

CLOSING STATEMENT BY COUNSEL FOR RESPONDENTS

MS. ORDÓÑEZ: Mr. President, Members of the Tribunal, on behalf of the Republic of Colombia, I would like to thank you for your commitment and dedication because you are listening to the clear and some of the reasons that we have shown to indicate that this Tribunal lacks jurisdiction to hear the claims. After navigating through thousands of pages, reports, and testimonies, today we can say again that Colombia has shown, again, that Claimants have not met the jurisdictional requirements of the TPA between Colombia and the United States.

With the Tribunal's permission, I'm going to make some comments in connection with this on behalf of the Republic of Colombia before continuing with our Closing Statement.

For Colombia, it's at least reproachable that

their own nationals are trying to circumvent the jurisdictional requirements of the Treaty and also to indicate that there are no jurisdictional merits of this case. Colombia trusts the good judgment of Honorable Members of this Tribunal to conclude that the adequate interpretation of the TPA between Colombia and the United States is the one entered into by the Parties and is posed for by the Parties.

The consent of the State cannot be imported via at Most-Favored-Nation clause. These are desperate attempts to interpret the provisions of the Treaty in a manner that is different than the one established by the Parties. It has been shown that the Claimants cannot ignore the temporal limitations set forth in the Treaty via deficient interpretations. The dispute was born at least 10 years before the entry into force of the Treaty. Three years also went by since knowledge was gained of the Decision of the Constitutional Court of 2014.

During this Hearing, Colombia showed that the dominant nationality of the Carrizosa brothers is the Colombian nationality. The Carrizosa brothers are successful businesspeople in Colombia that have continued the legacy of their father, the well-known Colombian businessperson Mr. Carrizosa Gelzis. And apart from the fact that they like music and culture and movies of the

States, we have been made clear this week that their dominant nationality is the Colombian nationality.

We have heard the brothers Carrizosa, and we saw that they and their statements showed that they are Colombian nationals. And we all want to put the flag of Colombia on the top of the Mount Everest, like Mr. Carrizosa said, and we are trying to protect the--in Colombia, like Felipe Carrizosa said, and we would all like to be successful businesspeople like Enrique Carrizosa. All Colombians would like to be like that.

There was this alleged investment by the Claimant, but it is clear that a court decision is not an investment protected by the Treaty. The literal language of the Treaty is clear. The word "investment" does not include a decision issued by an administrative or a judicial court. Although they say that the 2007 Council of State Judgment is an investment, this is not a qualified investment under the Treaty.

Mr. President, Members of the Tribunal, to conclude, I would like to avail myself of this opportunity to respectfully reiterate the request of Colombia to say that 100 percent of the costs must be paid by the Claimants and also all fees incurred by Colombia because Colombia has had to answer all these things that were so irresponsible, all these pleadings that were so irresponsible.

The country of Colombia is respectfully asking of this Tribunal not to permit these alleged investors to abuse investment treaties, and the possibility of success that Claimants had was always nonexistent.

I will now give the floor to Mr. Patricio Grané for him to continue with the Closing Statements by the Republic of Colombia. Thank you very much.

PRESIDENT BEECHEY: Thank you very much, Ms. Ordóñez.

MR. GRANÉ: Thank you, Mr. President.

Members of the Tribunal, let me begin by saying this very clearly. This case never should have been brought. It is not that there is one discrete jurisdictional objection in respect of which reasonable people could disagree. Rather, any responsible and well-informed investor would immediately recognize the myriad of insurmountable reasons why jurisdiction cannot be established in this case.

Objectively, this case never stood a chance of meeting the jurisdictional requirements under the TPA and public international law. Even Claimants seem to have come to that realization, as evidenced by their constant shifts in their position and case theory. And those shifts are not about marginal issues, but, rather, about things as fundamental as their alleged investment, the source of the

dispute, and the measures that they allege constitute a breach of the TPA.

For example, in the Request for Arbitration and in their Memorial, the focus of their claim was the 1998 Regulatory Measure and the 2011 Constitutional Court Judgment. Then Colombia raised its objections, and the Claimants pivoted. Now they attempt to stack their claims on the sole post-treaty act, the 2014 Confirmatory Order. But that 2014 Order buckles under the weight that Claimants suddenly heap on it.

Equally fatal to Claimants' case is their open disregard of the provisions of the TPA. From the outset, Claimants treated the jurisdictional requirements of the TPA as if they were optional, mere suggestions; beginning with the simple requirement of filing a Notice of Intent and continuing with the insistence of pursuing proceedings before the Inter-American Commission of Human Rights, in violation of that waiver provision, their inability to identify a covered investment, and their disregard for the fundamental principle of nonretroactivity.

This case never should have been brought. When deciding issues such as the scope of the TPA Chapter 12, under which this dispute is brought, Claimants and their Expert Mr. Wethington asked this Tribunal to ignore the plain meaning of treaty language. For example, they tell

the Tribunal that when Article 12.1.2 says that Chapter 10 applies "only to the extent that such chapter or Articles of such chapters are incorporated into Chapter 12", it doesn't mean what it says, according to Claimants and Mr. Wethington.

And, likewise, when Articles 12.1.2(b) says that ISDS is "incorporated into and made part of Chapter 12 solely for claims that a party has breached," the expropriation and compensation provisions under the Chapter 10 and three others that are not invoked by Claimants, Claimants say it does not mean what it says. They ask you to adopt a fantastical and strained interpretation of treaty text, an interpretation that the TPA Parties agree is manifestly wrong; an interpretation that does violence to the Vienna Convention. This case never should have been brought.

Claimants' belated realization that their case is hopeless has led them to take and make reckless and irresponsible assertions and adopt irresponsible positions.

In their Opening Statement a few days ago and again a few minutes ago, Claimants asserted for the first time at this Arbitration and without a shred of evidence--let me repeat that--without a shred of evidence that the judicial decisions that they challenge at this proceedings were procured through fraud and corruption.

There is no justification, Members of the Tribunal, for that unbecoming and irresponsible conduct on the part of Claimants. In any event, it discredits them more than it discredits their home country of Colombia.

Members of the Tribunal, there are a host of reasons laid out before you, any one of which is sufficient to dismiss this case in its entirety. The demonstrative that we have prepared for this Closing lists those reasons and provides a roadmap for you. The challenge that Colombia faces in this two-hour Closing is not choosing which of those many reasons is more compelling, they all are; but, rather, how to identify and summarize them within the time allotted. We will, nevertheless, endeavor to do so, but, of course, we rest on our written submissions.

And if it pleases the Tribunal, I will address Colombia's ratione temporis. My colleague Ms. Horne will then address the Tribunal's jurisdiction ratione voluntatis, after which my partner Paolo Di Rosa will address the jurisdiction to ratione materiae and ratione personae and will provide some concluding remarks on behalf of Colombia.

Now, turning to ratione temporis, it is difficult to address this objection without risking repetition, and for that, I apologize. And the reason is that Claimants have said very little, if anything, that addresses

Colombia's objection. Also, the customary international law principle and the relevant provision of the TPA, which is Article 10.1.3, are so fundamental and so well established that not even Claimant can muddle it.

In fact, we are rather disappointed that in both their Opening Presentation and again in their Closing just now, Claimants failed to heed your advice, Mr. President. In the prehearing conference, you invited each Party to follow Lord Sumption's example and to focus on the Parties' weakest arguments. Had Claimants done that, they would have attempted to explain to this Tribunal how, in their view, they hope to overcome the jurisdictional hurdle imposed by the nonretroactivity principle and the Limitations Period.

Specifically, we expected Claimants to explain how, in their view, their claims are not rooted on pre-treaty conduct. Also, we were hoping that Claimants would attempt to articulate how, in their view, the 2014 Confirmatory Order changed the status quo that existed before the entry into force of the Treaty. And, likewise, we were curious to hear how Claimants would attempt to argue that the 2014 Order gave rise to a new dispute. But Claimants did none of those things.

Now, of course, we didn't expect the presentation matching Lord Sumption's history of the Hundred Years' War,

but we did expect something. But since Claimants have given us nothing, we will need to tread over known ground, and, again, for that, I apologize. But we do so, however, fully aware that you, Members of the Tribunal, are seasoned experts in public international law and know the applicable law, including Article 10.1.3 of the TPA and the principle of nonretroactivity.

You do not need a professor on public international law to school you on those issues that you know so well. Therefore, we will attempt, rather, to focus on the application of the law, which you know, to the facts of this case.

Colombia has demonstrated that Claimants seek to hold Colombia liable for acts or facts that took place or a situation that ceased to exist before the date of entry into force of TPA. And that is confirmed by the fact that the Claimants began this Arbitration by identifying the 1998 Regulatory Measures and the 2011 Constitutional Court Judgment as the measures that allegedly breach Colombia's obligations under the TPA. And you will recall that, in my Opening Presentation and in our slides, we said it in more than a dozen submissions by Claimants that made it clear that their claims are based on those measures.

Now, Claimants then attempted to recast their entire case in the Reply by arguing that their claims

rested solely on the 2014 Order. Now, Claimants, of course, did that because the 2014 Order is the only measure that postdates the entry into force of the TPA. But is it sufficient to point to a post-treaty act such as the 2014 Order in order bring that measure and the dispute within the temporal scope? Of course, it is not. And the case law makes that clear.

Now, Claimants threw in a few slides in the PowerPoint deck listing of case law, including cases cited by Colombia, and, first, in the Opening said they were great cases. They asked you to read those cases; they insist that you read those cases.

Now, Colombia trusts that you already have read the cases and that you will do so again before you deliberate and draft your Award. And when you do, you will be able to confirm that Claimants' argument that the case law cited by Colombia offers no guidance on how to apply the principle of nonretroactivity cannot be taken seriously.

For instance, we cited EuroGas, which assessed a pre- and a postdate act for purposes of deciding on compliance with temporal requirements imposed by the relevant investment treaty in that case. And in that case, the Tribunal found that the situation was exactly the same before the BIT entered into force and after the BIT entered

into force. Because the post-treaty Government Decisions had not altered but had merely confirmed, as happened in this case, the pre-treaty status quo, the EuroGas Tribunal held that it did not have jurisdiction ratione temporis over those acts, even though they had postdated the Treaty's entry into force.

According to that Tribunal, the rule--to rule otherwise, and I quote, "would require the Tribunal to engineer a legalistic and artificial reasoning to bypass the temporal limitations on the application of the Treaty." EuroGas, of course, is RLA-0013, and what I just quoted is Paragraph 458.

We also cited the Spence Interim Award, which is RL-0024, which explained that the claim that is alleged must be sufficiently detached from the pre-entry into force acts and facts, and the post-treaty act must constitute an actionable breach in its own right such that the alleged breach can be evaluated on the merits without requiring a finding going to the lawfulness of the pre-treaty conduct.

Now, Claimants cite a paragraph from that Decision. They did so in the Opening. They didn't do it in the closing, unless I missed it, but they cite a paragraph from that Decision in which the Tribunal warns against the given presidential value to the Decision given, given that it was a fact-specific case. But the Claimants

have not explained why Spence is not apposite and offers no guidance to you, despite that warning by the Tribunal in Spence.

And why--Mr. President, Members of the Tribunal, why are Claimants so keen for you to disregard the guidance offered by Spence, EuroGas, Corona, ST-AD, Grand River, and other cases cited by Colombia? Because they know that if you do, if you fail to look at those Decisions, you will not understand how you can apply and should apply the principle of nonretroactivity.

And if do you follow that guidance to apply the principle, that fundamental principle on nonretroactivity in Article 10.1.3 of the TPA, you will find that the 2014 Order was rooted in pre-treaty conduct, did not change the pre-TPA status quo, and is not independently actionable. If you find that, you will have to conclude that Claimants' case must be dismissed in its entirety for lack of jurisdiction ratione temporis.

Now, in their Opening presentation, not so in the Closing, Claimants said time and again that this Tribunal must accept Claimants' characterization of their own claims, and in so doing, Claimants seem to be suggesting--that Colombia has somehow recast Claimants' claims. That is not the case. Colombia has cited to Claimants' own descriptions of their claims in their RFA,

in the Memorial, in the Reply, and in their pleadings to the Inter-American Commission. It is Claimants who, in their last written submission and in this Hearing, have attempted to reframe their claims. But they cannot disavow their earlier pleadings, all of which show unequivocally that their entire case is premised on the alleged wrongfulness of the 1998 Regulatory Measures and the 2011 Constitutional Court Judgment, both predating the TPA.

And, indeed, in their Memorial, Claimants literally listed nine purported reasons why the 1998 measures were wrongful and 16 alleged reasons why the 2011 Constitutional Court Judgment was wrongful. In their own descriptions of their claims, Claimants repeatedly alleged that the pre-treaty actions constituted violations of the Treaty. On your screens you will see examples of Claimants' own statements in their written submissions challenging the lawfulness of the 1998 Regulatory Measures and the 2011 Constitutional Court Judgment.

Now, Claimants also submitted a Damages Report, and I alluded to this in my Opening presentation. The entire Report serves as a clear admission of the source of liability under Claimants' case theory, and the Tribunal may recall from that presentation that Claimants' Damages Expert was asked by Claimants to assess the damages allegedly incurred by the Claimant as a result of what?

The 1998 Regulatory Measures.

Now, Claimants find themselves in an impossible situation. On the one hand, they are trying to convince you that their case is not about the 2011 Judgment; but on the other hand, they realize that the sole post-Treaty measure, the 2014 Order, changed nothing. And so, to try to bridge that gap, Claimants argue that the 2000 Judgment --I'm sorry, the 2011 Judgment was not final and that the alleged breach occurred when the 2014 Order confirmed the 2011 Judgment.

But that is both wrong under Colombian law and, importantly, it is contradicted by Claimants' own pleadings. Article 241 of the Colombian Constitution provides that the judgments by the Constitutional Court are final--black and white--and so it is with the 2011 Judgment. It's a Constitutional Court Judgment, and it is final by virtue and pursuant to Article 241 of the Constitution. And then Article 49 of Decree 2067 confirms that, by providing--confirms that by providing that there are no appeals for Constitutional Court Judgments, and this was confirmed by Dr. Ibáñez and by the Constitutional Court judgments that are on the record of this proceeding, which even Ms. Briceño cited in her Second Expert Report.

Now, Claimants themselves acknowledge that their litigation in Colombia, in the Colombian courts, was

brought to a close with the final judgment of the Constitutional Court in 2011, which is illustrated in this time--very simple timeline on this screen. Indeed, when they submitted their petition to the Inter-American Commission in June 2012, more than two years before the 2014 Order was issued, Claimants expressly acknowledged that they had exhausted all remedies in Colombia. Indeed, that was a requirement, a jurisdictional requirement, for them to bring that case before the Inter-American Commission on Human Rights.

On your screen, we have included one quote from that submission in 2012 where Claimants refer to the 1998 Regulatory Measures and the 2011 Constitutional Court Judgment and state that local remedies have been exhausted.

This submission is repeated in subsequent submissions by Claimants before that Commission in 2016 and in 2018. And this is R-0119, Page 16, for their submissions in 2016, and R-0122, Page 13, for their submissions of 2018.

Now, Claimants' submissions that in 2012, after the 2011 Constitutional Court's Judgment, but before the 2014 Order were issued, that local remedies had been exhausted squarely contradicts the Claimants' argument in this Arbitration that the 2011 Judgment was not final.

But in any event, not even Claimants can deny

that the Order, the 2014 Order, did nothing to alter the factual or legal situation that previously existed. That Order was nothing but a confirmation by the Constitutional Court of its previous Decision, the 2011 Judgment.

So, the simple fact is that the status quo remained the same before and after the entry into force of the TPA. And today we heard a baffling assertion by Claimants. Claimants asked you to assume as a hypothetical that the 2000 Order "had gone the other way." Those were counsel's exact words: Assume that the 2014 Order "had gone the other way."

In that case they suggest--well, they seem to suggest, if we understood them correctly, that the 2011 Judgment would not have been final. That, Members of the Tribunal, makes no sense and cannot possibly alter the analysis that you must conduct in the light of the principle of nonretroactivity in Article 10.1.3, because the undisputed fact before you is that the 2014 Order did not alter the pre-TPA 2011 Judgment. And that is the point that Claimants keep trying to ignore.

In any event, if the 2014 Order had gone the other way, to use Claimants' word, we would not be here, would we? Of course we wouldn't be. So, that hypothetical that they present to you offers absolutely no assistance.

In conclusion, after four written submissions, a

2.5-hour Opening and a two-hour Closing Presentation, Claimants have failed to articulate whether or how the 2014 Order independently breached the TPA, and what damage, if any, they allegedly incurred as a result of that measure, the 2014 Order, as opposed to the pre-treaty measures that they consistently pointed to as the source of liability.

Colombia has demonstrated that the Tribunal lacks jurisdiction because the dispute arose before the entry into force of the TPA. That is another one of our objections ratione temporis. And determining when a dispute arose depends, in part, of course on the definition of a "dispute." In its submissions, Colombia has applied the well-established international law definition of a "dispute" as first articulated by the Permanent Court of International Justice in the seminal Mavrommatis Advisory Opinion. And under that definition, which the Tribunal, of course, knows fully well, a dispute is "a disagreement on a point of law or fact; a conflict of legal views or of interests between two persons." In their written submissions, Claimants argue that the Tribunal should deviate from that definition, but they have not offered an alternative.

Now, Claimants' counsel in his Opening raised the question: What is the definition of "dispute" under Article 11.5 of the Switzerland-Colombia BIT? I confess

that I was on the edge of my seat, pen ready to take down that definition. Alas, I was disappointed, because no definition was proffered. What we did hear later, almost two hours later, was an attempt for the first time in this Arbitration to use the MFN clause to import a nonexistent definition of "dispute" from the Switzerland BIT--Switzerland-Colombia BIT. That is further evidence of Claimants' moving target and last-minute arguments that we have seen consistently and throughout this proceeding.

But, as we have explained, the definition of "dispute" that applies to the TPA is that adopted consistently by the ICJ and other international tribunals, and that is the one that I had just recalled. And under that definition, which even Claimants had defined as "classical definition," there can be no doubt that this dispute arose before the entry into force of the TPA.

As we have stated repeatedly, the dispute arose at the latest in July 2000, when Claimants filed a lawsuit before Colombian courts against the 1998 Regulatory Measures. And in filing that lawsuit, Claimants articulated their conflict of legal views and interests with the Colombian State. That is, therefore, when the dispute arose.

In an attempt to overcome the above, Claimants hope to artificially break their dispute into parts--I

think that the Claimants' counsel used the word they will "chop it into parts"--and argue that a new dispute arose when the 2014 Order was issued. But that is manifestly not the case. As the Lucchetti Tribunal explained: "The critical element in determining the existence of one or two separate disputes is whether or not they concern the same subject matter." RLA-0020, Paragraph 50.

Here, the subject matter has remained the same throughout since the lawsuit in July 2000, and it is the lawfulness of the 1998 Regulatory Measures.

Claimants' own statements in their written pleadings demonstrate that this is a single dispute that arose decades ago. One of many examples comes from Claimants' Memorial, which I quoted in our Opening Presentation, but I will quote again because of how clear and succinct it is: "In a nutshell, Colombia's financial Regulatory Authorities unlawfully expropriated Claimants' investment."

They are invoking a treaty protection, expropriation, they are referring to the investment, and they are pointing to something that occurred in 1998. In a nutshell, that is their case.

Thus, Claimants themselves define this dispute as being based on the 1998 Regulatory Measures, and Claimants' Statements before the Inter-American Commission on Human

Rights likewise demonstrate that this is a single dispute that arose long before the TPA entered into force. To recall, Claimant filed a petition with that Inter-American Commission on Human Rights in 2012, complaining of the 1998 Regulatory Measures and the 2011 Constitutional Court Judgment, and they--amongst the human rights that they invoked are the rights to private property.

Claimants subsequently updated that petition in 2016 to include complaints about the 2014 Confirmatory Order, in the same proceeding. Claimants have described a dispute cumulatively in their submissions to that Commission. They did so in 2017, which you can see on the screen, which is taken verbatim from R-0120, Page 116. You see there that in the same proceeding they point to the 2011 Constitutional Court Judgment alongside the 2014 Order, saying, 'That's"' the dispute. That is what we disagree with. That is what we think has violated our rights, including our right to private property.'"

Likewise, Claimants' submissions to the Commission in 2016 also refer to both the 2011 Judgment and the 2014 Order.

In conclusion, this case, as asserted by Claimants--not as recast by Colombia; as asserted by Claimants--lies outside the jurisdiction of the Tribunal by virtue of Article 10.1.3 of the TPA, because it seeks a

finding of liability arising out of an act or fact that took place before the date of entry into force of the TPA. But there is yet another reason why Claimants' Claims must be dismissed in their entirety. And it is that they failed to comply with the temporal limitation period.

Claimants apparently do not dispute that they are subject to a limitations period. They also do not dispute that, under the TPA's three-year limitation period, Claimants' claims over the 2014 Order are time-barred. If the Tribunal concludes, as we respectfully submit, that the TPA limitations period applies, the case ends. It must be dismissed for lack of jurisdiction ratione temporis. It is as simple as that, Members of the Tribunal.

Perfectly aware of that jurisdictional obstacle to their case, that fatal flaw of their case, Claimants attempt to circumvent the TPA limitations period, and they do so by invoking the MFN clause under Chapter 12 to import a longer limitations period.

However, Colombia has demonstrated that Chapter 12 of the MFN clause--or Chapter 12 MFN clause does not allow a Claimant to circumvent a condition of consent like the TPA limitation period. But even if it did, and Claimants were able to import from the Colombia-Switzerland BIT a longer 5-year limitations period, Claimants would still be time-barred.

Here I will spend only a few minutes addressing the legal impossibility of using the Chapter 12 MFN clause to import dispute resolution provisions from another Treaty, because Colombia has briefed this issue at length, and we know that this is an issue that the members of the Tribunal know full well and have referred to it in their writings. But we do wish to emphasize a few points.

First, Claimants and their Expert, Professor Mistelis, assert that generally worded MFN clauses apply to dispute-settlement provisions. And in doing so, Claimants are seeking you, this Tribunal, to join the Maffezini line of cases.

Now, during this Hearing, Claimants have tried to distance themselves from the Maffezini position. They did so in the Opening. But Claimants refer to Maffezini Decision frequently throughout their pleadings, as did their Expert, Professor Mistelis. You find these references in this slide on your screen.

Claimants, however, either ignored or deliberately omitted from their pleadings the fact that the Maffezini Tribunal specifically determined that where the States created "a highly institutionalized system of arbitration that incorporates precise Rules of Procedure, for example, with regard to the North American Free Trade Agreement and similar arrangements, it is clear that

neither of those mechanisms could be altered by the operation of the clause because these very specific provisions reflected the precise will of the Contracting Parties." Maffezini Paragraph 63.

Having spent so much time using NAFTA as a guidepost, even sometimes as a substitute for the TPA, Claimants cannot deny that this statement from Maffezini, the case they cite, completely undermines their reliance on Maffezini and its progeny.

Now, Professor Mistelis cited the ILC's 2015 commentary on MFN clauses in his Expert Reports, but he neglected to highlight certain key observations that render Maffezini inapposite in this situation.

First, the ILC noted "attempts to use MFN to add other kinds of dispute settlement provisions going beyond the 18-month litigation delay have generally been unsuccessful." Of course, the Tribunal knows that the 18-month litigation requirement or clause is not at issue in this case.

Second, also, the ILC concluded that "where the MFN clause provides simply for treatment, no less favorable without any qualification that arguably expands the scope of the treatment to be accorded, Tribunals have invariably refused to interpret such a provision as including dispute settlement."

Again, here, Claimants are not attempting to circumvent an 18-month litigation delay, and the wording of the MFN clause is that as described by the ILC.

Now, in the interest of time, I will skip over the footnote to Chapter 12--I'm sorry--to Chapter 10 MFN because Claimants said nothing new other than their attempt to disparage our argument by applying a mocking label to it, which, again, is unbecoming frankly, but Colombia rests on its submissions on this issue and also refers the Tribunal to the U.S. non-disputing party submission in this proceeding.

Now, Members of the Tribunal, even if you were inclined to be added to the Maffezini line of cases, the importation of the five-year Limitation Period from the Colombia-Switzerland BIT would not establish jurisdiction in this case. You will recall that Article 11(5) of the Colombia-Switzerland BIT that Claimants attempt to import imposes a five-year Limitation Period "from the date the investor first acquired or should have acquired knowledge of the events giving rise to the dispute." And as we have already demonstrated, in their written submissions, Claimants have admitted that the dispute arose with the 1998 Regulatory Measures and, at the latest, in July 2000.

What followed were a series of judicial decisions fundamentally tied to the subject matter, to use the

Lucchetti language, of the 1998 Measures. And even assuming that the dispute arose, not in July 2000, as, in fact, it did, but, rather, with the issuance of the 2011 Constitutional Court Judgment, Claimants' case must be dismissed because that Judgment was issued before the five-year cutoff date under Colombia-Switzerland BIT.

Now, this concludes our submission on jurisdiction ratione temporis.

I will ask very briefly, perhaps in the minute that remains, that my colleagues put up the demonstrative that we have created to serve as a road map for the Tribunal as you consider our various jurisdictional objections so that you can have a very graphic summary representation of our objections which exist ratione temporis. And, again, this is intended to serve as a road map for--of the Tribunal as you go down our long list of very compelling, we respectfully submit, jurisdictional objections.

In the interest of time, I will not be able to walk the Tribunal through what we have in this table, but it reflects everything that we have said consistently in this Arbitration, in our written submissions, and this week in this Hearing.

So, with that, and with the Tribunal's indulgence, I would invite my colleague, Ms. Horne, to

address the ratione voluntatis objection.

PRESIDENT BEECHEY: Thank you, Mr. Grané. By all means.

MS. HORNE: Good afternoon and evening once again, Mr. President and Members of the Tribunal.

I will briefly address the subject of this Tribunal's jurisdiction ratione voluntatis, and we are projecting the PowerPoint again on your screen.

As you may recall from my presentation on Monday, Colombia's objection is divided in four parts. I'll begin with the first part of the objection. The Tribunal does not have jurisdiction over Claimants' FET or national treatment claims because there is no consent to arbitrate such claims under Chapter 12 of the TPA.

This eminent Tribunal is well-versed in the customary rules of treaty interpretation, but they bear emphasizing given Claimants' persistence at ignoring those rules. In this case, the ordinary meaning of Article 12.1.2(b) of the TPA, the context of that provision, and the subsequent agreement and practice of the TPA Parties demonstrate that consent to arbitration under Chapter 12 is limited.

Now, the terms of Article 12.1.2(b) are unequivocal. The consent to arbitration applies "solely for Claims" under Articles 10.7, 10.8, 10.12, and 10.14.

The effect of the word "solely" is shown clearly on your screen. Consent to arbitrate is limited to these four types of claims and there is no consent to arbitrate claims under other provisions of the TPA, whether they be from Chapter 10 or from Chapter 12 itself.

The context of this clause fully supports the analysis. The chapeau of Article 12.1.2 makes clear that articles of other chapters, including the investor-State dispute settlement mechanism, apply "only to the extent" that they are expressly incorporated.

Moreover, Article 12.18 provides critical context. This goes to the question that the Tribunal posed and that Claimants earlier today were unable to answer. The State-to-State dispute settlement mechanism is the general mechanism that applies to claims under Chapter 12. That is how Chapter 12 claims must be resolved. And in that way, these are not rights without remedies as Claimants repeatedly suggest.

Article 12.1.2(b) creates a different regime, an exception that allows Financial Services Investors to submit only certain claims, claims under the investment protections imported from Chapter 10 to arbitration.

And here, Article 10.16.1 of the TPA is also relevant. Article 10.16.1 explicitly states that claims alleging breaches of the provisions of Chapter 10 are

subject to investor-State arbitration. You will not find such a provision in Chapter 12.

Now, VCLT Article 31(3) provides that the subsequent agreement and practice of the States' Parties must also be taken into account. Claimants raised for the first time this morning an objection that that this issue cannot be considered because it would somehow prejudice Claimants. The basis for this objection is unclear. The subsequent agreement and practice of State's Parties is an application of the plain terms of the Vienna Convention, which is on the record and, more importantly, reflects customary international law, which of course applies to this dispute, as Claimants have already admitted.

Furthermore, the TPA expressly provides the United States with the right to make a non-disputing party submission under Article 10.20.2. In other words, there is simply no basis on which to somehow ignore the subsequent agreement and practice of the Parties.

Moreover, Colombia specifically briefed this issue in its written observations to the U.S. submission, specifically at Paragraphs 4-14 of that submission. And in doing so, Colombia referenced the International Law Commission's commentary on subsequent agreement and practice. That commentary indicates that, first, a subsequent agreement need not be formal but must reflect an

intent to clarify the meaning of a treaty and a common understanding of the meaning; and, second, that subsequent practice encompasses all conduct in the application of the Treaty, including submissions in legal proceedings, so long as that conduct contributes to the identification of a common understanding.

Claimants conceded earlier today that the interpretations of Colombia and the United States "do not conflict." It is clever phrasing, but it's an admission that the Treaty Parties are in complete agreement. The United States has expressly affirmed that Article 12.1.2(b) limits the scope of consent to arbitration. Colombia has agreed in its written and oral submissions. Article 31(3), therefore, applies.

In their submissions, Claimants argue that NAFTA should be used as a guidepost when interpreting the TPA. NAFTA is, indeed, helpful, but not to Claimants' case. NAFTA has a separate Financial Services Chapter, Chapter Fourteen, and the ordinary meaning of NAFTA's terms, the context of those terms, the object and purpose of Chapter Fourteen, the subsequent agreement and practice of the NAFTA State's Parties and the relevant case law all confirm that NAFTA also limits consent to arbitration under its Financial Services Chapter.

As Claimants and their Expert have conceded, the

language of NAFTA Article 1401(2) shown on your screen is nearly identical to that of TPA Article 12.1.2(b). It provides consent to arbitration "solely for particular claims."

The context of Article 1401(2) confirms its meaning: Disputes under Chapter Fourteen are to be submitted to State-to-State arbitration. Further, the broad scope of consent to arbitration under the Separate Investment Chapter is explicit and clear. There is no counterpart in the Financial Services Chapter.

In addition, the object and purpose of NAFTA Chapter Fourteen confirms the limited scope of consent. The Fireman's Fund Tribunal specifically considered this issue, reviewed the evidence, and determined that the drafters of NAFTA did, in fact, want to create an entirely different regime for Financial Services Investors because of the different financial contexts and regulations present in the countries at the time.

The solution that they reached was for Financial Services Investors to be able to arbitrate expropriation claims but for other claims to be subject to State-to-State resolution only. And the three NAFTA States Parties fully agree on the interpretation of Article 1401(2). We reviewed these submissions during the Hearing. Canada and México made submissions to this effect in the Fireman's

Fund Arbitration. The attempt by Claimants and their Experts to read other words into those submissions is not effective. And the United States has since explicitly endorsed this position in this Arbitration.

That brings me to the relevant case law. The Fireman's Fund Tribunal is the only Tribunal to have interpreted or applied Article 1401(2) of NAFTA. Claimants have asserted that this Fireman's Fund Tribunal Decision involved findings on Article 1401(2) that were obiter dicta. Their Expert parroted this same position in his testimony. And while it's clear why Claimants may wish to undermine or minimize this Decision, they have blatantly mischaracterized the case.

What actually happened is the following: The Claimant asserted national treatment, FET, and expropriation claims under NAFTA Chapter Eleven, the Investment Chapter. México objected that the Claims should have, in fact, been governed by Chapter Fourteen because they involved a financial institution. The Tribunal, in a preliminary decision, interpreted the meaning of "financial institution" and held that the claims were, indeed, governed by NAFTA Chapter Fourteen. As a result, the Tribunal dismissed for lack of jurisdiction the Claimants' national treatment and FET claims, which fell outside the scope of consent to arbitration under NAFTA Chapter

Fourteen.

The Tribunal's jurisdiction thus turned on its interpretation of Article 1401(2). This is far from dicta. And you'll find the relevant paragraphs on your screen.

So, the proper interpretation of NAFTA is clear, but now let's briefly consider the historical context. In 1994, NAFTA enters into force. Article 1401(2) provides consent to arbitration under Chapter Fourteen but solely for four claims.

In July of 2003, the Fireman's Fund Tribunal issues its Jurisdictional Decision. It holds that Article 1401(2) limits consent to arbitration under Chapter Fourteen.

Recall, the United States participated in and was fully aware of this arbitration. Three years later Colombia and the United States signed the TPA. In that document, TPA Article 12.1.2(b) uses nearly identical language, the NAFTA Article 1401(2). The TPA then enters into force in 2012. This timeline directly contradicts Claimants' theory that TPA Article 12.1.2(b) was somehow intended to allow broad consent to arbitration.

Let's briefly consider now Claimants' theory. Their self-serving interpretation of Article 12.1.2(b) is based not on the text, not on the context, not on the object and purpose, subsequent practice or case law.

Instead, they rely on what they assert are supplementary means of interpretation under Article 32.

As a preliminary matter, resort to such supplementary means are not necessary in this case. But, in any event, Claimants have not identified any qualifying travaux within the meaning of Article 32. What are qualifying travaux? Well, the Austrian Airlines Tribunal analyzed travaux. It reviewed drafts of the Treaty provisions that were exchanged between the Parties during the negotiations. We don't have any such exchanges here.

What have Claimants submitted, purported evidence--their purported evidence comes in two parts. First the Opinions of Mr. Wethington, and, second, testimony of another U.S. official before U.S. Congress.

The first is Mr. Wethington's testimony, which he has admitted is based on his personal recollection and is not supported by any documents exchanged between the Treaty Parties during the negotiations of NAFTA. Moreover, Mr. Wethington's opinions are inconsistent with the texts of NAFTA as well at TPA. Mr. Wethington admitted as much in his First Expert Report.

He said: "Investor-State Dispute Settlement is not in Article 1401(2) specifically made applicable to breaches of Article 1405 and Article 1406." During his oral testimony, although he was desperate to focus on what

he thought NAFTA should say, he eventually made the same concession. In response to a question, he admitted that he could not point to a provision providing consent to arbitrate the protections of Chapter Fourteen.

The second piece of evidence on which Claimants' case hangs is congressional testimony by Mr. Barry Newman, who was not a lawyer. That testimony does not have weight under the VCLT and does not reflect Colombia's intentions, but even if it did, it doesn't support Claimants' interpretation.

Now, Claimants have relied heavily on one sentence of the testimony. You'll see on your screens we've provided the full paragraph, which provides critical context. The paragraph begins: "Aside from the basic financial services rules, the NAFTA also contains a number of very important investment protections for U.S. financial firms." It continues: "For example, NAFTA investments in financial institutions cannot be subject to unreasonable expropriation by another NAFTA country."

I'll pause here to recall that the expropriation provision is Article 1110 of NAFTA, which is imported from the investment chapter into the Financial Services Chapter, via Article 1401(2). So, he's talking here about an imported investment protection. He then continues: "In addition, a NAFTA country is not permitted to restrict the

transfer of profits outside its territory except for prudential reasons."

Again, I'll pause. The transfer obligation is Article 1109, so this is another one of those protections from the investment chapter that is imported through Article 1401(2). He then continues: "Any violation of an investment protection will permit an investor to bring a direct action against the offending NAFTA country for the financial harm caused by a violation."

This entire paragraph is discussing the protections that are imported from the investment chapter. Article 1401(2) incorporates these protections, and Article 1401(2) also provides that those imported protections, and those alone, are subject to investor-State arbitration. What this paragraph does not say is that financial services investor can arbitrate claims based on the provisions of Chapter Fourteen. You will not find that in this statement.

The very next paragraph is even more telling. It begins: "No legal agreement would be complete without a way to resolve disputes. Under the Agreement, a NAFTA country will be able to refer to a Government-to-Government dispute settlement mechanism to decide an issue concerning the breach of the Agreement's obligations."

Mr. Newman's testimony is quite clear. Alleged

breaches of Chapter Fourteen's protections are to be resolved through the State-to-State dispute settlement mechanism.

So, where does this leave us? If the Tribunal were to determine that Article 12.1.2(b) limits consent to arbitration, it could rely on all of the categories of evidence on the left-hand side of your screen. Chief among them, the actual text of the Treaty. Claimants' interpretation is supported only by the personal recollection of an individual who participated in the negotiations of NAFTA.

I'll move now to the next issue. Claimants assert that they can use the Chapter Twelve MFN clause to import consent. They cannot. As a preliminary matter and by virtue of Article 12.1.2(b), Claimants cannot invoke and the Tribunal does not have jurisdiction to apply the Chapter 12 MFN clause. The United States affirmed this point in its written submissions.

In any event, even if this Tribunal could apply the Chapter 12 MFN clause, Claimants could not use the MFN clause to create consent to arbitrate their national treatment and FET claims. This has been affirmed by a number of Tribunals, including the Austrian Airlines arbitration, which is quoted on your screen.

Claimants' Expert, Professor Mistelis, cited only

one case in support of their attempt to create consent to arbitration using the MFN clause, the RosInvest arbitration. But Professor Mistelis also conceded on cross-examination that the RosInvest Case involved the application of a very different MFN clause than the one at issue here.

Moreover, that Tribunal merely used the MFN clause to expand their jurisdiction from compensation for expropriation to the existence of an expropriation. That situation is quite different from the one at issue here, where Claimants seek to create consent to arbitrate Claims that are unrelated to those in the consent clause.

I'll turn briefly to the third aspect of our objection. Claimants cannot assert an FET Claim, in any event, because there is no such obligation to invoke. As I discussed on Tuesday,[1] Chapter 12 does not include or incorporate an FET obligation. Claimants appear to have conceded these points. However, during the Hearing Claimants have asserted the argument that they can submit an FET claim using the expropriation provision of Article 10.7.

This argument defies both the text of the Treaty and common sense. The expropriation obligation concerns expropriations. Claimants cannot submit an FET Claim under

[1] The speaker intended refer to opening presentations on Monday.

the expropriation provision of Article 10.7. On this point, Colombia and the United States are in complete agreement with the text of the TPA.

This brings me to the fourth and final part of Colombia's objection. Claimants fail to comply with three conditions of consent under the TPA. Here, I'll be brief because the TPA requirements are clear and the facts are undeniable. Claimants never submitted a Notice of Intent. They never attempted to negotiate before filing their Claims. And they never submitted a written waiver. These are requirements in the TPA.

With respect to the waiver requirement, Claimants have also violated that requirement by continuing to pursue a proceeding before the Inter-American Commission. Claimants have tried a variety of theories to distinguish the Inter-American Commission proceeding or to make it seem less relevant, but the TPA waiver requirements are clear, and all of them are met by the Inter-American proceeding.

It's a dispute-resolution procedure, it's been ongoing since Claimants initiated it in June of 2012, and Claimants have challenged the exact same measures that they have challenged in this proceeding.

So, having failed to comply with these conditions of consent, Claimants have not engaged Colombia's consent to arbitrate, and all of Claimants' Claims must be

dismissed.

Before I conclude, though, I wish to take a step back. This is a multi-part objection. The reason for that is not that the concepts or TPA requirements are complicated. Instead, the reason is that there are multiple jurisdictional obstacles to Claimants' Claims. Ultimately, what this means is that there are multiple paths for this Tribunal to follow to dismiss the Claims. And I'm going to briefly explore those paths now.

I'll begin with Claimants' FET Claim. This is the Claim with the most problems, so the screen is about to get full. First, Chapter Twelve does not include or incorporate an FET claim. There is no jurisdiction. And claimants cannot submit an FET Claim under the expropriation provision. Again, there is no jurisdiction.

Also, Colombia did not consent to arbitrate FET claims under Chapter 12, no jurisdiction. And even if Claimants could invoke the MFN clause, the fact is that an MFN clause cannot be used to create consent to arbitration where that consent does not exist in the TPA, no jurisdiction.

Third, Claimants did not satisfy three conditions of consent under the TPA. Failure to satisfy any one of these conditions leaves this Tribunal without jurisdiction. Claimants also attempt to support a national--to submit a

national treatment claim under Chapter 12. However, Colombia did not consent to arbitrate national treatment claims under Chapter 12. No jurisdiction.

Again, even if Claimants could invoke the MFN clause, which they can't, an MFN clause cannot be used to create consent where none exists. No jurisdiction.

Moreover, Claimants' failure to satisfy three conditions of consent doomed their national treatment Claim. No jurisdiction.

Finally, Claimants purport to submit an expropriation Claim. The problem with this Claim, as with the others, is that Claimants did not satisfy the requisite conditions under the TPA, and, therefore, never engaged Colombia's consent to arbitrate.

There is no jurisdiction.

In sum, there are many jurisdictional failings from which to choose, but the inescapable result is that all of Claimants' Claims fall outside of the jurisdiction, ratione voluntatis, of this Tribunal. And for your convenience, Mr. President, and Members of the Tribunal, these reasons are also summarized in Colombia's demonstrative exhibit, which was submitted this morning and referenced by my college.

Unless the Tribunal has any questions for me, I will yield the floor to my colleague, Mr. Di Rosa.

PRESIDENT BEECHEY: Thank you very much. Before you pass the baton to Mr. Di Rosa, we will take our 15 minutes. And there are 55 minutes left. All right.

MS. HORNE: Thank you very much, Mr. President.

PRESIDENT BEECHEY: Thank you very much indeed. Thanks, Ms. Horne.

(Brief recess.)

PRESIDENT BEECHEY: Mr. Di Rosa, the floor is yours, I think. And there's 55 minutes to go. And you'll need to come off mute.

MR. DI ROSA: Right. Okay. We were testing this right before. Apologies, Mr. President.

PRESIDENT BEECHEY: That's all right.

MR. DI ROSA: I was saying good evening to all of you. And we will be addressing the final two objections, which are the jurisdiction ratione materiae objection and then we will close with the ratione personae objection and then we will offer some final thoughts.

On ratione materiae, they had four theories. And they started, as we mentioned in the Opening, with the shares of Granahorrar as the relevant investment, and they had said it was the 2007 Judgment. And then they said it's some sort of transformation of those two. In the Opening, they said that it was the beneficial interest from these things, were residual rights. And then in the Closing,

they came full circle to assert that the relevant shareholding is--the relevant investment is the shareholding in Granahorrar.

And we would submit that it really doesn't matter. And the reason it doesn't matter is because our position is that all of this was extinguished definitively by the time that the Treaty entered into force. The shareholding had ceased to exist in 2006. The 2007 Council of State Judgment was reversed in 2011, and once that got reversed in 2011, whatever residual or beneficial interests they may have had also got extinguished.

And that's what makes this different from Mondev, for example, which is a case that they focused so heavily on. In Mondev, there had been the State measures that they were complaining about, which happened before the entry into force, but at the time of the entry into force, the Claimants still had their legal claim alive, and there not been any rulings on it.

Next slide.

Claimants took us to task in the Closing for focusing on the 2007 Judgment as the investment, but we didn't say this. They said this in the Memorial. Of course, their position has evolved, but to the extent that there is anything that relates to the 2000 Judgment, either itself or as embodied in some nebulous residual right, it

is nevertheless barred by the Footnote 15.

And they also said, well, it is ironic that Colombia is invoking the 2007 Judgment because they said that it didn't exist, and there is absolutely nothing incompatible between the two positions. Our primary position is that it no longer existed because it was reversed in 2011, and to the extent it does exist, or did exist, it would have been barred, in any event, by Footnote 15.

And they had some reference in the Opening to the fact that Footnote 15 is a footnote to one specific subparagraph (g) in Article 28, and we would submit it doesn't really matter. Because it's such a narrow provision, it didn't really fit neatly into any other provisions really. We assumed that it was placed there because subparagraph (g) deals with certain rights that are conferred by domestic law, and a judgment arguably reflects that type of right conferred by domestic law. But it doesn't matter, is our position.

Next slide.

Now, they have come full circle, as I indicated, to the position that the shares in Granahorrar are the relevant covered investment, and we have explained already that it cannot be a covered investment because the shares had ceased to exist at the time of the TPA entry into force

and because the Claimants acquired those shares in violation of the Colombian legal regime that was applicable to foreign investment at the time that they acquired, they first acquired that interest.

Next slide.

Now, we wish to focus on the Critical Dates because, obviously, it is important for our argument since our position is that all the relevant rights were extinguished before the entry force of the Treaty, and that matters because the Treaty date of entry into force is, in fact, a critical date that is implicit in the various Treaty provisions, including Article 12.1 of the TPA. And the other critical date is the date of alleged breach, which, in this particular case, is the 2014 Confirmatory Order. And I note that Claimants have not disputed these Critical Dates for ratione materiae purposes.

Next slide.

So, we wish to focus a little more on the timing of the investment and its implications for ratione materiae jurisdiction. There are three possible temporal scenarios. The first scenario is one where the investment is made and then gets terminated before the entry into force. So, the whole lifetime of the investment is before the Treaty's entry into force.

The second scenario is one where the investment

straddles the date of entry into force, and the third one is when the investment is made after the Treaty's entry into force and then continues or ends, but the whole lifetime is after the entry into force.

Our submission is that ratione materiae jurisdiction can only exist in Scenarios 2 and 3. And we will explain why.

In the first scenario, which is where the whole lifetime is before the entry into force of the Treaty, it is a simple argument. You know, if the investment didn't exist at the time of entry into force, then there is nothing for the Treaty to apply to, and if there was a State measure that applied, that affected the investment in some fashion before entry into force, then it was--it was a measure that was taken at a time when there was no Treaty obligation yet.

So, imposing liability on the State in this scenario would directly contradict the intertemporal rule which is embodied in Article 13 of the Draft Articles of State Responsibility because you would be penalizing the State for doing something that was not contrary. You would be penalizing the State under the Treaty for something that was--for conduct that was not contrary to the Treaty at the time that the conduct occurred for the simple reason that the Treaty was not yet in force.

And that's also implicit in Article 12.1 because 12.1 says that the chapter applies to measures adopted by a party relating to investments of such investors. So, the Measures have to affect an investment, and an investment has to be covered by the Treaty. So, this is why, we would submit, that in this case there is no ratione materiae jurisdiction for a temporal reason. And this lends itself to extreme examples.

And let's go to the next slide.

If Claimants' position were sustainable, that would mean that you could have investments resuscitated from decades before, and we've, you know, put on the screen a hypothetical extreme example, one where the investment is made in 1960. It actually ends in 1965. The Claimant then the following year, 1966, initiates litigation against the State, and then there's a final court decision denying all claims in 1970. And then they let 40 years pass, and then they--right before the TPA entry into force, they just present some sort of request for reconsideration for nullification of the 1970 ruling. Of course, that gets denied sometime right after the TPA's entry into force. And then, under Claimants' theory, this Claimant would be entitled to file a Notice of Arbitration under the TPA and in this case 2015. It could be any year after entry into force.

And we would submit that this can't be right.

Next slide.

Applying that same chart to this particular case, we have essentially the same scenario. The investment was made in 1988 and 1991. The Measures were taken--sorry, the shares ceased to exist in 2006, and then there was litigation about it. The 2007 Council of Judgment comes along, and then there's more litigation about that. And then in 2011, it gets--that Judgment gets reversed. And then there's this request for nullification, and that Decision comes after entry into force. And then they have the RFA.

But, essentially, their grievance here relates to an investment that consists either of the purchase--either of the Granahorrar shares or the 2000 Council of State Judgment or some embodiment of those two things, some right or some beneficial interest derived from those two things, and all of that ceased to exist before the TPA's entry into force.

So, if you were to rule that there is jurisdiction here over the Claimants' investment, you would essentially be saying, "Well, we are contemplating the possibility of applying the Treaty to a nonexistent investment," which, by definition, can't be right.

Next slide.

Now, the Claimants focused heavily on Saipem and Mondev, and those are distinguishable on a number of grounds. First of all, the treaties in those cases were different. We showed you in the Opening how the Treaty in this case is rather narrowly defined in terms of the investment. And both NAFTA and the Treaty that was at issue in Saipem, which was the Italy-Bangladesh investment treaty, both of them had, in their definition, a specific reference to the type of interest or right that the Claimants seem to be invoking here. You know, in the case of NAFTA, it was interest arising from the commitment of capital. In the Saipem BIT, it was credits for sums of money or any rights having an economic value. There is no similar language in the TPA. And the further distinction is that there is no judgment exclusion provision in either of the treaties that were at issue in Saipem and Mondev.

In the case of Mondev, there's additional reasons why it is distinguishable or inapposite. First of all, as we mentioned at the beginning, unlike here in Mondev, by the time of the Treaty's entry into force, Claimant had some local claims pending, but no court decisions had yet been issued. So, you could say, well, as of that point, the Claimant plausibly had some sort of residual right that was, you know, part of the litigation, and it was being vindicated in some fashion and had not yet been the subject

of any court decisions. So, you could say, well, you know, they had--the Claimant there had this right that was still pending resolution, so to speak, at the time of the Treaty's entry into force.

Another point about Mondev is that we submit that the Decision focused on the wrong critical date, and we have the relevant quote on the screen. They said: "To require the Claimant to maintain a continuing status as an investor under the law of the host State at the time the arbitration is commenced would tend to frustrate the very purpose of Chapter Eleven."

And we agree fully with that. But as noted, we do not know at that time the arbitration is commenced is a relevant ratione materiae critical date. It is a ratione personae critical date, but it's not a ratione materiae critical date, and the reason for that is obvious. If this were the rule then, you know, the more dramatically and the more definitively the State extinguishes the investment after the entry into force of the Treaty, then the more shielded the State would be from a claim because at the time the arbitration is commenced, the Claimant has nothing left; right?

And that would obviously thwart a big purpose of the Treaty, which is to enable claims for expropriations and the like, so long as they--the expropriatory acts occur

after entry into force. So, the critical date cannot be the time that the arbitration is commenced.

And then, finally, Mondev involved a scenario that corresponds to the first scenario that we mentioned a few slides ago. And to that extent, we would submit that Mondev was actually incorrectly decided on this particular issue. Because in Mondev, the relevant alleged expropriatory acts had occurred before the entry into force of the Treaty, and all that was left was the legal claim and then court decisions. So, if they had imposed liability on Mondev on that basis, then that would mean that they were imposing liability for actions that occurred after the Treaty entered into force--sorry--before the Treaty entered into force, which would violate the intertemporal rule, as we mentioned earlier. So, for all these reasons, we think that Mondev is not particularly instructive here.

And then the conformity requirement--we talked about this. There wasn't really anything new. The Claimants did concede that it does apply, but they said only to serious violations or fundamental violations. We showed you some cites of instances where the various Tribunals decided that the foreign investment legal regime was, in fact, a serious or important or fundamental legal provision that does have to be complied with by the

investor.

Next slide.

Importantly, the Claimants do not dispute that they did not comply with the foreign investment framework that was applicable at the time that they brought the Granahorrar shares. Instead, they advance four arguments that we have dealt with in our Briefs, and we dealt with to some extent in our Opening, so we won't dwell on it here. But none of these arguments has any merit.

No conformity requirement under international law; we dealt with that extensively in our Briefs. Claimants' violation is not severe enough; we just talked about that. Law 43, they say, precluded Claimants from complying with the foreign capital investment framework; incorrect, because the Law 43 entered into force in 1993, well after the investment was made, so this law could not have precluded them from doing anything. And then they say that Colombia is estopped because Colombia did not penalize them for any violation of this obligation to register their investment and so forth; and obviously Colombia did not know that these people had not complied with it. They did not know it was a foreign investment to begin with.

So, for these reasons, we would say that the Claimants failed to comply with the law that was applicable at the time to foreign investments and, as a result, not a

covered investment under the TPA.

Next.

So, for all these reasons, the Tribunal lacks jurisdiction ratione materiae. These various arguments are summarized in the same demonstrative that my colleague Ms. Horne alluded to and that Mr. Grané Labat showed you on the screen. You can refer to that for a condensation of our arguments.

So, we turn now to the jurisdiction ratione personae.

Next slide.

I'm going to start with the--with some commentary on the Claimants' ten guiding legal principles, which we did not have time to really address one by one in the Opening. We would submit that most of their legal principles are mistaken. The first three are the ones relating to governing law and the mandatory application of customary international law. We have conceded that that--that the Claimants are correct about this. They refuse to accept our concession, evidently, because they fought us about it again in the Opening--sorry, in their presentation today. We insist that we concede on this. There is nothing much more that I can say. We agree on these three points, the first three.

I think the reason for the disconnect was that

they seized upon the word "guidance," that we said this Tribunal should take "guidance" from the--from international jurisprudence on this, including Nottebohm and so forth. And the only reason we said "guidance" is because there is no mandatory set of factors that have to be applied in every specific case.

It's not like the ICJ said, well, in any dual nationality case or any effective nationality case you must apply these ten factors. It is precisely the opposite. They said, well, you must take into account the totality of the circumstances and various factors apply. And they certainly--the ICJ in 1955 certainly did not say, well, the Carrizosas in their TPA claim in 2020 are going to have to apply the following factors. So, since it's a totality of the circumstances, that's the part that is mandatory. The Tribunal has to take into account all the relevant factors. But, because those vary from case to case, we said, well, you take guidance from those earlier rulings in the sense of seeing what type of factors they considered and then apply those factors as relevant to this case.

Going to Number 4 on the screen here, they said each factual contact is to be afforded equal weight. Nobody in the history of international law, no Tribunal in the history of international law, has said this. They made that up. And if you look at the citations that they

provided for this proposition, you'll see that there is nothing in those sources that even remotely suggests this. And they don't because it makes no sense; right?

Claimants have said, well, you know, the fact that the Claimants celebrated Thanksgiving every year is evidence of their U.S. nationality. But surely that factor is not of equal weight, or the fact that they listen to U.S. music or watch Netflix. Certainly those factors are not of equal weight than the fact that they have been living in Bogotá for 20, 30 years; right? It cannot be of equal weight.

Number 5, consideration of the Claimants' entire lifespan, notwithstanding the particular importance on any specific time frames. And, you know, we will focus in more detail on the Critical Dates for ratione personae purposes, but we don't dispute that the Tribunal is free to look at the entire lifetime of the Claimants for context and for background, but ultimately the Tribunal must make the determination as of the Critical Dates. In other words, in 2014 and in 2018, what was the dominant nationality of the three Claimants? That's ultimately the determination. And that's compelled by the TPA provisions that we'll show you, but also compelled by long-standing jurisprudence and doctrine on this issue.

Number 6, absence of fraudulent abuse of process.

Illicit Treaty-shopping is of importance. No, it's not. It's not because this is relevant only to effectiveness. We conceded effectiveness, and it's one of those things, again, where they continue fighting a fight they don't have to fight.

Now, perhaps the reason that they keep insisting on this is because maybe it's--they are somehow persuaded that their nationality is really, really effective; right? But it doesn't work that way. There are no gradations. Nationality is either effective or it is not effective. There's no gradations. There is no gray area. And if a nationality is effective--or both nationalities, in this case, are effective, then you have to decide which of the two is the dominant one. But you don't have to dwell on effectiveness anymore.

And in any event, the factors are sort of similar, so you get to a lot of those factors in the dominance comparative analysis.

Number 7 here, dominant and effective nationality is a two-prong test, but the effective prong cannot be severed. We dealt with that already in the Opening. It's a two-prong test that had to be analyzed separately.

Number 8, customary international law intended to broaden the scope of qualifying investors to include dual citizens. No, entirely the opposite. The reason that

States like Colombia and U.S. are plugging these dual nationality holes is precisely the opposite reason. In the first generation of investment treaties, all that was required was that the investor have the nationality of the other Party, the non-host State, and that led a lot of dual nationals with the dominant nationality of the host State to file claims under these treaties and the Tribunals would say--many, most Tribunals said at the time, "Well, the Treaty--all it requires formally is that the person be a national of the other State. This person is a national of the other State, even though they are a dual national, so that's it."

In the more recent generations of these Treaties, and many countries are focusing on this--you know, this particular scenario where the Claimant is a dual national, and they are trying to exclude people who are dominant and effective nationals of the host State, not the other way around.

Number 9 calls for a qualitative analysis of the dominant and effective factors. They keep using this term, and we haven't really seen it used in any case, the term "qualitative." They haven't quoted anything that actually uses that word, as far as I know, but in our submission, it doesn't really matter, for this reason.

If the contrast is between qualitative and

quantitative, we agree; you do have to do a qualitative analysis in the sense that it is not a matter of just tallying up, okay, how many factors favor one nationality, how many factors favor the other. It is, you know, more of a holistic analysis, as the Claimants insist on saying, and they insist that we don't say, but we haven't not been saying that.

So, qualitative--you know, I suppose the distinction that we have been drawing is not so much between qualitative as much as with subjective; right? Qualitative involves some assessment of certain factors that don't lend themselves to numerical tabulation, but they still need to be analyzed.

And then Number 10, the factual factors need to be--that can be considered are nonexhaustive, and that--we agree with that.

So, next slide.

Then we focus now on the actual specific factors that the Claimants are suggesting that the Tribunal must apply in this case, and we submit that the ones on the left-hand column are relevant ones, and they are essentially permutations of our own list of four sets of factors.

Each of these factors on the left-hand screen are Claimant-proposed factors that we don't disagree with and

that we, in fact, think are reflected in our own set of factors in one way or another. What we do say is irrelevant are the five factors--or, whatever, the six factors on the right, taking them individually, how and why dual nationality was obtained. As we said in the Opening, this factor can be relevant in many cases--for example, under what circumstances did the person acquire nationality by naturalization? And that's just not the case here. It's not relevant. We know how dual nationality was obtained. It was obtained at birth, both nationalities, so less relevant in this case than in others.

Education: Same thing. Less relevant in this case than in others.

The Claimants focused heavily on the fact that they were educated--primary school, secondary school, college, and so forth--in the U.S. And, sure, that's true, but it happened between 30 and 40 years ago. If the Tribunal's inquiry were--the Critical Dates were 1980 and 1990, then maybe. At that time the Claimants were living full-time in the U.S. and their activities were there and so forth, and maybe at that time their dominant nationality was the U.S. one, but since they came back to Colombia in the '90s, the education factor has become less relevant because it happened so long ago.

Passport used for international travel. We

discussed this both in--I guess we discussed it with some of the Witnesses on cross-examination, but ultimately the fact that they travel with their U.S. passport is really not suggestive of anything inherently, because it is much easier to travel throughout the world with a U.S. passport than with a Colombian passport, for simple reasons, such as the fact that there are visa waivers in many countries to which a U.S. travelers can visit, and many of those States require that a Colombian national have a visa. So, again, we don't really know that that's all that edifying a factor.

Language. You know, it's hard to imagine that the Claimants did not speak to their father in Spanish, but, you know, we're prepared to accept for the sake of argument that all of their home conversations were in English. The point is, you know, it is not really necessarily indicative of anything, either, simply because there are millions of people, probably worldwide, that speak at home a language that is different from that of their nationality or of their host State.

Number 10, health care, again, speaks more to Claimants' means--economic means and socioeconomic status than anything else. There are wealthy people worldwide who come to Sloan Kettering or whatever it is, Houston, the Mayo Clinic, and so forth, to deal with medical issues, and

that doesn't really say anything about their nationality as such.

And then absence of Treaty-shopping and so forth is of significance. No, it's not, for the reasons we just explained in the previous slide.

So, next.

Relevant factors in this case. So, we go back to our original list of four sets of factors. We are not going to repeat them, but--the Tribunal is familiar with them by now, but we stand by them. We think these are the relevant factors in this particular case. We are not saying that they are the universe of factors that are relevant in any case. Claimants keep misattributing to us that argument. They keep saying--even in their Closing, they said, you know, "Colombia's abbreviated set of factors." It's abbreviated only because not all factors are relevant in this particular case. We happen to think that these are the relevant factors. Many of them overlap with the Claimants' factors. Ultimately, it's for the Tribunal to decide.

Next slide.

Centrality of the Critical Dates. So, we just wanted to provide the Treaty--sorry, the Tribunal with the Treaty basis for the Critical Dates. This is--these two provisions that appear on the screen are the reasons that

the determination by the Tribunal has to be made as of these specific dates, the time of the alleged breach, the time of submission of the claim to arbitration. I'm not going to read the Treaty provisions. The Tribunal is, no doubt, familiar with them by now, and in any event they are there on the screen for the Tribunal to review at a later time if they wish.

But, again, Claimants do not dispute that these are the Critical Dates. They call them the "relevant dates." They say you have to consider their whole lifetime, but it can't be both. You can consider the whole lifetime for certain purposes, but the Decision has to be made as of these two dates, which in this case are 2014 and 2018.

Next slide.

And aside from the Treaty basis for those Critical Dates, there's a fairly uniform jurisprudence and doctrine showing that these are the Critical Dates for ratione personae purposes. Not all the Critical Dates are the same for all jurisdictional inquiries. As we showed you, the date of filing the submission of arbitration is not relevant to ratione materiae, for example. But the various Tribunals have consistently concluded and analyzed these nationality issues as of the moment that the claim was submitted and the moment of the alleged breach. And

those include the Ballantines Tribunal most recently, but, you know, historically the Mergé Tribunal, and Achmea as well.

Next slide.

We alluded to this already briefly, and we suggested that their entire lives is not something that the Tribunal can make its decision on, although we're not really sure how it helps the Claimants to advance this argument.

If you look at Claimants' entire lives, their case on ratione personae is even worse, and we'll show you the cumulative number of years. But if you look at their lifetime, they were born in Bogotá, they lived in Bogotá as children for many years. Then they had that stretch of however many years--let's say 10; it wasn't quite that much for some of them--say 10 in the U.S. And then, you know, it's been, like, 30 years or however long--20, 30 years, maybe 14 for one of them--but, you know, it's been certainly a very long time that they've lived in Colombia such that, overall, the amount of time they spent in Colombia dwarfs the amount of time they spent in the U.S. So, I'm not really sure how the entire life theory advances their cause.

Next slide.

All right. So, let's try to apply the factors to

this particular case. We would suggest that all--on and around both of the Critical Dates, Colombia was the center of--well, it was certainly their permanent and habitual place of residence and had been for a long time. It was the center of their economic and professional lives, the center of their family, social, civic, personal, and political lives, and even during those precise dates, the Claimants were holding themselves formally as Colombians in an international proceeding. This is the Inter-American proceeding we were mentioning.

Next slide.

Now, Claimants went on at some length today about how residence is not really any more important of a factor than any others, and we disagree with that. And in support of our position, we wish to just stress a few things.

First of all, residence was the only factor that the ICJ in the Nottebohm Case referred to as important. We have the quote on the screen, only residences identified as important, and then there are other factors that have to be taken into account.

And then if you look at the Mergé case, they have a series of guiding principles--there's about seven or eight of them--and at least six of them focus on the place of residence. Sometimes they use the term "residence"; sometimes they use the word "sojourn." But it has to do

with where the person was physically located for an extended stretch.

Next slide.

The same has been true of the jurisprudence of the U.S.-Iran claims Tribunal. They have focused in on a good number of these dual nationality cases and they consistently in their Decisions on dual nationality list habitual residence first, consistent with the idea that it's an important factor, if not a determinant factor.

And to illustrate further how this is true, I point out that there are certain investment treaties that even affirmatively define dominant and effective nationality as the place where the person has the permanent and habitual residence, and this is--on the screen, you have a quote from one of the investment treaties that was quoted by Claimants themselves in their Memorial where you see at the bottom of the screen they actually provide guidance to Tribunals on how to define the--how to determine the dominant and effective nationality, and it's by reference to where the person ordinarily or permanently resides.

All of this is just by way of illustration of the fact that residence really is a very important aspect of this determination, and, as I mentioned in the Opening, that does make logical sense as well because residence is

ultimately defined--the place of residence ultimately defines many of the centers of one's life; right? If you're residing--been residing somewhere for 20 or 30 years, then many of your activities, professional and social, and your family ties and so forth tend to be centered there--not always, but most of the time, that's true. They go hand in hand. So, that's why international tribunals have consistently focused heavily on the place of residence.

Next slide.

Colombia was the Claimants' permanent habitual place of residence on and around the two Critical Dates. This is unquestionable, and it's by their own admission; right?

If you look at the right side of the slide, 2014, 2018, they have not disputed that they have been living in Bogotá for this time--since 2004 in the case of Enrique; since 2007 in the case of Alberto; and since 1994 in the case of Felipe. So, years and years before the Critical Dates, through the Critical Dates, up and to the present they have been residing in Colombia.

And at the bottom of screen, we have just for illustrative purposes on the Claimants' entire lives' point that, over the course of their entire lives, the amount of time that all three brothers have spent residing in

Colombia vastly outnumbers of the number of years that they have spent in the U.S.

Next slide.

Colombia was the center of Claimants' family lives on and around the Critical Dates, and we think that this was elicited amply in the cross-examination testimony of all three Claimants. They revealed that all of their--sorry--that all of their spouses or life partners present and past reside or resided in Colombia. They--we know from the pleadings, but they also confirmed that in the testimony, that all of the Claimants' children, those of them that have children, the four children, resided in Colombia and have resided since birth for many, many years.

Both of the Claimants' parents resided in Colombia at the time of the Critical Dates. And they also revealed in their testimony in this Hearing that most of their cousins live in Colombia and are Colombian nationals and that, you know, some of the aunts and uncles are in Colombia and then they also said some of them are outside of Colombia. So--but, you know, the big picture that you get from this slide is their families are in Colombia and have been for a long, long time. You know, certainly their nuclear families entirely, and a big part of their extended families as well.

Next slide.

Colombia was also the center of Claimants' economic and professional lives on and around the Critical Dates. And this is something that really mystifies me. All three of them focus very heavily on this idea that the reason they are in Colombia is because of the family business; right? They stress that very heavily in their pleadings, both written and oral, and I don't really understand that for a simple reason, which is that's--that's a big part of the inquiry. Most of our lives revolve around work and family; right? So, it's a little bit too facile to say, wait, well, you know, because my business and my family are there, it doesn't mean anything, you know, because that's precisely part of the inquiry; right? It's a little bit like saying, Well, you know, the only reason that I live here in Washington and have for the last 30 years is because my family and my work and my friends and my activities and my hobbies are here. Well, precisely; right? That's the nature of the inquiry. So, this doesn't really help them as far as we can tell.

Next slide. Well, let's go back one.

I mean, so, this is the reason that they offered for why they're in Colombia. But they also confirmed in numerous ways that their economic and professional lives center in Colombia and have centered there, including through the Critical Dates. They confirm that they are

employed by a Colombian company, that they work in Bogotá, they have an office in Bogotá. They are on the boards of a number of companies. They are the legal representative of a number of companies. They have a lot going on. They're prominent entrepreneurs and prominent businessmen in Colombia and they have a lot of stuff going on, but it's in Colombia, sure. They have investments in Panamá. Right. They have investments in the U.S. Sure. But the center of their economic and professional lives is clearly Colombia.

Next slide.

Key civic and political activities on and around the Critical Dates--they did confirm that they vote consistently in Colombia. The testimony on the voting in the U.S. was a little mixed. Felipe said he's never voted in the U.S. at all. All three Claimants have donated either individually or through their family companies to political campaigns in Colombia, and some of them said that they contributed to U.S. campaigns as well, although we have no documentary evidence of that.

Next slide.

Social lives--same thing. They admitted that they are members of various social clubs. Some of them are business-type social clubs or business clubs. Some are social clubs. Some are gulf clubs. But multiple social clubs. And since their whole families--entire families are

there, then, you know, it follows presumably that their friends are primarily located in Bogotá as well. You know, obviously they likely have friends in other places as well, but it's fair to infer, I think, from all this and from the location of the families, that their social lives are centered in Colombia.

Next slide.

All right. So, as applied, we tried to distill down for the benefit of the Tribunal the various factors including as reflected in the testimony and where things come out in the end. And there are a bunch of 50/50 factors. They have investments in Colombia, but also in the U.S. They have some extended family in the U.S., some in Colombia.

Income taxes--this one also mystifies me. And you know, in Opening--I want to read this.

In Opening, the Claimants said: "Where do the dual nationals file tax returns?" That is extremely important.

And then they go on to say: "If someone considers themselves primarily a Colombian citizen, why on God's good green earth would they be filing tax returns in the United States of America?" And the answer to that it's illegal not to. So--and tax evasion is a criminal offense in the U.S. So, those seem like pretty compelling reasons

to me.

Of course, they have to file income taxes in Colombia as well. So, those are a wash; right? It applies to both. That's why they are on the left-side column here. Same is true of various kinds of insurance.

Military Selective Service--we don't need to go into that. We think it's been obligatory for many decades. But it's not necessarily ultimately they were--conceded that they were also subject to similar requirements in Colombia. So, that is sort a neutral thing.

Cultural celebrations--they said they celebrate Thanksgiving and so forth, but we showed you photos of them celebrating Colombian--in our Briefs--celebrating Colombian festivities and so forth. So, that also is 50/50.

Irrelevant factors we already talked about, and so--next slide.

All right. So, we have separated the 50/50 and the irrelevant factors, and here in the next few slides we're going to focus on the slides that show the factors that we do consider are relevant and where they came out in terms of which column, the Colombia column on the left or the United States column on the right.

And the four that you see on the right are really about all that we're prepared to concede to the Claimants, and even that has question marks. The next two slides have

only factors on the left-hand side.

But subjective beliefs--I do want to pause there because Claimants showed you this slide and they said Mr. Di Rosa said that subjective beliefs are irrelevant and that no Tribunal had ever said that and that they made that up and so forth. And in response to that, I say, A, it is still my favorite factor of the Claimants; B, I stand by what I said. I've never seen a Tribunal that has referred to the subjective beliefs; and I stand by my statement that they made it up.

If you look at the two citations that they provided, one of them was Nottebohm Pages 22 to 26. If you look at those four pages--five pages, you will not see any reference to subjective beliefs or what the Claimant considered him or herself. You will not see any reference to that in the Mergé Decision as well--either. They cited to Page 247. If you look at the entirety of Page 247, there's not--not only do they not use the term "subjective," they do not even say anything that comes close to it. And I think that encapsulates the Claimants' handling of many of the Legal Authorities throughout this case. There just is no support in the citations they provided for that proposition.

We talked about other things. American School in Bogotá. They made a big deal about that. Ultimately, it

is a school in Bogotá. Sure. It's U.S. accredited. Fine. But it's also Colombian accredited. And 79 percent--one of them conceded that 79 percent of the students there are Colombians and only 10 percent are Americans. And that's in the school's website as well. So, really, this should be, at best, in the 50/50 column, but we are prepared, for the sake of argument, just to have it there.

Next slide.

So, we showed you on the right-hand it's the same factors. On the left-hand, though, we have additional factors for the position that Colombia was the state of dominant nationality at the Critical Dates. We talked about these things already.

Next slide.

And we talked a lot about these as well throughout, the factors on the right. Really, the factors on the right should not have appeared on these two slides because they are the same ones as we showed you before. But in the next slide, we do show you a consolidated version. This is essentially a compilation of the three slides that we showed you before. And on this slide, the only thing that I want to stress is that the Tribunal should be reminded that its inquiry on ratione personae and on nationality is--it's an either/or one because of that word "exclusively" that we had stressed at the very

beginning of this Hearing that appears in Article 12.20 and Article 10.28.

You have to pick one of the two. Were they more Colombian or were they more American based on all these factors? If you look at the slide, we think the answer to that question is really pretty clear. There is no way that anybody could reasonably conclude from all this that they were predominantly U.S. And that if you had to pick only one nationality, you know, what are they? Colombian or American? You know, you would have to come away with the conclusion that they are Colombian.

Next slide.

So, they have failed to establish the burden of proof. We talked about this in the Opening; so, we will just go ahead and conclude since we have very little time, Mr. President and Members of the Tribunal.

And by way of conclusion, we just want to emphasize the following: The slide that we showed you just before with all the factors on the left and the factors on the right, the lopsided graphic just illustrates why this case is abusive in nature because this is a Colombian family suing Colombia in an international forum.

The father was a well-known Colombian businessman. The three sons are now following in the father's footsteps. They are well-known businessmen in

Colombia. And, yet, here they are suing Colombia in an international forum, which is contrary to one of the most long-standing and time-honored principles of international law, which is you cannot sue the State of your nationality in an international forum. We mentioned that was precisely the purpose of the dual nationality clause that was inserted by Colombia and the U.S. in the TPA.

And the sole exception in international law for this long-standing principle is in the field of human rights; right? Human rights is the only field, the only type of treaty or context in which one can sue one's own State, and the Claimants have availed themselves of that right. They have, as Colombians, they have sued Colombia in the Inter-American Court Commission of Human Rights.

We submit they should not have done that for substantive reasons, but from a purely nationality standpoint, they were entitled to do that. They were entitled to do that at the Inter-American Commission. They are not entitled to do it here.

This case is also symptomatic, we would submit, Mr. President, Members of the Tribunal, and with this I'm going to conclude. This case is also symptomatic of a broader problem in the investor-State dispute-resolution system, the ISDS system.

It seems like out of every five claims these

days, two or three are abusive or speculative in some fashion. And that is in large part because of situations such as this one. You have investors with deep pockets, companies with deep pockets, individuals with deep pockets, who are willing to spend three or four million dollars in legal fees and so forth for the prospect of a big payoff; right?

Because these treaties and these cases have these gargantuan damages figures, in this case they are claiming $323 million. That was the figure they cited in their early pleadings. And, you know, sure, if they can afford to gamble 3 or $4 million in order to get a return of $323 million, that, you know, that is maybe an easy Decision for them, and so they just roll the dice and see what happens.

But this is one of the reasons that the system, the investor dispute--State system is under attack is, you know, and some of the criticisms of the system are unjust, but some of them are, in fact, legitimate, and this is one of them.

So, we would say the system has to self-correct to some extent, and that involves a revision of the institutional rules as is occurring fairly frequently these days. And it also involves a revision of the treaties, and we are seeing multiple new generation

treaties that are more refined than trying to deal with some of these criticisms that the system is receiving.

But we would say that the self-correction, Mr. President, Members of the Tribunal, also involves an obligation by the Tribunals in these cases to serve as guardians of the system as well.

And in that regard one powerful tool that the Tribunals have is to impose--to impose real sanctions and the costs and legal fees of these cases. And a lot of Tribunals sometimes say, well, you know, the arbitral costs are imposed on the Party that has not prevailed, but the legal fees are split evenly. And that is just not enough of a disincentive for--is not enough of a deterrent for Claimants such as these because the costs tend to be a few hundred thousand. They are willing to pay that.

The real disincentive and the real deterrent in these types of cases can only come from Tribunals such as this one imposing not only arbitral costs but also legal fees and expenses because that is--amounts to real money; right? That's the only way that would-be Claimants who have these speculative and abusive claims will be deterred from filing these sorts of claims in the future.

And otherwise, what incentive do States have to keep these treaties in force? What incentive do they have to really negotiate new investment treaties?

That's all we have to say, Mr. President, Members of the Tribunal. Thank you for your attention. We would be happy to entertain any questions you may have.

PRESIDENT BEECHEY: Mr. Di Rosa.

Do my colleagues have any questions? Mr. Söderlund.

ARBITRATOR SÖDERLUND: No, thank you.

ARBITRATOR FERRARI: No. I'm fine. Thank you.

POST-HEARING MATTERS

PRESIDENT BEECHEY: Professor Ferrari? Okay. Thank you. Very well.

Might I thank counsel on both sides for engaging in that marathon and covering as much ground as they did. We have your submissions. We have the slide Decks that go with them. There is a small number of points to raise with you to bring this to a conclusion.

We feel, as the Tribunal, that unless the Parties feel strongly to the contrary, that there is no need for Post-Hearing Briefs of any kind. We think you've done as comprehensive a job as we would expect of you. And we're not inviting to you spill more ink, and this is to say both of you feel very strongly--both sides feel very strongly that it needs it.

So, having sort of put myself up on--out for a shooting, I'll invite Claimants to let me know whether they

want to say any more or they've said enough?

MR. MARTÍNEZ-FRAGA: Mr. President, we are fine. We've said enough.

PRESIDENT BEECHEY: Mr. Di Rosa.

MR. DI ROSA: Same here, Mr. President. I think everybody has said enough.

PRESIDENT BEECHEY: All right. The one caveat is this, that if we felt that there was a matter about which we needed to trouble the Parties further, we would, of course, feel free to come back and make sure we did that, if that is acceptable to the Parties.

MR. MARTÍNEZ-FRAGA: Of course.

PRESIDENT BEECHEY: Thank you very much.

MR. DI ROSA: Yes, Mr. President.

PRESIDENT BEECHEY: We have had the benefit of a very fine transcription from David and Dawn over the last few days. I suspect that the numbers of changes you'll want to make would be pretty minimal, but would it be possible to let us have a fully revised and signed-off Transcript getting very close to the holiday break. But, I mean, if you could do it before the 23rd, that would be great. That depends entirely on whether--

(Comments off microphone.)

PRESIDENT BEECHEY: Is the 23rd pushing my luck, or would you want a little bit longer just to review it to

make sure.

MR. MARTÍNEZ-FRAGA: 23rd works for us, sir.

MR. DI ROSA: It's a bit of a strain, Mr. President, but we will do our best to do that.

PRESIDENT BEECHEY: Well, I'm not going fight you if you tell me that it will take a few days after the--

(Overlapping speakers.)

PRESIDENT BEECHEY: That's just fine.

MR. DI ROSA: I mean, honestly, it would be easier just due to other commitments that we have during the holidays and right after to have it done right after the new year, but, again, we will adapt to whatever the Tribunal prefers.

PRESIDENT BEECHEY: Well, you won't stop me scribbling in the meantime, so if you want to take that little bit of extra time, that's fine, but, please, not very much longer than that. So, as soon as possible after the new year holiday, if you would.

MR. DI ROSA: Thank you.

PRESIDENT BEECHEY: All right. And then comes the question, then, since it's been raised, submission on costs. I don't know whether the Parties have a sort of combined view on this, or whether you simply want some guidance from us. It seems to me, subject to correction from my colleagues, that we might ask you to submit--put it

this way: More an outline than a detailed document on costs.

What we are interested in are the certain sums that have actually been incurred, expended and--expended and incurred, and not just sitting out there waiting to be spent, but real money that has been spent. If you would break that down, the Costs of the arbitration, legal costs, costs of Experts, proper and reasonable disbursements, and then simply a certificate--I'd call a certificate, but effectively a confirmation from the law firms concerned that those monies have, indeed, been spent.

That is probably enough. And then we will take a view in consultation with you as to whether you need to have a right of Reply or whether we can simply leave it on one exchange.

Does that make sense?

MR. MARTÍNEZ-FRAGA: Absolutely.

MR. DI ROSA: It does, Mr. President. We just want to confirm that our understanding that this means that we are not to offer any legal argumentation about costs and the like?

PRESIDENT BEECHEY: No. Thank you, no. We will manage with what we have. Thank you very much.

If there is anything that arises, having seen that first exchange, or the Parties want to come back in

consultation with us, we will sort that out. But, again, would it be possible to let us have something from you in the course of--towards the end of the first or second week of January? Is that doable?

MR. MARTÍNEZ-FRAGA: It can be done. Second week.

MR. REETZ: Yeah, Mr. President, because the December invoices and such roll in early in the new year, it might be best to have a target mid-January for the cost submissions, if that's okay.

PRESIDENT BEECHEY: Yes. That's what I'm saying. So--okay. That's fine. So, we go towards the--well, let's put a date on it. And I appreciate that if you have to get it through various Government departments, it takes a little longer. I quite understand that.

15th of January? Is that all right?

MR. DI ROSA: That would work for us.

MR. MARTÍNEZ-FRAGA: That would work for us as well.

PRESIDENT BEECHEY: All right. Very good.

Are there any other matters that the Parties wish to raise with us?

MR. MARTÍNEZ-FRAGA: Not on Claimants' behalf, thank you, Mr. President.

MR. DI ROSA: And same for us other than to thank

the Tribunal Members and all the participants in this hearing, our opposing counsel and Claimants, and the stenographers and interpreters and the Tribunal Secretaries. It's a very difficult way to conduct business, but I think we managed well in this particular hearing.

PRESIDENT BEECHEY: That is appreciated, Mr. Di Rosa.

Do my colleagues have anything else they want to ask from the Parties now?

ARBITRATOR FERRARI: No, thank you.

ARBITRATOR SÖDERLUND: No thank you.

PRESIDENT BEECHEY: Very well.

Well, it leaves me to ask the final question: Are the Parties content with the way in which the matter has been handled over the course of hearing and leading up to the hearing?

MR. MARTÍNEZ-FRAGA: Very much so, on behalf of Claimants.

MR. DI ROSA: And likewise for Colombia, Mr. President.

PRESIDENT BEECHEY: Thank you very much.

Well, thank you all for indulging us and the system. It does work remarkably well, even though we were working over a number of times, and I still miss the court

of the hearing room. But this seems to work pretty well as a stopgap.

My thanks to the Claimants themselves for sitting through all of this. We will go and deliberate and get back to the Parties as soon as we reasonably can.

In the meantime, thank you again. Once more, thank you to our transcription services and thank you to the PCA for ensuring that all this is run as smoothly as it has.

With that, season's greetings, I think are appropriate, and my best wishes for a bug-free 2021.

MR. MARTÍNEZ-FRAGA: Thank you, sir.

ARBITRATOR FERRARI: Thank you everybody, and stay well. Be safe.

(Overlapping speakers.)

PRESIDENT BEECHEY: Thank you. If we can go back to the Tribunal room hearing just briefly, José.

(Whereupon, at 12:01 p.m. (EST), the Hearing was concluded.)

CERTIFICATE OF REPORTER

I, Dawn K. Larson, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

Dawn K. Larson

Dawn K. Larson