INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

AMEC FOSTER WHEELER USA CORPORATION, PROCESS CONSULTANTS, INC., AND JOINT VENTURE FOSTER WHEELER USA CORPORATION AND PROCESS CONSULTANTS, INC.

Claimants

and

REPUBLIC OF COLOMBIA

Respondent

ICSID Case No. ARB/19/34

AWARD

Members of the Tribunal
Mr. José Emilio Nunes Pinto, President
Mr. John Beechey CBE, Arbitrator
Prof. Marcelo G. Kohen, Arbitrator

Secretary of the Tribunal
Ms. Marisa Planells-Valero

Assistant of the Tribunal
Ms. Maria Claudia Procopiak

Date of dispatch to the Parties: December 19, 2024

REPRESENTATION OF THE PARTIES

Representing Amec Foster Wheeler USA Corporation, Process Consultants, Inc., and Joint Venture Foster Wheeler USA Corporation and Process Consultants, Inc.:

Mr. Robert L. Sills
Mr. Martín Ruiz García
Pillsbury Winthrop Shaw Pittman LLP
31 West 52nd Street
New York, NY 10019
USA
and
Mr. Charles C. Conrad
Ms. Elizabeth Dye
Mr. Richard Deutsch
Pillsbury Winthrop Shaw Pittman LLP
609 Main St.
Suite 2000
Houston, TX 77002
USA

Representing the Republic of Colombia:

Mr. César Palomino Cortés
Director General
Mr. Yebrail Haddad Linero
Director de Defensa Jurídica Internacional
Ms. Juana Martínez Quintero
Coordinadora de Arbitrajes de Inversión
Dirección de Defensa Jurídica Internacional
Agencia Nacional de Defensa
Jurídica del Estado
Carrera 7 No. 75-66 – 2do y 3er piso
Bogotá, Colombia
and
Ms. Claudia Frutos-Peterson
Ms. Elisa Botero
Mr. Fernando Tupa
Curtis, Mallet-Prevost, Colt & Mosle LLP
Pennsylvania Avenue, N.W.
Washington, D.C. 20006, USA
and
Ms. María Paulina Santacruz
Curtis, Mallet-Prevost, Colt & Mosle LLP
Calle 71, No. 11-10 Oficina 702
Bogotá, Colombia
and
Mr. Juan Jorge
Curtis, Mallet-Prevost, Colt & Mosle LLP
Marcelo Torcuato de Alvear 684 Piso 1
Buenos Aires, Argentina
and
Ms. Sara Dangón
Curtis, Mallet-Prevost, Colt & Mosle LLP
101 Park Ave
New York, NY 10178
USA

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TABLE OF SELECTED ABBREVIATIONS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings (2006)
US-Colombia TPA or Treaty	U.S.-Colombia Trade Promotion Agreement, which entered into force on May 15, 2012
C-[#]	Claimants' Exhibit
Counter-Memorial on Preliminary Objections	Claimants' Counter Memorial on Preliminary Objections dated October 14, 2021
Rejoinder on Preliminary Objections	Claimants' Rejoinder on Preliminary Objections dated February 11, 2022
CL-[#]	Claimants' Legal Authority
Hearing	Hearing on Preliminary Objections held in Washington, D.C., and by video conference from May 19, 2022 to May 20, 2022
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
R-[#]	Respondent's Exhibit
Memorial on Preliminary Objections	Respondent's Memorial on Preliminary Objections dated July 1, 2021
Reply on Preliminary Objections	Respondent's Reply on Preliminary Objections dated December 13, 2021
Tribunal	Arbitral tribunal constituted on June 18, 2020

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the U.S. - Colombia Trade Promotion Agreement, which entered into force on May 15, 2012 (the "**US-Colombia TPA**" or the "**Treaty**") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on October 14, 1966 (the "**ICSID Convention**").

2. The claimants are Amec Foster Wheeler USA Corporation and Process Consultants, Inc., two companies incorporated under the laws of the State of Delaware (U.S.), and Joint Venture Foster Wheeler USA Corporation and Process Consultants, Inc., a U.S. contractual joint venture organized under the laws of the State of New York (U.S.) (together, the "**Claimants**").

3. The respondent is the Republic of Colombia ("**Colombia**" or "**Respondent**").

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

5. This case relates to a dispute arising out of a contract for the construction and expansion of a Colombia-owned oil refinery for the supply of environmentally clean motor fuels.

II. PROCEDURAL HISTORY

6. On December 6, 2019, ICSID received a request for arbitration from Amec Foster Wheeler USA Corporation ("**Foster Wheeler**"), Process Consultants, Inc. ("**Process Consultants**"), and Joint Venture Foster Wheeler USA Corporation and Process Consultants, Inc. ("**FPJVC**"), against Colombia, together with Exhibits C-001-RFA through C-005-RFA and Legal Authority CL-001-RFA (the "**Request**").

7. On December 31, 2019, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the

registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

8. The Parties agreed to constitute the Tribunal in accordance with Article 37(2)(a) of the ICSID Convention as follows: the Tribunal would consist of three arbitrators, one to be appointed by each Party and the third, presiding, arbitrator to be appointed by agreement of the two co-arbitrators. The Tribunal is composed of José Emilio Nunes Pinto, a national of Brazil, President, appointed by agreement of the Parties; John Beechey, a national of the United Kingdom, appointed by Claimants; and Marcelo Kohen, a national of the Argentine Republic, appointed by Respondent.

9. On June 18, 2020, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**Arbitration Rules**"), notified the Parties that all three arbitrators had accepted their appointments, and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Marisa Planells-Valero, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

10. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on September 18, 2020, by video conference.

11. Following the first session, on March 18, 2021, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters and the decision of the Tribunal on disputed issues. Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from April 10, 2006, that the procedural languages would be English and Spanish, and that the place of proceeding would be Washington D.C. (U.S.). Procedural Order No. 1 also sets out the schedule for the jurisdictional phase of the proceedings. On April 1, 2021, the Tribunal issued a revised procedural calendar, including amendments agreed by the Parties.

12. In accordance with Procedural Order No. 1, on July 1, 2021, Respondent filed its Memorial on Preliminary Objections ("**Memorial on Preliminary Objections**"), together with

Exhibits R-001 through R-092 and Legal Authorities RL-001 through RL-227.

13. On September 2, 2021, Claimants submitted an Application for Provisional Measures and Emergency Temporary Relief, together with Exhibits C-001 through C-010, Legal Authorities CL-001 through CL-038, and the Witness Statements of César Torrente (CWS-1), Steve Conway (CWS-2), Thomas Grell (CWS-3), and Colin Johnson (CWS-4).

14. On September 7, 2021, the Tribunal invited Respondent to submit discrete responses to Claimants' Application for Emergency Temporary Relief (by September 17, 2021), and to Claimants' Application for Provisional Measures (by September 28, 2021).

15. On September 9, 2021, Respondent requested extensions of time to file its responses regarding both of Claimants' Applications. Respondent proposed a revised schedule upon which Claimants commented on September 10, 2021.

16. On September 13, 2021, the Tribunal invited the Parties to confer and to try to reach agreement on a revised procedural calendar regarding Claimants' Applications or, in case of disagreement, to provide any additional comments by September 15, 2021. The Tribunal also informed the Parties of its decision to stay the procedural calendar of September 7, 2021 until a revised calendar had been agreed by the Parties or a decision on the matter had been adopted by the Tribunal upon consideration of the Parties' positions.

17. On September 15, 2021, the Parties filed their respective comments regarding the procedural calendar. Respondent objected to Claimants' comments on September 16, 2021.

18. On September 20, 2021, the Tribunal issued a revised procedural calendar, as follows: (i) Respondent's Answer to Claimants' Application for Emergency Temporary Relief to be filed by September 30, 2021; and (ii) Respondent's Answer to Claimants' Application for Provisional Measures to be filed by October 28, 2021.

19. On September 30, 2021, Respondent filed its Answer to Claimants' Application for Emergency Temporary Relief, together with Exhibits R-093 through R-099 and Legal Authorities RL-228 through RL-242.

20. On October 5, 2021, Claimants requested leave to file a reply in response to Respondent's

Answer to the Application for Emergency Temporary Relief. Claimants also requested that the Tribunal schedule oral arguments. Respondent objected to Claimants' request by communication of October 6, 2021. Claimants filed further observations on October 7, 2021.

21. On October 8, 2021, the Tribunal invited (a) Claimants to submit a Reply to Respondent's Answer to the Application for Emergency Temporary Relief by October 12, 2021, and (b) Respondent to submit a Rejoinder to that Reply by October 18, 2021. In addition, the Tribunal invited the Parties to confirm their availability for a hearing on Claimants' Application of Provisional Measures.

22. On October 12, 2021, Claimants filed their Reply on the Application for Emergency Temporary Relief, together with Legal Authorities CL-039 through CL-049 and Supplemental Witness Statement of César Torrente (CWS-5).

23. On October 14, 2021, Claimants filed their Counter Memorial on Preliminary Objections ("**Counter-Memorial on Preliminary Objections**"), together with Exhibits C-011 through C-022 and Legal Authorities CL-050 through CL-207.

24. On October 18, 2021, Respondent filed its Rejoinder on Claimants' Application for Emergency Temporary Relief, together with Legal Authorities RL-243 through RL-247.

25. On October 25, 2021, the Tribunal rejected Claimants' Application for Emergency Temporary Relief. The Tribunal decided unanimously as follows:

> (a) Claimants' Request for Emergency Temporary relief is denied;
> (b) The Tribunal confirms that it will hear the Parties' oral arguments on Claimants' Request for Provisional Measures during the Hearing that will take place virtually on November 4, 2021.
> (c) Either Party may bring to the Tribunal's attention any new, relevant, facts that fundamentally change the current circumstances.
> (d) The Tribunal reserves its decision on costs for a later stage.

26. On October 28, 2021, Respondent submitted its Answer to Claimants' Application for

Provisional Measures, together with Legal Authorities RL-248 through RL-266.

27. On November 4, 2021, the Tribunal held a Hearing on Provisional Measures by video conference. The following persons attended the Hearing:

Tribunal:	
José Emilio Nunes Pinto	President
John Beechey	Arbitrator
Marcelo G. Kohen	Arbitrator
ICSID Secretariat:	
Marisa Planells-Valero	Secretary of the Tribunal
For the Claimants:	
Counsel:	
Robert Sills	Pillsbury Winthrop Shaw Pittman LLP
Charles C. Conrad	Pillsbury Winthrop Shaw Pittman LLP
Richard Deutsch	Pillsbury Winthrop Shaw Pittman LLP
Derek Soller	Pillsbury Winthrop Shaw Pittman LLP
Kristina Fridman	Pillsbury Winthrop Shaw Pittman LLP
Martín Ruiz García	Pillsbury Winthrop Shaw Pittman LLP
Party Representatives:	
Timothy Langan	Wood PLC
Catalina Nino	Wood PLC
For the Respondent:	
Counsel:	
Claudia Frutos-Peterson	Curtis, Mallet-Prevost, Colt & Mosle LLP
Elisa Botero	Curtis, Mallet-Prevost, Colt & Mosle LLP
Fernando Tupa	Curtis, Mallet-Prevost, Colt & Mosle LLP
María Paulina Santacruz	Curtis, Mallet-Prevost, Colt & Mosle LLP
Juan Jorge	Curtis, Mallet-Prevost, Colt & Mosle LLP
Ana María Ordoñez Puentes	*Agencia Nacional de Defensa Jurídica del Estado, República de Colombia*
Party Representatives and Co-counsel:	
Ana María Ordoñez Puentes	*Agencia Nacional de Defensa Jurídica del Estado, República de Colombia*
Elizabeth Prado	*Agencia Nacional de Defensa Jurídica del Estado, República de Colombia*
Juan Sebastián Rivera	*Agencia Nacional de Defensa Jurídica del Estado, República de Colombia*
Court Reporter:	
(late) David Kasdan	B&B Reporters

28. On November 4, 2021, at the Hearing, the Parties made further submissions, and the Tribunal put questions to counsel for the Parties. In their oral arguments, Claimants referred to a document which was not in the record. The Tribunal gave Respondent leave to provide any comments upon the new document by November 11, 2021.

29. On November 11, 2021, Respondent submitted its comments on the new document which had been introduced into the record by Claimants as Exhibit C-23.

30. On November 16, 2021, Claimants responded to Respondent's communication of November 12, 2021. On that same date, Respondent applied to the Tribunal to strike Claimants' November 16, 2021 letter from the record. Further comments from Claimants were received on that same date.

31. On December 2, 2021, Claimants requested leave to submit a new document into the record, namely, the Notice from the Coactive Collection Unit of the Comptroller General of the Republic of Colombia (the "**Notice**").

32. On December 3, 2021, the Tribunal invited Claimants to submit a copy of the Notice by December 6, 2021, and Respondent to provide comments on the contents of the Notice by December 8, 2021. The Parties proceeded accordingly.

33. On December 10, 2021, the Tribunal rejected Respondent's request to strike Claimants' letter of November 16, 2021 from the record. In doing so, the Tribunal invited Respondent to submit any additional comments in connection with Claimants' letter by December 15, 2021. Respondent proceeded accordingly.

34. On December 13, 2021, Respondent filed its Reply on Preliminary Objections ("**Reply on Preliminary Objections**"), together with Exhibits R-100 through R-126 and Legal Authorities RL-267 through RL-332.

35. On February 9, 2022, Claimants requested leave to submit additional documents into the record, indicating that Respondent had confirmed that it had no objection to their request. Based on the agreement of the Parties, the Tribunal invited Claimants to submit the new

documents by February 14, 2022. The Tribunal also invited Respondent to submit comments by February 18, 2022.

36. On February 11, 2022, Claimants filed their Rejoinder on Preliminary Objections ("**Rejoinder on Preliminary Objections**"), together with Exhibits C-024 through C-029 and Legal Authorities CL-208 through CL-262.

37. Pursuant to the Tribunal's instructions, on February 14, 2022, Claimants filed the new documents and requested leave to answer to Respondent's comments regarding the new documents. Respondent filed its observations on February 18, 2022.

38. On February 21, 2022, the Tribunal invited Claimants to comment on Respondent's communication of February 18 by February 24, 2022, and Respondent to submit any additional comments by February 28, 2022. The Parties proceeded accordingly.

39. On April 4, 2022, the United States of America filed a written submission as a Non-Disputing State Party (the "**NDP Submission**") pursuant to Article 10.20.2 of the US-Colombia TPA.

40. On April 19, 2022, the President held a pre-hearing organizational meeting with the Parties by video conference.

41. On April 25, 2022, Claimants filed their observations on the NDP's Submission, together with Exhibits C-030 through C-033 and Legal Authorities CL-263 through CL-287. On the same day, Respondent filed its observations on the NDP Submission, together with Legal Authorities RL-333 to RL-343.

42. On April 26, 2022, the Tribunal issued Procedural Order No. 2 concerning the organization of the hearing.

43. On April 27, 2022, Respondent requested leave to submit an additional document into the record. The next day, on April 28, 2022, Respondent requested that certain portions of Claimants' comments upon the NDP Submission be stricken from the record.

44. On May 3, 2022, following an exchange of communications, the Tribunal invited

Claimants to submit their comments regarding Respondent's request of April 27, 2022.

45. On May 4, 2022, Claimants filed their comments on Respondent's request to strike certain portions of Claimants' observations on the NDP Submission, together with Legal Authorities CL-288 through CL-291.

46. On May 9, 2022, in accordance with the Tribunal's instructions, Claimants filed their observations on Respondent's request of April 27, 2022.

47. On May 14, 2022, the Tribunal determined Respondent's requests of April 27 and 28, 2022. It granted Respondent's request to submit the new document and rejected Respondent's request to strike certain portions of Claimants' observations on the NDP Submission. Respondent submitted new Exhibit R-127 on May 15, 2022.

48. On May 16, 2022, Claimants filed a request to submit new documents. On May 17, 2022, pursuant to the Tribunal's instructions, Respondent provided comments upon Claimants' request.

49. On May 18, 2022, the Tribunal granted Claimants' request of May 16, 2022, pursuant to which, Claimants submitted Exhibits C-34 through C-36 and Legal Authority CL-292.

50. A hearing of the Preliminary Objections was held in person in Washington, D.C., from May 19, 2022 to May 20, 2022 (the "**Hearing**"), with certain participants attending remotely. The following persons attended the Hearing:[1]

Tribunal:	
José Emilio Nunes Pinto	President
John Beechey	Arbitrator
Marcelo G. Kohen	Arbitrator
ICSID Secretariat:	
Marisa Planells-Valero	Secretary of the Tribunal
For the Claimants:	
Counsel:	
Robert Sills	Pillsbury Winthrop Shaw Pittman LLP

[1] * Indicates Remote Participants.

Charles C. Conrad	Pillsbury Winthrop Shaw Pittman LLP
Richard Deutsch	Pillsbury Winthrop Shaw Pittman LLP
Derek Soller	Pillsbury Winthrop Shaw Pittman LLP
Elizabeth Dye	Pillsbury Winthrop Shaw Pittman LLP
Kristina Fridman	Pillsbury Winthrop Shaw Pittman LLP
Martín Ruiz García	Pillsbury Winthrop Shaw Pittman LLP
Héctor Hernández*	Philippi Prietocarrizosa Ferrero DU & Uría
Santiago Cruz*	Philippi Prietocarrizosa Ferrero DU & Uría
Party Representatives:	
Timothy Langan*	Wood PLC
Catalina Nino*	Wood PLC
For the Respondent:	
Counsel:	
Claudia Frutos-Peterson	Curtis, Mallet-Prevost, Colt & Mosle LLP
Elisa Botero	Curtis, Mallet-Prevost, Colt & Mosle LLP
Fernando Tupa	Curtis, Mallet-Prevost, Colt & Mosle LLP
María Paulina Santacruz*	Curtis, Mallet-Prevost, Colt & Mosle LLP
Juan Jorge*	Curtis, Mallet-Prevost, Colt & Mosle LLP
Sara Dangón*	Curtis, Mallet-Prevost, Colt & Mosle LLP
Gabriela Sadler	Curtis, Mallet-Prevost, Colt & Mosle LLP
Jaclyn Messemer	Curtis, Mallet-Prevost, Colt & Mosle LLP
Ana María Ordoñez Puentes	*Agencia Nacional de Defensa Jurídica del Estado, República de Colombia*
Giovanny Andrés Vega Barbosa	*Agencia Nacional de Defensa Jurídica del Estado, República de Colombia*
Elizabeth Prado	*Agencia Nacional de Defensa Jurídica del Estado, República de Colombia*
Party Representatives:	
Marcela María Silva Zambrano*	*Agencia Nacional de Defensa Jurídica del Estado, República de Colombia*
César Leonardo Rodríguez*	*Agencia Nacional de Defensa Jurídica del Estado, República de Colombia*
Yadira Castillo*	*Agencia Nacional de Defensa Jurídica del Estado, República de Colombia*
Andrés Reina*	*Agencia Nacional de Defensa Jurídica del Estado, República de Colombia*
Natalia Fernandez Alba*	*Agencia Nacional de Defensa Jurídica del Estado, República de Colombia*
Non-Disputing Party	
Lisa Grosh*	U.S. Department of State
John Daley*	U.S. Department of State
Nicole Thornton*	U.S. Department of State

Mary Muino*	U.S. Department of State
Elizabeth Donnelly*	U.S. Department of State
Susie Park Hodge*	Office of the U.S. Trade Representative
Catherine Gibson*	Office of the U.S. Trade Representative
Brandon Whitehill*	Office of the U.S. Trade Representative

Court Reporters:

Dante Rinaldi	DR-Esteno
(late) David Kasdan*	B&B Reporters
Margie Dauster*	B&B Reporters

Interpreters:

Silvia Colla*	ENG-SPA interpreter
Charles Roberts*	ENG-SPA interpreter
Daniel Giglio*	ENG-SPA interpreter

51. On May 31, 2022, the Tribunal issued Procedural Order No. 3 on Claimants' Application for Provisional Measures. The Tribunal denied Claimant's Request.

52. On June 30, 2022, Claimants submitted their Statements of Costs, with Legal Authorities CL-292 through CL-295. On the same day, the Respondent filed its Statements of Costs.

53. On December 22, 2022, Claimants informed the Tribunal that they proposed to apply to submit a new document into the record. On January 3, 2023, Respondent opposed the Claimants' prospective application. On January 5, 2023, Claimants responded to Respondent's comments. On January 9, 2023, the Tribunal indicated that it would consider any putative application by Claimants for leave to submit a new document if and when made.

54. On February 7, 2023, Claimants submitted a request to introduce excerpts of the statement of claim and the accompanying expert report filed by [redacted]. On February 15, 2023, Respondent opposed Claimants' request. On February 24, 2023, Claimants provided additional comments. On March 7, 2023, the Tribunal granted Claimants leave to introduce the new documents into the record as Factual Exhibit C-037. The Tribunal invited Claimants to submit comments regarding the weight and relevance of these documents as regards the Respondent's Preliminary Objections by March 14, 2023.

55. On March 14, 2023, Claimants requested an extension of time to submit comments on new Factual Exhibit C-037. On March 15, 2023, the Tribunal granted the Claimants' request.

56. On March 17, 2023, Claimants submitted their comments on Factual Exhibit C-037. On March 19, 2023, the Tribunal invited Respondent's comments on Claimants' communication.

57. On March 21, 2023, Respondent requested an extension of time to respond to Claimants' comments of March 17, 2024. On March 23, 2024, the Tribunal granted Respondent's request.

58. On March 31, 2023, Respondent submitted comments on Factual Exhibit C-037.

59. On February 27, 2024, the Tribunal proposed the appointment of Ms. Maria Claudia Procopiak as assistant to the Tribunal. On March 4, 2024, the Parties agreed with the Tribunal's proposal. On March 5, 2024, the Tribunal appointed Ms. Maria Claudia Procopiak as its assistant, who signed a declaration of independence and impartiality on that same date.

60. On June 18, 2024, Prof. Kohen informed the Parties that on June 13, 2024, he had acquired Swiss nationality in addition to his Argentinean nationality.

61. On June 21, 2024, Claimants submitted an Amended and Restated Request for Arbitration, together with factual exhibits C-038 to C-043 and legal authorities CL-296 to CL-331, by which they added ancillary claims in accordance with ICSID Arbitration Rule 40. On July 2, 2024, Respondent opposed the introduction of the Amended and Restated Request for Arbitration into the record.

62. On July 3, 2024, the Tribunal noted that, in accordance with paragraph 14.9 of Procedural Order No. 1, proceedings on the merits were currently suspended pending the Tribunal's determination of Respondent's Preliminary Objections and confirmed that it would not entertain a discussion on the Amended and Restated Request for Arbitration until it had issued its ruling on the Respondent's Preliminary Objections, if appropriate.

63. On July 6, 2024, Claimants requested a clarification from the Tribunal regarding the status

of the Amended and Restated Request for Arbitration. Claimants further indicated that they had filed a new case before ICSID (the "**New Request**"), setting forth the ancillary claims pleaded in the Amended and Restated Request for Arbitration, and that their hope was to withdraw the New Request without prejudice once the status of the Amended and Restated Request for Arbitration was clarified. On July 12, 2024, upon Claimants' request, the Tribunal confirmed that, without prejudice to any eventual assessment that the Tribunal might make of the Amended and Restated Request for Arbitration, and in accordance with ICSID Arbitration Rule 40, the Amended and Restated Request for Arbitration was part of the record in this case. On July 12, 2024, the Tribunal invited Claimants to confirm their intentions with respect to the newly filed Amended and Restated Request for Arbitration. On July 16, 2024, the Claimants indicated their intent to proceed with the registration of the New Request, but to suspend the proceedings until the Tribunal had issued its ruling on Respondent's Preliminary Objections.

64. On September 17, 2024, upon the Tribunal's invitation, the Claimants submitted an updated statement of costs. On September 18, 2024, the Respondent indicated that it had no additional costs to report since the statement of costs submitted on June 13, 2022.

65. The proceeding was closed on December 19, 2024.

III. SUMMARY OF THE RELEVANT FACTS

A. THE PROJECT

66. In the early 2000s, Ecopetrol, S.A. ("**Ecopetrol**"), a mixed capital company, the majority shareholder of which is Colombia with 88.49% of the capital stock, undertook a project to expand and modernize an oil refinery in Cartagena ("**Project**"). In order to execute the Project, Reficar was incorporated. Reficar's capital stock is 100% owned by Ecopetrol.[2]

B. THE CONTRACT

67. In October 2009, Foster Wheeler and Process Consultants entered into a joint venture

[2] Memorial on Preliminary Objections, ¶¶ 14-15; Rejoinder on Preliminary Objections, ¶¶ 20-21.

agreement, creating FPJVC, with the purpose of submitting a bid for the Project and performing the services if their bid were selected ("**Joint Venture Agreement**").[3]

68. In November 2009, FPJVC and Reficar entered into a contract pursuant to which FPJVC was to provide certain project management services to Reficar in relation to the Project ("**Contract**").[4]

69. [redacted]

C. THE FISCAL LIABILITY PROCEEDINGS

70. On December 24, 2015, the Comptroller General of the Republic ("**CGR**") ordered the Deputy Comptroller for the Mining and Energy Sector ("**Deputy Comptroller**") to conduct a special audit on the Project.[8]

71. In November 2016, the Deputy Comptroller issued a final report concluding that "in the development of the expansion and modernization of [Reficar], the principles of economy, effectiveness and efficiency were not complied [sic]."[9]

72. On March 10, 2017, the CGR commenced Fiscal Liability Proceedings against Claimants and others pursuant to Colombian Law No. 610 ("**Law 610**") for alleged acts of gross negligence in the expenditure of Colombia's funds in connection with five change controls

[3] Services Contract – Appendix 2: Joint Venture Agreement between Foster Wheeler and Process Consultants, R-4.

[4] Part II Mercantile Offer Ref. No. 13-125698-00 of November 18, 2009 (without Appendices 1-7 and 9-29) (Contract), C-5.

[5] [redacted]

[6] Memorial on Preliminary Objections, ¶ 63; Rejoinder on Preliminary Objections, ¶ 24.

[7] Rejoinder on Preliminary Objections, ¶ 24.

[8] Memorial on Preliminary Objections, ¶ 68; Rejoinder on Preliminary Objections, ¶ 25.

[9] Office of the Deputy Comptroller for the Mines and Energy Sector, Final report of the special audit, November 2016, p. 155, R-37.

– *i.e.*, increases in the investment budget of the Project ("**Change Controls**") – approved by the boards of directors of Reficar and Ecopetrol.[10]

73. On June 5, 2018, the Deputy Comptroller issued a fiscal liability indictment order ("**Indictment Order**") charging Claimants, members of the Ecopetrol Board of Directors and others with fiscal liability, finding that Change Controls Nos. 2, 3 and 4 had caused loss of public funds and generated fiscal damage.[11] Foster Wheeler and Process Consultants were charged with joint and several fiscal liability in the amount of US$ 2.43 billion, for gross negligence in connection with the fiscal management carried out by the board of directors and officials of Reficar.[12]

74. On August 15, 2018, the CGR issued Auto 0188, dismissing the charges against members of the Ecopetrol Board of Directors.[13]

75. On September 14, 2018, Foster Wheeler and Process Consultants filed their first *acción de tutela* ("**First Tutela**") alleging violations of their constitutional right to due process in the Fiscal Liability Proceedings. The First Tutela was dismissed, both at first instance as well as on appeal, without a ruling on the merits.[14]

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[10] Memorial on Preliminary Objections, ¶ 122; Rejoinder on Preliminary Objections, ¶ 28. Indictment Order – Part 1: General aspects of the proceedings and factual findings, pp. 12-84, R-52.

[11] Memorial on Preliminary Objections, ¶ 125; Rejoinder on Preliminary Objections, ¶ 29. Indictment Order – Part 1: General aspects of the proceedings and factual findings, R-52; Indictment Order – Part 2: Means of defense of those involved, R-53; Indictment Order – Part 3: Considerations of the office and results of the investigation, R-54; Indictment Order – Part 4: Determination and quantification of the damage, R-55; Indictment Order – Part 5: Charges against the members of the board of directors of Reficar I, R-56; Indictment Order – Part 6: Charges against the members of the board of directors of Reficar II, R-57; Indictment Order – Part 7: Charges against the members of the administration of Reficar I, R-58; Indictment Order – Part 8: Charges against the members of the administration of Reficar II, R-59; Indictment Order – Part 9: Charges against the members of the administration of Ecopetrol, R-60; Indictment Order – Part 10: Charges against contractors I, R-61; Indictment Order – Part 11: Charges against contractors II, R-62; Indictment Order – Part 12: Closure of proceedings I, R-63; Indictment Order – Part 13: Closure of proceedings II, R-64; Indictment Order – Part 14: Disaggregation of facts and resolutions, R-65.

[12] Memorial on Preliminary Objections, ¶ 128; Rejoinder on Preliminary Objections, ¶ 29. Indictment Order – Part 3: Considerations of the office and results of the investigation, p. 809, R-54.

[13] Rejoinder on Preliminary Objections, ¶ 35.

[14] Memorial on Preliminary Objections, ¶¶ 136-138; Rejoinder on Preliminary Objections, ¶ 37. Criminal Court 26 of the Bogotá Circuit, *Acción de Tutela* No. 2018-00182 filed by Foster Wheeler and Process Consultants against CGR, Tutela Judgment of First Instance, October 3, 2018, R-70; Superior Court of Bogotá – Criminal Chamber, *Acción de Tutela* No. 2018-00182 filed by Foster Wheeler and Process Consultants against CGR, Tutela Judgment of Second Instance, November 21, 2018, R-68.

76. On December 26, 2018, FPJVC sent Respondent a Notice of Intent to submit a claim to arbitration ("**Notice of Intent**") under Chapter Ten of the Treaty.[15]

77. On April 23, 2021, Foster Wheeler and Process Consultants filed their second *acción de tutela* ("**Second Tutela**") objecting to the inclusion of two technical reports relating to the CGR's damages quantifications in the Fiscal Liability Proceedings.[16] The Second Tutela was also denied without a ruling on the merits.

78. On April 26, 2021, the CGR issued a ruling with joint and several fiscal liability for gross negligence against Foster Wheeler, Process Consultants and 12 other natural persons and 2 other juridical persons in the amount of US$ 997 million ("**Ruling with Fiscal Liability**").[17]

79. On April 28, 2021, Foster Wheeler and Process Consultants filed their third *acción de tutela* ("**Third Tutela**") challenging the constitutionality of the 5-day time limit for appeal against the Ruling with Fiscal Liability provided for in Law 610, and requesting at least 90 days to respond to the findings of the Ruling with Fiscal Liability.[18] The Third Tutela was rejected.[19]

80. On May 7, 2021, Foster Wheeler and Process Consultants filed an appeal with the *Sala*

[15] Claimants' Notice of Intent to Submit a Claim to Arbitration Under Chapter Ten of the United States-Colombia Free Trade Agreement ("Notice of Intent"), C-4-RFA.

[16] Rejoinder on Preliminary Objections, ¶ 38. *Acción de Tutela* No. 2021-00138 filed by Foster Wheeler and Process Consultants against CGR, April 23, 2021, R-84.

[17] Ruling with Fiscal Liability – Part 1: Competence, evidentiary record, procedural actions and others, R-71; Ruling with Fiscal Liability – Part 2: Office considerations, R-72; Ruling with Fiscal Liability – Part 3: Individualization, members of the board of directors of Reficar I, R-73; Ruling with Fiscal Liability – Part 4: Individualization, members of the board of directors of Reficar II, R-74; Ruling with Fiscal Liability – Part 5: Individualization, members of the board of directors of Reficar III, R-75; Ruling with Fiscal Liability – Part 6: Individualization, officers of Reficar I, R-76; Ruling with Fiscal Liability – Part 7: Individualization, officers of Reficar II, R-77; Ruling with Fiscal Liability – Part 8: Individualization, officials of Reficar III, R-78; Ruling with Fiscal Liability – Part 9: Individualization, contractors I, R-79; Ruling with Fiscal Liability – Part 10: Individualization, contractors II, R-80; Ruling with Fiscal Liability – Part 11: Individualization, Ecopetrol officials, R-81; Ruling with Fiscal Liability – Part 12: Joint and several liability, civilly liable third parties and others, R-82; Ruling with Fiscal Liability – Part 13: Resolutory, R-83.

[18] *Acción de Tutela* No. 2021-00385 filed by Foster Wheeler and Process Consultants against CGR, April 28, 2021, R-87.

[19] Administrative Court of Cundinamarca – Fourth Section, Subsection B, *Acción de Tutela* No. 2021-00385 filed by Foster Wheeler and Process Consultants against CGR, *Tutela* Judgement of First Instance, May 14, 2021, R-88.

Fiscal Sancionatoria of the CGR ("**Fiscal Chamber**").[20]

81. On July 6, 2021, the Fiscal Chamber rejected the appeal and maintained the Ruling with Fiscal Liability ("**Ruling of Second Instance**").[21]

82. On August 26, 2021, the Special Decision Chamber No. 20 of the *Consejo de Estado* held that it would not conduct the automatic legality control of the Ruling with Fiscal Liability.[22]

83. On October 6, 2021, the Director of Forced Collection No. 1 of the CGR ("**Collection Director**") issued an order beginning the collection proceeding for the Ruling with Fiscal Liability.[23]

84. On November 29, 2021, the Collection Director issued a voluntary collection notice inviting Process Consultants to pay or negotiate settlements to satisfy the amounts owed pursuant to the Ruling with Fiscal Liability.[24]

D. [redacted]

85. [redacted][25]

[20] Appeal filed by Foster Wheeler and Process Consultants against the Ruling with Fiscal Liability, 7 May 2021, R-89.

[21] Ruling of Second Instance – Part 1: General data, subject and background I, R-101; Ruling of Second Instance – Part 2: Background II, R-102; Ruling of Second Instance – Part 3: Considerations I, R-103; Ruling of Second Instance – Part 4: Considerations II, R-104; Ruling of Second Instance – Part 5: Considerations III, conclusions and resolution, R-105.

[22] Pursuant to Law 2080 of 2021, any judgment with fiscal liability issued by the Comptroller General of the Republic or the Auditor General of the Republic is subject to the automatic control of legality of the *Consejo de Estado*. *Consejo de Estado* of Colombia, Chamber for Administrative Adjudicatory Proceedings, Special Decision Chamber No. 20, Decision on Admission, 26 August 2021, R-99.

[23] Reply on Preliminary Objections, ¶ 54; Rejoinder on Preliminary Objections, ¶ 43. Office of Forced Collection No. 1 of the CGR, Forced Collection Proceeding DCC1-037, Order No. DCC1-220, October 6, 2021, R-108.

[24] Office of Forced Collection No. 1 of the CGR, Persuasive Collection Notice No. 2021EE0205818 addressed to Process Consultants, November 29, 2021, R-109.

[25] [redacted]

IV. PRELIMINARY MATTERS

86. Before examining the arguments presented by the Parties with respect to this Tribunal's jurisdiction, the Tribunal will address two preliminary matters disputed by the Parties: the relevance of party and non-party submissions, and the test for establishing jurisdiction.

A. THE RELEVANCE OF PARTY AND NON-PARTY SUBMISSIONS

87. In support of its position, Colombia relies on previous party and non-party submissions, especially the non-party submissions made by the United States of America, the other Contracting Party to the Treaty.

88. Claimants contend that to the extent the NDP Submission addresses other treaties, it is not a generally recognized source of international law under the Vienna Convention, as Article 31(3) of the Vienna Convention refers to subsequent agreement or subsequent practice of the relevant treaty. A non-party interpretation of a different treaty cannot, by definition, establish the subsequent agreement or practice of the Treaty. And in order to show subsequent practice, Colombia must prove that both the U.S. and Colombia repeatedly interpret the Treaty in a consistent way, which it failed to do.

89. Further, Claimants submit that non-party submissions are of questionable value, given the incentive for States to limit the scope and reach of investment claims against them. As such, the NDP Submission should be considered nothing more than an *amicus* submission.[26]

90. Respondent contends that the views of the Contracting Parties to the Treaty are fundamental to understanding what their intentions were in agreeing to certain obligations and determining how the provisions of the Treaty should be interpreted. Subsequent agreements and practice of contracting parties to a treaty are considered to be authentic means of interpretation. As such, the NDP Submission is of greater probative value for determining the scope and meaning of Treaty provisions than decisions of arbitral tribunals

[26] Rejoinder on Preliminary Objections, Section III.B.

interpreting other treaties.[27]

91. The Tribunal considers that this aspect needs to be addressed by this Award due to the relevance of the fact that, in this very case, the non-party is one of the contracting parties to the Treaty. Despite Claimants' understanding that the NDP Submission is nothing more than an *amicus* submission, the Arbitral Tribunal finds that good reasons exist to attribute additional value to it. The aspects being discussed, and the arguments on which the Parties base their positions, are not foreign to the non-party. If the text of a given provision in a bilateral treaty needs interpretation, it is incumbent upon the interpreter to conduct research to identify the real intention of the parties upon their entering into a bilateral treaty, such as the TPA.

92. The Arbitral Tribunal is satisfied that it should not disregard the position adopted by the US as a non-party and it is free to attribute such weight as it deems appropriate to the NDP Submission in light of the circumstances.

93. That being said, the decision of the Arbitral Tribunal is the result of a thorough investigation and examination of all documents and submissions filed by the Parties. The NDP Submission is part of the arbitration record. It is indicative of the States' intentions when they agreed to certain obligations and it must be taken into account. But the positions referred to therein must necessarily be assessed together with the rest of the submission and the evidence presented by the Parties.

94. Furthermore, the NDP Submission may also clarify certain elements to be considered by this Tribunal in its evaluation as to whether or not it has jurisdiction to decide the dispute between the Parties in light of the prerequisites established by their mutual negotiations and which are laid down in the text of the Treaty.

95. In sum, the Arbitral Tribunal will examine carefully the NDP Submission to the extent that it may be a useful source of information with respect to the construction of the applicable provisions of the Treaty and which the Tribunal is bound to interpret.

[27] Reply on Preliminary Objections, ¶¶ 14-16.

B. THE TEST FOR ESTABLISHING JURISDICTION

96. In order to decide an objection raised pursuant to Article 10.20.4 of the Treaty, the Tribunal is required to "assume to be true claimant's factual allegations in support of any claim in the notice of arbitration."[28] With respect to the Jurisdictional Objections, Respondent argues that the Tribunal is not subject to such requirement and, therefore, Claimants have the burden of proving all facts on which the Tribunal's jurisdiction is based.[29]

97. For their part, Claimants claim that Colombia's Jurisdictional Objections were brought on a preliminary basis, as repeatedly confirmed by Colombia. As such, the same burden of proof applies to them as to other preliminary objections, *i.e.*, all factual allegations in the Request for Arbitration must be deemed true and Colombia has the burden of proof regarding its objections.[30]

98. The Tribunal finds that Claimants' assertion is inconsistent with the letter of the Treaty.

99. Article 10.20.4(c) provides that "[i]n deciding an objection *under this paragraph*, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration […]."[31] It is thus clear that only in analysing Respondent's objections which fall under Article 10.20.4 of the Treaty, is the Tribunal to proceed on the basis of an assumption that Claimants' factual allegations are true.

100. Colombia's jurisdiction objections are brought under different provisions of the Treaty. They do not come within the scope of Article 10.20.4(c). The burden is thus on Claimants to prove the necessary and relevant facts to establish that this Tribunal has jurisdiction to hear their claims.

101. Whilst Claimants seek to confer a character of generality to the provision contained in Article 10.20.4(c) of the Treaty, the Arbitral Tribunal does not find support for such a proposition in the text of the Treaty. As stated above, the Treaty is clear in providing that

[28] Agreement Between the Government of the United States and the Government of the Republic of Colombia Trade Promotion Agreement, signed Nov. 22, 2006, Chapter 10, Article 10.20.4(c), CL-1, RL-1.

[29] Memorial on Preliminary Objections, ¶ 280.

[30] Rejoinder on Preliminary Objections, ¶ 132.

[31] Treaty, Article 10.20.4(c), CL-1, RL-1 (emphasis added).

the tribunal shall assume claimant's factual allegations to be true only with respect to objections brought under Article 10.20.4(c). There is no language in the Treaty that indicates that such rule applies to objections brought under different provisions.

102. In any event, considering that, as detailed below, in light of the Arbitral Tribunal's decision on Respondent's preliminary objections, the question as to whether the Tribunal should assume Claimants' factual allegations to be true in order to rule on Respondent's jurisdictional objections has no bearing on the conclusions reached by the Arbitral Tribunal.

V. JURISDICTION

103. Respondent submits a preliminary objection under Article 10.20.4 of the Treaty, alleging that the claim submitted to arbitration by Claimants is not a claim in respect of which, as a matter of law, an award in their favour can be made, because the requirements set forth in Article 10.16.1 of the Treaty for the submission of a valid claim to arbitration are not met; and Claimants' claims exceed the forms of relief that the Tribunal is empowered to grant under Article 10.26 of the Treaty ("**Preliminary Objection**").

104. Additionally, Respondent presents the following five jurisdictional objections: first, Respondent argues that Claimants do not have a protected investment under the Treaty and the ICSID Convention. Second, Respondent alleges that Claimant FPJVC does not qualify as a "Juridical Person" under Article 25(2)(b) of the ICSID Convention. Third, Respondent argues that the Notice of Intent was issued by FPJVC alone and not by the other Claimants. Fourth, Respondent submits that Claimants have definitively elected to submit their claim for breach of fair and equitable treatment to the Colombian Courts. Finally, Respondent argues that there is no consent to submit Claimants' claims to arbitration, because their waiver is invalid.

105. The Parties' respective positions in connection with Respondent's objections are outlined below. The Tribunal notes, however, that in deciding this matter, it has considered the full extent of the Parties' arguments in their written submissions. To the extent that arguments are not referred to expressly in the summary below, they should be deemed to be subsumed

into the Tribunal's analysis. The Tribunal is free to determine the order in which it will examine those objections. Should the Tribunal find one of them to be admissible, there will be no need to examine the rest of them.

A. PRELIMINARY OBJECTION UNDER ARTICLE 10.20.4 OF THE TREATY

(1) An Award Cannot be Made in Claimants' Favour Because the Requirements of Article 10.16.1 of the Treaty Are Not Met

a. Respondent's Position

106. Respondent refers to Article 10.16.1 of the Treaty, which provides that a claimant may only submit to arbitration a claim that alleges (i) that the respondent has breached a substantive obligation under the Treaty, an investment authorization, or an investment agreement; and (ii) that, by reason of or arising out of such breach, the claimant has incurred loss or damage. In Colombia's view, Claimants' claims have met neither of these requirements and therefore must be dismissed in their entirety.[32]

(i) *Claimants' Claim is Premature*

107. As to the alleged breach of a substantive obligation, Respondent submits that Claimants' claims are premature, because "at the time of the initiation of this Arbitration, […] there was no measure on the part of Colombia that could have constituted a violation of the Treaty's substantive obligations."[33]

108. First, Respondent refers to Article 10.5.2(a) of the US-Colombia TPA which establishes "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." Respondent explains that "the administrative adjudicatory proceeding referred to in Article 10.5.2(a) (or '*procedimiento contencioso administrativo*', [in the Spanish version of the Treaty]) is a judicial proceeding before the administrative adjudicatory jurisdiction and must be distinguished from an administrative proceeding –

[32] Memorial on Preliminary Objections, ¶ 169; Reply on Preliminary Objections, ¶ 84.

[33] Memorial on Preliminary Objections, ¶ 181; Reply on Preliminary Objections, ¶¶ 85-89 and 108.

e.g., the Fiscal Liability Proceeding – before administrative authorities – e.g., the CGR."[34]

109. According to Respondent, "it is clear from the wording of [Article 10.5.2(a) of the US-Colombia TPA] that the obligation not to deny justice established in the Treaty is limited to proceedings of a judicial nature before courts with administrative adjudicatory jurisdiction and does not cover purely administrative proceedings." Accordingly, Respondent continues, "an administrative act that is subject to subsequent judicial control cannot – by itself – constitute a denial of justice or breach any of the other substantive obligations under the Treaty alleged by Claimants."[35] In this case, even if the Fiscal Liability Proceeding had already begun at the time Claimants filed their Notice of Arbitration,[36] "the [CGR Decision] had not even been issued."[37]

110. Respondent refers to a number of decisions in support of its position, including *Glencore v. Colombia,* a case under the Colombia-Switzerland BIT, and to which Claimants also refer.[38] Respondent notes that the Colombia-Switzerland BIT includes a provision requiring the claimant to exhaust local administrative remedies before initiating arbitration and the tribunal found that the claim was ripe, notwithstanding that a judicial decision had not been issued.[39] On the contrary, in this case, the CGR Decision did not even exist at the time of the submission of the Notice of Arbitration. Respondent further submits that "while it is true that the Treaty does not contain an express requirement to exhaust administrative remedies, in order to claim a denial of justice in an administrative adjudicatory proceeding, the administrative phase must be exhausted before the judicial phase in the administrative

[34] Reply on Preliminary Objections, ¶ 98. Respondent explains that, when referring to Article 10.5.2(a) of the US-Colombia TPA, Claimants incorrectly translate "administrative adjudicatory proceeding" as "*procedimiento adjudicatorio administrativo*" (Counter-Memorial on Preliminary Objections, ¶ 28), whereas in fact the official Spanish language text reads "*procedimiento contencioso administrativo*" (which presupposes a judicial proceeding before the administrative adjudicatory jurisdiction).

[35] Reply on Preliminary Objections, ¶¶ 95, 98.

[36] The Fiscal Liability Proceeding started on June 5, 2018 by issuance of an Indictment Order. According to Respondent, an Indictment Order is a procedural administrative act that does not define any legal situation, such that it could constitute a violation of the Treaty's substantive obligations. See Reply on Preliminary Objections, ¶ 93.

[37] Memorial on Preliminary Objections, ¶ 173; Reply on Preliminary Objections, ¶¶ 85, 88, 93.

[38] Memorial on Preliminary Objections, ¶¶ 179-180; Reply on Preliminary Objections, ¶ 107; *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, August 27, 2019, RL-20.

[39] Memorial on Preliminary Objections, ¶ 179; Notice of Arbitration, ¶¶ 130-131, 144, 165.

adjudicatory jurisdiction can begin."[40] Therefore, Respondent concludes, "absent an administrative adjudicatory proceeding, it is logically impossible for the substantive obligations of the Treaty to have been breached, much less so for a denial of justice to exist."[41]

111. Respondent also refers to *Corona v. Dominican Republic*[42] in which the tribunal emphasized that "an administrative act, in and of itself, particularly as [sic] the level of a first instance decision-maker" cannot "constitute a denial of justice under customary international law, when further remedies or avenues of appeal are potentially available under municipal law"[43] and added that "there can be no denial of justice without a final decision of a State's highest judicial authority."[44] Therefore, in Respondent's view, Claimants' case is premature in that "[a] mere administrative act that […] is subject to judicial control cannot, by itself, constitute a measure that is capable of constituting a breach of a substantive Treaty obligation."[45]

112. Colombia also rejects Claimants' second contention that even if their claim had been premature at the time of filing, subsequent events can make the claim ripe.[46] According to Respondent, even if the Tribunal was to assess the ripeness of the claim "based on what ha[d] occurred [at the time of the Respondent's Reply]", at that time, "there [was] still no measure capable of constituting a breach of a substantive obligation under the Treaty."[47]

[40] Reply on Preliminary Objections, ¶ 101.

[41] Reply on Preliminary Objections, ¶ 101.

[42] Memorial on Preliminary Objections, ¶ 177; Reply on Preliminary Objections, ¶¶ 96, 97; *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR- CAFTA, May 31, 2016, ¶ 248, RL-41.

[43] Reply on Preliminary Objections, ¶ 96; *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, May 31, 2016, ¶ 248, RL-41.

[44] Memorial on Preliminary objections, ¶ 178; Reply on Preliminary Objections, ¶ 96; *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, May 31, 2016, ¶ 264 (emphasis omitted), RL-41.

[45] Memorial on Preliminary Objections, ¶ 176; Reply on Preliminary Objections, ¶ 99.

[46] Reply on Preliminary Objections, ¶ 102.

[47] Reply on Preliminary Objections, ¶¶ 4, 95, 100.

113. On this point, Respondent explains that although Claimants have appealed the CGR Decision and the CGR has subsequently rejected the appeal, the CGR Decision is still subject to judicial control by the Colombian administrative courts. Since the Colombian administrative courts have not yet had the opportunity to decide upon the matter, Claimants' claims under the Treaty are premature and not admissible.[48]

114. Respondent also refers to *EnCana v. Ecuador*, in which the tribunal held that "investor-State arbitration under a provision [similar to Article 10.16.1 of the U.S.-Colombia TPA] must relate to a measure in breach of the [treaty] which has caused loss to the Claimant by the time of the commencement of the arbitration."[49]

(ii) *No Prima Facie Breach of Substantive Obligations*

115. Respondent refers to Article 10.20.4 of the Treaty, which establishes that "[i]n deciding an objection under this paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration […]." According to Colombia, this "presumption of truthfulness is limited to the factual allegations raised by Claimants in their Notice of Arbitration and does not extend to subsequent factual allegations, conclusions unsupported by factual allegations, or legal allegations."[50] According to Respondent, in their Notice of Arbitration, Claimants failed to establish a *prima facie* breach of a substantive treaty obligation.[51]

- *Fair and Equitable Treatment*

116. First, Claimants' allegations regarding a breach of the fair and equitable treatment standard ("**FET**") cannot satisfy the *prima facie* threshold, because this standard under the Treaty (i) protects only Investments and not Investors; and (ii) is limited to the minimum standard

[48] Reply on Preliminary Objections, ¶ 109.

[49] Reply on Preliminary Objections, ¶¶ 103-104 (emphasis in the original); *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, Award, February 3, 2006, ¶ 163, RL-277. Respondent also notes that Claimants refer to *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II, August 30, 2018, ¶¶ 4.461, 7.2-7.3, RL-78. However, contrary to the present case, in that case "the 'ripeness' of the claim was not at issue."

[50] Reply on Preliminary Objections, ¶¶ 79-81, 111 (emphasis omitted).

[51] Memorial on Preliminary Objections, ¶¶ 183-185; Reply on Preliminary Objections, ¶ 110.

of treatment ("**MST**") under customary international law. None of Claimants' allegations is capable of giving rise to a breach of this standard. Regardless of the applicable scope of the FET standard, there could not have been a denial of justice, since the administrative judiciary has not yet reviewed the CGR Decision.[52]

117. In relation to the first argument, Respondent relies on the wording of Article 10.5.1 of the Treaty, which only refers to "covered investments"[53]. It reads this provision as only providing protection to Investments, not to Investors.[54] In support of this submission, Colombia relies, *inter alia,* on submissions of the United States as a non-disputing party in other arbitration proceedings,[55] as well as on the *Grand River v. United States* decision.[56] For Colombia, even if the facts alleged by Claimants were taken to be true, they would have affected the investors and not their investment (*i.e.* the Service Contract).[57]

118. Respondent further submits that Article 10.5.2 of the Treaty expressly limits the FET standard to the MST under customary international law.[58] Colombia refers to a number of authorities addressing the scope of this standard[59] and extensively argues against the contention that the MST under customary international law has evolved to the point of matching the autonomous FET standard. [60] In Respondent's submission, Claimants' position with respect to the evolution of the content of the FET standard does not have the

[52] Reply on Preliminary Objections, ¶ 112.

[53] Memorial on Preliminary Objections, ¶ 187.

[54] Memorial on Preliminary Objections, ¶ 187; Reply on Preliminary Objections, ¶ 116.

[55] Memorial on Preliminary Objections, ¶ 188; Reply on Preliminary Objections, ¶ 120; *Angel Samuel Seda and others v. Republic of Colombia*, ICSID Case No. ARB/19/16, Submission of the United States of America, February 26, 2021, ¶ 5, RL-54. See also *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2 (NAFTA), Submission of the United States of America, June 21, 2019, ¶ 10, RL-55; *Omega Engineering LLC and Mr. Oscar Rivera v. Republic of Panamá*, ICSID Case No. ARB/16/42, Submission of the United States of America, February 3, 2020, ¶ 46, RL-56.

[56] Memorial on Preliminary Objections, ¶ 189; Reply on Preliminary Objections, ¶¶ 119-124; *Grand River Enterprises Six Nations, LTD., et al. v. United States of America*, UNCITRAL (NAFTA), Award, January 12, 2011, ¶ 177, RL-101; *Mr. Joshua Dean Nelson v. United Mexican States*, ICSID Case No. UNCT/17/1, Final Award, June 5, 2020, ¶ 312, RL-57; *Valeri Belokon v. Kyrgyz Republic*, UNCITRAL, Award, October 24, 2014, ¶¶ 245, 251, RL-58.

[57] Memorial on Preliminary Objections, ¶¶ 190-192; Reply on Preliminary Objections, ¶ 125.

[58] Memorial on Preliminary Objections, ¶¶ 193-195; Reply on Preliminary Objections, ¶ 126.

[59] Memorial on Preliminary Objections, ¶¶ 195-196, 199.

[60] Reply on Preliminary Objections, ¶¶ 128-133.

necessary consensus to constitute a rule of customary international law.[61]

119. According to Respondent, in order to breach the customary MST, Claimants would need to meet the criteria established in *Neer v. Mexico* (*i.e.* a gross denial of justice and a complete lack of due process or a manifest arbitrariness).[62] In Colombia's view, none of the allegations raised by Claimants, with the exception of the denial of justice and violation of due process claims, is "even remotely linked" to a possible breach of the MST standard.[63]

120. Respondent adds that, contrary to Claimants' allegations, the customary MST "does not include the protection of legitimate expectations."[64] Even if that was the case, Respondent continues, for legitimate expectations to exist: "they (i) must be objectively analyzed, (ii) at the time of making the investment, (iii) must be reasonable, and (iv) must be based on specific promises to the investor."[65] According to Respondent, Claimants have failed to refer to any specific promises that were made to them and that could give rise to legitimate expectations.[66]

121. Finally, Colombia submits that, in accordance with Article 10.5.2(a) of the U.S.-Colombia TPA, the protection against denial of justice is limited only "to judicial proceedings and does not cover administrative proceedings."[67] In the present dispute, there could not have been a denial of justice, because no judicial proceedings had been initiated to challenge the CGR Decision at the time Claimants submitted their Request for Arbitration.[68] Without a judicial review and without a final and definitive judicial decision, a denial of justice cannot possibly be established under customary international law.[69]

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[61] Reply on Preliminary Objections, ¶¶ 133-134.

[62] Memorial on Preliminary Objections, ¶ 196; Reply on Preliminary Objections, ¶ 134.

[63] Memorial on Preliminary Objections, ¶ 197.

[64] Reply on Preliminary Objections, ¶ 135.

[65] Reply on Preliminary Objections, ¶ 137.

[66] Reply on Preliminary Objections, ¶¶ 138-139.

[67] Memorial on Preliminary Objections, ¶ 201; Reply on Preliminary Objections, ¶ 98.

[68] Reply on Preliminary Objections, ¶¶ 141-143.

[69] Memorial on Preliminary Objections, ¶¶ 202-206; Reply on Preliminary Objections, ¶¶ 100, 143-144. In support of

122. Respondent also rejects Claimants' arguments that it would be futile or manifestly ineffective to pursue a judicial review of the CGR Decision.[70] It recalls "numerous cases of rulings on fiscal liability issued by the CGR that have been rendered ineffective or reversed, in whole or in part, after the available judicial remedies have been exercised."[71] Colombia also refers to the case law submitted by Claimants to note that, in those cases, denial of justice was found to have arisen in judicial proceedings, as opposed to administrative proceedings and, as such, they are inapplicable to the present case.[72] On this point, Respondent recalls that in *Loewen v. United States*, a case to which Claimants refer, "the tribunal did not find a denial of justice because the claimant had not exhausted all local judicial remedies."[73]

123. Respondent concludes that, in this case, there could be no *prima facie* case of a denial of justice, because Claimants had been able to exercise their right to defense in the administrative proceedings[74] and there were still judicial remedies available to the Claimants against the CGR Decision.[75]

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this position, the Respondent refers to the briefs submitted by US as an NDP in other proceedings. See, for example, *Angel Samuel Seda and others v. Republic of Colombia*, ICSID Case No. ARB/19/16, Submission of the United States of America, February 26, 2021, ¶ 32, RL-54; *Michael Ballantine and Lisa Ballantine v. Dominican Republic*, PCA Case No. 2016-17, Submission of the United States of America, July 6, 2018, ¶ 46, RL-62; see also, *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3 (DR-CAFTA), Submission of the United States of America, March 11, 2016, ¶ 13, RL-64; *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. Republic of Peru*, ICSID Case No. UNCT/18/2, Submission of the United States of America, June 21, 2019, ¶¶ 44-47, RL-66; *Italba Corporation v. Oriental Republic of Uruguay*, ICSID Case No. ARB/16/9, Submission of the United States of America, September 11, 2017, ¶ 20, RL-67.

[70] Reply on Preliminary Objections, ¶ 145.

[71] Memorial on Preliminary Objections, ¶ 209; Reply on Preliminary Objections, ¶ 145.

[72] Reply on Preliminary Objections, ¶ 146.

[73] Reply on Preliminary Objections, ¶ 147; *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, June 26, 2003, ¶¶ 151-157, 217, 242, CL-91.

[74] Memorial on Preliminary Objections, ¶¶ 211-213.

[75] Memorial on Preliminary Objections, ¶¶ 206-207; Reply on Preliminary Objections, ¶ 144; *Alps Finance v. Slovak Republic*, UNCITRAL, Award, March 5, 2011, ¶¶ 251-252, RL-82; *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, November 18, 2014, ¶ 392, RL-83; *Apotex Inc. v. Government of the United States of America*, ICSID Case No. UNCT/10/2 (NAFTA), Award on Jurisdiction and Admissibility, June 14, 2013, ¶ 276, RL-84; *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2 (NAFTA), Submission of the United States of America, June 21, 2019, ¶¶ 12-13, RL-55.

- *Expropriation*

124. Colombia argues that in order to determine expropriation, the right in question must be capable of being assessed independently from the rest of the covered investment. It relies upon a number of authorities in support of this position.[76]

125. Respondent rejects Claimants' argument to the effect that two of the contractual rights provided in the Services Contract [redacted] had been indirectly expropriated by Colombia when it initiated the Fiscal Liability Proceeding against Foster Wheeler and Process Consultants.

126. Respondent argues that these two contractual rights "are not capable of being economically exploited independently and separately from the Services Contract." In other words, "these concrete and specific rights cannot be 'expropriated' under the Treaty separately and independently from the rest of the alleged 'investment' (*i.e.*, the Services Contract), which Claimants do not even allege has been expropriated."[77] The impossibility of a "partial expropriation" is also supported by Article 10.7 of the U.S.-Colombia TPA, which provides for protection against expropriation of "a covered investment" and "not to certain 'specific rights' or 'parts' of that covered investment."[78]

127. Respondent adds that [redacted] and that the Fiscal Liability Proceeding concerned Claimants' fiscal liability. As fiscal liability is autonomous and independent from contractual liability, contractual clauses are unenforceable in a fiscal

[76] Memorial on Preliminary Objections, ¶¶ 217-218; Reply on Preliminary Objections, ¶¶ 153-155.

[77] Memorial on Preliminary Objections, ¶¶ 215-216; Reply on Preliminary Objections, ¶¶ 151-152.

[78] Memorial on Preliminary Objections, ¶¶ 218-219 (emphasis in the original); Reply on Preliminary Objections, ¶ 154. On this point, Respondent makes reference, *inter alia*, to the following authorities: *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1 (NAFTA), Award, March 31, 2010, ¶ 144, RL-105; *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, September 13, 2006, ¶ 67, RL-51.

liability proceeding.[79] [redacted].”[80] Thus, Respondent concludes that the allegations of expropriation raised by Claimants cannot establish a *prima facie* case of expropriation under the U.S.-Colombia TPA.

- *National Treatment Standard*

128. Respondent argues that the fact that the Fiscal Liability Proceeding was initiated against Foster Wheeler and Process Consultants rather than Ecopetrol’s Board of Directors does not give rise to a *prima facie* breach of this standard.[81] Both natural and juridical persons of Colombian and foreign nationality were charged in the Fiscal Liability Proceeding and, as such, there could have been no discrimination based on the Claimants’ U.S. citizenship.[82] Thus, the Fiscal Liability Proceeding had not “creat[ed] a disproportionate benefit for nationals over non-nationals,” nor did it appear “to favor its nationals over non-nationals.”[83]

- *Most Favoured Nation*

129. According to Respondent, none of Claimants’ arguments is capable of establishing a *prima facie* breach of the MFN obligation. Respondent refers to Claimants’ contention that Colombia breached the MFN obligation in Article 10.4 of the Treaty — “by allegedly granting Swiss investors and Swiss covered investments more favourable treatment than that granted to U.S. investors, on grounds that Swiss investors can purportedly invoke the umbrella clause contained in the Colombia-Switzerland BIT while Claimants cannot, given that the Treaty does not contain such a clause.” [84]

[79] Memorial on Preliminary Objections, ¶¶ 221-223; see also *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, August 27, 2019, ¶ 1083, RL-20.

[80] Reply on Preliminary Objections, ¶ 157.

[81] Memorial on Preliminary Objections, ¶¶ 225-226; Reply on Preliminary Objections, ¶ 159.

[82] Memorial on Preliminary Objections, ¶ 226; Reply on Preliminary Objections, ¶ 162.

[83] Memorial on Preliminary Objections, ¶¶ 228-229; Reply on Preliminary Objections, ¶¶ 160, 166; see *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, November 13, 2000, ¶ 252, RL-112.

[84] Memorial on Preliminary Objections, ¶ 231.

130. Respondent argues that the MFN standard under Article 10.4.1 of the U.S.-Colombia TPA "requires a comparison of factual situations of the treatment actually accorded to parties in like circumstances," to U.S. investors and investors from third countries, which Claimants have not established.[85] Additionally, the MFN provision cannot be used to import a new right from an investment treaty concluded with a third country that is not found in the base treaty.[86]

131. Moreover, even if the MFN provision allowed Claimants to import a completely new right from a different investment treaty, it would not be possible to import an umbrella clause from some other investment treaty concluded by Colombia as "this would contravene the public policy considerations that the Contracting Parties took into account when specifically excluding an umbrella clause from the Treaty."[87] Instead, the U.S.-Colombia TPA included a definition of the term "investment agreement", establishing the possibility that certain contractual claims could be submitted to arbitration by an investor in the event of a breach of a particular written agreement qualifying as an "investment agreement" under the Treaty. [88]

132. Additionally, Respondent explains that while the Colombia-Switzerland BIT contains an umbrella clause, it does not contain a consent to submit to arbitration any claims that may arise from a breach of that umbrella clause. Accordingly, even if the importation of the umbrella clause from the Colombia-Switzerland BIT was possible under the MFN clause of the Treaty, it would not be possible to import the right to submit that claim to arbitration, because such a right does not exist under that treaty either. [89]

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[85] Reply on Preliminary Objections, ¶ 170.

[86] Memorial on Preliminary Objections, ¶ 232 (emphasis omitted).

[87] Memorial on Preliminary Objections, ¶ 234.

[88] Memorial on Preliminary Objections, ¶ 234; Reply on Preliminary Objections., ¶¶ 172-173.

[89] Memorial on Preliminary Objections, ¶¶ 235-237; Reply on Preliminary Objections, ¶¶ 174-178. Respondent explains that while Article 10(2) of the Colombia-Switzerland BIT contains an umbrella clause, Article 11(3) of the treaty expressly provides that the contracting parties consent to the submission of investment disputes to international arbitration, "except for disputes with regard to Article 10 paragraph 2 of [the treaty]." In support of this position, Respondent refers to *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, August 27, 2019, ¶¶ 1001, 1006, 1009, 1025, RL-20. Finally, Respondent adds that, "for the same reasons, Claimants fail to comply with the requirements for applying the umbrella clause of the Colombia-Japan BIT, which is worded almost identically to the umbrella clause in the Colombia-Switzerland BIT."

133. Finally, Respondent submits that, even if the umbrella clause of the Colombia-Switzerland BIT could be imported in the manner requested by Claimants, it would be impossible to apply that clause in this case as the requirements for its application are not met.[90] Namely, (i) Reficar is not an "agency" of the Colombian government; (ii) the Services Contract cannot be both "an investment" and "a written agreement", which contains the obligation relating to the investment; and (iii) the factual allegations raised by Claimants cannot constitute a breach of the umbrella clause, because there was no breach of the Services Contract arbitration clause and any contractual limitation imposed on Reficar could not affect its fiscal liability. Thus, Claimants have not been capable of establishing a *prima facie* breach of the MFN clause. [91]

(iii) *No Prima Facie Breach of an Investment Agreement*

134. Colombia rejects Claimants' argument pursuant to which the Services Contract is treated as if it were an "investment agreement", because "it was entered into between Reficar, a 'State entity' and a 'national authority of a Party', and FPJVC, an 'investor of another Party.'" [92]

135. First, Respondent recalls that under Article 10.28 of the U.S.-Colombia TPA, an investment agreement is a written agreement on which "the investor relies in establishing or acquiring a covered investment other than the written agreement itself."[93] According to Respondent, it is clear from the text of the Treaty, that "the Services Contract cannot constitute an 'investment agreement' and, at the same time, a 'covered investment other than the written agreement itself.'"[94] Although Claimants submit that they have also invested assets like time, personnel, labour and capital while providing goods and services to Colombia, they "do not allege that those constituent items form part of their 'covered

[90] Memorial on Preliminary Objections, ¶¶ 238-239.

[91] Reply on Preliminary Objections, ¶¶ 178-179. Respondent explains that Claimants' fiscal liability is autonomous and independent to their contractual liability and falls outside the material scope of the Services Contract's arbitration clause.

[92] Memorial on Preliminary Objections, ¶¶ 242-243; Reply on Preliminary Objections, ¶ 181.

[93] Memorial on Preliminary Objections, ¶¶ 242, 244.

[94] Memorial on Preliminary Objections, ¶ 244; Reply on Preliminary Objections, ¶ 181.

investment' in this case, nor do those items form the basis of Claimants' damages claim."[95] The sole "covered investment" is the Services Contract and the damages claimed by Claimants relate exclusively to the Services Contract and not to the time, personnel, labour, capital, good or services, which have been in any event "fully compensated or reimbursed in accordance with the provisions of the Services Contract."[96]

136. Second, Respondent explains that the Services Contract was concluded with Reficar, a mixed capital company that forms part of the decentralized government,[97] whereas the U.S.-Colombia TPA describes a national authority of a party as "an authority at the central level of government."[98] Reficar cannot be a "national authority" under the U.S.-Colombia TPA, because the Contracting Parties to the Treaty have "expressly established that Ecopetrol, Reficar's parent company, is not an authority at the central government level."[99] Claimants' arguments as to the attribution of Reficar's actions to Colombia are irrelevant in this case, because the issue is not the attribution of Reficar's actions, but rather whether Reficar can be considered a "national authority" under the U.S.-Colombia TPA.[100]

137. Additionally, Respondent does not dispute that [redacted]."[101] However, the existence of an arbitration clause under the Services Contract has no impact on the concept of "investment agreement" under the U.S.-Colombia TPA, nor does it provide the Tribunal with jurisdiction to hear purely contractual claims.[102] Claimants allege that their claims "relate to CGR's. . . actions, and that such actions would

[95] Reply on Preliminary Objections, ¶ 183.

[96] Reply on Preliminary Objections, ¶ 183.

[97] Memorial on Preliminary Objections, ¶ 245 (emphasis omitted).

[98] Memorial on Preliminary Objections, ¶ 245; Reply on Preliminary Objections, ¶ 184.

[99] Reply on Preliminary Objections, ¶ 185. Respondent refers to Chapter 9, Annex 9.1, Section A, of the Colombia-US TPA, as amended by Decision No. 2 of the Free Trade Commission of the US-Colombia TPA, RL-318, which contains a list of U.S. and Colombian entities divided into four categories: Central Level of Government Entities, Sub-Central Level of Government Entities, Other Covered Entities and Special Covered Entities. Respondent notes that neither Ecopetrol nor Reficar are listed as Central Level of Government Entities, and that Ecopetrol is listed as a "Special Covered Entity," *i.e.*, as an entity that "conducts its procurement under private law ... and without any control or influence by the Government of Colombia."

[100] Reply on Preliminary Objections, ¶ 186.

[101] Memorial on Preliminary Objections, ¶ 248.

[102] Memorial on Preliminary Objections, ¶ 248.

constitute breaches by Colombia of the Services Contract."[103] However, the Fiscal Liability Proceeding concerns Claimants' fiscal, not contractual, liability.[104] Thus, any loss or damage caused by the CGR's actions would be "non-contractual in nature, and beyond the scope of any contractual breach of a purported investment agreement."[105]

138. Therefore, Respondent submits, the Services Contract is not an "investment agreement" and Claimants have failed to establish a *prima facie* case of a breach of an investment agreement in this dispute.[106]

(iv) *No Loss or Damage Resulting from the Alleged Breaches*

139. Respondent recalls that apart from the existence of a breach of a substantial Treaty provision or an investment agreement, two additional requirements must be met in order to make the claim admissible under the Treaty: (i) there must be a certain loss or damage at the time of submitting the claim to arbitration and (ii) such loss or damage must be incurred by reason of such breach. These requirements are aimed at "preventing the submission of claims that are not yet ripe, because no loss has occurred."[107]

140. Colombia refers to *Glamis v. United States*, in which the tribunal stated that "the existence or not of 'actual present harm' as a result of an allegedly violative measure – must be assessed at the time of the filing of the claim to arbitration."[108] No loss or damage had been incurred by reason of a breach of the U.S.-Colombia TPA obligations or an investment agreement at the time of submission of the Notice of Arbitration.[109] This is

[103] Reply on Preliminary Objections, ¶ 188 (inner quotation omitted); see also Counter-Memorial on Preliminary Objections, ¶ 114.

[104] Reply on Preliminary Objections, ¶ 188.

[105] Reply on Preliminary Objections, ¶ 188.

[106] Memorial on Preliminary Objections, ¶ 250; Reply on Preliminary Objections, ¶¶ 180, 189.

[107] Memorial on Preliminary Objections, ¶¶ 251-252; Reply on Preliminary Objections, ¶¶ 190-193. K. Vandevelde, U.S. *INTERNATIONAL INVESTMENT AGREEMENTS*, p. 598, RL-121; *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Submission of the United States of America, July 25, 2014, ¶ 4, RL-48; Christoph Schreuer, *What is a legal dispute?*, in INTERNATIONAL LAW BETWEEN UNIVERSALISM AND FRAGMENTATION, FESTSCHRIFT IN HONOUR OF GERHARD HAFNER (I. Buffard, J. Crawford, A. Pellet, S. Wittich (eds.) (Koninklijke Brill NV 2008), pp. 960, 970-972, CL-59.

[108] Reply on Preliminary Objections, ¶ 193; *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, June 8, 2009, ¶ 335 (footnote added), RL-40.

[109] Memorial on Preliminary Objections, ¶ 254; Reply on Preliminary Objections, ¶ 194.

because, by that time, only the Indictment Order had been issued in the Fiscal Liability Proceeding with no harm caused to Claimants.[110]

141. Claimants argue that the Tribunal should also take into account damages that materialized during the course of this arbitration.[111] However, Colombia submits, there is a difference "between the existence of damages as a requirement for submission to arbitration under the Treaty" and damages taken into account when determining potential compensation.[112] Claimants have not suffered any loss or damage "as a result of the alleged breaches of the Treaty [or investment agreement] under the Fiscal Liability Proceeding […]",[113] because they have not yet made any payment on the amount of the Ruling, whether voluntary or forced.[114] This is apparent from Claimants' Application for Provisional Measures in which Claimants admit "that the provisional measures were necessary to avert the damages they seek to prevent with this Arbitration."[115]

142. Respondent contends that Claimants' allegations regarding reputational damage cannot satisfy the requirements of Article 10.16.1 of the U.S.-Colombia TPA.[116] In particular, Respondent argues that Article 10.16.1 of the U.S.-Colombia TPA requires a "proximate causation" or a "sufficient causal link" between the damage suffered and a breach of the U.S.-Colombia TPA or an investment agreement.[117] In the present dispute, there is no causal link between the reputational damage and the Fiscal Liability Proceedings.[118]

143. Colombia further argues that Claimants' alleged "significant attorney's fees [incurred] in

[110] Memorial on Preliminary Objections, ¶ 255; Reply on Preliminary Objections, ¶ 194.

[111] Reply on Preliminary Objections, ¶ 195; Counter-Memorial on Preliminary Objections, ¶¶ 24-25, 122-123.

[112] Reply on Preliminary Objections, ¶ 197; *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, May 22, 2012, ¶¶ 427, 431, RL-171.

[113] Reply on Preliminary Objections, ¶ 198.

[114] Memorial on Preliminary Objections, ¶ 257; Reply on Preliminary Objections, ¶¶ 198-199; Respondent adds that in *Glencore v. Colombia*, the claimant "actually paid the amount of the ruling with fiscal liability prior to the commencement of the arbitration." Thus, unlike in the present dispute, the claimant *Glencore* brought a mature claim to arbitration.

[115] Reply on Preliminary Objections, ¶¶ 200-202; see Letter from Claimants to Respondent, August 24, 2021, p. 2, R-93; see also Application for Provisional Measures, ¶¶ 126, 131, 146, 149.

[116] Reply on Preliminary Objections, ¶ 204.

[117] Reply on Preliminary Objections, ¶ 206.

[118] Reply on Preliminary Objections, ¶¶ 206-207.

defending [themselves] in [the Fiscal Liability Proceeding]", are not compensable "damages", but rather "ordinary legal burdens" forming part of the cost of doing business in Colombia.[119] As a burden to be borne by Claimants, the fees for legal representation in the Fiscal Liability Proceeding cannot be considered as damage or loss in terms of Article 10.16.1 of the U.S.-Colombia TPA.[120]

144. Respondent recalls that the obligations to accord FET and not to expropriate under the U.S.-Colombia TPA only protect covered investments and not investors.[121] However, all the allegedly incurred damages in the present dispute affect the investors (such as damage to Claimants' reputation and credit), and not the covered investment (the Services Contract).[122] Moreover, Claimants have failed to establish the existence of an investment agreement, and are not claiming any alleged losses incurred by result of a breach of such agreement.[123]

b. Claimants' Position

(i) *Claimants' Claims are Ripe for Review*

145. Claimants argue that they comply with all the requirements in Article 10.16.1 of the Treaty for the claims to be admissible.[124] First, Claimants refer to Article 10.20.4(c) of the Treaty, which provides that, when assessing Respondent's preliminary objections, the Tribunal "*shall* assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof)." The tribunal "may also consider any relevant facts not in dispute."[125] Claimants rely on facts described in their Notice of Arbitration or that have occurred since and are not in dispute.[126] Moreover, as stated in *Kappes v. Guatemala,* Claimants submit that they may "clarify or elaborate on their allegations from

[119] Reply on Preliminary Objections, ¶¶ 208-209.

[120] Reply on Preliminary Objections, ¶¶ 210-212.

[121] Memorial on Preliminary Objections, ¶ 259.

[122] Memorial on Preliminary Objections, ¶ 259.

[123] Memorial on Preliminary Objections, ¶¶ 260-261; Reply on Preliminary Objections, ¶ 215.

[124] Counter-Memorial on Preliminary Objections, ¶ 15.

[125] Counter-Memorial on Preliminary Objections, ¶ 32 (emphasis in the original); Rejoinder on Preliminary Objections, ¶ 49.

[126] Rejoinder on Preliminary Objections, ¶ 49.

the Request for Arbitration."[127] Claimants also submit that, as explained in *Pac Rim v. El Salvador,* it is not mandatory to provide evidential proof for all their allegations in the initial pleading.[128]

146. First, Claimants rely on the undisputed fact that their appeal against the CGR Decision was rejected on July 6, 2021. [129] They submit that, accordingly, the CGR Decision is now final and enforceable under Colombian law. This contention is supported by the fact that the Office of the Comptroller General of the Republic has initiated worldwide enforcement efforts against Claimants' assets.[130]

147. Claimants further argue that Colombia's argument that judicial remedies must be exhausted for the claims to ripen is groundless.[131] They submit that they have exhausted all their administrative remedies in Colombia and that pursuing judicial review would be "futile or manifestly ineffective", because the CGR is already seeking to enforce the Fiscal Liability Decision.[132] Claimants submit that the tribunal's decision in *Corona Materials v. Dominican Republic* supports their case as it states that "the [e]xhaustion of local remedies is... typically not a jurisdictional prerequisite to an investor's submitting an international claim."[133]

148. Claimants also refer, *inter alia*, to *Eco Oro Minerals Corp. v. Colombia*,[134] to support their argument that the Tribunal should also consider facts that occurred after the submission of

[127] Rejoinder on Preliminary Objections, ¶¶ 50-52; *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections, March 13, 2020, ¶ 117, RL-176; see also *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Objections under CAFTA Articles 10.20.4 and 10.20.5, August 2, 2010, ¶¶ 89, 99, 105, RL-36.

[128] Rejoinder on Preliminary Objections, ¶¶ 54-55; *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Objections under CAFTA Articles 10.20.4 and 10.20.5, August 2, 2010, ¶¶ 96, 98, 112, RL-36.

[129] Counter-Memorial on Preliminary Objections, ¶ 15.

[130] Counter-Memorial on Preliminary Objections, ¶ 15.

[131] Counter-Memorial on Preliminary Objections, ¶ 15.

[132] Counter-Memorial on Preliminary Objections, ¶ 17.

[133] Counter-Memorial on Preliminary Objections, ¶ 18 (internal quotes omitted); *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, May 31, 2016, ¶¶ 259-261, RL-41.

[134] Counter-Memorial on Preliminary Objections, ¶ 22; *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction Liability and Directions on Quantum, September 9, 2021, ¶ 328, CL-50.

the Request for Arbitration. Notably, the *Eco Oro* tribunal "rejected Colombia's efforts to freeze the claims at the time of the Notice of Intent."[135] Claimants submit that ICSID tribunals have accepted new but related events not raised in a request for arbitration when determining treaty violations, including facts which were first raised "in much later phases of the arbitration, such as in the memorial on the merits."[136]

149. According to Claimants, *Glencore v. Colombia* is inapposite, because, contrary to the Switzerland-Colombia BIT, the U.S.-Colombia TPA does not include a provision requiring the claimant to exhaust local administrative remedies before initiating arbitration.[137] Therefore, Claimants submit, a provision requiring exhaustion of local remedies is to be understood as imposing additional requirements on a claimant.[138] The fact that the U.S.-Colombia TPA does not include any express requirement that local administrative remedies have to be exhausted supports Claimants' ripeness claim.[139]

150. On this point, Claimants also note that the FET provision in Article 10.5.2(a) of the U.S.-Colombia TPA, "includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings."[140] Claimants submit that while analyzing an identical provision, the tribunal in *TECO Guatemala Holdings v. The Republic of Guatemala* "found claims based solely on administrative acts to be ripe."[141]

151. Therefore, although the rejection of the appeal to the CGR Decision and the enforcement efforts increased the harm caused to Claimants, their claims were ripe long before such appeal was rejected.[142]

152. Claimants further note that Colombia relies on "more than 20 non-party submissions by

[135] Counter-Memorial on Preliminary Objections, ¶ 22; *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction Liability and Directions on Quantum, September 9, 2021, ¶ 328, CL-50.

[136] Counter-Memorial on Preliminary Objections, ¶ 23.

[137] Counter-Memorial on Preliminary Objections, ¶¶ 26-27.

[138] Counter-Memorial on Preliminary Objections, ¶ 27.

[139] Counter-Memorial on Preliminary Objections, ¶ 27.

[140] Counter-Memorial on Preliminary Objections, ¶ 28.

[141] Counter-Memorial on Preliminary Objections, ¶ 28; see *TECO Guatemala Holdings LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, December 19, 2013, ¶¶ 457-465, 471-484, CL-61.

[142] Counter-Memorial on Preliminary Objections, ¶ 31.

the United States", of which only three refer to the U.S.-Colombia TPA.[143] Claimants argue that Article 31(3) of the VCLT does not recognize "a non-party's interpretation of a different treaty [as a] subsequent agreement or subsequent practice" in relation to the U.S.-Colombia TPA.[144] Moreover, in order to show subsequent practice, Respondent would have to prove that "the US and Colombia repeatedly interpret the [U.S.-Colombia] TPA in a consistent way, which it cannot do."[145]

(ii) *Prima Facie Breach of Substantive Obligations*

153. Claimants argue that Colombia has failed to establish that "the facts alleged by the Claimants, if established, are incapable of forming the basis for a treaty violation." At this stage of the proceeding, the Tribunal "must only be satisfied that *prima facie* the claim, as stated by the Claimants when initiating this arbitration" is within the jurisdiction of ICSID and this Tribunal.[146] Claimants also submit that Respondent is abusing the preliminary objections procedure and that in order for Claimants' claims to be dismissed, they must be deemed as "certain - and not simply 'likely' - to fail" at the outset of the arbitration.[147] Respondent fails to meet this standard.[148] Respondent's views on the merits are irrelevant for the purpose of assessing the preliminary issue and should be rejected.[149]

- *Fair and Equitable Treatment*

154. Claimants argue that their claim meets the *prima facie* test regarding the FET standard. First, Claimants argue that the protection of the FET standard is accorded not only to

[143] Rejoinder on Preliminary Objections, ¶ 59; see *Angel Samuel Seda and others v. Republic of Colombia*, ICSID Case No. ARB/19/16, Submission of the United States of America, February 26, 2021, RL-54; *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/05, Submission of the United States of America, May 1, 2020, RL-206; *Alberto Carrizosa Gelzis et al. v. Republic of Colombia*, PCA Case No. 2018-56, Submission of the United States of America, May 1, 2020, RL-207.

[144] Rejoinder on Preliminary Objections, ¶ 59.

[145] Rejoinder on Preliminary Objections, ¶ 60.

[146] Counter-Memorial on Preliminary Objections, ¶ 33.

[147] Counter-Memorial on Preliminary Objections, ¶ 35; Rejoinder on Preliminary Objections, ¶¶ 56-58; Michele Potestà & Marija Sobat, *Frivolous Claims in International Adjudication: A Study of ICSID Rule 41(5) and of Procedures of Other Courts and Tribunals to Dismiss Claims Summarily*, 3 J. Int. Disp. Settl. 137 (2012), p. 22, CL-67.

[148] Counter-Memorial on Preliminary Objections, ¶ 35; Rejoinder on Preliminary Objections, ¶ 58.

[149] Counter-Memorial on Preliminary Objections, ¶ 36.

covered investments, but also to investors.[150] In support of their position, Claimants cite *Mohamed Abdel Raouf Bahgat v. Egypt* and *Lion Mexico v. Mexico* and add that their view has also been recognized by a number of NAFTA tribunals.[151] In Claimants' view, none of the authorities presented by Respondent is apposite: they do not address expressly the issue of whether the FET standard is to be accorded only to investments and not to investors.[152] In Claimants' view, "it is not at all clear how it would be possible to provide investments with FET without affording similar protection to the owners of those investments."[153]

155. Claimants also oppose Respondent's view regarding the scope of the FET standard.[154] Claimants argue that "numerous authorities have arrived at the conclusion that the [MST] is indistinguishable from or materially identical to that of the FET standard found in other investment treaties,"[155] and that "[a] requirement that aliens be treated fairly and equitably in relation to business, trade and investment . . . has become sufficiently part of widespread and consistent practice so as to demonstrate that it is reflected today in customary international law as *opinio juris*."[156]

156. Claimants further submit that the content of the customary MST is constantly evolving and is not "frozen in time."[157] On this point, Claimants note that the *Neer* formula "no longer reflects contemporary customary international law,"[158] and that Respondent has failed to prove that *Neer* "sets the applicable standard and that Claimants' allegations do not meet

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[150] Counter-Memorial on Preliminary Objections, ¶¶ 37, 39.

[151] Counter-Memorial on Preliminary Objections, ¶¶ 37-38; Rejoinder on Preliminary Objections, ¶ 72.

[152] See Rejoinder on Preliminary Objections, ¶¶ 73-74.

[153] Rejoinder on Preliminary Objections, ¶¶ 75-76; see *Mohamed Abdel Raouf Bahgat v. The Arab Republic of Egypt*, PCA Case No. 2012- 07, Final Award, December 23, 2019, ¶ 185, CL-52.

[154] Counter-Memorial on Preliminary Objections, ¶¶ 42-43.

[155] Counter-Memorial on Preliminary Objections, ¶ 44; Rejoinder on Preliminary Objections ¶ 63.

[156] Counter-Memorial on Preliminary Objections, ¶ 45; see *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Award, March 31, 2010, ¶ 210, RL-105.

[157] Counter-Memorial on Preliminary Objections, ¶ 46; see *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, January 9, 2003, ¶ 179, CL-82; *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, September 9, 2021, ¶ 744, CL-50; Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (OUP 2017), ¶¶ 7.05, 7.10, RL-42; Christoph Schreuer & August Reinisch, *International Protection of Investments: Substantive Standards* (Cambridge 2020), ¶ 314, CL-83.

[158] Counter-Memorial on Preliminary Objections, ¶¶ 48-49; Jan Paulsson & Georgios Petrochilos, *Neer-ly Misled?*, 32 Miami Law Research Paper Series 242 (2010), pp. 247, 250 (citations omitted), CL-88.

it."[159] In contrast, Claimants agree with the definition of the MST requirements as set out in *Waste Management v. Mexico* requiring a conduct which is "arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory […] or involves a lack of due process leading to an outcome which offends judicial propriety."[160] Claimants note that this formulation has been widely accepted by subsequent tribunals.[161] Thus, "[t]here is no basis to apply the antiquated FET standard as advocated by Colombia."[162]

157. Claimants further submit that a breach of the investor's legitimate expectations can form a basis for breach of the MST under customary international law.[163] In the *Bolivia v. Chile* decision[164], the ICJ excluded the concept of legitimate expectations as between States.[165] However, according to Claimants, "it does not follow from the ICJ opinion that such a concept does not exist between foreign investors and States."[166] Therefore, Respondent's objection that Claimants rely on an incorrect standard for FET and do not meet the standard of *Neer* should be rejected.[167]

158. Claimants recall that their claim also includes complaints of denial of justice and due process.[168] When it comes to due process and the test applicable to establish a breach,[169]

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[159] Rejoinder on Preliminary Objections, ¶ 64.

[160] Counter-Memorial on Preliminary Objections, ¶ 50; *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, ¶ 98, RL-96.

[161] Counter-Memorial on Preliminary Objections, ¶ 50; Rejoinder on Preliminary Objections, ¶¶ 65-66; see, for example, *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, September 9, 2021, ¶ 744, CL-50.

[162] Rejoinder on Preliminary Objections, ¶ 68.

[163] Rejoinder on Preliminary Objections, ¶ 69; see *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, June 8, 2009, ¶¶ 620-621, RL-40; *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, ¶ 98, RL-96; *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Award, January 26, 2006, ¶ 147, RL-225; see also *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, September 9, 2021, ¶¶ 804, 820, CL-50.

[164] Reply on Preliminary Objections, ¶ 135; see *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile),* International Court of Justice, Judgment of October 1, 2018, 507 I.C.J. REPORTS 2018, ¶ 162, RL-71.

[165] Rejoinder on Preliminary Objections, ¶ 69; see *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, May 22, 2012, ¶¶ 160-162, RL-171.

[166] Rejoinder on Preliminary Objections, ¶ 69.

[167] Rejoinder on Preliminary Objections, ¶ 71.

[168] Counter-Memorial on Preliminary Objections, ¶ 51; see Rejoinder on Preliminary Objections, ¶ 77.

[169] See Jan Paulsson, *Denial of Justice in International Law* (CUP 2005), p. 7, CL-89; *ADC Affiliate Limited. and*

Claimants argue that they "may pursue a claim for breach of the treaty standards that is based directly upon allegations of administrative misconduct," and the investor may do so "irrespective of whether he has sought redress before the local courts."[170] Claimants allege several breaches of the FET standard related to the CGR's conduct and the administration of the Fiscal Liability Proceeding.[171] Respondent has not met the burden of proof to show that Claimants' allegations cannot succeed.[172]

159. As regards Colombia's argument that for a claim of denial of justice to succeed, judicial remedies need to be exhausted, Claimants submit that the CGR proceedings fall within the definition of "administrative adjudicatory proceedings" under Article 10.5.2(a) of the U.S.-Colombia TPA. Claimants reject Respondent's argument based on the Spanish version of the TPA, pursuant to which, the reference to "administrative adjudicatory proceedings" is a reference to a judicial proceeding before the administrative adjudicatory jurisdiction. According to Claimants, there is nothing in the English text of the U.S.-Colombia TPA (which is equally as authoritative as the Spanish text[173]) that indicates that such proceedings are limited to judicial proceedings only.[174] Other tribunals interpreting the same language have reached the same conclusion.[175] As to the differences between the two language versions, Claimants' interpretation should prevail in accordance with Article 33(3) of the VCLT, because "Claimants' interpretation can have the same meaning in English and Spanish, but Respondent's interpretation only makes sense, if at all, in Spanish."[176] Accordingly, Article 10.5.2(a) of the U.S.-Colombia TPA should "be

ADC & ADMC Management Limited v. The Republic of Hungary, ICSID Case No. ARB/03/16, Award, October 2, 2006, ¶ 435, CL-90; *Chevron Corporation y Texaco Petroleum Company v. Republic of Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II, August 30, 2018, ¶ 8.26, CL-42.

[170] Counter-Memorial on Preliminary Objections, ¶ 54 (internal quotation marks omitted); see *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, March 10, 2015, ¶ 491, RL-157; Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (OUP 2017), ¶¶ 7.104, 7.174, RL-42.

[171] Rejoinder on Preliminary Objections, ¶¶ 77-78; see Counter-Memorial on Preliminary objections., ¶ 55.

[172] Rejoinder on Preliminary Objections, ¶ 79.

[173] Rejoinder on Preliminary Objections, ¶ 83; Treaty, Article 23.6.

[174] Rejoinder on Preliminary Objections, ¶¶ 81-83.

[175] Rejoinder on Preliminary Objections, ¶ 83; *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR- CAFTA, May 31, 2016, ¶¶ 251, 253, RL-41.

[176] Rejoinder on Preliminary Objections, ¶¶ 84-87.

interpreted as allowing for a denial of justice claim resulting from an administrative adjudicatory proceeding", such as the Fiscal Liability Proceeding.[177]

160. Claimants also submit that, at this stage of the proceedings, they are not required to support their allegation as to the futility of seeking judicial review of the Fiscal Liability Ruling by evidence.[178] Their claim was ripe when filed and Colombia's subsequent actions only confirmed that.[179] Specifically, since initiating the arbitration, Claimants have exhausted their administrative remedies and the CGR Decision has become final.[180] These facts are not disputed by the Respondent.[181]

161. Claimants had a legitimate expectation to a stable legal framework and that Colombia would respect its contractual rights.[182] As to the former, Claimants argue that legal stability is a decisive factor when making a foreign investment.[183] In Claimants' view, Colombia has breached Claimants' legitimate expectation by "misapplication of its own laws to assist the CGR's effort to maintain jurisdiction over FPJVC;" "discriminatory application of those same laws in favor of Colombian nationals;" "failure to protect Claimants' due process rights;" "[the] assessment of grossly disproportionate, ambiguous and irrationally-determined damages;" "changes in its damage theories during the CGR proceeding without affording Claimants an opportunity to address them;" "retroactive application to Claimants of a statute broadening the definition of 'fiscal manager,'" and "failure to respect and protect Claimants contractual rights."[184]

162. As to the latter, Claimants expected the commitments entered into by Colombia or its agency to be respected.[185] In particular, Claimants expected Colombia and Reficar, "an

[177] Rejoinder on Preliminary Objections, ¶ 86.
[178] Rejoinder on Preliminary Objections, ¶ 88.
[179] Rejoinder on Preliminary Objections, ¶ 89.
[180] Rejoinder on Preliminary Objections, ¶ 89.
[181] Rejoinder on Preliminary Objections, ¶ 89, n. 174.
[182] Counter-Memorial on Preliminary Objections, ¶ 56.
[183] Counter-Memorial on Preliminary Objections, ¶ 57.
[184] Counter-Memorial on Preliminary Objections, ¶ 59; Rejoinder on Preliminary Objections, ¶ 70.
[185] Counter-Memorial on Preliminary Objections, ¶¶ 60-61.

arm of the Colombian state"[186] to respect their rights under the Services Contract, in particular [redacted].[187] Therefore, Claimants say that their FET claim does meet the *prima facie* test[188] and Respondent's objections to the FET claim should be dismissed.[189]

- *Expropriation*

163. When addressing the expropriation claim, Claimants argue that their investment in Colombia consists of "entering into the [Services] Contract and performing under that agreement, including the establishment of a significant presence in Colombia through which those services were rendered."[190] Claimants argue that Respondent has expropriated two of their core rights under the Services Contract, [redacted].[191]

164. Claimants submit that the U.S.-Colombia TPA includes protection from both direct and indirect expropriation[192] and that it is possible to expropriate specific contractual rights.[193] Claimants recall that other tribunals have found that "contractual rights […] can be expropriated […] through a series of sovereign acts designed illegitimately to end the

[186] Counter-Memorial on Preliminary Objections, ¶ 61.

[187] Counter-Memorial on Preliminary Objections, ¶ 61.

[188] Counter-Memorial on Preliminary Objections, ¶ 63.

[189] Rejoinder on Preliminary Objections, ¶ 90.

[190] Counter-Memorial on Preliminary Objections, ¶ 64.

[191] Counter-Memorial on Preliminary Objections, ¶ 65; Rejoinder on Preliminary Objections, ¶ 116.

[192] Counter-Memorial on Preliminary Objections, ¶¶ 66-68.

[193] Counter-Memorial on Preliminary Objections, ¶ 69; see Case *Concerning Certain German Interests in Polish Upper Silesia*, Judgment, August 25, 1925, ¶ 168, CL-104; *Phillips Petroleum Co. Iran v. National Iranian Oil Co*., IUSCT Case No. 39, Award No. 425-39-2, June 29, 1989, ¶ 76, CL-105; *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, May 20, 1992, ¶ 165, RL-168; see also *Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, August 20, 2007, ¶ 7.5.4, CL-106; *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, February 6, 2007, ¶ 271, CL-107; *Saipem S.p.A. v. Peoples' Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, March 21, 2007, CL-108, where the tribunal stated "[i]t is widely accepted under general international law that immaterial rights can be the subject of expropriation"; *European Media Ventures S.A. v. The Czech Republic*, UNCITRAL, Partial Award on Liability, July 8, 2009, ¶¶ 64-65, CL-109.

concession."[194] In the present dispute, the expropriation was carried out by "the imposition of a lawless decree" requiring Claimants to pay Respondent "many times the revenue they received for doing their work precisely in accordance with the Contract."[195]

165. [redacted], it is clear that this submission is based on facts occurring after the Notice for Arbitration, implying Colombia's acknowledgement that this Tribunal can consider also events subsequent to the filing of the claim.[196] Therefore, the expropriation claim also meets the *prima facie* test.[197]

- *National Treatment*

166. As regards the national treatment claim, Claimants submit that the board members of Ecopetrol should have been subject to the CGR proceeding as they were "fiscal managers" under Colombian law,[198] whereas Claimants did not fall under the definition of a "fiscal manager" and were nevertheless charged by the CGR.[199] Claimants explain that this decision was based on bias against non-Colombians and resulted in a violation of the national treatment and FET obligations under the U.S.-Colombia TPA.[200] Claimants restate that, in accordance with Article 10.20.4(c) of the U.S.-Colombia TPA, at this stage, the facts presented by the Claimants "shall [be] assume[d] to be true" by the Tribunal.[201]

167. Respondent's argument relating to the fact that both domestic and foreign natural and juridical persons were charged by the CGR is not apposite, because it ignores "the unequal

[194] Counter-Memorial on Preliminary Objections, ¶ 70 (internal quotation marks omitted); *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, February 6, 2007, ¶ 271, CL-107.

[195] Counter-Memorial on Preliminary Objections, ¶ 70; see *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award, October 30, 2017, ¶ 7.49, CL-110.

[196] Rejoinder on Preliminary Objections, ¶ 115.

[197] Counter-Memorial on Preliminary Objections, ¶ 70; Rejoinder on Preliminary Objections, ¶ 116.

[198] Counter-Memorial on Preliminary Objections, ¶ 95.

[199] Counter-Memorial on Preliminary Objections, ¶ 95; Rejoinder on Preliminary Objections, ¶ 92.

[200] Counter-Memorial on Preliminary Objections, ¶ 95.

[201] Counter-Memorial on Preliminary Objections, ¶ 96.

dismissal based on nationality."[202] Claimants submit that Reficar was the owner and manager of the Project, whereas Claimants were providing support and recommendations as requested from Reficar.[203] Therefore, the two entities were not "in like circumstances."[204] In any case, Respondent's arguments cannot stand as a basis for terminating the case before advancing to the merits stage.[205]

168. According to Claimants, Respondent's allegation that in the Fiscal Liability Proceedings, Claimants were treated more favorably than Colombian nationals, because the CGR has not issued any precautionary measures against the Claimants, is also irrelevant.[206] CGR did not issue any precautionary measures solely because it could not identify any of Claimants' assets.[207] Indeed, the CGR "even approached the United States Department of Justice for help to locate and seize Claimants' assets."[208] Therefore, the CGR's failure to attach any of Claimant's assets cannot be seen as a more favorable treatment.[209]

169. The sole fact "that Colombians who were not fiscal managers, because they were found to lack authority over expenditures were dismissed [from the Fiscal Liability Proceeding], while Claimants, who were not fiscal managers, by that same test, were not" is what constitutes a breach of the national treatment standard in this case.[210] Case law cited by Respondent supports the contention that "nationality-based discrimination need not be *de jure* but can be *de facto.*"[211] Therefore, Claimants have established that there has been a

[202] Counter-Memorial on Preliminary Objections, ¶ 97; Rejoinder on Preliminary Objections, ¶ 94.

[203] Rejoinder on Preliminary Objections, ¶ 94.

[204] Rejoinder on Preliminary Objections, ¶ 94.

[205] Counter-Memorial on Preliminary Objections, ¶ 98; Rejoinder on Preliminary Objections, ¶ 91; see also Rejoinder on Preliminary Objections, ¶ 95.

[206] Rejoinder on Preliminary Objections, ¶ 97.

[207] Rejoinder on Preliminary Objections, ¶ 97; Respondent's Answer to Claimants' Application for Temporary Emergency Relief, September 30, 2021, ¶ 33.

[208] Rejoinder on Preliminary Objections, ¶ 98.

[209] Rejoinder on Preliminary Objections, ¶ 98.

[210] Rejoinder on Preliminary Objections, ¶ 99.

[211] Rejoinder on Preliminary Objections, ¶ 100; *Angel Samuel Seda and others v. Republic of Colombia*, ICSID Case No. ARB/19/16, Submission of the United States of America, February 26, 2021, ¶ 50, RL-54; Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, p. 152, RL-296; *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002, ¶¶ 166, 184, RL-102; *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Decision on Jurisdiction, June 29, 2018, ¶ 249, RL-111.

prima facie breach of the national treatment standard.[212]

- *MFN*

170. When addressing the MFN claim, Claimants first observe that while the U.S.-Colombia TPA expressly explains that "treatment" for the purposes of the MFN clause "does not encompass dispute resolution mechanisms" from other treaties, there is no language in the Treaty excluding substantive provisions.[213] Thus, Claimants argue that the MFN clause contained in the U.S.-Colombia TPA allows for the importation of substantive rights contained in other treaties entered into by Colombia.[214] This is more apparent after interpreting this provision according to the presumption that the express exclusion of importing one type of provision "must be read as an inclusion" of other types of provisions.[215] Thus, as the U.S.-Colombia TPA did not expressly exclude importing substantive provisions from the MFN clause, it is permissible to import such provisions and Respondent's objection should be rejected.[216]

171. Claimants also argue that a number of tribunals has permitted the importation of an umbrella clause from another treaty.[217] Moreover, Claimants submit that Respondent's arguments that a provision such as an umbrella clause does not exist under the U.S.-Colombia TPA is wrong; the U.S.-Colombia TPA contains a provision akin to an umbrella clause in Article 10.16.1(a)(i)(C).[218] Additionally, in Claimants' view, importing an umbrella clause is not contrary to public policy as argued by the Respondent.[219] On the contrary, it does not upset the balance negotiated in the U.S.-Colombia TPA, as "it achieves

[212] Counter-Memorial on Preliminary Objections, ¶ 94.

[213] Counter-Memorial on Preliminary Objections, ¶¶ 72-73.

[214] Counter-Memorial on Preliminary Objections, ¶¶ 74-75; Rejoinder on Preliminary Objections, ¶ 102.

[215] Counter-Memorial on Preliminary Objections, ¶¶ 76-79 (emphasis omitted).

[216] Counter-Memorial on Preliminary Objections, ¶¶ 80-81.

[217] Counter-Memorial on Preliminary Objections, ¶ 82; *Consutel Group S.P.A. in Liquidazione v. People's Democratic Republic of Algeria*, PCA Case No. 2017-33, Final Award, February 3, 2020, ¶¶ 358-359, RL-131; *EDF International S.A. SAUR International S.A., and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, June 11, 2012, ¶ 933, CL-128; *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, April 8, 2013, ¶ 396, CL-129; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile,* ICSID Case No. ARB/01/7, Award, May 25, 2004, ¶ 104, CL-125.

[218] Rejoinder on Preliminary Objections, ¶ 106.

[219] Counter-Memorial on Preliminary Objections, ¶ 85; Rejoinder on Preliminary Objections, ¶ 108.

exactly the result which the parties intended by the incorporation in the BIT of an MFN clause."[220]

172. Claimants submit that no *de facto* comparator of treatment accorded in like circumstances is necessary to establish MFN protection.[221] According to Claimants, "[t]he beneficiary of the MFN clause, however, does not need to show that the third-party state (or its nationals) have invoked the benefits of the third-party treaty. The mere existence of the third-party treaty is sufficient."[222] Claimants cite *ATA Construction v. Jordan*[223], *Bayindir v. Pakistan*[224] and *Rumeli v. Kazakhstan*[225] in support of their position. On the contrary, *Ickale v. Turkmenistan* and *Muhammet Cap v. Turkmenistan*, cited by Respondent, are inapposite and inconsistent with jurisprudence on the subject[226] and the reasoning of the two tribunals has been described as "highly problematic."[227] Similarly, Claimants add, Respondent's argument that the Colombia-Swiss BIT does not contain a consent to arbitrate disputes related to breaches of the umbrella clause is also inapposite, because the consent to arbitrate is still based on the U.S.-Colombia TPA, not the Colombia-Swiss BIT.[228]

173. Finally, Claimants submit that the Colombia-Japan BIT also contains an umbrella clause

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[220] Counter-Memorial on Preliminary Objections, ¶ 85; *White Industries Australia Ltd. v. The Republic of India,* UNCITRAL, Final Award, November 30, 2011, ¶¶ 11.2.3-11.2.4, CL-209; see Rejoinder on Preliminary Objections, ¶ 107.

[221] Counter-Memorial on Preliminary Objections, ¶¶ 86-88.

[222] Counter-Memorial on Preliminary Objections, ¶ 88; Cohen Smutny, Petr Polášek & Chad Farrell, *The MFN Clause and Its Evolving Boundaries, in Arbitration Under International Agreements: A Guide to the Key Issues* (K. Yannaca-Small ed., OUP 2018), ¶ 23.20, CL-135.

[223] *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, May 18, 2010, ¶ 125, n. 16, CL-134.

[224] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, November 14, 2005, ¶¶ 230-232, CL-33; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, August 27, 2009, ¶ 153, CL-126.

[225] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, July 29, 2008, ¶¶ 558, 575, CL-70.

[226] Rejoinder on Preliminary Objections, ¶¶ 104-106.

[227] Counter-Memorial on Preliminary Objections, ¶ 89; Stephan W. Schill, *MFN Clauses as Bilateral Commitments to Multilateralism: A Reply to Simon Batifort and J. Benton Heath*, 111 Am. J. Int'l L. 914 (2017), p. 930, CL-114.

[228] Counter-Memorial on Preliminary Objections, ¶ 90; Rejoinder on Preliminary Objections, ¶ 109; *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, August 3, 2004, ¶ 120, CL-123; see also Stephan W. Schill, *Mulitilateralizing Investment Treaties through Most-Favored- Nation Clauses*, 27 BERKELEY J. INT'L LAW 496, 536 (2009), CL-131.

that does not exclude breaches of the umbrella clause from the ambit of the consent to arbitration.[229] Therefore, the Colombia-Japan BIT stands as an alternate basis upon which Claimants are entitled to invoke a breach of an umbrella clause.[230]

(iii) *Prima Facie Breach of an Investment Agreement*

174. Claimants first note that the Services Contract was concluded between a foreign investor and Reficar, a "State entity" under Colombian law and a "national authority of a Party" under the U.S.-Colombia TPA.[231] Claimants also recall that the Services Contract has the character of a "State Contract" under Colombian law and that it was concluded with the aim of refurbishing Colombia's infrastructure.[232] Claimants argue that not only is the Services Contract a covered investment, but that Claimants also invested "significant amounts of time, capital, personnel, and labor in [the] Colombian territory" in reliance on the Services Contract, making it an investment agreement.[233] Claimants' claims and damages are related to a covered investment (time, capital, personnel, labour) provided in reliance upon an investment agreement (i.e. the Services Contract).[234]

175. Claimants further reject Colombia's contention (in reliance primarily on the definitions in Annex 9.1 to the U.S.-Colombia TPA) that Reficar is not a "national authority," because it is not an "authority at the central level of government" as defined by Article 10.28. However, Claimants submit, this Annex does not refer to Chapter 10 (Investment) in any way, and the text of Chapter Nine limits Annex 9.1's application to 'procuring entities.' Therefore, according to Claimants, Annex 9.1 "does not inform what qualifies as a 'national authority' under Chapter Ten."[235]

176. They further explain that "national authority" in the U.S.-Colombia TPA refers to "an authority at the central level of government", which the Treaty defines "for Colombia, [as]

[229] Counter-Memorial on Preliminary Objections, ¶¶ 91-92; Rejoinder on Preliminary Objections, ¶ 109.
[230] Counter-Memorial on Preliminary Objections, ¶ 93.
[231] Counter-Memorial on Preliminary Objections, ¶ 104.
[232] Counter-Memorial on Preliminary Objections, ¶ 104.
[233] Counter-Memorial on Preliminary Objections, ¶ 106; Rejoinder on Preliminary Objections, ¶ 114.
[234] Counter-Memorial on Preliminary Objections, ¶ 107.
[235] Rejoinder on Preliminary Objections, ¶ 113.

the national level of government."[236] On this point, Claimants explain that "Colombia, through its internal laws, has delegated to Ecopetrol and its wholly owned subsidiary Reficar, the signatory to the Contract, 'governmental authority,' including the ability to 'approve commercial transactions.'"[237] Moreover, through Ecopetrol, Colombia owns 88% of the stock in Reficar, which is thus majority controlled by the State.[238] Therefore, Claimants submit that the Services Contract with Reficar must be attributed to Colombia.[239]

177. In any case, Claimants continue, it is not appropriate to analyze the complex question of attribution at the jurisdictional stage of the proceedings; such a matter is best dealt with at the merits stage,[240] save for a "manifest" lack of any link to the acts at issue.[241] This threshold is not met in the present dispute and Claimants have therefore established that, *prima facie*, Reficar's conduct is attributable to Colombia. Accordingly, Claimants say that they entered into the Services Contract with a national authority of a Party.[242]

178. Finally, Claimants clarify that they "are not asking the Tribunal to determine whether Reficar breached the [Services] Contract."[243] Rather, Claimants' claims are concerned with the actions of the CGR, and thus of Colombia, which are in breach of the Services Contract by "[redacted]

[236] Counter-Memorial on Preliminary Objections, ¶ 108.

[237] Counter-Memorial on Preliminary Objections, ¶ 108.

[238] Counter-Memorial on Preliminary Objections, ¶ 109.

[239] Counter-Memorial on Preliminary Objections, ¶ 109.

[240] Counter-Memorial on Preliminary Objections, ¶ 111; see *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, June 18, 2010, ¶ 144, RL-128; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, June 16, 2006, ¶ 85, CL-172; Csaba Kovács, *Attribution in International Investment Law* (Kluwer 2018), p. 297, CL-148.

[241] Counter-Memorial on Preliminary Objections, ¶ 111; see *Staur Eiendom AS, EBO Invest AS and Rox Holding AS v. Republic of Latvia*, ICSID Case No. ARB/16/38, Award, February 28, 2020, ¶ 303, CL-149; *Consutel Group S.P.A. in Liquidazione v. People's Democratic Republic of Algeria,* PCA Case No. 2017-33, Final Award, February 3, 2020, ¶ 316, RL-131; *Noble Energy, Inc. and Machalapower Cia. Ltda. v. The Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction, March 5, 2008, ¶ 166, CL-150.

[242] Counter-Memorial on Preliminary Objections, ¶¶ 111-112.

[243] Counter-Memorial on Preliminary Objections, ¶ 114. [redacted]

[redacted]."[244] Therefore, Claimants have established a *prima facie* breach of an investment agreement.[245]

(iv) *Loss or Damage resulting from the Alleged Breaches*

179. According to Claimants, Respondent's argument that the loss or damage must be incurred by the covered investment and not the investor is based on a faulty understanding of the U.S.-Colombia TPA.[246]

180. As previously noted by Claimants, their covered investment consists not only of the Services Contract, but also of additional assets which have been deployed in Colombia "to implement the Project as directed by Reficar."[247] Claimants also oppose Respondent's contention that no loss or damage can be incurred until Claimants make the payment required by the CGR Decision.[248] Claimants submit that they have already incurred reputational damage from being named in the Fiscal Liability Proceeding and "significant attorney's fees in defending [themselves] in those proceedings."[249] Additionally, in Claimants' view, the "basic damages principle of full reparation for damages […] would be impossible if only damages incurred as of the start of the arbitration were considered, with no recognition or consideration of ongoing or further damages that are typical of almost every investor-state arbitration." According to Claimants, "proof of damages is not a prerequisite for establishing the existence of a claim in ICSID arbitration."[250]

181. As to the attorney's fees, Claimants submit that Respondent's reliance on Colombian law on this point is baseless. For the purposes of the U.S.-Colombia TPA, damages are determined pursuant to international law. Pursuant to international law, "attorney's fees resulting from proceedings that have breached treaty obligations are an appropriate basis

[244] Counter-Memorial on Preliminary Objections, ¶ 114; Rejoinder on Preliminary Objections, ¶ 114.

[245] See Counter-Memorial on Preliminary Objections, ¶ 115.

[246] Counter-Memorial on Preliminary Objections, ¶¶ 116-117. See also *supra* ¶¶ 154-162 incorporating Claimants' arguments regarding the FET breach.

[247] Counter-Memorial on Preliminary Objections, ¶ 119.

[248] Counter-Memorial on Preliminary Objections, ¶ 121.

[249] Counter-Memorial on Preliminary Objections, ¶ 121; Rejoinder on Preliminary Objections, ¶ 117.

[250] Counter-Memorial on Preliminary Objections, ¶¶ 24-25.

for damages."[251]

182. Claimants also argue they are not required to prove their moral damages as this is a matter for a later stage of the proceedings.[252] Claimants' allegations are to be assumed to be true by the Tribunal and Respondent has not provided any legal basis to disregard Claimants' arguments that they have suffered damage to their reputation due to the CGR's false statements accusing them of fraud and corruption.[253] Respondent bears the burden to prove this allegation and it has failed to do so.[254]

183. In *Mobil Investments v. Canada,* the tribunal stated that "[a] call for payment may be sufficient" in order to establish damage which can be compensated for.[255] That tribunal also stated that it had jurisdiction to compensate "for damages that accrued after the Notice of Arbitration but in the course of the proceedings […]."[256] Contrary to Respondent's contentions, the *Mobil Investments v. Canada* case is apposite to the present case, as here too, "Claimants' damages began during the course of the CGR proceedings and continue through the present day."[257]

184. Therefore, Claimants have established that they have already suffered loss and damage as a result of Colombia's actions "which continue to accrue."[258] Additionally, it is possible for this Tribunal to consider not only the breaches which occurred as of the day of the Notice of Arbitration, but also those which have arisen during the course of these proceedings.[259] Finally, the Tribunal can issue "an award directing that a compensating

[251] Rejoinder on Preliminary Objections, ¶ 124.

[252] Rejoinder on Preliminary Objections, ¶ 125.

[253] Rejoinder on Preliminary Objections, ¶ 125.

[254] Rejoinder on Preliminary Objections, ¶ 126.

[255] Counter-Memorial on Preliminary Objections, ¶ 122; *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, May 22, 2012, ¶ 428, CL-151. Claimants add that the Tribunal in *Mobil Investments v. Canada* relied on the *Grand River* case.

[256] Counter-Memorial on Preliminary objections, ¶ 122; *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, May 22, 2012, ¶ 430, CL-151.

[257] Rejoinder on Preliminary Objections, ¶¶ 118-121.

[258] Counter-Memorial on Preliminary Objections, ¶ 123.

[259] Counter-Memorial on Preliminary Objections, ¶ 123.

payment be made for any assets seized by Colombia."[260]

(2) Claimants' Claims Fall Outside the Tribunal's Powers Under Article 10.26 of the Treaty

a. Respondent's Position

185. Respondent argues that the Tribunal is not empowered under Article 10.26 of the U.S.-Colombia TPA to grant the relief sought by Claimants. In particular, Colombia submits that (i) the Tribunal cannot award moral damages; (ii) the Tribunal cannot award non-monetary damages or injunctions; and (iii) the Tribunal cannot issue an offsetting award.[261]

186. First, under Article 10.26 of the US-Colombia FTA, the Tribunal is empowered to award "monetary damages" and expressly prohibited from awarding "punitive damages."[262] Respondent argues that moral damages are considered "non-monetary damages" under international law[263] and cites *Daillo*[264] and *Cantoral Benavides v. Peru*[265], among others, in support of this position.[266] Thus, Respondent says that the Tribunal cannot award Claimants moral damages,[267] whether they are considered "non-monetary" or "punitive" damages.[268] The principle of full reparation cannot override the express language of the U.S.-Colombia TPA.[269]

187. Second, Article 10.26 of the U.S.-Colombia TPA allows the Tribunal to award "only monetary damages or order restitution of property."[270] Therefore, the Tribunal cannot grant

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[260] Rejoinder on Preliminary Objections, ¶ 130.

[261] Memorial on Preliminary Objections, ¶ 262; Reply on Preliminary Objections, ¶ 216.

[262] Memorial on Preliminary Objections, ¶ 264; Reply on Preliminary Objections, ¶¶ 217, 219.

[263] Memorial on Preliminary Objections, ¶ 265.

[264] *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment – Compensation owed by the Republic of the Congo to the Republic of Guinea, I.C.J. REPORTS 324, June 19, 2012, ¶¶ 24-25, RL-144.

[265] *Case of Cantoral-Benavides v. Peru*, Inter-American Court of Human Rights, Judgment of December 3, 2001 (Reparation and Costs), ¶ 53, RL-148.

[266] Memorial on Preliminary Objections., ¶¶ 265-266.

[267] Memorial on Preliminary Objections., ¶ 268.

[268] Reply on Preliminary Objections, ¶ 220.

[269] Reply on Preliminary Objections, ¶ 223.

[270] Memorial on Preliminary Objections, ¶ 269 (emphasis and internal quotation omitted); Reply on Preliminary Objections, ¶ 226.

Claimants' request that the Tribunal issue an order prohibiting the CGR or any other organ of Colombia from seizing any of Claimants' assets.[271]

188. Third, Respondent recalls that Claimants are yet to incur any actual damage which could be offset by the Tribunal.[272] The U.S.-Colombia TPA requires damage or loss to be incurred as a requirement for validly submitting a claim to arbitration.[273] Colombia submits that it will be only after Claimants have made voluntary or compulsory payment of the amount of the CGR Decision that certain monetary damages, which, in principle, would be capable of being compensated under Article 10.26 of the Treaty, will be incurred.[274]

189. Finally, Respondent recalls that the CGR Decision "establishes the joint and several liability" of Claimants, as well as other fiscally liable parties, and it is therefore unclear whether Claimants will have to make full or partial payment of the amount of the CGR Decision.[275] Claimants' reference to *Glencore v. Colombia* is inapposite, because, in that case, claimant had paid pursuant to the fiscal liability ruling.[276]

190. Finally, Respondent notes that Claimants also seek a declaratory award, "ordering Respondent to compensate Claimants for any future damages Claimants might […] suffer from any future payment they might […] have to make […] to satisfy all or part of the amount of the Ruling with Fiscal Liability." According to Respondent, the Tribunal cannot grant such relief either, as the U.S.-Colombia TPA only allows the Tribunal to award monetary damages.[277] Therefore, the Tribunal lacks the power to grant an offsetting award as requested by Claimants.[278]

b. Claimants' Position

191. Claimants argue that, contrary to Respondent's submission, moral damages do not fall

[271] Memorial on Preliminary Objections, ¶ 269; Reply on Preliminary Objections, ¶ 226.
[272] Memorial on Preliminary Objections, ¶ 272; Reply on Preliminary Objections, ¶ 229.
[273] Memorial on Preliminary Objections, ¶ 273.
[274] Memorial on Preliminary Objections, ¶ 276; see Reply on Preliminary Objections, ¶ 231.
[275] Reply on Preliminary Objections, ¶ 231 (emphasis omitted).
[276] Reply on Preliminary Objections, ¶ 233.
[277] Reply on Preliminary Objections, ¶ 234.
[278] Memorial on Preliminary Objections, ¶ 278; Reply on Preliminary Objections, ¶ 236.

within the category of punitive damages[279] and that none of Respondent's authorities suggests otherwise.[280] Moral damages are compensatory and monetary, and thus this Tribunal is allowed to award them[281]. Claimants agree that awarding punitive damages is not recognized in international law, and that compensation should be restorative in nature.[282] However, they contend that moral damages are not punitive in nature.[283] On the contrary, Claimants argue, moral damages are "compensatory and monetary, and thus fully allowed by the [U.S.-Colombia] TPA."[284] Furthermore, "the purpose of the principle of full reparation could not be achieved without the recognition of moral damages."[285]

192. Additionally, Respondent's contention that this Tribunal cannot grant an offsetting award is not supported by jurisprudence.[286] The CGR has issued a final decision and it is "actively engaged in trying to collect it."[287] There is nothing "merely hypothetical" or "[i]ndeterminate" about the damages incurred by Claimants.[288] Claimants note that Colombia has quantified the amount of money or property it intends to take from Claimants, and it would be "perverse" to allow Claimants to file a claim only once Respondent has bankrupted them.[289] Accordingly, "[a]n offsetting award for any amounts actually collected is an appropriate remedy."[290]

(3) Tribunal's Analysis

193. The various aspects associated with the arguments put forward by Claimants and Respondent require the Arbitral Tribunal to analyze them altogether to the extent that they

[279] Counter-Memorial on Preliminary Objections, ¶ 125; Rejoinder on Preliminary Objections, ¶ 127.

[280] Rejoinder on Preliminary Objections, ¶ 127.

[281] Rejoinder on Preliminary Objections, ¶¶ 125 and 128; see *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, February 6, 2008, ¶ 290, CL-156.

[282] Counter-Memorial on Preliminary Objections, ¶ 127.

[283] Counter-Memorial on Preliminary Objections, ¶ 128.

[284] Rejoinder on Preliminary Objections, ¶ 128.

[285] Counter-Memorial on Preliminary Objections, ¶ 129.

[286] Rejoinder on Preliminary Objections, ¶ 130; *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, August 27, 2019, ¶¶ 1473-1505, 1683, 1687, CL-5.

[287] Rejoinder on Preliminary Objections, ¶ 130.

[288] Counter-Memorial on Preliminary Objections, ¶ 132.

[289] Counter-Memorial on Preliminary Objections, ¶ 132.

[290] Rejoinder on Preliminary Objections, ¶ 130.

are intertwined and in accordance with the Treaty.

194. Pursuant to Article 10.20.4 of the TPA, the Arbitral Tribunal shall address and decide as a preliminary question any objection by Respondent that, as a matter of law, a claim submitted is not a claim for which an award in favour of Claimants may be made under Article 10.26 of the TPA.

195. Article 10.20.4 of the TPA leads the Arbitral Tribunal to an analysis of the claim put forward by Claimants in light of the provisions of Article 10.16 of the TPA. Such provision contains the requirements which are to be fulfilled, if a claim is to qualify as a claim for which an award may be made under Article 10.26 of the TPA.

196. As an initial step, Article 10.15 of the TPA provides that "[i]n the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures."

197. In this case, it is reported that the Parties' efforts were unsuccessful. Claimant was dissatisfied by the failure to reach a negotiated solution and decided to move forward in accordance with the rules provided by the TPA.

198. Claimants claim in their Request for Arbitration that Respondent, through its instrumentalities and/or other high-level authorities – CGR – in conducting the investigation in the Fiscal Liability Proceedings, has ridden over Claimants' rights and breached fundamental provisions of the TPA, customary international law, and Colombian law giving rise to moral and monetary damages to Claimants.

199. As detailed above, Claimants' claims in this case are based on the Fiscal Liability Proceeding initiated by the CGR in Colombia against Foster Wheeler and Process Consultants amongst other natural and juridical persons, both Colombian and foreign. According to Claimant:

(i) "[t]he national treatment claim is based on the CGR's refusal to apply the same legal standard to the Claimants as it did to the similarly-situated Colombian Ecopetrol Board members

who were released from the CGR proceedings even though they, unlike FPJVC, had actual decision-making authority;"

(ii) "[t]he expropriation of Claimants' fundamental protections in the Contract occurred when the CGR stripped it of such rights by forcing FPJVC into the proceedings without legitimate legal or factual bases;"

(iii) "[t]he fair and equitable treatment claim arises from the CGR's acts that were contrary to Claimants' due process rights, as well as breaching Claimants' legitimate expectations, including that its contract rights would be respected and that it would receive fair treatment from Colombian governmental entities like the CGR in accordance with Colombian law and the provisions of the TPA, among other acts and omissions. Claimants' fair and equitable treatment claim also arises from the denial of justice suffered by Claimants arising from, among other acts and omissions, the numerous due process violations that plagued the entirety of the CGR proceedings;"

(iv) "Claimant's umbrella clause claims and Investment Agreement claims both occurred with the CGR's initial acts to deprive FPJVC of its contract rights by initiating the proceedings."[291]

200. Based on the above, Claimants contend that nothing further than what has been set forth in the Request for Arbitration is required for their claims to be sufficiently "ripe" and that more recent events in connection with the Fiscal Liability Proceedings have only exacerbated the violations of law committed by Colombia.

201. Colombia, however, argues that, according to Article 10.16.1 of the TPA, the submission of a valid claim to arbitration requires that a substantive obligation under the Treaty had been breached as of the date of the submission. At the time Claimants filed their Notice of Arbitration, Claimants had failed to identify any measure in the Fiscal Liability Proceedings capable of constituting such a breach, since at that moment, only the Indictment Order, which is a procedural administrative act that did not define any legal situation, had been issued.

[291] Counter-Memorial on Preliminary Objections, ¶ 13.

202. According to Respondent, despite the fact that the CGR issued the Ruling with Fiscal Liability on July 6, 2021, months after the commencement of this arbitration, Claimants' claim remains premature as any administrative act that is subject to subsequent judicial control cannot constitute a breach under the Treaty.

203. Article 10.16.1(a) of the TPA provides, in its relevant part, as follows:

> 1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:
>
> (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim
>
> (i) that the respondent has breached
>
> (A) an obligation under Section A,
>
> (B) an investment authorization, or
>
> (C) an investment agreement;
>
> and
>
> (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach; […].

204. As such, for a claim to be admissible, a measure capable of constituting a Treaty breach must have existed as of the date of the submission. The Arbitral Tribunal will thus analyse whether, as of the day of the submission of the present Request for Arbitration, a measure capable of constituting a Treaty breach existed.

205. Even if the evidence associated with the claims may, in certain instances, be made available only after the filing of the appropriate request for arbitration, this shall not be deemed a blank check allowing a claimant to introduce documents periodically throughout the arbitration. Moreover, the submission of evidence after the initial procedural moment is also subject to a high standard of proof as to when the evidence became available.

206. This possibility is limited by the due process of law and the right of defence of respondent which must be at all times preserved. In sum, even if the evidence is central for the admissibility of the claim and was only obtained after the relevant filing, the introduction of the same may not be considered in ascertaining the fulfilment of the prerequisites under the Treaty.

207. *First*, the Arbitral Tribunal notes that there is no dispute between the Parties that, at the time the arbitration was initiated, only the Indictment Order had been issued and a final administrative decision was still pending.

208. *Second,* the Tribunal accepts that when the Fiscal Chamber formally rejected FPJVC's appeal on 6 July 2021 and affirmed the Ruling with Fiscal Liability in its entirety, Claimants had exhausted their administrative appeals.

209. Nonetheless, the Ruling with Fiscal Liability is still subject to subsequent judicial control by the tribunals of the administrative adjudicatory jurisdiction.

210. The Tribunal notes Claimants' argument that the Ruling with Fiscal Liability is the result of an administrative adjudicatory proceeding falling within the ambit of Article 10.5.2(a) of the Treaty, thus allowing a claim for denial of justice. However, the Arbitral Tribunal understands that the administrative adjudicatory proceeding referred to in Article 10.5.2(a) is a judicial proceeding before the administrative adjudicatory jurisdiction, and not an administrative proceeding as the Fiscal Liability Proceeding.

211. The recourse to the expression used in the Spanish version of the Treaty is helpful to confirm such understanding in so far as "*procedimiento contencioso administrativo*" unequivocally means a proceeding initiated before a national court.

212. Moreover, Article 10.5.2(a) expressly states that "'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." It is clear from the text of this article that the obligation not to deny justice encompasses all of criminal, civil and administrative adjudicatory proceedings.

213. This is further confirmed by the analysis of other provisions of Chapter 10 of the Treaty. When the Treaty refers specifically to purely administrative proceedings, as opposed to judicial proceedings, it makes reference to "administrative proceedings"[292] and "administrative process."[293] The only instance in which the expression "administrative adjudicatory proceedings" is used is in Article 10.5.2(a) which, when read in conjunction with "criminal, civil, or" must refer to judicial proceedings.

214. Hence, the obligation not to deny justice established in the Treaty is limited to proceedings of a judicial nature before national courts and does not cover purely administrative proceedings.

215. In the present case, considering that the judiciary has not yet intervened, it cannot be considered that there could be a denial of justice under customary international law. As decided by the *Flughafen v. Venezuela* tribunal, "[t]here could be no international responsibility of a State for denial of justice if there is still an effective local remedy against the local decision that is challenged."[294] [Translation of the Tribunal]

216. Even if one might argue that subsequent events could ripen a claim after the commencement of the arbitration, in the present case, no final decision before the administrative adjudicatory jurisdiction exists. Considering that the Ruling with Fiscal Liability could be overturned after judicial review, it cannot constitute a denial of justice or a breach of any of the other substantive obligations under the Treaty alleged by Claimants.

217. *Third*, as noted by the NPD Submission, with which the Tribunal agrees, "[i]t is well-established that the international responsibility of States may not be invoked with respect

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[292] Article 10.8.4(e) of the Treaty, CL-1, RL-1: "Notwithstanding paragraphs 1 through 3, a Party may prevent a transfer through the equitable, non-discriminatory, and good faith application of its laws relating to: […] (e) ensuring compliance with orders or judgments in judicial or administrative proceedings.".

[293] Article 10.9.3(b)(ii) of the Treaty, CL-1, RL-1: "[…] Paragraph 1(f) does not apply: […] when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal, or competition authority to remedy a practice determined after judicial or administrative process to be anticompetitive under the Party's competition laws.".

[294] *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, November 18, 2014, ¶ 392, RL-83.

to non-final judicial acts, unless recourse to further domestic remedies is obviously futile or manifestly ineffective."[295] Claimants, however, have not presented any evidence to substantiate their allegations that it would be obviously futile or manifestly ineffective to seek further review of the Ruling with Fiscal Liability. On the other hand, Respondent has provided the Tribunal with several examples of rulings with fiscal liability issued by the Deputy Comptroller that have been rendered ineffective or reversed, in whole or in part, following a prosecution of judicial remedies.[296]

218. *Finally*, the denial of justice when alleged has to be accompanied by strong evidence. The existence of appeals or revision mechanisms have a temporary effect. A lower-level decision by an instrumentality which is made in accordance with applicable procedural rules may not be deemed a denial of justice, since the recourse to a higher-level authority may result in a revision or an annulment of the decision. It is open to Claimants to pursue an appeal as due process allows and as is consistent with the scope of fair and equitable treatment adumbrated in Article 10.5.2(a) of the TPA.

219. Therefore, the absence of a measure capable of constituting a breach of a substantive obligation under the TPA by Respondent at the time the arbitration was initiated makes Claimants' claim premature and inadmissible.

220. The fact that the Ruling with Fiscal Liability issued by the CGR is not an administrative adjudicatory proceeding as provided by the TPA and contemplates certain appeals or defences at the administrative judicial level is fatal to the admissibility of Claimants' claims. For Treaty purposes, an administrative act of CGR does not entitle a party to

[295] NDP Submission, ¶ 5.

[296] See for example *Consejo de Estado* of Colombia, Chamber for Administrative Adjudicatory Proceedings, First Section, Judgment, November 20, 2014 (*Condor S.A. Compañía de Seguros v. Comptroller of Bogotá D.C.*), pp. 11-12, 33, RL-87; *Consejo de Estado* of Colombia, Chamber for Administrative Adjudicatory Proceedings, First Section, Judgment, October 22, 2015 (*Marta Inés Martínez Arias v. Municipality of Armenia-Municipal Comptroller of Armenia*), pp. 9-10; 22-23, RL-88; *Consejo de Estado* of Colombia, Chamber for Administrative Adjudicatory Proceedings, Fifth Section, Judgment, July 5, 2018 (*Ezequiel Paladines Cuellar v. Office of the Departmental Comptroller of the Atlantic*), pp. 27-28, RL-89; *Consejo de Estado* of Colombia, Chamber for Administrative Adjudicatory Proceedings, First Section, Judgment, November 12, 2020 (*Ana María Piñeros Ricardo v. Comptroller General of the Republic*), pp. 108-109, RL-90; *Consejo de Estado* of Colombia, Chamber for Administrative Adjudicatory Proceedings, First Section, Judgment, February 18, 2021 (*Aseguradora Colseguros S.A. v. Comptroller General of the Republic*), pp. 36-37, RL-91.

commence arbitration based on the argument of denial of justice capable of breaching the FET obligation by Respondent. Based on the information provided by the Parties to the Arbitral Tribunal it is apparent that Claimants have taken no steps to initiate judicial proceedings to challenge the Ruling with Fiscal Liability.

221. The Tribunal resumes the discussion with respect to the timing of filing of the Request for Arbitration and the inexistence at that point of a final administrative act. The Tribunal reiterates that the final administrative act had to be in existence at the time of the filing of the Request for Arbitration, and it was not.

222. In light of the foregoing considerations, the Tribunal concludes that Claimants failed to comply with the first prerequisites for the admission of their claims under the Treaty in so far as there is no evidence of any breach of a provision of the TPA at the time the Request for Arbitration was submitted. Hence, the Tribunal accepts the preliminary objection filed by Respondent and, further, decides that Claimants' claims may not be admitted, the arbitration being therefore terminated.

223. The Tribunal, therefore, does not need to analyze whether loss or damage existed at the time the claim was submitted to arbitration.

224. Finally, in light of the above conclusion, the Tribunal need not analyze its powers under Article 10.26 of the U.S.-Colombia TPA to grant the relief sought by the Claimants.

B. OBJECTIONS TO JURISDICTION

(1) Claimants Do Not Have a Protected Investment Under the Treaty and the ICSID Convention

a. Respondent's Position

225. First, Colombia argues that the Tribunal lacks jurisdiction *ratione materiae*, because Claimants do not possess an "investment" under Article 10.28 of the U.S.-Colombia TPA. This Article requires an "investment" to have certain characteristics, such as *e.g.,* the

assumption of risk.[297] Article 10.28(e) establishes "turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts" among the forms that an investment may take. Colombia argues that Claimants do not have a management or construction contract, but "merely a contract for the provision of consultancy services",[298] and adds that "[c]ommentators agree that paragraph (e) […] excludes ordinary commercial contracts that do not have the characteristics of an investment."[299]

226. Moreover, assumption of risk is a mandatory requirement that an investment must possess pursuant to Article 10.28 of the U.S.-Colombia TPA.[300] The existence of an "investment risk" is a "fundamental element of the concept of an 'investment' under both the Treaty and the ICSID Convention." "Investment risk" must be distinguished from generic risk connected to any economic activity and "commercial risk", which is inherent in any contract and consists of the risk of non-performance of contractual obligations. Respondent recalls that "investment risk" was distinguished from "commercial risk" in *Romak v. Uzbekistan and Poštová banka and Istrokapital v. Greece*, among others. Contrary to Claimants' allegations, all of the cases cited by Respondent, "highlight the need for an investment risk to be present for there to be a protected 'investment.'"[301]

227. Colombia also submits that, in order for the Tribunal to have jurisdiction over the dispute, "the asset possessed by the claimants […] must also be objectively considered an 'investment' under the terms of the ICSID Convention."[302] The "*Salini* test" provides for "an objective notion of what constitutes an 'investment' under the ICSID Convention, and

[297] Memorial on Preliminary Objections, ¶¶ 281-282; Reply on Preliminary Objections, ¶ 244; see Article 10.28 of the U.S.-Colombia TPA, RL-1.

[298] Reply on Preliminary Objections, ¶ 241 (emphasis omitted).

[299] Memorial on Preliminary Objections, ¶ 283; see Reply on Preliminary Objections, ¶¶ 241-243; see, for example, Lee M. Caplan and Jeremy K. Sharpe, United States, in COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 755 (C. Brown (ed.) Oxford University Press 2013), n. 53, RL-37; Kenneth J. Vandevelde, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (Oxford University Press 2009), p. 123, RL-121.

[300] Reply on Preliminary Objections, ¶ 244.

[301] Reply on Preliminary Objections, ¶¶ 248, 286.

[302] Memorial on Preliminary Objections, ¶ 285; see *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, February 7, 2011, ¶ 107, RL-186.

one of the essential elements of that notion is the existence of investment risk."[303] Even if an investment qualifies as such under a treaty, that does not mean that it also qualifies as an investment under the ICSID Convention.[304] This "double keyhole" approach is applicable in all ICSID arbitrations.[305]

228. Colombia recalls that the "investment" claimed by Claimants is the Services Contract, because "all other 'activities' and resources described by Claimants simply correspond to the performance of their contractual obligations" under such Contract.[306] However, the Services Contract is only a commercial contract and does not involve any "investment risk."[307] [redacted][308] While the facts alleged might indicate "a certain contribution of resources and a certain duration," they do not show an assumption or existence of investment risk.[309]

229. Thus, the Services Contract does not involve any "investment risk."[310] The periodic remuneration ensured that Claimants were "never at risk of losing the human, financial and technical resources [they] allocated to the performance of the Services Contract and that [they] had no uncertainty as to whether or not [they] would make a profit."[311] The fact that the consultancy services provided by Claimants related to the construction of a refinery

[303] Memorial on Preliminary Objections, ¶ 285; Reply on Preliminary Objections, ¶ 249; see *Salini Construttori S.P.A and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, July 23, 2001, ¶ 52, RL-189; *Ulysseas, Inc. v. Republic of Ecuador*, UNCITRAL, Final Award, June 12, 2012, ¶ 251, RL-190; *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, November 30, 2012, ¶ 5.43, RL-100; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, September 27, 2012, ¶ 227, RL-191.

[304] Reply on Preliminary Objections, ¶ 249; Christoph Schreuer *et al.*, *THE ICSID CONVENTION: A COMMENTARY* (2d ed., Cambridge University Press 2009), Article 25, ¶ 122, RL-187.

[305] *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Excerpts of Award, July 2, 2018, ¶ 243, CL-168; *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia*, Partial Award on Jurisdiction, September 8, 2006, ¶ 112, CL-184.

[306] Memorial on Preliminary Objections, ¶ 292.

[307] Memorial on Preliminary Objections, ¶ 293.

[308] Memorial on Preliminary Objections, ¶ 293.

[309] Reply on Preliminary Objections, ¶ 253.

[310] Memorial on Preliminary Objections, ¶ 294.

[311] Memorial on Preliminary Objections, ¶ 294; Reply on Preliminary Objections, ¶ 253.

does not change the character of the Services Contract to something more than an ordinary commercial contract for the provision of services.[312]

b. Claimants' Position

230. Claimants argue that Article 10.28 of the U.S.-Colombia TPA reflects a standard formulation of the definition of the word "investment."[313] Among the non-exhaustive list of examples of an investment are "construction, management […] and other similar contracts."[314] "Thus, by its terms, the [Services] Contract meets the definition of an investment pursuant to the [U.S.-Colombia] TPA."[315] Claimants add that the U.S.-Colombia TPA "define[s] 'investment' in a way that comfortably encompasses so-called ordinary commercial transactions."[316]

231. Claimants recall that Article 10.28 of the U.S.-Colombia TPA states that the investment "must have characteristics of an investment, including […] the commitment of capital or other resources, the expectation of gain or profit, *or* the assumption of risk."[317] Nevertheless, Claimants did assume risk,[318] and this is supported both by the decision in *Salini v. Morocco*,[319] as well as by other tribunals that found that "even the very existence of a dispute constitutes sufficient evidence of risk."[320] Additionally, it cannot be disputed that Claimants had committed capital and other resources with the expectation of profit. They conclude that the assumption of risk is "plainly not required by the [U.S.-Colombia]

[312] Memorial on Preliminary Objections, ¶ 297; see Reply on Preliminary Objections, ¶ 247.

[313] Counter-Memorial on Preliminary Objections, ¶ 136; Christoph H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge 2010), ¶ 142, RL-187; see *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, July 11, 1997, ¶ 34, CL-161.

[314] Counter-Memorial on Preliminary Objections, ¶ 137.

[315] Counter-Memorial on Preliminary Objections, ¶ 137; Rejoinder on Preliminary Objections, ¶ 137.

[316] Counter-Memorial on Preliminary Objections, ¶ 138 (internal quotation marks omitted).

[317] Counter-Memorial on Preliminary Objections, ¶ 139 (internal quotation marks omitted) (emphasis added).

[318] Rejoinder on Preliminary Objections, ¶ 143.

[319] Rejoinder on Preliminary Objections, ¶ 143; *Salini Construttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, July 23, 2001, ¶¶ 55-56, CL-226; see also *A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG, Hamburg (Germany) v. The Czech Republic*, PCA Case No. 2017-15, Final Award, May 11, 2020, ¶ 475, CL-227.

[320] Rejoinder on Preliminary Objections, ¶ 143; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, October 31, 2012, ¶ 301, CL-228; *Fedax N.V. v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, July 11, 1997, ¶ 40, CL-161.

TPA."[321]

232. Citing *Garanti Koza v. Turkmenistan*,[322] Claimants argue that when the definition of an investment under the relevant treaty does not exceed what is permissible under the ICSID Convention, then, by meeting the definition under the treaty, "it is also an investment for purposes of Article 25 of the ICSID Convention."[323] According to Claimants, in this dispute, it has not been shown that the definition of an investment in the U.S.-Colombia TPA exceeds the scope of what is permissible under the ICSID Convention. Therefore, Claimants conclude, the analysis whether Claimants have made a qualified investment can end when the U.S.-Colombia TPA definition is met.[324]

233. Claimants further submit that, if the Tribunal was to adopt the "double keyhole" approach, they would also meet the definition of investment of the ICSID Convention as developed by investment tribunals.[325] First, Claimants note that the ICSID Convention does not include a definition of the term "investment",[326] and that tribunals have analyzed the existence of an investment by applying criteria such as contribution, a certain duration, and an element of risk.[327] Claimants note that as Prof. Schreuer has clarified: "[t]hese features should not necessarily be understood as jurisdictional requirements but merely as typical characteristics of investments under the Convention."[328]

234. None of the cases cited by Respondent is apposite, because none of them is analogous to the Services Contract investment.[329] The Services Contract was, at the time of signing, a

[321] Counter-Memorial on Preliminary Objections, ¶ 139.

[322] *Garanti Koza LLP v. Turkmenistan,* ICSID Case No. ARB/11/20, Award, December 19, 2016, ¶¶ 238-242, CL-165.

[323] Counter-Memorial on Preliminary Objections, ¶ 140.

[324] Counter-Memorial on Preliminary Objections, ¶ 140.

[325] Counter-Memorial on Preliminary Objections, ¶ 141.

[326] Counter-Memorial on Preliminary Objections, ¶ 142.

[327] Counter-Memorial on Preliminary Objections, ¶ 143; see *Mabco Constructions SA v. Republic of Kosovo*, ICSID Case No. ARB/17/25, Decision on Jurisdiction, October 30, 2020, ¶ 96, CL-167; *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Excerpts of Award, July 2, 2018, ¶ 237, CL-168.

[328] Counter-Memorial on Preliminary Objections, ¶ 144; Christoph H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge 2010), ¶ 122, RL-187.

[329] Counter-Memorial on Preliminary Objections, ¶ 147; Rejoinder on Preliminary Objections, ¶ 144.

"management or construction contract."[330] The fact that Reficar subsequently changed the scope of Claimants' work does not change the fact that, when executed, the Services Contract qualified as an investment.[331] Claimants also note that, as stated in the Notice of Arbitration, the Services Contract is not the only basis for their investment "although it would be sufficient."[332]

235. Claimants also provided services, capital, labour, time, and personnel in connection with the Services Contract, and while the parties to the Contract agreed that Claimants' services would last for approximately 45 months, they lasted for over 6 years.[333] In support of their position, Claimants cite *Bayindir v. Pakistan,* in which the tribunal found "a substantial commitment" in training over 60 engineers and providing significant equipment and personnel.[334] For the *Bayindir* tribunal, a three-year contract was of a sufficient duration.[335] With respect to assumption of risk, the *Bayindir* tribunal found that "besides the inherent risk in long-term contracts, […] the very existence of a defect liability period of one year and of a maintenance period of four year against payment, creates an obvious risk."[336]

c. Tribunal's Analysis

236. This objection need not be examined in light of the Tribunal's decision regarding the inadmissibility of the claims when appraising the Preliminary Objection.

[330] Rejoinder on Preliminary Objections, ¶¶ 135-136.

[331] Rejoinder on Preliminary Objections, ¶ 136.

[332] Rejoinder on Preliminary Objections, ¶¶ 138-139.

[333] Counter-Memorial on Preliminary Objections, ¶¶ 152-153.

[334] Counter-Memorial on Preliminary Objections, ¶ 154; *Bayindir Insaat Turizm Ticaret Ve Sanayi A. Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, November 14, 2005, ¶ 115, RL-52.

[335] Counter-Memorial on Preliminary Objections, ¶ 154; *Bayindir Insaat Turizm Ticaret Ve Sanayi A. Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, November 14, 2005, ¶¶ 132-133, RL-52.

[336] Counter-Memorial on Preliminary Objections, ¶¶ 154-155; *Bayindir Insaat Turizm Ticaret Ve Sanayi A. Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, November 14, 2005, ¶¶ 134-136, RL-52. See also *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, June 16, 2006, ¶ 92, CL-172.

(2) Claimant FPJVC Does Not Qualify as a "Juridical Person" Under Article 25(2)(b) of the ICSID Convention

a. Respondent's Position

237. Respondent notes that Claimant FPJVC is a "contractual joint venture"[337] incorporated under the laws of New York State and that it "has no separate legal personality from that of its members Foster Wheeler and Process Consultants."[338] As such, Claimant FPJVC does not qualify as a juridical person under Article 25(1) of the ICSID Convention.[339] Colombia adds that, in the Joint Venture Agreement, Foster Wheeler and Process Consultants expressly agreed that FPJVC would be an "unincorporated entity."[340] Under New York law, such entities are not considered juridical persons independent of their members and as having separate legal personality.[341] On the contrary, they are considered as "a partnership for a limited purpose" without legal personality.[342] For this reason, the Fiscal Liability Proceeding only involves Foster Wheeler and Process Consultants, and not FPJVC.[343] The fact that, exceptionally, a partnership may sue or be sued does not convert it into a juridical person.[344] Respondent refers to New York case law in support of its position.[345]

238. Additionally, under New York law, a partnership cannot have its own "nationality." According to Respondent, for this reason, FPJVC cannot qualify as a "national of another Contracting State" under the ICSID Convention.[346]

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[337] Memorial on Preliminary Objections, ¶ 301; see Notice of Arbitration, ¶¶ 1, 15. See also Notice of Intent, ¶ 5, C-4-RFA.

[338] Memorial on Preliminary Objections, ¶ 301.

[339] Memorial on Preliminary Objections, ¶¶ 300-301; Reply on Preliminary Objections, ¶ 255.

[340] Memorial on Preliminary Objections, ¶ 302 (emphasis omitted); Reply on Preliminary Objections, ¶ 262 (emphasis omitted).

[341] Memorial on Preliminary Objections, ¶ 302; Reply on Preliminary Objections, ¶ 256.

[342] Reply on Preliminary Objections, ¶ 256.

[343] Memorial on Preliminary Objections, ¶ 302; Reply on Preliminary Objections, ¶ 262.

[344] Reply on Preliminary Objections, ¶ 257.

[345] Reply on Preliminary Objections, ¶¶ 258-259; see *Niagara Mohawk Power Corp. v. Freed*, Supreme Court of New York, Appellate Division, Fourth Department, 278 A.D.2d 839 (2000), p. 2, RL-324; *Koons v. Kaiser*, Southern District of New York, 91 F. Supp. 511 (1950), p. 6, RL-325.

[346] Reply on Preliminary Objections, ¶ 261.

239. In support of its position, Colombia cites *Impregilo v. Pakistan*[347] in which the tribunal "concluded that a contractual joint venture did not constitute a juridical person for purposes of Article 25(2)(b) of the ICSID Convention,"[348] and notes that Prof. Schreuer shares this position.[349] Contrary to Claimants' allegations, the fact that the joint venture in *Impregilo* was governed by Swiss law is not relevant, because in both cases, the joint ventures have no separate legal personality.[350]

240. Additionally, although the Treaty defines an "enterprise," *inter alia,* as a "joint venture," it does not specify whether this term includes unincorporated joint ventures or only those which have been incorporated.[351] However, even if FPJVC was to qualify as an investor under the terms of the U.S.-Colombia TPA, this would not be sufficient for the Tribunal to exercise *ratione personae* jurisdiction over it, because it is also necessary for the investor to qualify as a "national of another Contracting State" under Article 25(1) of the ICSID Convention.[352]

241. In Colombia's view, the relevant question is not one of consent to ICSID arbitration under the U.S.-Colombia TPA, but "whether all the objective requirements set forth in the ICSID Convention for an ICSID tribunal to have jurisdiction over the present dispute are met."[353] In particular, Respondent submits that "[t]he fact that consent to ICSID arbitration may be given through a unilateral offer by a State in an investment treaty does not supplant the need to meet the other objective requirements of the ICSID Convention for the Centre to exercise jurisdiction, including that the dispute be between a Contracting State and a national of another Contracting State."[354]

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[347] Memorial on Preliminary Objections, ¶ 303; *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, April 22, 2005, ¶¶ 131, 134, 137, 139, RL-129.

[348] Memorial on Preliminary Objections, ¶ 303.

[349] Memorial on Preliminary Objections, ¶ 304; Christoph Schreuer *et al.*, *THE ICSID CONVENTION: A COMMENTARY* (2d ed., Cambridge University Press 2009), Article 25, ¶¶ 689-692, RL-187.

[350] Reply on Preliminary Objections, ¶ 263.

[351] Memorial on Preliminary Objections, ¶ 306.

[352] Memorial on Preliminary Objections, ¶¶ 307-308; Reply on Preliminary Objections, ¶ 264; Christoph Schreuer *et al.*, *THE ICSID CONVENTION: A COMMENTARY* (2d ed., Cambridge University Press 2009), Article 25, ¶¶ 693, RL-187.

[353] Reply on Preliminary Objections, ¶ 267.

[354] Reply on Preliminary Objections, ¶ 267.

242. In sum, Claimant FPJVC does not qualify as "a national of another Contracting State" as it is not a juridical person, and the Tribunal thus lacks jurisdiction *ratione personae* over FPJVC's claim.[355]

b. Claimants' Position

243. Claimants argue that Colombia's objection has no legal merit. Claimants submit that it is common ground that the definition of a "juridical person" is that which obtains under the law of incorporation of the entity which, in case of FPJVC, is New York State law.[356] Claimants then note that, contrary to the position in *Impregilo v. Pakistan*, where the joint venture had "no legal personality under Swiss law,"[357] FPJVC is a juridical person under New York law:[358] "New York law recognizes joint ventures as juridical persons with the capacity to sue and be sued, and they routinely appear as parties in New York litigation."[359]

244. According to Claimants, pursuant to New York case law "it is proper to look to the Partnership Law to resolve disputes involving joint ventures."[360] And according to New York law, a joint venture is merely a particular type of partnership, able to sue or be sued under applicable law.[361] A partnership can also hold property in its own name and is considered to be a resident of the country in which it has its principal office—not just where the partners reside.[362] Claimants also recall that it was FPJVC which executed the Services Contract and Colombia considered FPJVC a sufficient juridical entity to have capacity to enter into a long-term agreement.[363] Furthermore, Claimants note that "Colombia does not provide any law stating that contractual joint ventures are to be treated differently from other joint ventures" and that they had no say in selecting the parties which the CGR chose

[355] Reply on Preliminary Objections, ¶ 268.

[356] Counter-Memorial on Preliminary Objections, ¶¶ 157-158.

[357] Counter-Memorial on Preliminary Objections, ¶ 158; *Impregilo S.p.A. v. Islamic Republican of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, April 22, 2005, ¶¶ 118-119, RL-129.

[358] Counter-Memorial on Preliminary Objections, ¶ 158; Rejoinder on Preliminary Objections, ¶ 150.

[359] Counter-Memorial on Preliminary Objections, ¶¶ 159-160.

[360] Counter-Memorial on Preliminary Objections, ¶¶ 159, 161; see *Eskenazi v. Schapiro*, 27 A.D.3d 312, 315 (N.Y. App. Div., 1st Dep't 2006), CL-173. See also, *Deutsche Bank Natl. Trust Co. v. Bills*, 2012 N.Y. Misc. LEXIS 4842, at *10 (N.Y. Sup. Ct. October 15, 2012), RL-201.

[361] Counter-Memorial on Preliminary Objections, ¶¶ 159 and 162; Rejoinder on Preliminary Objections, ¶ 147.

[362] Rejoinder on Preliminary Objections, ¶ 147.

[363] Rejoinder on Preliminary Objections, ¶ 149.

to name in the Fiscal Liability Proceedings, making Respondent's argument on this point irrelevant.[364]

245. Finally, as to the consent requirements under Article 25 of the ICSID Convention, in Claimants' view, Colombia has failed to allege or explain how an "investor of a Party" under the U.S.-Colombia TPA would be different from "a national of another Contracting State" under the ICSID Convention. According to Claimants, the case law cited by Respondent does not support its position on this point. [365]

246. In sum, Claimants submit that FPJVC qualifies as a "national of another Contracting State"[366] and Colombia's objection should be dismissed.[367]

c. Tribunal's Analysis

247. This objection need not be examined in light of the Tribunal's decision regarding the inadmissibility of the claims when appraising the Preliminary Objection.

(3) The Notice of Intent was only Sent by FPJVC and Not by the Other Claimants

a. Respondent's Position

248. Colombia notes that Article 10.16.2 of the U.S.-Colombia TPA requires "each claimant submitting a claim to arbitration [to] deliver a notice of intent at least ninety (90) days before the claim is submitted to arbitration."[368] Respondent explains that, in this case, the Notice of Intent was sent on December 26, 2018,[369] but only by Claimant FPJVC on its own behalf.[370] For that reason, Claimants Foster Wheeler and Process Consultants do not benefit by the Notice of Intent sent by FPJVC,[371] and fail to meet this requirement.[372]

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[364] Rejoinder on Preliminary Objections, ¶ 149.
[365] Rejoinder on Preliminary Objections, ¶ 151.
[366] Counter-Memorial on Preliminary Objections, ¶¶ 163, 171.
[367] Rejoinder on Preliminary Objections, ¶ 152.
[368] Memorial on Preliminary Objections, ¶ 313 (emphasis omitted); Reply on Preliminary Objections, ¶ 271.
[369] Memorial on Preliminary Objections, ¶ 311.
[370] Memorial on Preliminary Objections, ¶ 312.
[371] Memorial on Preliminary Objections, ¶ 312.
[372] Memorial on Preliminary Objections, ¶ 313; Reply on Preliminary Objections, ¶ 269.

249. According to Respondent, Foster Wheeler's and Process Consultants' failure to deliver a notice of intent results in the Tribunal's lack of jurisdiction *ratione voluntatis* to hear claims brought by these Claimants.[373] None of Claimants' arguments makes up for their failure to comply with this essential requirement, which is a part of Colombia's consent to arbitration of claims brought by claimants under the U.S.-Colombia TPA.[374] In support of this argument, Colombia cites the U.S. non-disputing party submissions in different proceedings and relevant case law, including *B-Mex v. Mexico*.[375]

250. Respondent further notes that Claimants themselves have argued in this arbitration that each of them qualifies as a separate "enterprise" and "investor" under the U.S.-Colombia TPA.[376] Therefore, Foster Wheeler and Process Consultants cannot benefit from the Notice of Intent submitted by FPJVC.[377] Respondent also rejects Claimants' argument that the lack of compliance with the requirements of Article 10.16.2 of the U.S.-Colombia TPA by Foster Wheeler and Process Consultants is "unimportant", because Respondent was allegedly informed about their claims through FPJVC's Notice of Intent.[378]

b. Claimants' Position

251. Claimants note that Colombia does not dispute that it received 90 days written Notice of Intent from FPJVC, in accordance with Article 10.16.2 of the U.S.-Colombia TPA.[379] They reject Colombia's allegation that the requirements of Article 10.16.2 of the U.S.-Colombia TPA are not a formality, but an explicit requirement.[380] Claimants refer to the decision in *B-Mex v. Mexico* in support of their position.[381]

252. In particular, Claimants recall that in *B-Mex v. Mexico*, the notice of intent "did not provide

[373] Memorial on Preliminary Objections, ¶ 314; Reply on Preliminary Objections, ¶ 269.

[374] Reply on Preliminary Objections, ¶ 270.

[375] Memorial on Preliminary Objections, ¶ 317; Reply on Preliminary Objections, ¶ 276*; B-Mex, LLC et al. v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, July 19, 2019, ¶¶ 3, 41, 63, 70, 118, 134, RL-216.

[376] Memorial on Preliminary Objections, ¶ 312; Reply on Preliminary Objections, ¶ 274.

[377] Memorial on Preliminary Objections, ¶ 312; Reply on Preliminary Objections, ¶ 274.

[378] Reply on Preliminary Objections, ¶ 275.

[379] Counter-Memorial on Preliminary Objections, ¶¶ 172-173.

[380] Counter-Memorial on Preliminary Objections, ¶ 173.

[381] Counter-Memorial on Preliminary Objections, ¶ 174; *B-Mex, LLC, et al. v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, July 19, 2019, ¶¶ 54-139, RL-216.

the names and addresses of [...] 31 [out of 69] Additional Claimants or of Operadora Pesa."[382] Mexico had argued that these omissions deprived the tribunal of jurisdiction and rendered the claims by the "additional Claimants" inadmissible.[383] The tribunal in *B-Mex v. Mexico* rejected Respondent's argument, noting that other tribunals "have dismissed the proposition that a failure to satisfy [notice of intent requirements] must result in the loss of jurisdiction",[384] and that a tribunal "must do what best serves the interests of justice."[385] Claimants cite additional case law in support of their position.[386]

253. Claimants further argue that the Notice of Intent did provide notice by all three Claimants,[387] because the Notice makes clear that it is from a contractual joint venture and that both of its members are corporations organized under US law.[388] Concurrently, the "FPJVC" reference in the Notice of Intent is used interchangeably for all three Claimants, in line with the definition stated at the outset of the Notice.[389] Additionally, Claimants note that Colombia does not deny that it has always been aware of the existence of other members of the joint venture.[390]

254. In sum, (i) Colombia knew that FPJVC was a joint venture composed of its two members, Foster Wheeler and Process Consultants, because the Notice of Intent said so, as does the CGR Decision[391]; and (ii) Colombia does not suffer, and could not have suffered, any

[382] Counter-Memorial on Preliminary Objections, ¶ 175; *B-Mex, LLC, et al. v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, July 19, 2019, ¶ 65, RL-216.

[383] Counter-Memorial on Preliminary Objections, ¶ 175; *B-Mex, LLC, et al. v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, July 19, 2019, ¶¶ 72-73, RL-216.

[384] Counter-Memorial on Preliminary Objections., ¶ 177; *B-Mex, LLC, et al. v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, July 19, 2019, ¶¶ 118-119, RL-216.

[385] Counter-Memorial on Preliminary Objections, ¶ 178; *B-Mex, LLC, et al. v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, July 19, 2019, ¶ 128, footnote 118, RL-216.

[386] Rejoinder on Preliminary Objections, ¶ 154; *Ethyl Corporation v. The Government of Canada*, UNCITRAL, Award on Jurisdiction, June 24, 1998, ¶¶ 78-85, CL-56; *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, ¶¶ 42-44, CL-238; *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, January 9, 2003, ¶¶ 133-135, CL-82; *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award, August 2, 2010, ¶¶ 101-105, CL-212; Rejoinder on Preliminary Objections, ¶ 154.

[387] Rejoinder on Preliminary Objections, ¶ 155.

[388] Rejoinder on Preliminary Objections, ¶ 155.

[389] Rejoinder on Preliminary Objections, ¶ 156.

[390] Rejoinder on Preliminary Objections, ¶ 157.

[391] Counter-Memorial on Preliminary Objections, ¶ 179.

prejudice from the alleged omission on which its argument rests.[392]

c. Tribunal's Analysis

255. This objection need not be examined in light of the Tribunal's decision regarding the inadmissibility of the claims when appraising the Preliminary Objection.

(4) Claimants Have Definitively Elected to Submit their Claim for Breach of Fair and Equitable Treatment to the Colombian Courts

a. Respondent's Position

256. Colombia submits that Annex 10-G to the U.S.-Colombia TPA constitutes a limitation to Respondent's consent to arbitration by providing "that a claim that Colombia has breached a substantive obligation under the Treaty may not be submitted to arbitration under the Treaty if the U.S. investor has already claimed the breach in a judicial or administrative proceeding in Colombia."[393]

257. Colombia argues that, unlike other *electa una via* provisions, Annex 10-G "does not require that the purported breach be brought before the judicial or administrative court, but simply that the breach of a substantive Treaty obligation be alleged in a local judicial or administrative proceeding."[394] It adds that that is precisely what has happened in the present case.[395]

258. Respondent recalls that in the First Tutela before the Colombian courts, Foster Wheeler and Process Consultants alleged that their due process rights had been infringed in the Fiscal Liability Proceeding, specifically, they alleged that due process was an element of the FET obligation under the U.S.-Colombia TPA.[396] Colombia submits that Claimants' allegations in the local proceedings "are perfectly aligned with the allegations for breach of FET in this Arbitration."[397] In accordance with Annex 10-G to the U.S.-Colombia TPA,

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[392] Counter-Memorial on Preliminary Objections, ¶¶ 180-181; see *B-Mex, LLC, et al. v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, July 19, 2019, ¶¶ 132-133, RL-216.

[393] Memorial on Preliminary Objections, ¶¶ 320–321 (emphasis omitted).

[394] Memorial on Preliminary Objections, ¶ 322 (emphasis in the original).

[395] Memorial on Preliminary Objections, ¶ 323; Reply on Preliminary Objections, ¶ 280.

[396] Memorial on Preliminary Objections, ¶ 323; see also ¶ 324.

[397] Memorial on Preliminary Objections, ¶ 326 (emphasis omitted).

Claimants, having raised such allegations in a local proceeding, are now precluded from bringing the same claim before this Tribunal.[398]

259. According to Colombia, none of the arguments raised by Claimants can effectively preclude the application of the *electa una via* provision contained in Annex 10-G to the U.S.-Colombia TPA.[399] The only requirement for Annex 10-G's application is the allegation of a breach of the FET obligation[400] and it is irrelevant whether or not the First Tutela was brought to preserve Claimants' rights.[401]

260. Nothing in the U.S.-Colombia TPA prevented Claimants from initiating local actions and then waiving them before commencing the Arbitration.[402] Concurrently, nothing prevented Claimants from bringing the First Tutela without alleging a breach of the FET obligation under the U.S.-Colombia TPA.[403]

261. Moreover, nothing in Annex 10-G requires "that the subject matter, parties and cause of action in both proceedings be identical."[404] This provision merely requires that "the investor or the enterprise [has] alleged a breach of the same substantive obligation under the Treaty."[405] Claimants' citation of Article 10.18.4 of the U.S.-Colombia TPA to contend that the *electa una via* provisions contained in both provisions have similar language is inapposite. Unlike Article 10.18.4, Annex 10-G only requires that a breach of a substantive obligation under the Treaty be alleged (and not that the same breach be submitted to a judicial or administrative tribunal).[406]

262. Therefore, the Tribunal lacks jurisdiction *ratione voluntatis* to hear Claimants' claim of

[398] Memorial on Preliminary Objections, ¶¶ 323, 327.
[399] Reply on Preliminary Objections, ¶ 279.
[400] Reply on Preliminary Objections, ¶ 280.
[401] Reply on Preliminary Objections, ¶ 280.
[402] Reply on Preliminary Objections, ¶ 283.
[403] Reply on Preliminary Objections, ¶ 283.
[404] Reply on Preliminary Objections, ¶ 284.
[405] Reply on Preliminary Objections, ¶ 284 (emphasis omitted).
[406] Reply on Preliminary Objections, ¶ 285.

breach of the FET obligation under the Treaty.[407]

b. Claimants' Position

263. Claimants raise two main counterarguments.[408] First (i), that the action filed in Colombia was necessary to preserve Claimants' rights, and second (ii), that this action fails to meet the triple identity test necessary to have a preclusive effect.[409]

264. As regards the first argument, Claimants submit that the First Tutela sought nothing more than to preserve Claimants' rights before the CGR and was brought under Colombian law.[410] An *acción de tutela* is a "subsidiary and residual" mechanism for "immediate judicial protection of the fundamental rights"[411] and it cannot trigger a fork-in-the-road provision.[412]

265. According to Claimants, they had no reasonable alternative other than to submit the First *T*utela if they were to preserve their fundamental rights under Colombian law.[413] In support of their argument, Claimants cite case law where tribunals have found that a fork-in-the-road provision cannot be triggered by defensive actions brought to preserve a claimant's rights.[414]

266. Second, Claimants submit that the First Tutela does not meet the triple identity test, which requires "a claim with the same object, [the same] parties and [the same] cause of action [has] already [been] brought before a different judicial forum."[415] First, the object is different, because in this arbitration, Claimants are seeking monetary damages and

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[407] Memorial on Preliminary Objections, ¶ 328; Reply on Preliminary Objections, ¶¶ 278, 286.

[408] Counter-Memorial on Preliminary Objections, ¶ 183.

[409] Counter-Memorial on Preliminary Objections, ¶ 183.

[410] Counter-Memorial on Preliminary Objections, ¶ 184.

[411] Counter-Memorial on Preliminary Objections, ¶ 185 (emphasis omitted); see Memorial on Preliminary Objections, ¶¶ 136-283.

[412] Counter-Memorial on Preliminary Objections, ¶ 184.

[413] Counter-Memorial on Preliminary Objections, ¶ 186.

[414] Counter-Memorial on Preliminary Objections, ¶¶ 187-188; Christoph Schreuer, Travelling the BIT Route of Waiting Periods, Umbrella Clauses and Forks in the Road, 9(2) Offprints of The Journal of World Investment & Trade, 241, 249 (2004), CL-193.

[415] Counter-Memorial on Preliminary Objections, ¶ 190; *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, September 11, 2009, ¶ 211, CL-194.

additional costs, whereas *tutelas* cannot be brought for monetary damages.[416] Second, the parties are different, because while in this arbitration the Parties are FPJVC and Colombia, in the First Tutela the parties are FPJVC and CGR, among others.[417] Finally, the cause of action is also different.[418] In the First Tutela the claims are brought under the Colombian Constitution[419] as opposed to the U.S.-Colombia TPA or the ICSID Convention.[420] Colombian constitutional claims are "fundamentally different" from claims brought pursuant to the U.S.-Colombia TPA.[421] Claimants also submit that "[c]learly the local claim did not result in the submission of the BIT dispute to the [Colombian] courts."[422] In addition, Claimants' First Tutela "expressly disclaimed seeking any relief under the [U.S.-Colombia] TPA."[423]

267. Furthermore, Claimants submit that the wording of Annex 10-G does not support Colombia's allegations.[424] In particular, the second paragraph of Annex 10-G clearly states that "if an investor of the United States elects to submit a claim of the type described in paragraph 1 to a court or administrative tribunal ... that election shall be definitive...."[425] Claimants argue that a "submission of a claim" is necessary to trigger the provision, and that Colombia makes no argument that Claimants had submitted their FET claim in the First Tutela.[426] Colombia's reading of the first paragraph of Annex 10-G to the effect that a mere allegation of a breach is sufficient to trigger the provision cannot be squared with the language of the second paragraph.[427] Respondent's submission that the triple identity

[416] Counter-Memorial on Preliminary Objections, ¶ 191.

[417] Counter-Memorial on Preliminary Objections, ¶ 192.

[418] Counter-Memorial on Preliminary Objections, ¶ 193.

[419] Counter-Memorial on Preliminary Objections, ¶ 186.

[420] Counter-Memorial on Preliminary Objections, ¶ 193.

[421] Counter-Memorial on Preliminary Objections, ¶ 193.

[422] Counter-Memorial on Preliminary Objections, ¶ 193; *Pan-American Energy LLC & BP Argentina Exploration Company v. Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, July 27, 2006, ¶¶ 152, 157, RL-174.

[423] Rejoinder on Preliminary Objections, ¶ 163.

[424] Rejoinder on Preliminary Objections, ¶ 161.

[425] Rejoinder on Preliminary Objections, ¶ 161 (emphasis omitted).

[426] Rejoinder on Preliminary Objections, ¶ 161.

[427] Rejoinder on Preliminary Objections, ¶ 162.

test does not apply is based on "the same misinterpretation of Annex 10-G."[428] Claimants add that both Article 10.18.4 and Annex 10-G to the U.S.-Colombia TPA require a "submission of a claim" and Respondent's argument is therefore without legal merit.[429]

268. In sum, Colombia's objection has no basis in the language of the U.S.-Colombia TPA or in law and should be rejected.[430]

c. Tribunal's Analysis

269. This objection need not be examined in light of the Tribunal's decision regarding the inadmissibility of the claims when appraising the Preliminary Objection.

(5) Claimants' Waiver is Invalid, and Thus There is No Consent to Submit Their Claim to Arbitration Under the Treaty

a. Respondent's Position

270. Respondent notes that Article 10.18 of the U.S.-Colombia TPA establishes that "a claim may not be submitted to arbitration unless the notice of arbitration is accompanied by a written waiver by the claimant of the claims submitted to arbitration."[431] The Contracting Parties' consent to arbitration is conditioned upon the fulfilment of this prerequisite, among others.[432] This was confirmed by the tribunal in *Renco v. Peru*,[433] when it stated that "an effective waiver is a fundamental prerequisite for the existence of an arbitration agreement."[434]

271. In particular, Respondent recalls that in *Renco v. Peru*, the claimant filed a notice of arbitration including a waiver with reservations, which was replicated in its second notice of arbitration.[435] The tribunal found that such waivers were not permitted under the

[428] Rejoinder on Preliminary Objections, ¶ 163.

[429] Rejoinder on Preliminary Objections, ¶ 164.

[430] Rejoinder on Preliminary Objections, ¶ 165.

[431] Memorial on Preliminary Objections, ¶ 330.

[432] Memorial on Preliminary Objections, ¶ 331; Reply on Preliminary Objections, ¶ 289.

[433] Memorial on Preliminary Objections, ¶ 332; *The Renco Group Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, July 15, 2016, ¶¶ 73, 138, 158, RL-218.

[434] Memorial on Preliminary Objections, ¶ 332. See also Memorial on Preliminary Objections, ¶¶ 332-334.

[435] Memorial on Preliminary Objections, ¶ 333.

treaty.[436] Colombia submits that *Renco v. Peru* is analogous to the present dispute as in both cases, the claimants made a reservation of rights that exceeded what is permissible under Article 10.18.2(b) of the U.S.-Colombia TPA (or the identical provision of the Peru-U.S. TPA).[437]

272. Finally, Respondent notes that, in its non-disputing party submission in *Angel Seda v. Colombia*, the U.S. interpreted Article 10.18.2(b) of the U.S.-Colombia TPA as "a condition of consent to arbitration, [and emphasized] the need to comply with the formal and material requirements in order for such a waiver to be valid and effective."[438]

273. Respondent further notes that, in their waiver, Claimants have reserved their right to continue to defend themselves in the Fiscal Liability Proceeding and in "any related proceedings, including any appeals."[439] Consequently, Claimants continue to pursue all local proceedings where "the measures alleged to constitute breaches of the substantive obligations under the [U.S.-Colombia TPA] are at issue […], while pursuing the present

[436] Memorial on Preliminary Objections, ¶ 333; *The Renco Group Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, July 15, 2016, ¶ 81, RL-218.

[437] Reply on Preliminary Objections, ¶ 291.

[438] Memorial on Preliminary Objections., ¶ 336; *Angel Samuel Seda and others v. Republic of Colombia*, ICSID Case No. ARB/19/16, Submission of the United States of America, February 26, 2021, ¶¶ 9-13, RL-54. Respondent argues that this same position has been maintained by the United States in its submissions as a non-disputing party in several investment cases involving waiver provisions identical or similar to the one contained in the Treaty. See *Alberto Carrizosa Gelzis et al. v. Republic of Colombia*, PCA Case No. 2018-56, Submission of the United States of America, May 1, 2020, ¶¶ 32-38, RL-207; *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/05, Submission of the United States of America, May 1, 2020, ¶¶ 32-38, RL-206; *The Renco Group Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Second Submission of the United States of America, September 1, 2015, ¶¶ 5-10, RL-219; *The Renco Group Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Third Submission of the United States of America, October 11, 2015, ¶¶ 6, 8, RL-220; *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. Republic of Peru*, ICSID Case No. UNCT/18/2, Submission of the United States of America, June 21, 2019, ¶¶ 10-17, RL-66; *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Submission of the United States of America, March 11, 2016, ¶ 9, RL-64; *KBR, Inc. v. United Mexican States*, ICSID Case No. UNCT/14/1, Submission of the United States of America, February 14, 2014, ¶¶ 2-3, RL-226; *Detroit International Bridge Company v. Government of Canada*, PCA Case No. 2012-25, Submission of the United States of America, July 14, 2008, ¶¶ 4-7, RL-227. See also *The Renco Group Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Second Submission of the United States of America, September 1, 2015, ¶ 16, RL-219; *The Renco Group Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Third Submission of the United States of America, October 11, 2015, ¶¶ 4-5, RL-220; *Bay View Group LLC and The Spalena Company LLC v. Republic of Rwanda*, ICSID Case No. ARB/18/21 (Rwanda-U.S. BIT), Submission of the United States of America, February 19, 2021, ¶ 15, n. 23, RL-63; *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. Republic of Peru*, ICSID Case No. UNCT/18/2 (Peru-U.S. TPA), Submission of the United States of America, June 21, 2019, ¶ 17, RL-66.

[439] Memorial on Preliminary Objections, ¶¶ 337, 339 (internal quote omitted); Notice of Arbitration, ¶ 25.

Arbitration."[440] Thus, Claimants have also failed to act consistently with their waiver as Claimants Foster Wheeler and Process Consultants have not only appealed the Fiscal Liability Ruling, but also initiated two additional *acciones de tutela* before Colombian courts subsequent to filing their Notice of Arbitration.[441]

274. As to Claimants' argument that it would be unfair to require them to waive the right to defend themselves, Respondent notes that the U.S.-Colombia TPA does not require Claimants to abandon their local proceedings, but it does require them to do so should they wish to submit a claim to arbitration under the Treaty.[442] Claimants could have waited for a final decision in the Colombian courts and then submitted their claims to arbitration, but they are precluded from continuing a local proceeding and submitting a claim to arbitration regarding the same measures that allegedly constituted a breach of the substantive U.S.-Colombia TPA obligations.[443] In other words, what Claimants are trying to achieve by initiating this Arbitration is to take two bites at the same apple, which is exactly what Article 10.18.2(b) of the U.S.-Colombia TPA is intended to prevent.[444]

275. Regarding Claimants' argument that Colombia was the initiator of multiple local proceedings, Respondent recalls that Claimants initiated this Arbitration before the CGR Decision had even been issued.[445] Contrary to Article 10.18.2(b) of the U.S.-Colombia TPA, Claimants cannot file appeals in the Fiscal Liability Proceeding, initiate *acciones de tutela*, and "simultaneously continue this Arbitration where they challenge the same measure."[446]

276. As to Claimants' argument related to the exception in Article 10.18.3 of the U.S.-Colombia TPA permitting actions seeking interim injunctive relief, Colombia notes that "neither the actions of Foster Wheeler and Process Consultants in the Fiscal Liability Proceeding, nor

[440] Memorial on Preliminary Objections, ¶ 339.
[441] Memorial on Preliminary Objections, ¶ 340; Reply on Preliminary Objections, ¶ 292.
[442] Memorial on Preliminary Objections, ¶ 341.
[443] Memorial on Preliminary Objections, ¶ 341; Reply on Preliminary Objections, ¶ 298.
[444] Memorial on Preliminary Objections, ¶ 342.
[445] Reply on Preliminary Objections, ¶ 294.
[446] Reply on Preliminary Objections, ¶ 294.

the *acciones de tutela* filed before the Colombian courts, can qualify as provisional measures,"[447] because none of these actions, in case of success, would have the effect of preserving Claimants' rights while this arbitration is pending.[448]

277. In sum, since Claimants had failed to submit an effective waiver to initiate or continue their claims in local proceedings in Colombia with respect to the same measure that they allege constituted a breach of the Treaty, the Tribunal lacks jurisdiction *ratione voluntatis* to hear their claim.[449]

b. Claimants' Position

278. Claimants take the preliminary point that Respondent's objection should be dismissed, because the party by which multiple parallel proceedings were initiated was Colombia.[450] A party should not be allowed to invoke treaty provisions in the name of avoiding parallel proceedings, "when it is the very cause of that procedural chaos."[451]

279. Moreover, Claimants recall Article 10.18.3 of the U.S.-Colombia TPA, which allows a claimant to initiate or continue actions brought for the purpose of preserving its rights.[452] Claimants argue that the *acciones de tutela* fall within this exception.[453] Furthermore, none of Respondent's authorities supports the argument that "a request for arbitration must be accompanied by a waiver of any right to self-defense."[454] The waiver pursuant to Article 10.18.2(b) of the U.S.-Colombia TPA requires Claimants not to act offensively.[455] Claimants' reservation of the right to self-defense is not contrary to such requirement.[456]

280. Claimants submit that Respondent's reliance on the case *Renco v. Peru* is inapposite because, in that case, the claimant reserved the right to bring its "claims in an unspecified

[447] Reply on Preliminary Objections, ¶ 296 (internal quote omitted).
[448] Reply on Preliminary Objections, ¶ 296.
[449] Memorial on Preliminary Objections, ¶ 343.
[450] Counter-Memorial on Preliminary Objections, ¶ 200.
[451] Counter-Memorial on Preliminary Objections, ¶ 200.
[452] Counter-Memorial on Preliminary Objections, ¶ 201.
[453] Counter-Memorial on Preliminary Objections, ¶ 202; see also ¶¶ 72-75.
[454] Counter-Memorial on Preliminary Objections, ¶ 203.
[455] Rejoinder on Preliminary Objections, ¶ 167.
[456] Rejoinder on Preliminary Objections, ¶ 167.

forum after the resolution of the international arbitration."[457] This is completely different from the present case.[458] Moreover, none of the additional cases cited by Colombia involves a waiver that reserves a claimant's right to defend itself.[459] In fact, requiring such a waiver would be unjust, because "[t]he investor would have to sit still and endure any form of injustice passively on pain of losing its access to international arbitration."[460]

281. Respondent's citation to *Commerce Group v. El Salvador* is also inapposite. In that case, there was no dispute that the relief sought in local proceedings was the same as that sought in international arbitration.[461] In the present case, however, Colombia brought the local action and Claimants are merely seeking to defend themselves against it.[462] The Second Tutela was for non-monetary relief. The Third Tutela was for interim relief to allow Claimants a reasonable amount of time within which to appeal the CGR decision.[463]

282. Second, in *Thunderbird v. Mexico*, also cited by Respondent, the claimant did not file any waiver until long after the arbitration had commenced.[464] Here, Claimants filed an appropriate waiver and their defences in the local proceedings "created no risk of either legal uncertainty or double redress."[465] Finally, in *Railroad Development Corporation v. Republic of Guatemala*, there was no dispute in that case that the claimant had filed a domestic arbitration that overlapped with the ICSID arbitration. Notably, rather than dismissing the whole claim, the tribunal dismissed only the individual claims that were at issue in the domestic arbitration.[466] Finally, as to Colombia's assertion that Claimants should abandon all local proceedings, Claimants argue that those proceedings are not theirs

[457] Counter-Memorial on Preliminary Objections, ¶ 204 (emphasis omitted).

[458] Counter-Memorial on Preliminary Objections, ¶ 204.

[459] Counter-Memorial on Preliminary Objections, ¶ 204; Rejoinder on Preliminary Objections, ¶ 168.

[460] Counter-Memorial on Preliminary Objections, ¶ 205.

[461] Rejoinder on Preliminary Objections, ¶ 170; *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, March 14, 2011, ¶¶ 104-107, RL-223.

[462] Rejoinder on Preliminary Objections, ¶ 170.

[463] Rejoinder on Preliminary Objections, ¶ 170.

[464] Rejoinder on Preliminary Objections, ¶ 172.

[465] Rejoinder on Preliminary Objections, ¶ 172.

[466] Rejoinder on Preliminary Objections, ¶ 173; *Railroad Development Corporation v. Republic of Guatemala,* ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction CAFTA Article 10.20.5, November 17, 2008, ¶¶ 72-75, RL-224.

to abandon, they are Colombia's.[467] The reservation of the right to self-defense necessarily refers to Colombia's proceedings in which Claimants are forced to defend themselves.[468]

c. Tribunal's Analysis

283. This objection need not be examined in light of the Tribunal's decision regarding the inadmissibility of the claims when appraising the Preliminary Objection.

VI. COSTS

A. RESPONDENT'S COST SUBMISSIONS

284. Respondent requests an award of costs in the total amount of US$ 1,575,326.[469]

285. According to Respondent, its preliminary objections are "legitimate, sound, well-founded, and admissible under Article 10.20.4 of the Treaty and all other relevant provisions."[470] Claimants, on the other hand, not only failed to present a convincing case on jurisdiction, but also employed what was said to be a questionable conduct that increased the costs of these proceedings. For example, Claimants (i) initiated this arbitration pre-emptively and prematurely, (ii) initially opposed Respondent's request to hear its preliminary objection as a preliminary question, despite the express language of the Treaty, causing the Parties to exchange several communications to address Claimants' unfounded opposition, (iii) filed a Provisional Measure Application devoid of legal and factual basis, (iv) shifted positions during the course of the arbitration, causing Colombia to dedicate considerable time in addressing them, (v) initiated several parallel proceedings such as the *acciones de tutela* causing Respondent to defend itself simultaneously in different fora, and (vi) made several untimely requests to incorporate new evidence into the record. Respondent says

[467] Counter-Memorial on Preliminary Objections, ¶ 206.

[468] Counter-Memorial on Preliminary Objections, ¶ 206.

[469] Respondent's Statement of Costs, ¶ 7. This amount is comprised of US$ 350,000 on advance payments to ICSID and US$ 1,225,326 for legal fees and expenses (US$ 1,100,750 for legal fees and expenses of Curtis, Mallet-Prevost, Colt & Mosle LLP, and US$ 124,576 for legal fees and expenses of the *Agencia Nacional de Defensa Jurídica del Estado de Colombia*). On September 18, 2024, Respondent confirmed that it had not incurred any additional costs.

[470] Respondent's Statement of Costs, ¶ 5.

that all of these tactics and strategies support an award on costs in its favour.

B. CLAIMANTS' COST SUBMISSIONS

286. Claimants claim an award of costs in the total amount of US$ 2,413,233.[471]

287. Claimants allege that Respondent's objections were frivolous and should be denied. As such, and pursuant to the principle that costs follow the event, Claimants' costs in defending against those objections should be borne by Colombia.

288. Moreover, Respondent misused the preliminary objections procedure and engaged in conduct to make the proceedings more expensive, a factor which should be taken into account by the Tribunal. For example, Colombia (i) belatedly requested the Tribunal to hear its Article 10.20.4 objections and its jurisdictional objections as preliminary matters, making its application 20 days after the 45-day window for expedited preliminary objections pursuant to Article 10.20.5 of the Treaty had lapsed, (ii) challenged facts that must be assumed to be true, raised inappropriate objections regarding complex issues of fact and law, and abused the preliminary objections process to make its case on the merits without giving Claimants an opportunity to fully present evidence or obtain disclosure, (iii) insisted on Spanish translations for the hearing but then insisted that the Spanish transcripts not be part of the record, and (iv) filed a meritless application to strike Claimants' response to the NDP Submission.

289. Finally, Respondent's meritless objections to the Claimant's application to introduce excerpts of the statement of claim and accompanying expert report [redacted] caused Claimants to incur substantial costs in responding to Colombia's arguments and subsequently commenting on the weight and relevance of the documents once admitted by the Tribunal.

290. For all these reasons, all costs should be borne by Respondent.

[471] Claimants' Statement of Costs, p. 3 and Claimants' Supplemental Statement of Costs, p. 4. This amount is comprised of US$ 375,000 on advance payments to ICSID, and US$ 2,038,233 for legal fees and expenses (US$ 1,897,406 for attorney's fees, US$ 122,391 for supplemental attorney's fees and US$ 18,436 of costs).

C. THE TRIBUNAL'S DECISION ON COSTS

291. Article 61(2) of the ICSID Convention provides:

> *In the case of arbitration proceedings, the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.*

292. This provision gives the Tribunal discretion to allocate all costs of the arbitration, including attorney's fees and other costs, between the Parties as it deems appropriate.

293. Since the decision made by the Tribunal constitutes the recognition of the arguments put forward by Respondent, and considering that Claimants were also unsuccessful on their Application for Provisional Measures, the Arbitral Tribunal holds that Claimants shall reimburse Respondent for its share on the costs associated with the Tribunal's fees and expenses, the Tribunal Assistant's fees and expenses and ICSID's administrative fees and direct expenses in the amount of US$ 330,528.39 as well as for its legal costs amounting to US$ 1,225,326[472].

294. The costs of the arbitration, including the fees and expenses of the Tribunal and the Tribunal's Assistant, ICSID's administrative fees and direct expenses, amount to (in USD):

Tribunals' fees and expenses

José Emilio Nunes Pinto	US$	168,156.78
John Beechey	US$	84,364.84
Marcelo Kohen	US$	119,736.94

Assistant's fees and expenses

Maria Claudia Procopiak	US$	10,650.00

[472] Respondent's Statement of Costs, ¶ 7. This amount is comprised of US$ 1,100,750 for legal fees and expenses of Curtis, Mallet-Prevost, Colt & Mosle LLP, and US$ 124,576 for legal fees and expenses of the *Agencia Nacional de Defensa Jurídica del Estado de Colombia*. On September 18, 2024, Respondent confirmed that it had not incurred any additional costs.

ICSID's administrative fees	US$ 220,000.00
Direct expenses	US$ 58,148.22
Total	**US$ 661,056.78**

295. The above costs have been paid out of the advances made by the Parties in equal parts.[473] As a result, each Party's share of the costs of arbitration amounts to US$ 330,528.39.

VII. DECISION

296. For the reasons set forth above, the Tribunal by unanimous vote decides as follows:

(1) ADMITS the Preliminary Objection filed by Respondent and DECLARE that the Claimants' claims are inadmissible and as a consequence thereof the arbitration is terminated.

(2) ORDERS Claimants to pay to Respondent the amount of US$ 330,528.39 in connection with the Arbitral Tribunal's fees and expenses, the Tribunal Assistant's fees and expenses and ICSID's costs as well as Respondent's legal costs in the amount of US$ 1,225,326.

(3) REJECTS all other prayers for relief.

[473] The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

[signed]

Mr. John Beechey
Arbitrator

Date: December 19, 2024

Prof. Marcelo G. Kohen
Arbitrator

Date:

Mr. José Emilio Nunes Pinto
President of the Tribunal

Date:

[signed]

Mr. John Beechey Arbitrator	Prof. Marcelo G. Kohen Arbitrator
Date:	Date: December 19, 2024

Mr. José Emilio Nunes Pinto
President of the Tribunal

Date:

Mr. John Beechey
Arbitrator

Date:

Prof. Marcelo G. Kohen
Arbitrator

Date:

[signed]

Mr. José Emilio Nunes Pinto
President of the Tribunal

Date: December 19, 2024